DECISION MEMORANDUM

TO:COMMISSIONER HANSEN

COMMISSIONER NELSON

COMMISSIONER SMITH

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WORKING FILE

FROM:SCOTT WOODBURY

DATE:MAY 16, 1997

RE:CASE NO. UPL-E-96-5

DECLARATORY RULING-RECONSIDERATION

On July 12, 1996, PacifiCorp dba Utah Power & Light Company (Utah Power; Company) filed a Petition for Declaratory Ruling with the Idaho Public Utilities Commission (Commission) in Case No. UPL-E-96-3 (later moved to Case No. UPL-E-96-5).  Commission Rules of Procedure, IDAPA 31.01.01.101.  The Company sought a ruling related to the purchase of energy from an independent power producer, Earth Power Resources, Inc.  (Earth Power), and the applicable rates.  Based on related filings, Idaho Power Company and The Washington Water Power Company were granted intervenor party status.

Earth Power is the owner and operator of two separately qualified small production facilities (QFs) located in Churchill County, Nevada: (1) The Lee Hot Springs Project (QF-95-1-001) and (2) the Allen Springs Project (QF-96-15-000).  Tr. p. 13; Exh. 202, 203, 301.  Both projects are located within Known Geothermal Resource Area (KGRA) No. 12 in Churchill County, Nevada, an area encompassing in excess of 225,000 acres.  Tr. p. 17; Exh. 207.  The QFs are self-certified.  18 C.F.R. § 292.207(a)(1) and (2).  The facilities will generate power using geothermal energy, hot fluids from the earth.

Earth Power presently has an approved Power Purchase Agreement with Utah Power for a 999 kW project to be located at Lee Hot Springs.  Earth Power proposes to develop two additional under 1 MW projects at the Lee Hot Springs site and to sell the entire output of each through separate contracts to Water Power and Idaho Power.  Tr. p. 13.  Earth Power further proposes to develop three under 1 MW projects at the Allen Springs site and to sell the entire output of each through separate contracts to Utah Power, Water Power and Idaho Power.  Tr. p. 13.

Earth Power is planning to construct a common gathering system that will gather geothermal liquids from wells drilled at various locations and distribute those liquids to a common heat exchanger and then through separate pipelines to three separate turbine generators at each QF site.  Tr. pp. 20, 21.  Separate corporations will operate the wells, gathering systems, generators and transmission systems.  Tr. pp. 268, 269.  The generation will be separately metered at each generator at each project site for purpose of calculating gross kWh output for each utility.  Tr. p. 22.  A line will be run from each project to a common electric distribution system.  Tr. p. 22.

In Commission Order Nos. 25882, 25883 and 25884 issued January 31, 1995, the Commission lowered the threshold availability for published avoided cost rates from 10 MW to 1 MW.  Tr. p. 70.  The Commission in its Orders stated:

Ratepayers should not be asked to subsidize the QF industry through the establishment of avoided cost rates that exceed utility costs that would result from an effective least cost planning process.  Reducing the threshold correspondingly reduces the risks associated with the published rates being set either too high or too low.

. . .

Lowering the threshold, along with adopting a least cost planning based methodology . . . will help to ensure that a greater number of QF projects are cost effective by market standards before they are acquired by our utilities.

Tr. pp. 168, 191-193, 294, 295.

On January 30, 1997, the Commission issued final Order No. 26772 and declaratory ruling in Case No. UPL-E-96-5.  In its Order the Commission made the following findings:

To be eligible for the Commission’s published rates, the cogeneration or small power production facility must satisfy the general requirements and criteria for qualification established by the FERC in 18 C.F.R. § 292.203, and obtain qualifying status pursuant to the procedures established in 18 C.F.R. § 292.207. . . .

This Commission equates the term “project,” to the extent that we have used it alone in our rate orders and schedules, with “qualifying facility,” as that term is defined by FERC.  Based upon the record in this proceeding, we find that Earth Power currently has two QFs: 1) the Lee Hot Springs project and 2) the Allen Springs project.  If Earth Power desires to acquire QF status for the other projects, qualifying status is obtained from FERC.  FERC is also the appropriate forum for challenges and objections to qualifying status.

Qualifying Facilities less than 1 MW in size under present Commission Orders are eligible for published avoided cost rates.  If the total or aggregate generation of a QF is 1 MW or greater, the appropriate methodology for calculating avoided costs is the Integrated Resource Plan (IRP) methodology.  Earth Power presently has an approved Power Purchase Agreement with Utah Power for a 999 kW project at Lee Hot Springs.  In electing to contract with Utah Power for the published less than 1 MW rate, we find that Earth Power has elected to limit the size of its project at Lee Hot Springs to 999 kW.  Additional generation facilities at that site will have to separately qualify as a “qualifying facility” as defined at 18 CFR 292.207 in order to be eligible for a contract from Idaho regulated utilities.

Order No. 26772.

Timely Petitions for Reconsideration were filed by Idaho Power, PacifiCorp and Water Power.  Reference IDAPA 31.01.01.331.  Earth Power filed an answer to the three Petitions and opposes reconsideration.  The positions of the parties can be summarized as follows:

It is the common contention of the utilities that the Commission should reconsider its determination that the term “project” is synonymous with “qualifying facility.”  The utilities suggest that a more acceptable rule would be to define “project” for purposes of eligibility for published rates available to QFs less than 1 MW in size along the same lines that the FERC uses to define “same site” for the qualification criteria 80 megawatt size limitation, (18 C.F.R. § 292.203; 18 C.F.R. § 292.204(a)(2))  e.g., as proposed by PacifiCorp—by equating “project” for purposes of eligibility for published rates, with “all cogeneration and small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located within one mile of each other, or, for hydroelectric facilities, facilities using water from the same impoundment for power generation”—with/reserved right to modify the application of its definition of “project” for good cause shown.  18 C.F.R. § 292.204(a)(3).   It is not just and reasonable to the electric consumer or in the public interest (18 C.F.R. § 292.304(a)(1)(I)), the utilities contend, to allow developers through creative self-certifications to reconfigure what is in reality a greater than 1 MW capacity project into multiple 1 MW projects so as to obtain published (and ostensibly higher) rates.  The utilities request reconsideration by written briefs or comments.

Earth Power by way of answer contends that the utilities in their Petitions for Reconsideration propose the same arguments that were considered and rejected by the Commission in its Order.  Earth Power characterizes the utility filings as collateral attacks on the Commission’s avoided cost ratemaking Orders and the reasonableness of the posted rates available to small QFs.  Earth Power additionally refutes the utility claim that the posted rates are higher than those which result from the IRP methodology.

The Federal Energy Regulatory Commission (FERC), Earth Power states, has defined facility as “electrical generation equipment.”  18 C.F.R. § 292.204(a)(2)(ii).  That definition, Earth Power states, does not include common facilities.  It is not the Commission’s responsibility under PURPA, Earth Power contends, to define or certify qualifying facilities.  That is FERC’s responsibility.  By declaring that all QFs under 1 MW are eligible for avoided cost rates of a certain level, Earth Power contends, that the Commission has fulfilled its responsibility under PURPA.

The Commission granted reconsideration in Case No. UPL-E-96-5 by Order No. 26847 issued March 19, 1997.  In its Order, the Commission stated:

we will permit the utilities to provide the Commission with further briefing regarding the standard adopted by the Commission in Order No. 26772 pertaining to QF eligibility for published avoided cost rates.  We expect utilities to present statutory and case authority for all arguments advanced.  We expect any alternative proposed to be supported by the established record.  We expect specific argument from the utilities demonstrating, to the extent that they are able to do so, why the Commission’s decision in Order No. 26772 is unsound; why there is no legal basis for the standard enunciated; and why our decision is otherwise contrary to the public interest.

In accordance with the established scheduling, briefs were submitted by the three utilities in Earth Power (attached).  The filings can be summarized as generally reiterating the positions advanced in the underlying Petitions for Reconsideration and related response.

In Order No. 26772, the Commission defined “project” synonymously with the FERC definition of “qualifying facility” under 18 C.F.R. § 292.207.  The utilities contend that in so doing the Commission allows QFs to obtain higher published rates (reference Staff testimony —IRP methodology more accurately reflects true avoided costs than does the SAR methodology which produces the published rates. Tr. p. 320) through creatively designed “less than 1 MW projects” (IPCo brief).   Such “gamesmanship” the utilities contend violates “ratepayer neutrality” and is contrary to the public interest.  18 C.F.R. § 292.304(a)(1)(i).  It is suggested that the Commission define “project” using FERC’s “same site” approach 18 C.F.R. § 292.204(a)(2), so that “multiple turbine generator sites which are within one mile of each other, and as in this case, using much of the same equipment, are one “project” for rate entitlement purposes.” (IPCo Brief); or as “all CSPP facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located within one mile of each other, or for hydro electric facilities, facilities using water from the same impoundment for power generation” (PacifiCorp Brief).  PacifiCorp contends that the project definition could be departed from on application and for good cause shown.  Alternatively, Water Power proposes an “integrated engineering standard” for purpose of evaluating whether affiliated multiple generators whose generating capacities cumulatively exceed one megawatt are individually entitled to the under one megawatt rates.

Earth Power contends that the utilities are asking the Commission “to regulate Earth Power’s internal affairs by requiring that its various projects be built to a size that, in reality, would eliminate their eligibility for published avoided cost rates.”  Designing project to comply with Commission rules on entitlement to rates, Earth Power states, is not “manipulation”, it is not “intentional circumvention” of the Commission’s rules and it certainly does not “defeat” the Commission’s policy.  Compliance with the Commission’s guidelines, Earth Power argues, simply cannot be used to damn the QF.  Earth Power queries—where would the power companies have the Commission draw the line between bad (intentional) compliance and good (unintentional) compliance?  When does a QF not intentionally act to manipulate its project in order to comply with the multitude of Commission and FERC regulations for maintaining QF status?

Regarding FERC’s one site rule, Earth Power notes that FERC has explicitly ruled that facilities, even though they are part of single integrated project, are nevertheless separate if the generating equipment are located more than one mile apart:

However, nothing in PURPA or our regulations state that identification of a facility for purposes of certification as a small power producer must be the same as that for licensing purposes.  A critical test under PURPA relates to whether the facilities are located at one site rather than whether they are integrated as a project.  The Applicants three facilities would, in fact, be located more than one mile from each other.  Therefore, under the regulations, the facilities are not considered to be located at the same site, but rather are located at three distinct sites.

Eldorado County Water Agency, 24 FERC ¶ 61-280 (1983).

A more fundamental problem with the use of the one site rule, Earth Power contends, is that the one site rule has been formulated by FERC to determine QF status and hence eligibility  to avoided cost rates that are set by state commissions.  The one site rule limits a QF’s size to 80 MW.  The power companies now propose to modify the one site rule for the purpose of eliminating eligibility to published avoided cost rates by entities they admit are, in fact, QFs.  This, Earth Power contends, is a direct attack on FERC’s responsibility to determine QF status and hence eligibility to avoided cost rates set by the state commissions.

Commission Decision

The Commission in Order No. 26772 found as follows:

This Commission equates the term “project,” to the extent that we have used it alone in our rate orders and schedules, with “qualifying facility,” as that term is defined by FERC.

The Commission in its Order granting reconsideration stated as follows:

We expect specific argument from the utilities demonstrating, to the extent that they are able to do so, why the Commission’s decision in Order No. 26772 is unsound; why there is no legal basis for the standard enunciated; and why our decision is otherwise contrary to the public interest.

Is the Commission persuaded that the standard enunciated in declaratory Order No. 26772 equating the term “project” with “qualifying facility” is unsound and should be changed?  If so, what change is necessary?  If not, should the Commission’s Order be reaffirmed?

Scott Woodbury

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