

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1799

Served electronically at Salem, Oregon, October 11, 2016, to:

Respondent's Attorneys

R. Bryce Dalley
Dustin T. Till
PacifiCorp d/b/a Pacific Power
825 NE Multnomah Street, Suite 2000
Portland, Oregon 97232
bryce.dalley@pacificcorp.com
dustin.till@pacificcorp.com

Complainant's Attorneys

Todd G. Glass
Keene M. O'Connor
Wilson Sonsini Goodrich & Rosati PC
701 5th Avenue, Suite 5100
Seattle, Washington 98104
tglass@wsgr.com
kmoconnor@wsgr.com

David Bunge
Cypress Creek Renewables, LLC
3250 Ocean Park Boulevard, Suite 355
Santa Monica, California 90405
bunge@ccrenew.com

Re: UM 1799, CYPRESS CREEK RENEWABLES, LLC, (CCR) Complainant
vs. PACIFICORP d/b/a PACIFIC POWER (Pacific Power), Respondent

Cypress Creek Renewables, LLC filed a Petition for Declaratory Ruling on August 24, 2016, and was assigned docket number DR 51. CCR's petition was brought before the Commission at its October 11, 2016 Public Meeting, and the Commission decided that this petition will be treated as a complaint.

A copy of CCR's complaint against Pacific Power is attached and served on Respondent, under ORS 756.512(1). The Commission has assigned Docket No. UM 1799 to this complaint. Please use this number whenever you refer to this case.

The Public Utility Commission must receive an Answer from the Respondent or its attorneys by October 21, 2016, under OAR 860-001-0400(4)(d). A copy must be served on the complainant.

After the filing of the answer, a prehearing conference will be scheduled to adopt a procedural schedule for this matter.

PUBLIC UTILITY COMMISSION OF OREGON



Cheryl Walker
Administrative Specialist 2
Administrative Hearings Division
(503) 378-2849

Attachments: Complaint
Notice of Contested Case Rights and Procedures

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DR _____

Petition of

CYPRESS CREEK RENEWABLES, LLC

Petition for Declaratory Ruling

I. INTRODUCTION

Pursuant to ORS § 756.450 and OAR § 860-001-0430, Cypress Creek Renewables, LLC (the “Petitioner”) requests that the Oregon Public Utility Commission (the “Commission”) issue a declaratory ruling confirming the Commission’s determination and directive in Order No. 11-505 that “[r]enewable QFs willing to sell their output and cede their RECs to the utility allow the utility to avoid building (or buying) renewable generation to meet their RPS requirements [and these] QFs should be offered an avoided cost stream that reflects the costs that utility will avoid.” Docket No. UM 1396 (Phase II), Order No. 11-505 at 9 (Dec. 13, 2011) (“Order No. 11-505”).

Petitioner has been engaged with PacifiCorp d/b/a Pacific Power (“PacifiCorp”) since April 2016 in an attempt to negotiate three power purchase agreements (“PPAs”) for Petitioner’s solar photovoltaic power projects (the “Projects”), all of which are qualifying facilities (“QFs”) under the Public Utility Regulatory Policies Act (“PURPA”) and the Federal Energy Regulatory Commission’s (“FERC”) implementing regulations. Petitioner and PacifiCorp have been unable to conclude these negotiations, however, because they have not been able to come to an understanding as to the “avoided cost stream that reflects the costs that [PacifiCorp] will avoid.”

Id.

The Projects are all 40 MWs and thus do not qualify for the “standard avoided cost rates” under PacifiCorp’s Schedule 37, which is limited to QFs no larger than 3 MWs. Petitioner has thus sought PPAs under Schedule 38, which does not provide rates but instead provides a process by which PacifiCorp provides “indicative pricing,” which is “not final and binding,” with the understanding that “[p]rices and other terms and conditions are only final and binding to the extent contained in a power purchase agreement executed by both parties.” *See* Section B.2 of PacifiCorp’s current Schedule 38; *see also* Section B.2 of PacifiCorp’s proposed Non-Standard Avoided Costs Rates, filed in Docket No. UM 1610 (July 12, 2016).¹ Consistent with Order No. 11-505, Petitioner has requested PPAs offering renewable indicative pricing, inclusive of the Renewable Energy Certificates (also known as Renewable Energy Credits and Green Tags, collectively, “RECs”) that Petitioner is willing to sell to PacifiCorp and thus reflective of the full cost that PacifiCorp avoids in purchasing renewable energy from Petitioner’s QFs.

Petitioner and PacifiCorp have been unable to come to terms as to whether PacifiCorp is required to offer such renewable pricing under Schedule 38. Specifically, PacifiCorp has stated to Petitioner that PacifiCorp is not certain that the Commission’s regulations and orders require it to provide such pricing. Accordingly, Petitioner is respectfully requesting that the Commission give PacifiCorp the required regulatory certainty.

II. REQUIRED INFORMATION

“On petition of any interested person, the Public Utility Commission may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the commission.” ORS § 756.450 As discussed in detail below,

¹Petitioner understands that, going forward, PacifiCorp does not intend to refer to Schedule 37 or Schedule 38, but instead to documents reflecting its Standard Avoided Cost Rates and Non-Standard Avoided Cost Rates, respectively. For convenience, this petition uses the historical Schedule 37 and Schedule 38 nomenclature to refer to Standard Avoided Cost Rates and Non-Standard Avoided Cost Rates, respectively.

Petitioner is an “interest person” and the ruling requested herein goes directly to Order No. 11-505, which is enforceable by the Commission. In accordance with OAR § 860-001-0430(1), the balance of this Petition sets forth:

- (a) The rule or statute that may apply to the person, property or facts;
- (b) A detailed statement of the relevant or assumed facts, including sufficient facts to show petitioner’s interest;
- (c) All propositions of law or arguments asserted by petitioner;
- (d) The questions presented;
- (e) The specific relief requested; and
- (f) The name and contact information, including telephone number, physical address, and electronic mail address of petitioner and of any other person known by petitioner to have legal rights, duties, or privileges that will be affected by the request.

A. The rule or statute that may apply to the person, property, or facts

As noted above, this petition requests clarification as to the application of the Commission’s directive in Order No. 11-505 that renewable QFs “should be offered an avoided cost stream that reflects the costs that [the] utility will avoid.” Order No. 11-505 at 9.

B. A detailed statement of the relevant or assumed facts, including sufficient facts to show petitioner’s interest

Petitioner’s interest in the relief requested herein is clear. Petitioner is a developer of solar QFs throughout the United States, including in Oregon. Petitioner has executed six Schedule 37 contracts with PacifiCorp. Petitioner has requested three Schedule 38 contracts from PacifiCorp for three of its Projects currently in development, and has further specifically requested renewable Schedule 38 rates for such contracts, based on the Commission’s directive in Order No. 11-505.

The relevant facts are equally straight-forward. On April 26, 2016, Petitioner requested via email indicative pricing under Schedule 38 for three of its Projects currently in development, and provided all information required by Schedule 38. Petitioner expressly (1) requested indicative pricing for renewable QFs and (2) referred to Order No. 11-505 as the basis for this

request. PacifiCorp responded via email that PacifiCorp is unsure whether it is required to provide indicative pricing for renewable QFs under Schedule 38.

PacifiCorp based its uncertainty on three assertions. The first was that any request for Schedule 38 contracts was (at the time, i.e., prior to Order No. 16-174, discussed in more detail below) based solely on the pricing methodology provided in Order No. 07-360. The second was that PacifiCorp was waiting for approval of a new calculation methodology in Docket UM 1610. The third was PacifiCorp's view that Commission staff testimony in Docket UM 1610 made it seem that PacifiCorp might not be required to offer renewable Schedule 38 rates.²

Petitioner has informed PacifiCorp that it intends to file this Petition for Declaratory Ruling. PacifiCorp did not object.

C. All propositions of law or arguments asserted by petitioner

The Petitioner requests that the Commission issue a declaratory ruling confirming its directive in Order No. 11-505 that “[r]enewable QFs willing to sell their output and cede their RECs to the utility allow the utility to avoid building (or buying) renewable generation to meet their RPS requirements [and these] QFs should be offered an avoided cost stream that reflects the costs that utility will avoid.” Order No. 11-505 at 9. Such a ruling would fit squarely within the Commission’s determination in Order No. 11-505 that it “has the authority to adopt a separate

²PacifiCorp referred Petitioner to the Staff Opening Testimony of Brittany Andrus in Docket UM 1610 (Phase II), filed May 22, 2015. In response to the question “Are PGE and PacifiCorp required to use Standard Renewable Avoided Cost prices as the starting point when the QF seeking a non-standard contract is a renewable QF?”, Senior Utility Analyst Brittany Andrus testified that:

Staff does not think so. The Commission issued its guidelines for negotiating non-standard contracts prior to their decision to require PGE and PacifiCorp to offer Standard Renewable Avoided Cost prices. The Commission’s order requiring Standard Renewable Avoided Cost prices does not specify that PacifiCorp and PGE are to use these renewable prices as the starting point for negotiations with renewable QFs seeking non-standard contracts. In the absence of such a requirement, Staff interprets Order No. 07-360 to require that Standard Non-Renewable Avoided Cost prices are the starting point for negotiations regardless of whether the negotiating QF is a renewable or non- resource.

Staff/500, Andrus/32-33.

avoided cost rate for renewable resources” and that “[b]ecause ORS Chapter 469A requires that electric utilities meet a renewable portfolio standard through the acquisition of [RECs] associated with qualifying renewable generation resources, a properly designed renewable energy avoided cost rate for renewable resources would comply with PURPA.” *Id.* at 4. The Commission went on to exercise this avoided cost rate design authority and “agree[d] with the parties [in Docket No. UM 1396 (Phase II)] that a separate avoided cost stream for renewable resources should be adopted for PGE and Pacific Power, the two Oregon utilities currently subject to the RPS.” *Id.* The Commission specifically grounded this authority in its determination that “[a]llowing a renewable QF to choose between the two avoided cost streams is consistent with FERC’s ruling that clarified the right of the states to determine the avoided cost associated with utility purchases of energy ‘from generators with certain characteristics.’” *Id.* at 9 (quoting *California Public Utilities Commission*, 133 FERC ¶ 61,059 (October 21, 2010) at 13-14;³ *see also* Order No. 11-505 at 4 and footnote 2).

Indeed, offering the renewable cost stream is mandated by PURPA in this context. In Order No. 11-505, the Commission required that a “renewable resource QF will keep all associated [RECs] during periods of renewable resource sufficiency, but will transfer those RECs to the purchasing utility during periods of renewable resource deficiency.” *Id.* at 1. The Commission reemphasized this arrangement only a few months ago: “In Order No. 11-505, we determined that a utility, once it becomes renewable resource deficient, receives a renewable QF’s RECs for the remainder of the standard contract. Thus, Order No. 11-505 ties REC

³ The balance of the sentence cited by the Commission in Order No. 11-505 is further instructive in the instant matter addressed by this petition: “Stated more generally, *SoCal Edison* supports the proposition that, where a state requires a utility to procure a certain percentage of energy from generators with certain characteristics, generators with those characteristics constitute the sources that are relevant to the determination of the utility’s avoided cost for that procurement requirement.” *California Public Utilities Commission*, 133 FERC ¶ 61,059 (October 21, 2010) at 13-14 (emphasis added). In the current context, the relevant generators are renewable generators and the relevant avoided costs are those that included avoided renewable energy costs.

ownership to utilities sufficiency or deficiency position.” Docket No. UM 1610, Order No. 16-174 at 5 (May 13, 2016) (“Order No. 16-174”). Renewable QFs transferring their RECs to a utility during periods of resource deficiency must be paid for them; only a renewable-specific avoided cost stream accomplishes this. Just last month, the Federal Energy Regulatory Commission (“FERC”) again underscored the renewable-specific payment requirement in relation to a mandatory REC transfer obligation:

[A] state regulatory authority may not assign ownership of RECs to utilities based on a logic that the avoided cost rates in PURPA contracts already compensate QFs for RECs in addition to compensating QFs for energy and capacity, because the avoided cost rates are, in fact, compensation just for energy and capacity.

Windham Solar LLC and Allco Finance Limited, 156 FERC ¶ 61,042 at 3 (July 21, 2016). Reconciling the Commission’s requirement that a renewable resource deficient utility “receives a renewable QF’s RECs for the remainder of the standard contract” with FERC’s determination that PURPA requires such renewable QFs be paid a rate that is inclusive of the value of the transferred RECs leads to the clear requirement of a renewable resource-specific avoided cost stream.

PacifiCorp’s first stated reason not to offer renewable Schedule 38 rates is that Order No. 07-360 should govern. This position ignores, however, that Order No. 11-505 is (1) the more recent statement of the Commission’s policy on the pricing to be offered to renewable QFs and (2) clearly requires that renewable QFs be offered a renewable avoided cost pricing stream. That Order No. 11-505 governs PacifiCorp’s obligation here is clear from reading the more-recent still Order No. 16-174.

The Commission undertook in Order No. 16-174 to “consider proposals to revise the rates, terms, and conditions for Qualifying Facility (QF) standard and non-standard contracts in Oregon.” Order No. 16-174 at 1 (emphasis added). The Commission specifically reemphasized

its determinations in Order No. 11-505 as part of Order No. 16-174. *See id.* at 5. Nothing in Order No. 16-174 limited these determinations to apply only to Schedule 37 contracts.

In the wake of Order No. 16-174, PacifiCorp's second statement that it is waiting for clarification it expected in that order is likewise unavailing. Nothing in Order No. 16-174 (or any other order since Order No. 11-505) calls into question the Commission's clear instruction that renewable QFs, including the Projects, "should be offered an avoided cost stream that reflects the costs that [the] utility will avoid," Order No. 11-505 at 9, and that "a separate avoided cost stream for renewable resources should be adopted for PGE and Pacific Power." *Id.* at 4.

Finally, PacifiCorp's reliance on Staff testimony in Docket UM 1610 is misplaced. Testimony provides Staff's analysis of an issue; it is not controlling on the Commission or on any party to a Commission docket. In contrast, the Commission's Order No. 11-505 clearly is controlling, speaks directly to the issue raised in this petition, and requires that PacifiCorp offer Petitioner the renewable avoided cost pricing it has requested.

Petitioner thus asks that the Commission apply its directives from Order No. 11-505 and issue a declaratory ruling that all renewable QFs are required to be offered an avoided cost rate stream that reflects renewable attributes in addition to energy and capacity. Petitioner requests that the declaratory ruling specifically include the Projects, although it should not be limited to them, as the issue is not limited to a lack of understanding between Petitioner and PacifiCorp but instead goes to proper implementation of the Commission's orders.

D. The questions presented

Does Order No. 11-505 require that renewable QFs, including but not limited to the Projects, be offered an avoided cost stream that reflects renewable attributes in addition to

energy and capacity?

E. The specific relief requested

Petitioner requests that the Commission confirm its directive in Order No. 11-505 that “Renewable QFs willing to sell their output and cede their RECs to the utility allow the utility to avoid building (or buying) renewable generation to meet their RPS requirements [and these] QFs should be offered an avoided cost stream that reflects the costs that utility will avoid,” Order 11-505 at 9, and require that PacifiCorp offer renewable QFs, including but not limited to the Projects, an avoided cost stream that reflects renewable attributes in addition to energy and capacity.

F. The names and contact information of petitioner and any other person known by petitioner to have legal rights, duties or privileges that will be affected by the request

Petitioner:

Cypress Creek Renewables, LLC
3250 Ocean Park Blvd
Suite 355
Santa Monica, CA 90405
Attention: David Bunge
Phone: (636) 474-9067
Email: bunge@ccrenew.com

Wilson Sonsini Goodrich & Rosati PC
701 Fifth Avenue
Suite 5100
Seattle, WA 98104
Attention: Todd G. Glass
Keene M. O’Connor
Phone: (206) 883-2500
Email: tglass@wsgr.com
kmoconnor@wsgr.com

PacifiCorp:

PacifiCorp d/b/a Pacific Power
825 NE Multnomah Street
Suite 2000
Portland, OR 97232
Attention: R. Bryce Dalley
Dustin T. Till
Phone: (503) 813-5029
Email: bryce.dalley@pacificorp.com
dustin.till@pacificorp.com

III. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Commission issue a declaratory ruling confirming its directive in Order No. 11-505 that “QFs should be offered an avoided cost stream that reflects the costs that utility will avoid.” Specifically, Petitioner respectfully requests that the Commission’s ruling expressly confirm that the PPAs that PacifiCorp is required to offer to purchase the output from the Projects (including their RECs) contain a renewable avoided cost-based pricing stream, and that PacifiCorp should offer such renewable avoided cost-based pricing to all similarly situated QFs.

Respectfully submitted this 24th day of August, 2016.

/s/ Todd G. Glass
Todd G. Glass, OSB 943193
Keene M. O’Connor
Wilson Sonsini Goodrich & Rosati PC
701 5th Avenue
Suite 5100
Seattle, WA 98104
Phone: (206) 883-2500
Fax: (206) 883-2599
tglass@wsgr.com
kmoconnor@wsgr.com

*Of Attorneys for
Cypress Creek Renewables, LLC*

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

Oregon law requires state agencies to provide parties written notice of contested case rights and procedures. Under ORS 183.413, you are entitled to be informed of the following:

Hearing: The time and place of any hearing held in these proceedings will be noticed separately. The Commission will hold the hearing under its general authority set forth in ORS 756.040 and use procedures set forth in ORS 756.518 through 756.610 and OAR Chapter 860, Division 001. Copies of these statutes and rules may be accessed via the Commission's website at www.puc.state.or.us. The Commission will hear issues as identified by the parties.

Right to Attorney: As a party to these proceedings, you may be represented by counsel. Should you desire counsel but cannot afford one, legal aid may be able to assist you; parties are ordinarily represented by counsel. The Commission Staff, if participating as a party in the case, will be represented by the Department of Justice. Generally, once a hearing has begun, you will not be allowed to postpone the hearing to obtain counsel.

Administrative Law Judge: The Commission has delegated the authority to preside over hearings to Administrative Law Judges (ALJs). The scope of an ALJ's authority is defined in OAR 860-001-0090. The ALJs make evidentiary and other procedural rulings, analyze the contested issues, and present legal and policy recommendations to the Commission.

Hearing Rights: You have the right to respond to all issues identified and present evidence and witnesses on those issues. *See* OAR 860-001-0450 through OAR 860-001-0490. You may obtain discovery from other parties through depositions, subpoenas, and data requests. *See* ORS 756.538 and 756.543; OAR 860-001-0500 through 860-001-0540.

Evidence: Evidence is generally admissible if it is of a type relied upon by reasonable persons in the conduct of their serious affairs. *See* OAR 860-001-0450. Objections to the admissibility of evidence must be made at the time the evidence is offered. Objections are generally made on grounds that the evidence is unreliable, irrelevant, repetitious, or because its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay. The order of presenting evidence is determined by the ALJ. The burden of presenting evidence to support an allegation rests with the person raising the allegation. Generally, once a hearing is completed, the ALJ will not allow the introduction of additional evidence without good cause.

Record: The hearing will be recorded, either by a court reporter or by audio digital recording, to preserve the testimony and other evidence presented. Parties may contact the court reporter about ordering a transcript or request, if available, a copy of the audio recording from the Commission for a fee set forth in OAR 860-001-0060. The hearing record will be made part of the evidentiary record that serves as the basis for the Commission's decision and, if necessary, the record on any judicial appeal.

Final Order and Appeal: After the hearing, the ALJ will prepare a draft order resolving all issues and present it to the Commission. The draft order is not open to party comment. The Commission will make the final decision in the case and may adopt, modify, or reject the ALJ's recommendation. If you disagree with the Commission's decision, you may request reconsideration of the final order within 60 days from the date of service of the order. *See* ORS 756.561 and OAR 860-001-0720. You may also file a petition for review with the Court of Appeals within 60 days from the date of service of the order. *See* ORS 756.610.