

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)	ORDER NO. 32588
POWER,)	
)	
Respondent.)	
)	

On June 8, 2012, XRG-DP-7, XRG-DP-8, XRG-DP-9, and XRG-DP-10, LLCs (referred to collectively as “XRG” or “the projects”) filed a Petition for Reconsideration of Commission Order No. 32553 pursuant to Rule 331 of the Commission’s Rules of Procedure. IDAPA 31.01.01.331. On June 18, 2012, PacifiCorp dba Rocky Mountain Power filed its answer to XRG’s Petition. Based upon our review of the Petition and Answer, we grant XRG’s request for reconsideration. The Commission will issue a separate order outlining the reconsideration schedule.

BACKGROUND

A. Complaint and Answer

On July 29, 2010, XRG filed a complaint with the Commission against Rocky Mountain Power alleging that the utility was 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 power purchase agreements (PPAs, Agreements) including pre-March 16, 2010, published avoided cost rates.¹ XRG maintains that, prior to the Commission’s implementation of new published avoided cost rates on March 16, 2010, XRG requested four PPAs and 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 as way as to be entitled to pre-March 16, 2010 (vintage), published

¹ XRG seeks published avoided cost rates contained in Order No. 30744 — rates superseded on March 16, 2010 by the lower rates of Order No. 31025.

avoided cost rates. *Id.* In response to XRG's request for Agreements, Rocky Mountain Power provided one draft PPA to XRG in May 2009. *Id.* at 4.

On August 23, 2010, Rocky Mountain Power filed its Answer to XRG's Complaint. Rocky Mountain Power admitted that XRG contacted the utility as early as 2007 regarding PPAs for proposed QFs in Idaho. Answer at 3. However, Rocky Mountain Power argued that XRG was 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 alleged 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.

The Company maintained 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 acknowledged that it delivered one draft PPA to XRG in May 2009. The Company stated 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.*

B. Motion for Summary Judgment and Answer

On February 7, 2011, after a period of protracted discovery, 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 requested a protective order partially staying discovery pending the resolution of the Company's motion for summary judgment. Rocky Mountain Power alleged that XRG's production requests were 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 asked the Commission to deny the relief XRG requested in its Complaint as a matter of law because XRG failed to raise a genuine issue of material fact demonstrating that XRG was entitled to pre-March 16, 2010, published avoided cost rates.

Rocky Mountain Power maintained 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. Rocky Mountain Power argues that XRG failed to demonstrate that it had transmission contracts or even

a viable plan for transmitting output to Rocky Mountain Power's system. The Company maintained 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.

Finally, Rocky Mountain Power maintained that XRG 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 alleged that XRG did not diligently pursue its claim and Rocky Mountain Power was prejudiced by the delay. *Id.* at 20.

On February 22, 2011, XRG filed its Answer to Rocky Mountain Power's Motions. XRG opposed the Company's Motions. XRG argued that it would be patently unfair and not in the public interest to decide this case by summary judgment. XRG contended 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 argued 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 suggested an evidentiary hearing.

XRG further maintained that the project's level of maturity as to its development is evidence of the QF's intent to obligate itself. *Id.* XRG asserted 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 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. Finally, XRG maintained that Rocky Mountain Power's motion failed the basic requirement that it include admissible evidence in support of all material facts.

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.

C. Oral Argument

In response to Rocky Mountain Power's Motion for Summary Judgment and XRG's Answer and 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 was 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 argued 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 further maintained that, prior to March 16, 2010, XRG did not clearly manifest its intent to obligate itself to deliver power to the Company.

At hearing, XRG maintained that there were still material facts in dispute and that the project was entitled to additional discovery. Tr. at 17. Specifically, XRG argued 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. "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.

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After a thorough review of the evidence and arguments of the parties, the Commission denied Rocky Mountain Power's Motion for Summary Judgment. However, the Commission determined that, based on the totality of the evidence and arguments presented, XRG is not entitled to pre-March 16, 2010, published avoided cost rates. *See* IPUC Rule of Procedure 327, IDAPA 31.01.01.327.

The Commission stated that evidence in the record did not indicate that Rocky Mountain Power was refusing to negotiate in March 2009. We determined that email communications between the parties indicated that XRG and Rocky Mountain Power were poised to discuss transmission constraints in early November 2009. Clearly, negotiations had begun and the parties held differing views about the availability of transmission. However, this

Commission stated that the evidence did not support a finding 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. Consequently, the Complaint filed by XRG against Rocky Mountain Power on July 29, 2010, was dismissed.

PETITION FOR RECONSIDERATION

In its Petition, XRG requests that the Commission reconsider its previous order and issue an order that 1) denies Rocky Mountain Power's Motion for Summary Judgment; 2) reinstates XRG's original claim in its complaint for rates in Order No. 30744; 3) grants XRG's request for leave to amend its complaint to alternatively claim right to the rates in Order No. 31025; 4) grants XRG's Motion to Complete Discovery by ordering Rocky Mountain Power to respond to XRG's revised discovery requests; and 5) provides XRG an opportunity to file its own motion for summary judgment at the close of discovery.

XRG maintains that the Commission failed to rule on several motions/requests. XRG further argues that the Commission, in arriving at its decision, applied an arbitrary and unreasonable legal standard. Finally, XRG states that its entitlement to published avoided cost rates in Order No. 30744 relies upon evidence that Rocky Mountain Power refused to process its request for four PPAs. XRG argues that, in order to prove its contention, XRG must be permitted to complete discovery.

ANSWER

Rocky Mountain Power filed its Answer to XRG's Petition on June 18, 2012. Rocky Mountain Power maintains that the Commission's decision to dismiss XRG's Complaint is supported by substantial evidence. The Company argues that XRG's allegations of Commission error are incorrect.

Rocky Mountain Power asserts that the Commission discussed the record at length in arriving at its decision and that denial of additional discovery did not prejudice XRG. The Company further argues that XRG's motion to amend was procedurally deficient because the request was made in a footnote in XRG's Answer to the Company's Motion for Summary Judgment. Rocky Mountain Power suggests that the Commission utilize an opportunity on reconsideration to clarify the facts and reasoning supporting its decision to dismiss XRG's underlying Complaint.

FINDINGS AND CONCLUSIONS

Reconsideration provides an opportunity for a party to bring to the Commission's attention any question previously determined and thereby affords the Commission with an opportunity to rectify any mistake or omission. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). The Commission may grant reconsideration by rehearing if it intends to take additional argument. If reconsideration is granted, the Commission must complete its reconsideration within 13 weeks after the deadline for filing petitions for reconsideration. *Idaho Code* § 61-626(2). The Commission must issue its order upon reconsideration within 28 days after the matter is finally submitted. *Id.*

Based on XRG's Petition for Reconsideration and Rocky Mountain Power's Answer, the Commission grants XRG's Petition to reconsider and Rocky Mountain Power's request to clarify Order No. 32553. A scheduling order will be issued separately that will allow for reconsideration within the time provided by statute. *Idaho Code* § 61-626.

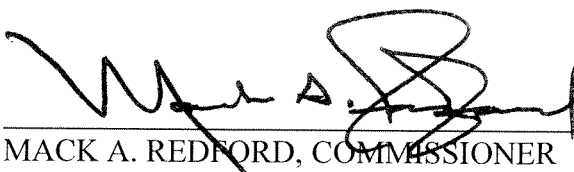
ORDER

IT IS HEREBY ORDERED that the June 8, 2012, Petition for Reconsideration filed by XRG is granted.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 6th day of July 2012.



PAUL KRELLANDER, PRESIDENT

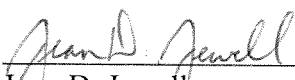


MACK A. REDFORD, COMMISSIONER



MARSHA H. SMITH, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

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