MEMORANDUM

TO:COMMISSIONER HANSEN

COMMISSIONER NELSON

COMMISSIONER SMITH

FROM:SCOTT WOODBURY

DATE:NOVEMBER 17, 1997

RE:CASE NO. WWP-E-96-6

EARTH POWER RESOURCES, INC. V. THE WASHINGTON WATER POWER COMPANY

On July 3, 1996, Earth Power Resources, Inc. (Earth Power) a Nevada corporation, filed a complaint against Washington Water Power Company (Water Power; Company) with the Idaho Public Utilities Commission (Commission).  Reference IDAPA 31.01.01.043.  Earth Power represents that it is the developer of two 1 MW geothermal PURPA qualifying projects located at Allen Springs (QF 96-15-000) and Lee Hot Springs (QF 95-1-001) in Churchill County, Nevada.  Earth Power represents that it initiated negotiations with Water Power on December 5, 1995.  Earth Power contends that it has offered to sell the output of its two facilities to Water Power and that Water Power has refused to purchase at rates, terms and conditions that Earth Power believes that it is otherwise entitled to.

On July  26, 1996, Water Power filed a response with the Commission.  Water Power denies that its actions reflect a refusal to negotiate with Earth Power and contends that it has acted in accordance with Commission Orders and policy.  Water Power denies that Earth Power is entitled to receive payment for its power at the requested rates.

Pursuant to Commission Notice, public hearing in Case No. WWP-E-96-6 was held in Boise, Idaho on October 9, 1997.  The following parties appeared by and through their respective counsel:

Earth Power Resources, Inc.Peter J.  Richardson

The Washington Water Power Company R.  Blair Strong

Commission StaffScott D. Woodbury

The testimony of the parties actively participating can be summarized as follows:

Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) and the implementing rules and regulations of the Federal Energy Regulatory Commission (FERC) require electric utilities to purchase power from qualifying small power facilities (QFs).  Earth Power Resources, Inc., a Nevada corporation qualified to do business in Idaho, is the self-certified developer of two QFs, Allen Springs (QF 96-15-000) and Lee Hot Springs (QF 95-1-001).  Reference Exhibits 103 and 102.

The record reveals that by letter dated December 5, 1995, Earth Power proposed to install an under 1 MW plant at each of its QFs and requested separate power purchase contracts for the output of each from The Washington Water Power Company.  Exhibit 104.  The rates requested were the levelized non fueled rates for under 1 MW facilities available and on file with the Commission.  (WWP Tariff Schedule 62; Tr. p. 3).  Reference Order No. 26135, 44.42 mills/kWh for 1998 online date.  Earth Power was unsuccessful in obtaining power purchase contracts.  On July 1, 1996, the Company’s avoided cost rates changed and were significantly reduced.  Reference Order No. 26511.  Earth Power claims grandfathered entitlement to the older higher rates.  To qualify for the grandfathered rate, Earth Power must demonstrate that it was “ready, willing and able” to sign a contract, that it demonstrated a commitment to enter into a “legally enforceable obligation”, and that “but for” the actions of Water Power, Earth Power would otherwise have secured a contract prior to the rates changing.

The evidence reveals that Earth Power dealt exclusively with H. Douglas Young, the Company’s contracts and resource administrator.  Upon receipt of Earth Power’s letter request for separate power purchase contracts, the Company mistakenly provided Earth Power on the same date by telefax with levelized non fueled rates different (i.e., 48.32 mills/kWh for 1998 online) from those on file with the Commission.  Exhibit 105.  On December 20, 1995, Water Power provided Earth Power with a draft contract and by cover letter indicated that Earth Power would have to obtain clarification from the Commission Staff as to whether geothermal projects are entitled to non fueled rates.  Exhibit 106.  Earth Power obtained Staff clarification (Exhibit 108) and prepared revisions to the draft contracts, returning the marked-up revisions to the Company in late February 1996  (Tr. p. 14; Exhibits 109, 110), requesting the rates provided by the Company and indicating its readiness to finalize power purchase agreements.

On March 28, 1996, Water Power responded that it had mistakenly provided (Tr. p. 175)

Earth Power with “the wrong Idaho prototype contract.”  Exhibit 111.  The Company provided Earth Power with a new and significantly longer draft contract which again included incorrect rates and which also included proposed security provisions, a benchmark proposal and a retail wheeling regulatory out clause.  Exhibit 112.  Earth Power retained legal counsel and on May 16, 1996 sent Water Power a detailed 11 page response, including suggested changes.  Exhibit 113.  In its letter, Earth Power stated “Earth Power has obtained QF status for Allen Springs and Lee Hot Springs separately.  Each qualifying facility (as that term is used in PURPA and FERC implementing regulations) will have several generating projects located at each site.”

Water Power responded with a one page letter dated May 24, 1996 (Exhibit 114), offering a ten year contract at significantly lower rates (22.66 mills/kWh, 1998 on line), rates reflecting a proposed change in the Company’s avoided cost and first deficit year (Tr. pp. 119, 133) and rates which were subsequently approved by the Commission in Order No. 26511 for effective date July 1, 1996.  Tr. pp. 184, 185.  Water Power in its letter notes “we are concerned about how Earth Power’s project is characterized, because automatic entitlement to the scheduled avoided costs is conditioned upon the ‘facility’ having a generating capacity of 1MW or less.  It appears that the ‘facility’ in this case consists of several generating units which will collectively exceed the 1 MW threshold.”  At this point, Water Power admits its ceased negotiations for a contract for an under 1 MW facility.  Tr. pp. 191, 193.

Earth Power by letter to Water Power dated June 5, 1996 (Exhibit 115), indicated that the reduced rates were unacceptable and offered a compromise 20 year contract rate (20 year contract at 39.19 mills/kWh) in return for execution of contracts “within the next week or so.”  On June 7, 1997, Water Power provided Earth Power with a draft contract containing 20 year levelized non fueled rates of 32.79 mills for a 1998 on line date, the rates submitted by the Company in Case No. WWP-E-96-3 and rates which reflected a change in first deficit year from 2000 to 2010.

Earth Power responded by letter dated June 21, 1997 (Exhibit 118), representing its belief based on telephone conversations with the Company, that failing to accept the most recent WWP rate offer pushed negotiation back to Water Power’s earlier March 28th draft (Exhibit 112) and Earth Power’s May 16 response (Exhibit 113).  Proceeding from that point Earth Power conceded on many points of prior disagreement, with the exception of substituting a proposed minimum delivery requirement in place of the suggested benchmark requirement (reference Tr. p. 113), reserving the right to request Commission clarification as to the applicability of the “K” factor security requirement (reference Order No. 21690; Tr. p. 213), and if determined by the Commission to be applicable, substitution of Water Power’s actual discount rate (currently 10.13%, Tr. p. 212) in lieu of the 18% set out in the security Order.  Tr. pp. 215, 216.  Earth Power requested the Company’s posted and effective rates.  Reference Order Nos. 26079, 26135.  Although promising that Water Power would be sent a revised re-dapted draft contract on Monday, June 24th, it was not until Friday, June 28th that Earth Power transmitted an executed contract to the Company for its signature.  Exhibit 120.

Regarding the “K factor” the Commission in Order No. 21690 indicated that the K factor was developed as an additive item to reflect its belief that the risk of a QF losing its economic supply of motive force increases exponentially with time.  Tr. p. 31.  Earth Power contends that approximately 15% of project revenue is dependent upon applicability of the K factor.  Tr. p. 239.  Water Power points out that in Order No. 21690 p. 9 dated January 11, 1988, the Commission described hydro projects as a lowest risk technology and described unproven technologies such as geothermal as high risk.  Tr. pp. 242, 243.  Earth Power contends that geothermal is now a more reliable and proven technology, very similar to hydro in that there is no risk of loss of economic motive force when it can be demonstrated by recognized independent experts in the field that there is a sufficient reservoir of geothermal fluids to run the project for the life of the contract.  Tr. p. 217.

Two letters were dispatched from Earth Power on June 28, 1996, one from its legal counsel which accompanied the contracts (Exhibit 119), provided a chronology of negotiation and requested that Water Power affix its signatures; the other from Ron Barr himself (Exhibit 120), indicating in return for a contract and the March 28 draft rates, his commitment to accept all proposed disputed terms (including K factor, discount rate, etc.), “with the exception of substituting a minimum net delivery provision to replace the benchmark provision and a few minor non substantive changes included in the new draft.”  It does not appear that Water Power reviewed the submitted contract when it was submitted.  Tr. pp. 146, 147.  On July 1, 1996, Water Power’s posted rates changed.  Reference Order No. 26511.

Water Power’s Schedule 62 tariff rates are available to QFs with a generating capacity of 1 MW or less.  Tr. pp. 100, 121.  It is Water Power’s contention that Earth Power did not qualify for the Company’s less than 1 MW rates because Earth Power proposed to build multiple projects at each QF, which collectively exceeded 1 MW (Tr. pp. 99, 121), a fact that Water Power contends that it only first learned in writing of May 16, 1996.  Tr. p. 115; Exhibit 113).  It is Earth Power’s contention that it was reasonable during the time frame during its negotiation with Water Power for it to assume that it could develop three less than 1 MW projects at each QF selling the output of one project from each QF to Water Power, Utah Power and Idaho Power.  It is only since Commission clarification and after its filing of its complaint against Water Power, that Earth Power contends that it learned that if it wants individual less than 1 MW contracts that it is necessary to separately qualify each generator.  Tr. pp. 75, 249.  Reference Case No. UPL-E-96-5, Order No. 26772 issued January 30, 1997.  A fly in the ointment is Earth Power’s June 26, 1996, contract with PacifiCorp  dba UP&L for a less than 1 MW power purchase contract for Lee Hot Springs (QF- 95-1-001).  Tr. p. 261.  No additional QFs in the vicinity of the Lee site have been certified by Earth Power.  Tr. p. 76.  Earth Power having contracted with PacifiCorp for the Lee QF, Water Power contends that Earth Power is not eligible to receive a contract from Water Power for its Lee Hot Springs project.  Tr. p. 105.

Post hearing briefs were filed by both Earth Power and Water Power.  (Attached).

Commission Decision

●Was Earth Power “ready, willing and able” to sign a contract?

Lee Hot SpringsQF 96-115-000 (PCp contract)

Allen SpringsQF 95-1-001

●Did Earth Power effectively communicate its willingness to enter into a “legally enforceable obligation” to provide power?

●“But for” the actions (or inaction) of WWP would Earth Power have obtained a power purchase contract(s) prior to the avoided cost rates changing July 1, 1996?

●Did Water Power engage in reasonable negotiation with Earth Power?

When it mistakenly provided the wrong rates?

When it mistakenly provided the wrong contract?

When it insisted on

A regulatory out provision?

A benchmark provision?

A “K” factor additive?

When it terminated negotiations with Earth Power for a less than 1 MW contract(s) once it learned of Earth Power’s proposal to develop multiple less than 1 MW projects at each QF?

Re: effect of declaratory ruling in UPL-E-96-5?

Scott Woodbury

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