Office of the Secretary
Service Date
February 7, 2011

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE JOINT PETITION OF IDAHO POWER COMPANY, AVISTA CORPORATION, AND PACIFICORP DBA ROCKY MOUNTAIN POWER TO ADDRESS AVOIDED COST ISSUES AND TO ADJUST THE PUBLISHED AVOIDED COST RATE ELIGIBILITY CAP.	)	**CASE NO. GNR-E-10-04**
	)	**ORDER NO. 32176**

On November 5, 2010, Idaho Power Company, 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 the Public Utility Regulatory Policies Act of 1978 (PURPA). PURPA was intended to encourage the development of renewable energy technologies as alternatives to the use of fossil fuels and the construction of new generating facilities by electric utilities. Section 210 of PURPA generally requires electric utilities to purchase power produced by qualifying facilities (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).

While the investigation is underway, the Petitioners also moved the Commission to "lower the published avoided cost rate eligibility cap from 10 aMW to 100 kW [to] be effective immediately. . . ." Petition at 7. Pursuant to PURPA regulations issued by the Federal Energy Regulatory Commission (FERC), this Commission must publish avoided cost rates for small QFs with a design capacity of 100 kW or less. 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) and (2). When this case was initiated, the eligibility cap for the published avoided cost rate was set at 10 aMW. Order No. 30488. The avoided cost rates for purchases from QFs larger than the eligibility cap (10 aMW) must be individually negotiated by the QF and the public utility. In a negotiated contract, the utility's avoided cost is the starting point for rate negotiations.

As set out in greater detail below, the Commission grants in part and denies in part the Petitioners' Motion to reduce the eligibility cap. The Commission temporarily reduces the

eligibility cap for published avoided cost rates from 10 aMW to 100 kW for wind and solar QFs only.

BACKGROUND

A. The Joint Petition

The Petition states that Idaho Power currently has more than 208 MW of wind generation and an additional 264 MW of Commission-approved QF wind contracts (many of which are scheduled to be online by December 31, 2010). The Petition asserts that Idaho Power could have 1,100 MW of wind-powered generation on its system in the near term that would exceed the minimum loads experienced on Idaho Power's system this year. "Cumulatively, this amount of generation would exceed any other single source of generation – hydro, coal, natural gas, or renewables – that exists on Idaho Power's system." *Id.* at 4.

Rocky Mountain asserts that it is in a similar situation. The Petition declares that in 2005, Rocky Mountain had a single 20 MW wind QF contract and less than 50 MW of wind QF requests in Idaho. "As of today, [Rocky Mountain] has 64 MW of wind QF contracts executed; however, none have achieved commercial operation, and another 358 MW of standard wind QF contracts are proposed." Rocky Mountain maintains that the majority of these proposed standard wind QF contracts are configured to interconnect with the utility's Goshen substation "where integration of the QF resource as a Network Resource for serving load could be impacted by transmission constraints across Path C if the wind power is exported to RMP's northern Utah load." *Id.* at 4.

The Petition states that many current QF projects are "large, utility-scale wind farms that are broken up into 10 aMW increments in order to qualify for the published [avoided cost] rates." *Id.* at 5. The Petition maintains that the typical wind developer is no longer "unsophisticated" about the QF process and small projects (0.5-1.5 MW) "are no longer the norm." *Id.* The Petitioners assert that it is "commonplace" for wind developers seeking QF contracts with Idaho Power and Rocky Mountain to aggregate "six or more 'projects' totaling 100 to 150 MW of nameplate rating, and the multiple projects to all share interconnection facilities to one common utility delivery point." *Id.*

B. Procedural History

After the filing of the Joint Petition, the Commission received several Petitions to Intervene. The following parties requested, and were granted, intervenor status: Cedar Creek

Wind, LLC; Exergy Development Group of Idaho; Grandview Solar II; Idaho Windfarms, LLC; Interconnect Solar Development, LLC; the Northwest and Intermountain Power Producers Coalition (NIPPC); Renewable Energy Coalition (Coalition);[1] Intermountain Wind, LLC; J.R. Simplot Company; Board of Commissioners of Adams County (Adams County); Birch Power Company; Dynamis Energy, LLC; North Side and Twin Falls Canal Companies (Canal Companies); and Blue Ribbon Energy, LLC.

In addition to the Petitions to Intervene, the Commission also received four answers to the Joint Petition. Answers were filed by NIPPC, the Coalition, Simplot, and the Milk Producers of Idaho.[2] The answers raise both procedural and substantive objections to the Petitioners' request to lower the eligibility cap for the published avoided cost rate to 100 kW nameplate capacity. The Milk Producers, Simplot and the Coalition also argue in their answers that the lowering of the eligibility cap should not apply to non-wind QFs. Simplot asserts that the Joint Petition does not refer to any "problems associated with biomass, cogeneration, solar, small hydro, waste-to-energy projects or any other type of PURPA eligible QF resource. These other types of [QF] resources have very different generating characteristics from wind and should therefore not be caught in the overly broad sweep of the Joint Motion." Simplot Answer at 3.

C. The Commission's Notice of Petition

On December 3, 2010, the Commission issued an Order and Notice of Joint Petition. After reviewing the Joint Petition and the answers, the Commission declined the Motion to immediately reduce the eligibility cap. Instead, the Commission determined that it would expeditiously consider the Petitioners' request to reduce the eligibility cap through the use of Modified Procedure (written comments) and oral arguments. The Notice established an intervention deadline of December 17, 2010; set deadlines for initial comments and reply comments of December 22, 2010, and January 19, 2011, respectively; and scheduled an oral argument for January 27, 2011. Order No. 32131.

The Commission specifically requested comment and argument regarding: (1) the advisability of reducing the published avoided cost eligibility cap; (2) if the eligibility cap is

[1] The Coalition is an Oregon-based consortium of existing base load hydroelectric and biomass QFs located in the Northwest.

[2] The Milk Producers did not file a Petition to Intervene and its "Answer" was a "letter in opposition." The Milk Producers letter, therefore, will been treated as a comment.

reduced, the appropriateness of exempting non-wind QF projects from the reduced eligibility cap; and (3) the consequences of dividing larger wind projects into 10 aMW projects to utilize the published rate.[3] The Commission also determined that its decision regarding the Joint Petitioners' Motion to reduce the published avoided cost eligibility cap would become effective on December 14, 2010.

PROCEDURAL AND SUBSTANTIVE MOTIONS

Before and at the January 27, 2011 oral argument, several parties made various motions. The motions are addressed in greater detail below.

A. Motion to Strike

With its reply comments filed on January 19, 2011, Rocky Mountain Power prefiled the direct testimony of Bruce Griswold. On January 21, 2011, NIPPC filed a Motion to Strike Griswold's testimony. NIPPC renewed its Motion to Strike at oral argument. Given NIPPC's Motion, Rocky Mountain Power withdrew Mr. Griswold's testimony. Tr. at 11.

B. Motion for a Technical Hearing

In their initial comments and reply comments, both NIPPC and Adams County requested that the Commission conduct a technical hearing in order to allow the parties to present witnesses. Several times during oral argument NIPPC and Adams County referenced the need for a technical hearing, but did not renew their Motion.

The Commission finds that the parties' positions have been adequately presented through initial comments, reply comments and oral argument, and that a technical hearing is not necessary to resolve the question of whether the eligibility cap should be reduced. We also find that conducting a technical hearing would unnecessarily delay the decision making process. Consequently, the Commission denies the parties' requests for a technical hearing. We find that the comments and oral argument provide sufficient information to resolve the policy question of temporarily reducing the eligibility cap.

C. Request to Take Official Notice

At oral argument, NIPPC distributed a document entitled "Request for Official Notice" and asked the Commission to take official notice of a host of documents listed in the "Request" including approximately 14 PUC Orders, several FERC orders, and the "Filings,

[3] The Commission intends to consider the other avoided cost issues identified by the Petitioners and other interested parties in subsequent proceedings.

Testimony, Exhibits and Orders" in 24 different PUC dockets. In addition, NIPPC orally asked that the Commission take official notice of "three documents related to coal costs that support our comments": a settlement agreement of the Environmental Protection Agency; an Oregon State Senate Natural Resources Committee report on greenhouse gas emissions; and MidAmerican Holdings Company's comments from a coal combustion residual rulemaking. Tr. at 7-8. The Commission acknowledged official notice of its own notices and orders. *Id.* at 9.

Pursuant to our Procedure Rule 263.01, the Commission may take official notice at hearing and in its Orders of:

a. (1) Its own orders, notices, rules, certificates and permits, and (2) those of any other regulatory agency, state or federal;

b. (1) matters of common knowledge, (2) technical, financial, or scientific facts established and published in accepted authorities or in the Commission's specialized knowledge, and (3) matters judicially noticeable; and

c. Data contained in periodic reports of regulated utilities filed with the Commission or federal regulatory agencies.

However, "[u]nless otherwise agreed to by the parties and approved by the presiding officer, parties requesting the Commission to take official notice of documents must submit those documents to the Commission in the manner prescribed for documents in Rule 262." Rule 263.02 (emphasis added). Although NIPPC presented the Commission with a list of citations to documents, it did not actually provide copies of the requested documents to the Commission or to the parties. NIPPC also advised the Commission that all of its requested documents met the parameters of Rule 263.01. Tr. at 10. However, Rule 263.01 pertains to matters that the *Commission* may officially note. Parties requesting official notice must comply with Rule 263.02 and provide copies of the documents for which it seeks official notice. The purpose of providing copies to parties is to afford the parties an opportunity to review, and if necessary, contest the offered material. *Id.* Moreover, the majority of the "filings, testimonies and exhibits" from the 24 PUC dockets are not documents or information subject to official notice per Rule 263. Notwithstanding the Commission's acknowledgement of taking official notice of its own notices and orders, the Commission denies NIPPC's request to take official notice of the remainder of its listed documents, including the three additional documents regarding coal costs.

D. Motion to Dismiss

During oral argument, Blue Ribbon Energy asked the Commission to dismiss the utilities' Joint Petition. Blue Ribbon articulated three bases upon which the Commission should dismiss the Petition: (1) the utilities' failed to file the Petition in good faith; (2) the utilities have not presented a basis upon which relief can be granted; and (3) the utilities' Joint Petition constitutes an effort by the utilities to terminate their obligations to enter into PURPA contracts. Tr. at 74. The utilities responded that their Joint Petition was made in good faith and based on verifiable evidence that large QF projects are receiving an avoided cost rate in excess of the utility's true avoided cost. *Id.* at 82. Rocky Mountain Power specifically pointed out that the costs of QF contracts are borne by ratepayers and that the utilities were acting in the ratepayers' interest. *Id.* at 83.

The Commission denied Blue Ribbon's request for dismissal of the Petition. The Commission stated that the utilities' Petition was based on the Commission's authority to set the eligibility cap for QF projects. *Id.* at 87. We reject Blue Ribbon's argument that a reduction in the eligibility cap relieves utilities of their obligation to purchase QF power. Tr. at 76-77, 81. Finally, Blue Ribbon's argument regarding the 80 MW maximum size of a QF is not relevant to the cap size of the standard published rate. *Cf.* 18 C.F.R. §§ 292.204(a) and 292.304(c).

COMMENTS AND ORAL ARGUMENT

Comments and arguments were presented by developers of QF facilities, Staff, each of the Petitioners, and other interested persons. Idaho Power, Avista, and Rocky Mountain Power all propose lowering the threshold for PURPA published avoided cost rates from 10 aMW to 100 kW for all QF resources. The utilities argue that the number of QFs currently requesting contracts under the published 10 aMW avoided cost rate is excessive and the utilities' ability to continue to accept the QF energy without negatively impacting the electric system and the utilities' customers is at risk. Specifically, the utilities cite large wind QFs as the source of their current predicament.

Idaho Power stated that "the current application of the [published rate] methodology, including the 10 average megawatt cap, has several problems associated with it that have potentially huge ramifications or implications for our customers. . . ." Tr. at 13. Avista maintained that reducing the eligibility cap to 100 kW "is the most practical, simplest, most easily implemented and enforced solution to the issues" that the utilities are facing. *Id.* at 31.

When addressing the disaggregation issue raised by the Petition, Rocky Mountain Power argued that a disaggregated wind project "looks a lot like a large wind QF project. Except for additional [electric] meters, the differences are almost purely legal." *Id.* at 33. Rocky Mountain Power explained that "the large QFs have an option and this option is valuable and that value comes at the expense of ratepayers." *Id.* at 36. The Petitioners also maintain that it is important that any change in the eligibility cap be applied equally for all three utilities in order to prevent a utility not granted a reduction from disproportionately attracting a greater number of QF project proposals.

Without exception, the Intervenors oppose reduction of the published avoided cost rate eligibility cap. The Intervenors generally contend that lowering the threshold is an imposition on legally permissible QF projects that cannot absorb the costs of negotiating with a utility and the increased difficulty of obtaining financing created by the uncertainty of the payments they will receive under PURPA contracts negotiated through use of the Integrated Resource Plan (IRP) Methodology.

Dynamis, Adams County, Birch Power, Interconnect Solar, the Canal Companies, the Coalition and Commission Staff urge the Commission to narrowly apply any reduction in eligibility cap to the resource identified by the utilities as causing the immediate problem: wind QFs. Interconnect Solar distinguishes its resource from wind by arguing that "[s]olar power is not 'intermittent' and instead has a firm nature to its production that directly matches a utility's need for energy and capacity during heavy load hours." Interconnect Solar Comments at 2. Even Intermountain Wind, a self-professed family operation, maintains that "[a]n overly broad eligibility reduction would harm projects that are legitimately entitled access to PURPA published avoided cost rates and would adversely affect the development of renewable energy in Idaho." Intermountain Wind Comments at 5. Intermountain Wind also argues that, "[w]hether PURPA published rates should be available to commercial scale projects may be fairly debatable. Whether those rates should be available to parties such as Intermountain is not." *Id.* at 4.

NIPPC maintains that a reduction in the published avoided cost rate eligibility cap is not warranted for any resource because the utilities have not demonstrated that the published avoided cost rate is too high. NIPPC further argues that, although the utilities have identified large wind projects as the immediate source of the problem, the utilities do not claim that they

would be unable to integrate the amount of wind currently in the queue. NIPPC and Adams County claim that disaggregation "is irrelevant and a non-issue, because if the avoided cost rates are accurately set, the rates for an IRP methodology avoided cost project would be essentially the same as the rates for a non-IRP methodology avoided cost project." Tr. at 49. They go on to assert that "[n]o developer is going to go in for the IRP methodology knowing that it sets the avoided cost rate under actual avoided cost rates if they're able to take advantage of the true avoided cost rate. . . ." *Id.* at 51.

NIPPC and Intermountain Wind also oppose the Commission's decision to implement a December 14, 2010, effective date. Intermountain Wind argues that the Commission "does not have authority to look back in time and rearrange legal rights that existed on a certain day in the past." Intermountain Wind Reply at 4. NIPPC contends that a December 14 effective date "violates the filed rate doctrine and the prohibition against retroactive ratemaking." NIPPC Comments at 8.

Commission Staff asserts that, although large wind projects are not inherently undesirable, the disaggregation of multiple, affiliated QFs seeking to qualify for published rate contracts raises concerns. Staff contends that "considering each 10 aMW QF individually for purposes of eligibility for [published] avoided cost rates creates an artificial mismatch between the method used to establish a project's avoided cost rates and the collective size of the project." Staff Comments at 4. Staff emphasizes that, "[w]hen large QFs are added to a utility's renewable portfolio, but the QFs disaggregate in order to qualify for the published rate, the avoided cost paid to the QF becomes inaccurate, because under the published rate methodology, there's no mechanism to reflect the utility's reduced avoided cost." Tr. at 88. Staff further maintains that obligating utilities to accept generation that they do not need unnecessarily increases the rates paid by the utilities' customers. Staff Comments at 5. Staff insists that the problem described by the utilities is real and requires immediate attention.

DISCUSSION AND FINDINGS

The Idaho Public Utilities Commission has jurisdiction over 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 its implementing regulations of FERC to set avoided costs, to establish standard published avoided

cost rates, to order electric utilities to enter into fixed-term obligations for the purchase of energy from QFs, and to implement FERC regulations.

Based upon the record, the Commission finds 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 the implications of disaggregated QF projects.[4] We maintain the eligibility cap at 10 aMW for QF projects other than wind and solar (including but not limited to biomass, small hydro, cogeneration, geothermal, and waste-to-energy). The Petitioners have not convinced us that lowering the eligibility cap for these other QF technologies is necessary or in the public interest.

Wind and solar resources present unique characteristics that differentiate them from other PURPA QFs. Wind and solar generation, integration, capacity and ability to disaggregate provide a basis for distinguishing the eligibility cap for wind and solar from other resources. Furthermore, these intermittent resources must be "firmed" by ancillary services to assure system reliability. Temporarily reducing the eligibility cap for wind and solar while we continue our investigation, will still allow wind and solar projects larger than 100 kW to negotiate avoided cost rates using the IRP Methodology.

Lowering the cap to 100 kW does not change the published avoided cost rates established in Order No. 31025 (March 16, 2010). The published rate for wind and solar QFs will still be available for projects 100 kW or smaller and as we have stated previously, will be the starting point for negotiating an avoided cost rate for larger wind and solar QF projects.

At a minimum, FERC regulations require that standard or published rates be set for purchases from QFs with a design capacity of 100 kW or less. These regulations also grant the Commission the discretion to set the published rate eligibility cap at a higher level. 18 C.F.R. § 292.304(c). Whether it is a published rate or a rate for a larger QF, FERC requires that the avoided cost rates for all QF purchases be just and reasonable to utility customers and in the public interest; and not discriminate against qualifying cogeneration and small power production facilities. 18 C.F.R. § 292.304(a)(1). In establishing a published rate, the Commission may differentiate among QFs using various technologies on the basis of supply characteristics of the different technologies; the availability of capacity and energy during daily and seasonal peaks;

[4] Other avoided cost issues identified in the Joint Petition, including utilization and/or modification of the IRP Methodology, will be considered after a determination regarding disaggregation.

dispatchability; reliability; and other factors. 18 C.F.R. § 292.304(c)(3); *In re California PUC, Order Granting Clarification and Dismissing Rehearing*, 133 FERC ¶ 61,059 (October 21, 2010) at ¶ 23. Contrary to NIPPC's assertions, FERC rules insist that rates for purchases from QFs be just and reasonable to *ratepayers* and in the public interest – not in the interest of the QFs.

This Commission established a clear and reasoned distinction between small and large QFs in 1995 when it adopted the use of the IRP methodology for larger QFs. Order Nos. 25882, 25883, 25884. The Commission explained that requiring larger QF projects "to prove their viability by market standards ensures that utilities will not be required to acquire resources priced higher than would result from a least cost planning [RFP] process. Ratepayers will not be disadvantaged and QFs will be treated fairly and consistently with the requirements and goals of PURPA." *Id.* at 6. The purpose, then and now, of distinguishing between small and large QFs with the application of the IRP methodology for large QF projects is to more precisely value the energy being delivered – not encourage or discourage QF resources.

We note that parties have challenged the accuracy of the IRP Methodology. We believe that the IRP Methodology appropriately assesses 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. Unfortunately, the IRP Methodology is being under-utilized because our Orders do not currently prevent QF developers from breaking up what is truly a single, large project into several small QF projects in order to avail themselves of what may sometimes be more favorable, published avoided cost rates.

Based on the foregoing, the Commission temporarily reduces the eligibility cap for published avoided cost rates from 10 aMW to 100 kW for wind and solar resources only, effective December 14, 2010. Arguments that the Commission is without authority to implement its eligibility cap reduction on December 14 are unpersuasive for several reasons. First, the filed rate doctrine and rule against retroactive ratemaking do not extend "to cases in which [parties] are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service." *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C.Cir.1992). "The goals of equity and predictability are not undermined when the Commission warns all parties involved that a change in rates is only tentative and might be disallowed." *OXY USA, Inc. v. FERC*, 64 F.3d 679, 699 (D.C.Cir.1995). The Commission provided notice on December 3, 2010, that its decision regarding the published avoided cost rate

eligibility cap would become effective December 14, 2010. One need look no further than the abundance of firm energy sales agreements filed with the Commission within that time frame to realize that the parties took the Commission's notice of its effective date seriously. Consequently, adequate notice was provided to all parties that the eligibility cap was subject to change.

Second, as previously mentioned, the published avoided cost rates established in Order No. 31025 have not changed. What has temporarily changed is the availability of published rates to wind and solar QFs. Wind and solar projects larger than 100 kW are still entitled to PURPA contracts and avoided cost rates that reflect the unique characteristics of their resource.

This Commission is supportive of all small power producers contemplated by PURPA, including wind and solar, and it is not the Commission's intent to push small wind and solar QF projects out of the market. With this goal in mind, the Commission is initiating additional proceedings to investigate and determine in a finite timeframe requirements by which wind and solar QFs can obtain a published avoided cost rate without allowing large QFs to obtain a rate that is not an accurate reflection of a utility's avoided cost for such projects. It is just and reasonable and in compliance with the intent and mandate of PURPA that large QF projects avail themselves of economies of scale. Such an approach will assist the Commission in fulfilling its obligations under PURPA.

The Commission directs the parties to meet informally within 10 days of the issuance of this Order to establish an expedited schedule, including dates for discovery, prefiled direct testimony and rebuttal that will accommodate a technical hearing during the week of May 9, 2011. Specifically, the Commission solicits information and investigation of a published avoided cost rate eligibility cap structure that: (1) allows small wind and solar QFs to avail themselves of published rates for projects producing 10 aMW or less; and (2) prevents large QFs from disaggregating in order to obtain a published avoided cost rate that exceeds a utility's avoided cost.

ORDER

IT IS HEREBY ORDERED that the Petitioners' Motion to reduce the eligibility cap for published avoided cost rates is granted in part and denied in part. The Commission temporarily reduces the eligibility cap for published avoided cost rates from 10 aMW to 100 kW

for wind and solar QFs only, effective December 14, 2010. The Petitioners' Motion to reduce the published eligibility cap for other QFs is denied.

IT IS FURTHER ORDERED that NIPPC's request for the Commission to take official notice of our Notices and Orders is granted and the request regarding the other documents is denied as set out above.

IT IS FURTHER ORDERED that the parties meet informally within 10 days of the issuance of this Order to establish a schedule consistent with a technical hearing to occur during the week of May 9, 2011. The Commission directs the parties to address disaggregation, as more fully described above.

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 7th day of February 2011.

JIM D. KEMPTON, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

MACK A. REDFORD, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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