Office of the Secretary
Service Date
May 18, 2012

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

XRG-DP-7, XRG-DP-8, XRG-DP-9, XRG-DP-10, LLCs,	)	**CASE NO. PAC-E-10-08**
Complainants,	)	
vs.	)	
PACIFICORP DBA ROCKY MOUNTAIN POWER,	)	**ORDER NO. 32553**
Respondent.	)	

XRG filed a complaint with the Commission against PacifiCorp dba Rocky Mountain Power on July 29, 2010, alleging that Rocky Mountain Power is in violation of the Public Utility Regulatory Policies Act (PURPA), Federal Energy Regulatory Commission (FERC) regulations and orders, and this Commission's Orders by failing to provide XRG with a power purchase agreement including pre-March 16, 2010, published avoided cost rates.[1] On August 23, 2010, Rocky Mountain Power filed its answer. Rocky Mountain Power maintains that XRG is not entitled to pre-March 16, 2010, published avoided cost rates because the parties had not executed any power purchase agreements (PPAs) at that point in time.

After a period of protracted discovery, on February 7, 2011, Rocky Mountain Power filed a Motion for a Protective Order to Stay Discovery and a Motion for Summary Judgment with the Commission. Rocky Mountain Power requests a protective order partially staying discovery pending the resolution of the Company's Motion for Summary Judgment.

XRG alleges that PacifiCorp's Motion for Summary Judgment is not appropriate because Commission rules do not provide for motions for summary judgment. "The complex factual record before the Commission does not support a finding that it would be in the public interest to process this case without a hearing." Answer at 17. XRG also maintains that PacifiCorp's Motion fails the basic requirement that it include admissible evidence in support of all material facts.

[1] XRG seeks published avoided cost rates contained in Order No. 30744— rates superseded on March 16, 2010, by the lower rates of Order No. 31025.

After a thorough review of the evidence and arguments of the parties, the Commission denies Rocky Mountain Power's Motion for Summary Judgment. However, the Commission finds that, based on the totality of the evidence and arguments presented, XRG is not entitled to pre-March 16, 2010, published avoided cost rates. Consequently, the complaint filed by XRG against Rocky Mountain Power on July 29, 2010, is dismissed.

THE COMPLAINT

In its complaint, XRG asserts that, prior to March 16, 2010, XRG requested four standard power purchase agreements (PPAs, Agreements) for four PURPA qualifying facilities (QF) under 10 average megawatts (aMW) each. Complaint at 1. Three of XRG's projects were expected to have a nameplate capacity of 20 MW. The fourth project was expected to have a nameplate capacity of 10 MW. XRG states that it has had "extensive contact" with Rocky Mountain Power regarding obtaining PPAs for its four projects. In response to XRG's request for agreements, Rocky Mountain Power provided one draft PPA to XRG in May 2009. *Id.* at 4.

XRG maintains that, prior to the Commission's implementation of new published avoided cost rates on March 16, 2010, XRG provided Rocky Mountain Power with the "essential elements" of its four projects. XRG argues that it "obligated itself to enter into four draft PPAs for the projects" in such a way as to be entitled to pre-March 16, 2010 (vintage), published avoided cost rates. *Id.*

XRG alleges that Rocky Mountain Power is in violation of PURPA, FERC regulations and orders, and Commission Orders by failing to provide XRG with agreements containing vintage published avoided cost rates. *Id.* at 5.

THE ANSWER

Rocky Mountain Power admits that XRG contacted the utility as early as 2007 regarding PPAs for proposed QFs in Idaho. Answer at 3. The Company maintains that it informed XRG several times in writing in 2009 that transmission capacity from XRG's proposed delivery point was insufficient to accept more than 23 MW of net output from XRG's proposed projects. *Id.* Rocky Mountain Power admits that it delivered one draft PPA to XRG in May 2009. The Company states that the draft PPA was intended to "be a template for the non-price terms and conditions of PPAs for the three remaining qualifying facilities proposed by XRG." *Id.*

Rocky Mountain Power argues that XRG is not entitled to vintage published avoided cost rates because XRG had not executed any PPAs nor had it created a legally enforceable obligation prior to March 16, 2010. *Id.* at 6. The Company further alleges that, because XRG failed to take any timely action to challenge Rocky Mountain Power, the projects are barred by the doctrines of laches and estoppel from obtaining PPAs with vintage rates.

MOTION FOR SUMMARY JUDGMENT

On February 7, 2011, Rocky Mountain Power filed a Motion for a Protective Order to Stay Discovery and a Motion for Summary Judgment with the Commission. Rocky Mountain Power requests a protective order partially staying discovery pending the resolution of the Company's Motion for Summary Judgment. Rocky Mountain Power alleges that XRG's production requests are unduly burdensome and not relevant to resolving any of the issues raised in the Company's Motion for Summary Judgment. With its Motion for Summary Judgment, Rocky Mountain Power asks the Commission to deny the relief XRG requests in its complaint as a matter of law because XRG has failed to raise a genuine issue of material fact demonstrating that XRG is entitled to pre-March 16, 2010, published avoided cost rates.

Rocky Mountain Power maintains that it is entitled to judgment as a matter of law because XRG has failed to raise a genuine issue of material fact demonstrating that XRG actively negotiated the terms of a power purchase agreement. The Company states that XRG did not actively negotiate because it requested four PPAs in January 2009, received a draft agreement in May 2009 and again in October 2009, and failed to comment on those draft agreements. Motion at 11. "XRG likely will argue that its ability to actively negotiate was frustrated by the Company's position that it could accept no more than 23 MW of XRG output at Brady Substation." *Id.* However, "a QF cannot obtain grandfathered rates by requesting a power purchase agreement and then relying on a dispute with the utility as an excuse for not fully negotiating an agreement before rates change." *Id.* at 13.

Rocky Mountain Power argues that XRG has failed to raise a genuine issue of material fact demonstrating that it has transmission contracts or even a viable plan for transmitting output to Rocky Mountain Power's system. The Company maintains that a viable transmission and interconnection proposal is required to present a power sales proposal of sufficient maturity to support a claim for grandfathered rates.

Rocky Mountain Power argues that correspondence between BPA and XRG indicates that, "prior to March 16, 2010, none of the XRG projects had applied for: (1) a Raft River interconnection agreement; (2) Raft River Point-to-Point transmission; (3) BPA Point-to-Point transmission; or (4) Idaho Power Company Point-to-Point transmission. Moreover, until January 5, 2011, XRG did not even know whether there was a physical transmission path from its project site to Brady Substation." *Id.* at 9. "Neither the Company nor XRG nor the Commission can safely assume that securing transmission and interconnection rights for an indirectly connected QF is feasible until all non-OATT interconnections and transmission services have been contractually secured." *Id.* at 16.

Finally, Rocky Mountain Power maintains that XRG has failed to show that it signed a PPA or filed a meritorious complaint seeking vintage rates. "Even though XRG contacted the Company to request grandfathered status on March 11 and March 12, 2009 – thereby demonstrating XRG's awareness of the pending rate change – it waited over four months after the rate change before filing its complaint." *Id.* at 19. The Company alleges that XRG did not diligently pursue its claim and Rocky Mountain Power was prejudiced by the delay. *Id.* at 20.

ANSWER TO MOTION FOR SUMMARY JUDGMENT

On February 22, 2011, XRG filed its answer to Rocky Mountain Power's Motions. XRG opposes the Company's Motions. XRG argues that it would be patently unfair and not in the public interest to decide this case by summary judgment. XRG contends that the outstanding discovery requests pertain to crucial issues in the case – i.e., Rocky Mountain Power's bad faith investigation into available transmission capacity.[2] Moreover, XRG argues that the Company's Motion should be denied because the record overwhelmingly demonstrates that there are genuine issues of material fact "as to whether XRG met its obligation to attempt to actively negotiate, but was precluded from doing so by Rocky Mountain Power's bad faith." *Id.* at 19. To the extent that the facts differ between the parties, XRG suggests an evidentiary hearing.

XRG maintains that the project's level of maturity as to its development is evidence of the QFs intent to obligate itself. *Id.* XRG further asserts that the Commission should reject Rocky Mountain Power's argument that a QF must secure firm transmission and interconnection rights prior to being able to create a legally enforceable obligation because "[s]ecuring firm

[2] XRG also filed a Motion to Complete Discovery pursuant to I.R.C.P. 56(f), asking the Commission to compel Rocky Mountain Power to answer XRG's remaining discovery requests.

interconnection and wheeling rights prior to execution of a PURPA PPA is simply not a requirement in Idaho." *Id.* at 24. "A QF cannot be expected to commit the time and resources to complete each process with no assurance of which rates will be available to its project, or that it will even receive a contract." *Id.* at 26.

ORAL ARGUMENT

In response to Rocky Mountain Power's Motion for Summary Judgment and XRG's request for a hearing, the Commission issued a Notice of Hearing for Oral Argument on May 18, 2011. Order No. 32246. The Commission directed the parties to address whether there is a genuine issue as to any material fact regarding XRG's complaint. The Commission also invited the parties to address XRG's Motion to Complete Discovery. Oral arguments were presented on June 9, 2011.

Rocky Mountain Power argues that it "repeatedly and consistently told XRG that it would only accept 23 megawatts at the published avoided cost price." Tr. at 6. The Company provided XRG with one draft PPA in May 2009. In October 2009, the Company explained that it was only offering one PPA because the point of delivery proposed by XRG had transmission constraints. Tr. at 7. Rocky Mountain Power explained that, if the Company had an obligation to accept additional output at Borah and Brady, "PacifiCorp will expect [XRG] to pay for all resulting interconnection costs, including network upgrades." Tr. at 7.

Rocky Mountain Power maintains that, prior to March 16, 2010, XRG did not clearly manifest its intent to obligate itself to deliver power to the Company. Rocky Mountain Power contends that XRG expressed an intent to negotiate, but that the parties never agreed to any material terms for the power purchase agreements because XRG had not returned the draft agreement provided by the Company in May 2009. Rocky Mountain Power detailed that the parties

> didn't agree to the price, at least not with respect to the three projects PacifiCorp said it didn't have existing capacity to accept; they didn't agree on the point of delivery or the form of delivery to the point of delivery, that is, the off-system transmission that would bring the power to the point of delivery; they didn't agree on delay default security; they never even discussed curtailment rights or insurance; and they didn't agree on a commercial on-line date, and the record shows that more than one date was proposed.

Tr. at 10. Rocky Mountain Power argues that "each time [the Company] requested that XRG confirm the continuing validity of its January 2009 submittal – and it did so on October 2nd of 2009 and also April 13, 2010 – it received no response." *Id.* Rocky Mountain Power further asserts that there were long periods of time where no communication occurred between the Company and XRG, i.e., May 12 to July 6, 2009 – July 6 to September 18, 2009 – November 9, 2009 to March 11, 2010. *Id.* Communication was re-established in March 2010 only after XRG was notified by Rocky Mountain Power of the Commission's intent to revise published avoided cost rates.

XRG maintains that there are still material facts in dispute and that the project is entitled to additional discovery. Tr. at 17. Specifically, XRG argues that Rocky Mountain Power either knowingly, or through negligence or ineptitude, "acted so as to prevent the QF from obtaining a contract." Tr. at 31. "Rocky Mountain Power's refusal to negotiate at that point in time was a major contributing factor to XRG not being able to fund $80,000 for an additional interconnection study [required by BPA] for all four projects." Tr. at 30. XRG alleges that Rocky Mountain Power's failure to negotiate "caused XRG to allow its interconnection requests to lapse in March of 2009." Tr. at 30.

XRG filed its complaint in July 2010 regarding the transmission access dispute with Rocky Mountain Power. On September 21, 2010, during the discovery phase of this complaint, Rocky Mountain Power notified XRG that network transmission was now available for the output from all four projects and could be integrated without any upgrade costs. Tr. at 24. XRG questions how Rocky Mountain Power did not know earlier that network transmission to accommodate all four projects would be available by the projects' initial on-line date in January 2009. "XRG's theory of the case is that Rocky Mountain Power abused its role as PURPA negotiator and network transmission service provider to stall PURPA negotiations from March 2009 until September of 2010 by failing to acknowledge the availability of the Populus to Terminal upgrades for XRG's project." Tr. at 31-32.

DISCUSSION AND CONCLUSIONS

The Idaho Public Utilities Commission has jurisdiction over PacifiCorp dba Rocky Mountain Power, an electric utility, and the issues raised in this matter pursuant to the authority and power granted it under Title 61 of the Idaho Code and the Public Utility Regulatory Policies Act of 1978 (PURPA). The Commission has authority under PURPA and the implementing

regulations of the Federal Energy Regulatory Commission (FERC) to set avoided costs, to order electric utilities to enter into fixed-term obligations for the purchase of energy from qualified facilities (QFs) and to implement FERC rules.

The Commission has reviewed the record in this case, including the complaint and answer, Motion for Summary Judgment and Answer, and the transcript of the oral argument held on June 9, 2011. As an initial matter, we deny Rocky Mountain Power's Motion for Summary Judgment. We find that there are genuine issues of material fact related to the underlying complaint that do not permit a determination of this case through use of summary judgment. However, we find that the record provided through pleadings and at oral argument presents ample evidence for the Commission to decide the underlying, disputed matters alleged in XRG's original complaint. Rule of Procedure 327, IDAPA 31.01.01.327.

XRG submitted its initial request for four power purchase agreements in January 2009. In March 2009, Rocky Mountain Power communicated its concerns regarding transmission constraints to XRG. Because XRG was proposing a point of delivery at the Company's Brady substation, Rocky Mountain Power asserted that it could only accept 23 MW at the published avoided cost rates. The Company explained that any additional purchases of energy from XRG by Rocky Mountain Power would have to be price-adjusted to reflect any resulting interconnection and network upgrade costs. Tr. at 7. In May 2009, Rocky Mountain Power provided one draft PPA containing the current published avoided cost rates.

XRG allowed its interconnection requests with BPA to lapse in March 2009. XRG claims that Rocky Mountain Power's failure to negotiate caused the project's inability to fund $80,000 for an additional interconnection study required by BPA. Tr. at 30. However, at the time XRG allowed its interconnection requests to expire, Rocky Mountain Power had only recently asserted its inability to accept more than 23 MW at the Company's Brady substation. Moreover, the record in this case reflects that regular communications between XRG and Rocky Mountain Power continued through May 2009 when Rocky Mountain Power provided XRG with a single PPA for its review. We find no evidence in the record that Rocky Mountain Power was refusing to negotiate in March 2009. Therefore, we find that XRG's assertion that its interconnection requests with BPA lapsed because of Rocky Mountain Power's intransigent conduct is without merit.

Significant periods of time with no communication elapsed, i.e., May 12 to July 6, 2009 – July 6 to September 18, 2009 – November 9, 2009 to March 11, 2010. On July 6, 2009, XRG acknowledged the lapse in communications to Rocky Mountain Power by stating, "Please accept our apologies on not getting back to you sooner." Motion for Summary Judgment, Exhibit A at 201. XRG further stated that it would "provide a redline to this contract and the other 3 identical contracts proposed. . . ." *Id.* By September 2009, XRG had not yet returned the draft PPA provided by Rocky Mountain Power to the project four months earlier. In a communication to Rocky Mountain Power dated September 18, 2009, XRG states, "We would appreciate in the next 10 days the balance of 5 contracts per the above. Then we shall proceed in modifying and negotiating the terms and conditions of all 6 power agreements." *Id.* at 205. Rocky Mountain Power responded on October 2, 2009, asking XRG to confirm its intent to proceed with the one contract for which transmission was available. The Company explained, "We have not provided draft PPAs for the remaining five projects since it will require substantial time and effort and, given the challenges identified above, PacifiCorp does not want to undertake this effort if your projects have fatal flaws such as the available transmission issue identified. It was my understanding from our previous communications that you were agreeable to move forward on a single project and investigate alternatives, if any, for the other five. . . ." *Id.* at 209. E-mail communications indicate that XRG and Rocky Mountain Power were poised to discuss the transmission constraints in early November 2009.

On March 10, 2010, XRG received notice of the Commission's intent to revise its published avoided cost rates. On March 11, 2010, XRG contacted Rocky Mountain Power and notified the Company that the project would replicate the single PPA provided by the Company for XRG's three other projects and "present a redline of all four projects as originally requested back in January 2009 for your review and approval." *Id.* at 289. XRG explained that, "On November 10th, in a conference call between RMP transmission, [Rocky Mountain Power], and [XRG], it became clear if we delayed the online dates to June 2011, ample upgrade work shall have been performed to allow all 4 – 20 MW requests to be processed." *Id.* at 289. On March 12, 2010, counsel for XRG notified Rocky Mountain Power that "XRG is still prepared to enter into these contracts and has been so prepared since 2009." *Id.* at 296. XRG also asked the Company to confirm that the projects were entitled to the current avoided cost rates. On March

16, 2010, the Commission issued Order No. 31025 revising, and lowering, the published avoided cost rates for PURPA projects.

XRG maintains in its complaint that, prior to March 16, 2010, it provided Rocky Mountain Power with the "essential elements" of its four projects in order to be entitled to pre-March 16, 2010, ("vintage") published avoided cost rates. We find no evidence that XRG ever returned the one draft PPA with modifications and/or edits – much less three additional PPAs that XRG asserted it would reproduce and submit for Rocky Mountain Power's review. Even in XRG's March 12, 2010, letter from counsel indicating XRG's intent to enter into contracts, no redlined PPAs were included. Negotiations had begun and the parties clearly had differing views about the availability of transmission, but we cannot find that XRG took sufficient action so as to obligate itself to deliver energy to Rocky Mountain Power for any of the four projects contemplated by the developer.

XRG admitted to being delayed by other projects in July 2009. At that time, XRG stated that it would redline the draft PPA provided by Rocky Mountain Power and replicate it for the "other 3 identical contracts proposed." We find that XRG's failure to return even a single draft PPA in time to be eligible for the existing (now vintage) published avoided cost rates cannot be attributed to a failure to negotiate by Rocky Mountain Power. XRG declined to return a redlined version of the draft PPA, opting instead to wait and negotiate all six of its projects concurrently – four published rate contracts and two IRP-based rate contracts. It was not until notification of the published rate adjustments in March 2010 that XRG began to take action to secure the higher published avoided cost rates. However, XRG never returned a draft PPA – even after inquiry by Rocky Mountain Power. A legally enforceable obligation for utility purchase of QF power can be incurred prior to memorialization of terms in a contract between the parties, but, under the circumstances and facts presented in this case, no terms of any PPA were ever negotiated or discussed. A draft PPA was provided to XRG by Rocky Mountain Power. XRG failed to take sufficient action to create an obligation on its part.

We further find that, prior to the time the published rates changed in March 2010, Rocky Mountain Power reasonably held its position that transmission in the area of XRG's requested interconnection was constrained. In early 2009, when XRG initially proposed its projects, Rocky Mountain Power reviewed the publicly available information regarding its available transmission (OASIS). The report showed that there was then between 20 and 25 MW

of unsubscribed capacity available at the location requested by XRG. Tr. at 49. This information was relayed to XRG. Rocky Mountain Power suggested proceeding with a single PPA and investigating alternatives for the remainder of the projects. XRG was provided a draft PPA but did not follow up. Based on these facts, we cannot find that Rocky Mountain Power was attempting to impede negotiations with XRG by failing to acknowledge the Populus to Terminal transmission upgrades. The parties had not yet begun active negotiations on the projects.

A legally enforceable obligation cannot exist until a QF takes sufficient steps to show that it has obligated itself to provide energy to the utility. We find that an assertion that XRG intends to enter into a contract with Rocky Mountain Power, without actions in furtherance of its intent, is not sufficient to establish entitlement to pre-March 2010 published avoided cost rates. Consequently, we dismiss XRG's complaint.

ORDER

IT IS HEREBY ORDERED that Rocky Mountain Power's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that, for the reasons set out in greater detail in the body of this Order, XRG's complaint is dismissed. XRG has not established entitlement to pre-March 16, 2010, published avoided cost rates. Consequently, XRG's Motion to Compel Discovery is denied.

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 18th day of May 2012.

PAUL KJELLANDER, PRESIDENT

MACK A. REDFORD, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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