ORDER NO. 15 209

ENTERED

JUL 07 2015

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1734

In the Matter of

PACIFICORP, dba PACIFIC POWER,

Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap.

ORDER

DISPOSITION: MOTION TO DISMISS DENIED

I. INTRODUCTION

The Community Renewable Energy Association (CREA) and Renewable Energy Coalition (REC) seek to dismiss the application filed by PacifiCorp, dba Pacific Power, relating to our policies implementing the Public Utility Regulatory Policies Act (PURPA). In that application, PacifiCorp requests two changes to standard contracts the company must offer to small qualifying facilities (QFs). First, the company asks we reduce the standard contract fixed-price period from 15 years to three years. Second, the company asks we lower the eligibility cap for standard QF pricing from 10 megawatts (MW) to 100 kilowatts (kW) for wind and solar QFs. For reasons that follow, we deny the motion to dismiss.

II. DISCUSSION

A. Parties' Positions

1. CREA and REC

CREA and REC argue that PacifiCorp's application should be dismissed as an impermissible collateral attack on past decisions and current proceedings in docket UM 1610. The parties contend that PacifiCorp's application first seeks to relitigate our Phase I determinations in Order No. 14-058 to uphold the standard contract 20-year term and 10 MW eligibility cap for standard contracts. They also contend the company's application unfairly impacts the current Phase II proceedings by requiring the parties to relitigate the standard contract term and eligibility cap at the same time they are addressing the issues in Phase II. CREA and REC claim that, if PacifiCorp's application is granted, many of the current Phase II issues will become irrelevant. Moreover, they

contend that the parties' analysis of the Phase II issues would have been different if they were aware of a possibility of reduced terms and eligibility caps for standard contracts.

In support of their motion, CREA and REC emphasize the need for finality of decisions. They note that the Commission has previously rejected attempts to relitigate matters, citing Order No. 03-085 where we rejected Verizon's attempt to revisit an issue decided in an earlier phase of a telecommunications proceedings based on new information developed in another proceeding.[1] CREA and REC also point out that PacifiCorp itself recently opposed a request for reconsideration on the grounds that the moving parties "seek to immediately relitigate issues already argued and decided."[2]

Finally, CREA and REC argue that PacifiCorp has provided misplaced and exaggerated arguments that provide no justification for this alleged collateral attack. They argue that PacifiCorp's portrayal of the increase in QF requests is misleading, the harm the company claims is difficult to imagine, and the company's proposed solutions are overly broad.

2. Renewable Northwest, Obsidian Renewables, LLC, and Cypress Creek Renewables

Renewable Northwest, Obsidian Renewables, LLC, and Cypress Creek Renewables, LLC, support the motion to dismiss. They join CREA and REC and argue that PacifiCorp's application is procedurally deficient because it attempts to relitigate issues already decided.

3. PacifiCorp

PacifiCorp opposes the motion to dismiss and argues that it is not seeking a collateral attack on docket UM 1610. Rather, PacifiCorp contends that the application demonstrates that changed circumstances necessitate revisions to the fixed-price term and eligibility threshold to ensure that customers pay no more than avoided costs and remain indifferent to the company's mandatory QF purchase obligations.

PacifiCorp emphasizes the dramatic increase in QF activity the company has experienced since we issued Order No. 14-058 in February 2014.. PacifiCorp states that, in that brief time, it has executed 104 MW of new Oregon power purchase agreements (PPAs), and has also received requests for an additional 587 MW in Oregon. According to PacifiCorp, these changed circumstances justify the Commission's substantive consideration of its application.

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[1] *See In re Unbundled Network Elements*, Docket Nos. UT 138 & UT 139 (Phase III), Order No. 03-085 at 14-16 (Feb 5, 2003).

[2] PacifiCorp's Response in Opposition to Joint Parties Motion for Clarification or, in the alternative, Application for Reconsideration or Rehearing, Docket No. UE 267 (May 5, 2015).

4. Commission Staff

Commission Staff requests the opportunity to investigate and analyze PacifiCorp's application, finding that the short interval since we issued Order No. 14-058 does not foreclose the possibility that a change of circumstances now warrants revisiting those decisions. Staff also argues the Commission is not precluded from revisiting past policy decisions, and that investigating the application will not impact docket UM 1610 as strongly as CREA and REC allege.

III. RESOLUTION

We deny the motion to dismiss. Because this Commission acts in a legislative capacity when it establishes general policies to implement PURPA, we are not precluded from revisiting those policies when the conditions under which they were adopted may have changed. To the contrary, we have a duty to reexamine all PURPA policies, when necessary, to promote QF development while also ensuring that ratepayers pay no more than a utility's avoided costs.[3] Indeed, since 2005, we have conducted three multi-phase proceedings to revamp, clarify, and refine our QF policies to address changing market conditions.[4]

The Attorney General has recognized the need for this agency to revisit past decisions and take such steps as may be proper under the circumstances. As Staff notes, the Attorney General opined that, while it is appropriate for an administrative agency to prevent parties from relitigating matters in which it acted in a judicial capacity, the same is not true when the administrative agency acts in a legislative capacity. The opinion states:

> When the purpose is one of regulatory action, as distinguished from merely applying law or policy to past facts, an agency must at all times be free to take such steps as may be proper in the circumstances, irrespective of its past decisions.[5]

The decision whether to revisit a past decision is a matter of our discretion. We may decline a request to revisit an earlier decision if we find that circumstances have not changed or a further inquiry is not necessary. For example, in Order No. 03-085 cited by CREA and REC, Verizon sought to reexamine how certain charges should be calculated when it provides network elements to competing carriers. We declined the request,

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[3] *See In the Matter of Idaho Power Co.*, Docket No. UM 1725, Order No. 15-199 at 6 (Jun 23, 2015) ("we must balance our duty to create a settled and uniform institutional climate for qualifying facilities in Oregon, while ensuring that electric utilities purchase power from QFs at rates that are just and reasonable to the utility's customers, in the public interest, and that do not discriminate against QFs, but that are not more than avoided costs." (internal quotations omitted).

[4] *See* Docket Nos. UM 1129, UM 1396, and UM 1610.

[5] Or Op Atty Gen OP-6454, 1992 WL 526799, (Or.A.G.), (Jun 8, 1992).

noting that the evidence Verizon sought to introduce was irrelevant to the inquiry as mandated by the Federal Communications Commission.[6]

Here, we find sufficient grounds to revisit our decisions in Order No. 14-058 to uphold the 20-year term and 10 MW eligibility cap for standard contracts. The numbers presented in PacifiCorp's application document a substantial increase in QF activity since we issued that order, and warrant a reevaluation of our PURPA policies to ensure that electric utilities purchase power from QFs at rates that are just and reasonable and are not more than avoided costs. We acknowledge the questions raised by CREA and REC about whether PacifiCorp has overstated the extent of new QF development. Nonetheless, in ruling on a motion to dismiss, we assume the truth of all well-pleaded facts and give the nonmoving party the benefit of all favorable inferences that may be drawn from those facts.[7]

In addition, reexamining the issues raised in PacifiCorp's application is consistent with our investigation in docket UM 1725 to review Idaho Power's request to modify certain QF policies.[8] We expect that our investigation of PacifiCorp's application will proceed roughly in parallel with our review of Idaho Power's application, as the two dockets will involve similar policy considerations.

Finally, although our review of PacifiCorp's application will possibly impact docket UM 1610, we direct the parties to continue to proceed with the schedule adopted for Phase II. Even assuming, *arguendo*, that we reduce the eligibility cap and contract length for standard contracts offered by PacifiCorp, determinations on Phase II issues—including when there is a legally enforceable obligation, compensation for capacity during the resource sufficiency period, the specific questions about avoided cost price calculations, and others—will remain relevant. Thus, any uncertainty created by PacifiCorp's instant application does not change the need to proceed with Phase II.[9] To the extent that parties want to consider additional issues beyond the UM 1610 Phase II issues list, we will presumably have a Phase III to address, at a minimum, solar integration charges, as well as other issues that need attention.[10]

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[6] *In re Unbundled Network Elements,* Order No. 03-085 at 11.

[7] ORCP 21; *International Brotherhood v. Oregon Steel Mills, Inc.*, 168 Or App 101, 104 n 1 (2000), *clarified, recalled, clarified, motion denied on other grounds,* 180 Or App 265 (2002).

[8] *In the Matter of Idaho Power Co.,* Order No. 15-199.

[9] We note that Idaho Power's application in docket UM 1725 has already required the parties to manage uncertainty in addressing Phase II issues in docket UM 1610.

[10] *Id.* at 7 ("Further, given the rapid growth in solar QF activity, we believe it is time to address solar integration charges. We direct the parties to address in docket UM 1610 the level of solar integration charges to incorporate into avoided cost rates.").

IV. ORDER

IT IS ORDERED that the motion to dismiss, filed by the Community Renewable Energy Association and Renewable Energy Coalition, is denied.

Made, entered, and effective JUL 07 2015.

Susan K. Ackerman
Chair

John Savage
Commissioner

Stephen M. Bloom
Commissioner