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STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

September 14, 2005

Jean D. Jewell
Commission Secretary
Idaho Public Utilities Commission
PO Box 83720
Boise, Idaho 83720-0074

RE: Staff Comments Filed in Case No. PAC-E-05-9

Dear Ms. Jewell:

Attached please find Corrected Staff Comments dated today, September 14, 2005. Please replace the Staff Comments filed yesterday, September 13, 2005, in Case Number PAC-E-05-9 with the Corrected Staff Comments on the Commission's website to avoid any confusion.

The changes to Staff's Comments solely involve the final paragraph on page 2 regarding the 90 to 110 percent performance band adopted by the Commission in Order No. 29632. Staff's Comments mischaracterized the Commission's findings in Order No. 29632, and the changes are necessary to demonstrate the actual 90 to 110 percent performance band adopted by the Commission in Order No. 29632 and applied by Staff when reviewing this contract.

The relevant text now states:

When a QF delivers less than 90 percent of the forecasted amount "for reasons other than forced outage or forced majeure events... the shortfall energy shall be priced at 85% of the market price, less the contract rate, the difference capped at 150% of contract rate." *Id.* Further, "energy delivered in excess of 100% should be priced at 85% of the market or contract price, whichever is less." *Id.* However, "[t]he QF will receive no payment for any energy provided above the 10 MW cap." *Id.*

The corrected text states:

When a QF delivers less than 90 percent of the forecasted amount, all delivered energy shall be priced at 85% of the market price, or the contract rate, whichever is less. *Id.* Further, when a QF delivers energy in excess of

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110 percent of the forecasted amount, the “energy delivered in excess of 110% should be priced at 85% of the market or contract price, whichever is less.” *Id.* However, “[t]he QF will receive no payment for any energy provided above the 10 MW cap.” *Id.*

Thank you,



Kira Dale Pfisterer
Deputy Attorney General

Enclosure

cc: Parties of Record

L:PAC-E-05-09_kdp

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Attorney for the Commission Staff

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

**IN THE MATTER OF THE APPLICATION OF)
PACIFICORP FOR APPROVAL OF A POWER) CASE NO. PAC-E-05-9
PURCHASE AGREEMENT FOR THE SALE)
AND PURCHASE OF ELECTRIC ENERGY)
BETWEEN PACIFICORP AND) CORRECTED COMMENTS OF
SCHWENDIMAN WIND LLC) THE COMMISSION STAFF
_____)**

COMES NOW the Staff of the Idaho Public Utilities Commission, by and through its Attorney of record, Kira Dale Pfisterer, Deputy Attorney General, and submits the following comments in response to Order No. 29862.

I. BACKGROUND

On August 15, 2005, PacifiCorp filed an Application for approval of a Power Purchase Agreement (the Agreement) for the sale and purchase of electric energy between PacifiCorp and Schwendiman Wind LLC (Schwendiman). Schwendiman intends to operate the Facility as a qualified small power production facility (QF) under the Public Utility Regulatory Policies Act of 1978 (PURPA). The wind project will provide non-firm intermittent energy. On August 31, 2005, the Commission solicited comments on the Application. *See* Order No. 29862.

A. *The Legal Framework*

Pursuant to PURPA and related regulations promulgated by the Federal Energy Regulation Commission (FERC), an electric utility, such as PacifiCorp, is required to purchase electric energy from eligible QFs. 16 U.S.C. § 824a –3(a); 18 C.F.R § 292.303. The state commissions set the rate for such purchases. 16 U.S.C. § 824a – 3(b); 18 C.F.R. § 292.304. These rates must be just and reasonable to the utility’s customers and in the public interest and must not discriminate against qualifying cogenerators or small power producers. *Id.*

1. The Eligibility Cap

In Idaho, standard administratively determined rates, the “published rates,” are made available to QFs that meet an eligibility cap limiting the size of the project. On August 4, 2005, the Commission temporarily reduced the eligibility cap for non-firmed wind projects in Idaho from 10 average megawatts (10 aMW) to 100 kilowatts (kW). *See* Order No. 29839 (Case. No. IPC-E-05-22). Pursuant to the Commission’s Order, this new eligibility cap is effective July 1, 2005. *Id.* at 11.

2. The 90-110 Performance Band

On November 22, 2004, the Commission established certain performance criteria for the purpose of determining eligibility for firm energy avoided cost rates. *See* Order No. 29632 (Case No. IPC-E-04-08). These eligibility criteria apply to all utilities.¹

The criteria established in Order No. 29632 include monthly forecasts of expected generation. *Id.* at 14. Projects must deliver generation within a band of 90 to 110 percent of the monthly forecasted amount in order to be eligible for the published avoided cost rates for firm energy projects. *Id.* at 20. When a QF delivers less than 90 percent of the forecasted amount, all delivered energy shall be priced at 85% of the market price, or the contract rate, whichever is less. *Id.* Further, when a QF delivers energy in excess of 110 percent of the forecasted amount, the “energy delivered in excess of 110% should be priced at 85% of the market or contract price, whichever is less.” *Id.* However, “[t]he QF will receive no payment for any energy provided above the 10 MW cap.” *Id.*

¹ Although Case No. IPC-E-04-08 arose from a complaint case against Idaho Power, all three electric utilities, including PacifiCorp, participated because the proceeding involved generic issues related to the methodology for computing published rates and the refining eligibility criteria for them. In fact, PacifiCorp offered a witness in the case who agreed with Idaho Power that QFs should be required to commit to monthly (as opposed to daily or hourly) delivery schedules in order to obtain firm energy prices. Tr. at 510-511.

B. *The Application*

PacifiCorp submitted the Application for Commission approval on August 15, 2005. This Application includes a formal pleading submitted by PacifiCorp's attorney; a letter from project engineer, Brian D. Jackson, on behalf of the Schwendiman Wind Project; and the Agreement itself dated July 19, 2005.

The Agreement is for a twenty-year term. Pursuant to the Agreement, Schwendiman intends to design, construct, install, own, operate, and maintain a wind generating facility with a nameplate capacity rating of 17.5 megawatts (MW) to be located near Idaho Falls, in Bonneville County, Idaho. The generation of the Facility is not expected to exceed 10 average MW on a monthly basis. Nonetheless, the Agreement contains provisions addressing the contingencies of over- and under-production. If the facility generates power in excess of 10 aMW, PacifiCorp will accept the power to a certain maximum level but will not pay for it. The Agreement also contains provisions relating to a "minimum availability obligation." Pursuant to these provisions, the Facility must achieve an average availability minimum of at least 75 percent in the first year, 85 percent in years 2-10, and 80 percent in the last 10 years of the Agreement.

Mr. Jackson's letter in the Application specifically addresses the grandfathering requirements of Order No. 29839. Mr. Jackson asserts that Schwendiman meets each of the criteria for published rate eligibility.

II. STAFF ANALYSIS

It is Staff's position that the grandfathering provisions in Order No. 29839 apply to this Application and Staff finds that the Agreement meets the Commission's grandfathering provisions for published rate availability as set forth in Order No. 29839. Nonetheless, the Agreement fails to include a provision establishing a 90-110 percent performance band as required by Order No. 29632. Therefore, Staff recommends that the Commission deny this Application as filed.

A. *Order No. 29839 Applies to This Application.*

On August 4, 2005, the Commission issued Order No. 29839 in response to an Idaho Power petition requesting a temporary suspension of the Company's obligation under PURPA to enter into new contracts to purchase energy generated by wind QFs. Order No. 29839 at 1. Idaho Power requested that the proposed temporary suspension remain in effect for a period of

time sufficient to allow the Commission to investigate the impacts on Idaho Power's customers arising out of the addition of substantial amounts of wind-powered generation projects. *Id.*

The Commission did not grant Idaho Power's requested suspension. Instead, the Commission: (1) reduced the published rate eligibility cap for non-firmed wind projects to 100 kW effective July 1, 2005; (2) required individual negotiation for larger wind QFs; and (3) established criteria for assessing QF contract entitlement under the previous standard. *Id.*

The contract entitlement provisions, deemed the "grandfathering provisions," allow a QF, like Schwendiman, with a capacity over 100 kW but less than 10 aMW, to be eligible for the published rates. The grandfathering provisions set up a two-prong test for eligibility. First, the QF must demonstrate either: (1) submittal of a signed power purchase agreement to the utility, or (2) submittal to the utility of a completed Application for Interconnection Study and payment of fee. *Id.* at 10. Provided that one of these threshold criteria is satisfied, the QF must also demonstrate other indicia of substantial progress and project maturity, such as (a) a wind study demonstrating a viable site for the project, (b) a signed contract for wind turbines, (c) arranged financing for the project, and/or (d) related progress on the facility permitting and licensing path. *Id.* If the grandfathering provisions do not apply, then the QF must negotiate a rate with the utility subject to Commission approval. *Id.*

Order No. 29839, including the grandfathering provisions, applies to PacifiCorp. The Order states:

PacifiCorp and Avista ... have both requested similar procedural and regulatory treatment as pertains to the availability of published rates for wind QF's. On the evidence presented, we find that neither PacifiCorp nor Avista are in the situation of having to purchase an amount of QF wind generation as has been offered and presented to Idaho Power. Nevertheless, because we find for administrative reasons that it is prudent and expedient to examine this question for all jurisdictional utilities at the same time, we find this request to be reasonable and justified.

Order No. 29839. Thus, the Commission decided that, even though PacifiCorp and Avista are not experiencing the same problems as Idaho Power, they are subject to the same "procedural and regulatory treatment as pertains to the availability of published rates for wind QF's." Staff believes this necessarily includes the grandfathering provisions.

Moreover, even though the grandfathering provisions specifically are subject to petitions for reconsideration and for stay, the Order is in effect until the Commission makes a determination otherwise. Pursuant to *Idaho Code* § 61-626(3), "[a] petition for reconsideration

shall not excuse any corporation, public utility or person from complying with or obeying any order or any requirement of any order of the commission or operate in any manner, to stay or postpone the enforcement thereof, except as the commission may by order direct.” Therefore, until the Commission makes a decision to stay the application of Order No. 29839 or to rescind or modify Order No. 29839, including the grandfathering provisions, it is the legal standard that applies to the Schwendiman contract.

B. *The Schwendiman Agreement Meets the Grandfathering Provisions of Order No. 29839.*

In evaluating whether the Schwendiman Project meets the grandfathering criteria set forth in Order No. 29839, Staff considered each criterion individually. As described in further detail below, the Schwendiman contract does not meet the first requirement for grandfathering in that there was not a signed power purchase agreement by July 1, 2005. However, Schwendiman does meet the second requirement for grandfathering, because it has submitted a completed interconnection study application and has paid a fee. In addition, Schwendiman meets at least one of the described indicia of project development and maturity. Therefore, Staff believes Schwendiman meets the grandfathering provisions necessary for published rate eligibility as set forth in Order No. 29839.

1. Schwendiman Did Not Have a Signed Power Purchase Agreement by July 1, 2005.

The Application does not demonstrate that there was a signed power purchase agreement by July 1, 2005. The submitted Agreement is dated July 19, 2005. Nonetheless, Mr. Jackson states in the Application that Schwendiman submitted a signed power purchase agreement to PacifiCorp on June 26, 2005. Jackson further provides, “PacifiCorp was not yet willing to sign that document and thus, several points were revised and finalized during further negotiations in July to reach a negotiated final contract agreeable to both parties.”

In response to Staff production requests, PacifiCorp states that the parties were still negotiating material aspects of a power purchase agreement when Schwendiman tendered the signed June 26th draft Agreement. PacifiCorp further states that it had asked Schwendiman on June 22 not to tender the draft because material terms remained at issue. According to the Company, the June 22 draft Agreement was incomplete for several reasons, including the following: (1) a lack of agreement on damage provisions; (2) a lack of agreement on liquidated damage calculations; (3) questions regarding Schwendiman’s ability to perform per the milestones; (4) a missing engineer’s certification; and (5) a missing QF certification.

Based on the information provided by both parties, Staff believes there was not an agreement of the parties, either express or implied, by July 1, 2005. Therefore, the Application fails to meet the first requirement for published rate availability set forth in Order No. 29839.

Furthermore, this Agreement appears to differ from the contracts contemplated by Staff in its comments recommending grandfathering criteria in Case No. IPC-E-05-22. In those comments, Staff recommended that contracts be grandfathered if they had been signed by the project owner and were materially the same as other Idaho Power wind contracts that had recently been signed. Except for the project names, locations, descriptions and generation amounts, all recent Idaho Power wind contracts had been virtually identical. As a result, Staff believes that signature by the project owner implied agreement with Idaho Power, despite the lack of an Idaho Power signature.

This Agreement differs for two distinct reasons. First, there was clear disagreement between the parties on and after July 1, 2005. Further negotiation was necessary before the parties could reach a final agreement. Second, this Agreement was not with Idaho Power, it was with PacifiCorp. This contract was the first PURPA contract PacifiCorp has submitted for Commission approval in over ten years and differs markedly from all previous PacifiCorp contracts. Thus, it is unreasonable to assume that any delay past the Commission's July 1 cutoff date was simply administrative and that ultimate contract signature would simply be a ministerial matter. Although PacifiCorp eventually signed the contract and submitted it for Commission approval, it did so after July 1. Consequently, Staff does not believe the first criterion of contract signature prior to July 1, 2005 has been met.

2. Submittal of a Completed Application for Interconnection Study and Fee Payment

Schwendiman meets the second requirement for project eligibility, because Schwendiman submitted a number of applications for interconnection study and made payments to PacifiCorp to conduct such studies prior to July 1, 2005. In his letter accompanying PacifiCorp's Application, Mr. Jackson describes interconnection studies and payments to PacifiCorp dating as far back as August 2003. Staff has verified that the interconnection studies have been done and that the fees were indeed paid. Thus, Staff believes that the second criterion for project eligibility has been satisfied.

3. Other Indicia of Project Maturity

The other indicia of project maturity outlined in Commission Order No. 29839 include: a wind study demonstrating a viable site for the project; a signed contract for wind turbines;

arrangement of project financing; and related progress on the facility permitting and licensing path. Staff believes that Schwendiman meets at least one of these criteria – the wind study demonstrating a viable site for the project.

a. Wind study demonstrating a viable site for the project

Staff finds that Schwendiman meets the requirement of a wind study demonstrating a viable site. The wind study provided in response to Staff's production requests consists of a summary of wind data collected by Schwendiman, in addition to a September 2004 letter from a wind energy consultant analyzing the data. The consultant's analysis seems to conclude that the proposed site is viable, but it also concludes that there is some uncertainty as to the true long-term wind speeds at the site, uncertainty about some of the wind data themselves, and uncertainty about extrapolation of the wind data to other heights. Although Staff would prefer to see a wind study without so much uncertainty, Staff nevertheless believes that the wind study completed for the proposed site meets minimum standards.

b. Signed contract for wind turbines

Schwendiman has been unable to produce a signed contract for purchase of wind turbines. Only a "preliminary agreement" has been obtained to date. A June 30, 2005 letter from the turbine manufacturer states "We can schedule your new orders for the Clipper turbines, but we need to make those orders firm with cash deposits as soon as your power purchase agreements are completed." The letter also states, "I will maintain this project's position in the production schedule while we finalize the Turbine Supply Agreement over the next month." Therefore, Staff does not believe that this criterion is satisfied.

c. Arrangement of project financing

Staff does not believe that this criterion is satisfied. Schwendiman admits that financing arrangements are completely contingent upon the signed, approved power purchase agreement as well as the signed and finalized turbine purchase order. A September 6, 2005 letter provided in response to Staff production requests confirms this and further provides that financing will be by private investors who do not wish to be disclosed at this time.

d. Related progress on the facility permitting and licensing path

Staff is not certain if Schwendiman meets this criterion. Schwendiman has obtained a conditional use permit from the Bonneville County Planning and Zoning Commission. Schwendiman further contends that environmental reviews have also been conducted as part of a USDA grant in 2003 and 2004. However, the Idaho Department of Fish and Game contacted

Staff informally to express concerns about the proposed project and inquire about the agency's ability to comment on the project, either in proceedings before the Commission or in other forums. Thus, Staff is still uncertain as to whether this criterion is satisfied.

C. The Schwendiman Agreement Fails to Include a 90-110 Performance Band.

The Agreement between PacifiCorp and Schwendiman does not comply with the required 90-110 percent performance band criteria established in Order No. 29632. Moreover, the "minimum availability provisions" fail to address the concerns addressed by the performance band. The 90-110 percent performance band criteria established by the Commission are to be applied to monthly generation in order to insure a reasonable degree of firmness, whereas the "minimum availability obligation" provisions in this Agreement only apply to annual generation. Staff believes that a project could meet the "minimum availability obligation" in this Agreement but fail to meet the 90-110 percent performance band criteria required by the Commission. Because this Agreement fails to contain a 90-110% percent performance band, Staff does not believe that this Agreement should be approved as submitted.

D. The Schwendiman Agreement Otherwise Meets the Commission's Requirements for Published Rate Eligibility.

Staff has reviewed all of the other rates, terms and conditions in the proposed Agreement and believes that they comply with all effective Commission orders. For example, provided that the Schwendiman Agreement meets the grandfathering provisions of Order No. 29839, the Facility must have a production capacity under 10 aMW in order to be eligible for the published avoided cost rates. *See* Order No. 29646. Under the Agreement, Schwendiman will be required to provide certain data to PacifiCorp in order that PacifiCorp may determine whether, under normal or average conditions, the Facility will not exceed 10 aMW on a monthly basis. Furthermore, should the Facility exceed 10 aMW on a monthly basis, PacifiCorp will accept the energy but will not purchase or pay for the accepted, excess energy. This Agreement satisfies the Commission's requirements and sufficiently guarantees that the facility will not receive the published rates when producing in excess of 10 aMW.

E. Cost Allocation of Contract Costs.

Staff has some concerns regarding the potential impact of this QF contract on PacifiCorp's Idaho customers. However, it is impossible at this time to evaluate fully what such an impact will be.

On February 28, 2005, the Commission approved PacifiCorp's proposed Inter-Jurisdictional Cost Allocation Revised Protocol (Revised Protocol). *See* Order No. 29708. The Revised Protocol is the methodology the Commission will follow when allocating PacifiCorp system costs to Idaho.

As stated in Recital E on page 1 of the Agreement, the Agreement will be categorized as a "New QF" under the terms of the Revised Protocol. The Revised Protocol states that the costs of "any NEW QF contract, *which exceed the costs PacifiCorp would have otherwise incurred acquiring a comparable resource*, will be assigned on a situs basis to the State approving such contract" (emphasis added). Costs not in excess of a "comparable resource" will be system assigned. The Revised Protocol defines a comparable resource to mean "resources with similar capacity factors, start-up costs, and other output and operating characteristics."

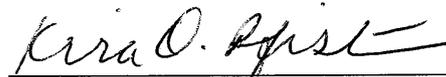
In order to be able to determine in the future whether the costs to PacifiCorp under this Agreement exceed the costs PacifiCorp would have otherwise incurred acquiring a comparable resource, Staff inquired of PacifiCorp as to how it intends to define the "comparable resource." Staff believes that it is important to clearly and specifically define the comparable resource now, because it may be very difficult in the future to reconstruct today's market prices and resource alternatives looking back in hindsight. For example, if the comparable resource is the market, those costs will need to begin to be tracked for any benchmarking or comparison that would be required at a later date. In addition, the market must be defined in terms of which location will be used and in terms of whether the market will be defined as long-term or short-term. If the "comparable resource" is another generation alternative, then the current costs of other comparable alternatives should be memorialized now for possible use in a future rate case.

In response to Staff's production requests regarding a definition of the comparable resource, PacifiCorp responded that the Commission should make that determination in a future rate case. Absent a company analysis establishing a "comparable resource," it is impossible for Staff to fully evaluate the impact of the Schwendiman project on PacifiCorp's Idaho customers.

IV. STAFF RECOMMENDATION

Staff recommends that the Agreement not be approved as filed because of the absence of the 90-110 percent banding provisions that are required by Commission Order No. 29632.

Respectfully submitted this 14th day of September 2005.



Kira Dale Pfister
Deputy Attorney General

Technical Staff: Rick Sterling

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 14TH DAY OF SEPTEMBER 2005, SERVED THE FOREGOING **CORRECTED COMMENTS OF THE COMMISSION STAFF**, IN CASE NO. PAC-E-05-09, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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