

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1129

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| In the Matter of |) | |
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| PUBLIC UTILITY COMMISSION OF |) | |
| OREGON |) | ORDER |
| |) | |
| Staff's Investigation Relating to Electric |) | |
| Utility Purchases from Qualifying Facilities. |) | |

DISPOSITION: FILINGS NOT SUBJECT TO REFUND DURING INVESTIGATION

PROCEDURAL BACKGROUND

On May 12, 2004, the Public Utility Commission of Oregon (Commission) opened an investigation related to electric utility purchases from qualifying facilities (QFs) under the Public Utility Regulatory Policies Act (PURPA).¹ On May 13, 2005, the Commission issued Order No. 05-584 which established a methodology to calculate avoided cost rates and specified terms and conditions to be included in standard QF contracts. The Commission directed Idaho Power Company (Idaho Power), Pacific Power & Light (PacifiCorp) and Portland General Electric Company (PGE) (collectively "the electric utilities" or "the utilities") to make compliance filings implementing Order No. 05-584. Each electric utility filed avoided costs, revised tariffs and new standard QF contracts on July 12, 2005.²

Despite finding that the filings generally implemented Order No. 05-584, Commission Staff (Staff) determined, in a Staff Report dated July 25, 2005, that certain issues of compliance merited further review. Other parties concurred that additional investigation was warranted, but most parties perceived the proposed tariffs and contracts, as filed, to be "far superior" to existing tariffs and contracts. Consequently, Staff declined to recommend that the Commission suspend the filings until completion of an investigation. Rather, Staff recommended that the Commission allow the filings to take effect during an investigation with the qualification that they would be subject to refund,³ pursuant to ORS 757.215(4),⁴ upon adoption of final tariffs and contracts.⁵ Staff

¹ The United States Congress passed PURPA in 1978, as codified in the United States Code (USC) at 16 U.S.C. § 824a-3.

² PGE filed Advice No. 05-10; PacifiCorp filed Advice No. 05-006; and Idaho Power filed Advice No. 05-06.

³ ORS 757.215(4) provides:

If the commission is required to or determines to conduct a hearing on a rate or schedule of rates filed pursuant to ORS 757.210, but does not order

suggested that the Commission direct the utilities to include the following language in standard contracts:

The seller and (enter electric company name) acknowledge that the rates, terms and conditions specified in this agreement and the related tariffs are being investigated by the Oregon Public Utility Commission. Upon a decision by the Oregon Public Utility Commission in the investigation, the (electric company name) will notify the seller within ten calendar days. If the rates resulting from the investigation are higher than the rates in effect during the initial period, the (electric company name), will refund, with interest, the difference to the seller. The seller shall have thirty calendar days from the effective date of the revised standard contract and tariffs complying with the Commission's order to amend this agreement if the seller so chooses to adopt the revised standard contract and/or the revised rates, terms and conditions in the tariff approved by the Oregon Public Utility Commission as a result of the investigation.

Staff acknowledged some uncertainty, however, as to whether ORS 757.215(4) applied to the utilities' filings and alternatively suggested that the Commission allow the filed tariffs and contracts to take effect "as is."

At its public meeting, on August 2, 2005, the Commission ordered that an investigation of the filings be undertaken, but allowed the filings to go into effect, *potentially* subject to refund.⁶ The Commission directed that "the question as to whether these filings are subject to refund would be separately addressed at the outset of the investigation." To implement its decision, the Commission directed utilities to include a slightly modified version of Staff's proposed clause in standard contracts, as follows (deleted language in ~~strike through~~ and new language in **bold**):

The seller and (enter electric company name) acknowledge that the rates, terms and conditions specified in this agreement and the related tariffs are being investigated by the Oregon Public Utility

a suspension thereof, any increased revenue collected by the utility as a result of such rate or rate schedule becoming effective shall be received subject to being refunded. If the rate or rate schedule thereafter approved by the commission is for a lesser increase or for no increase, the utility shall refund the amount of revenues received that exceeds the amount approved as nearly as possible to the customers from whom such excess revenues were collected, by a credit against future bills or otherwise, in such manner as the commission orders.

⁴ Staff contemplated that "refunds" would encompass additional payments to QFs should the Commission order higher avoided cost rates at the end of the investigation.

⁵ Staff recommended that the Commission direct the utilities to include refund language in the standard contracts.

⁶ The Commission directed utilities to include Staff's recommended refund language, slightly modified, in standard contracts. Order No. 05-899, p. 2.

Commission. Upon a decision by the Oregon Public Utility Commission in the investigation, the (electric company name) will notify the seller within ten calendar days. If the rates resulting from the investigation are higher than the rates in effect during the initial period, the (electric company name), **pursuant to the investigation will may be required to** refund, with interest, the difference to the seller. The seller shall have thirty calendar days from the effective date of the revised standard contract and tariffs complying with the Commission's order to amend this agreement if the seller so chooses to adopt the revised standard contract and/or the revised rates, terms and conditions in the tariff approved by the Oregon Public Utility Commission as a result of the investigation.

This question has been taken up at the beginning of the second phase of this docket. On September 2, 2005, PGE and Idaho Power submitted legal briefs on the issue. On September 21, 2005, Staff filed a response.

PARTIES' POSITIONS

PGE suggests, and Idaho Power strongly argues, that federal law precludes the Commission from conditionally approving, subject to refund, PURPA-related rates. Idaho Power asserts that the courts, including the Oregon Court of Appeals, have consistently held that state commissions are not authorized under PURPA or implementing FERC regulations to revisit adopted QF rates.⁷ Indeed, Idaho Power argues that state commissions are obligated under federal law to provide certainty in setting QF rates and that retroactively adjusting QF rates is inappropriate, particularly when such adjustments would be asymmetric in nature.⁸

PGE and Idaho Power also argue that state law does not authorize the QF rate refunds envisioned by Order No. 05-899. PGE and Idaho Power contend that ORS 757.215(4) is inapplicable, on its face, to QF transactions. PGE points out that the rates at issue were not filed under ORS 757.210, to which ORS 757.215(4) exclusively applies, while Idaho Power asserts that all of ORS Chapter 757 is inapplicable to QF related rates. Idaho Power asserts that the Commission's delegated authority under PURPA is contained only in ORS Chapter 758. Regardless of the source of the Commission's regulatory authority over QF-related rates, tariffs and contracts, PGE and Idaho Power agree that ORS 757.215(4), by its plain language, does not apply to rates paid to QFs. They assert that the statute allows the Commission to adopt tariffs for services provided by the utility to customers subject to refund, but does not allow the Commission to adopt tariffs subject to refund for rates paid to QFs selling energy to utilities. PGE points out that the tariff's use of the term, "customer," precludes

⁷ Idaho Power's Comments on the Commission's Authority to Order Tariffs Subject to Refund (Idaho Power's Comments), 4-6, citing *Oregon Trail Electric Consumers Cooperative, Inc. v. Co-Gen Co.*, 168 Or. App. 466, 482 (2000) and *Smith Cogeneration Management, Inc. v. Corp. Comm'n*, 863 P.2d 1227 (Ok. 1993).

⁸ *Id.* at 6-7.

application to QF related tariffs as it is the utility, not the QF, who is the customer in this relationship. Moreover, PGE asserts that the term, “refund,” does not encompass the concept of a buyer making additional payments to a seller.

In its response, Staff concedes that ORS 757.215(4) “very likely does not apply” to the utilities’ compliance filings.⁹ Staff disputes Idaho Power’s concerns about retroactive ratemaking, observing that the Commission “*conditionally* approved the rates.” Staff also continues to contend that the utilities filed the tariffs at issue under ORS 757.210. However, Staff “concur[s] that the plain language of ORS 757.215(4) does not seem to readily apply to a utility making third-party purchases from a QF power producer.” Staff agrees with PGE that the statute’s provision that revenues collected from customers above the amount ultimately approved by the Commission are subject to refund does not seem to contemplate payments to QFs for the purchase of energy. Consequently, Staff recommends that the Commission should modify Order No. 05-899 to strike all references to ORS 757.215(4), and to revise the paragraph that utilities were directed to include in standard contracts by striking the following language:

The seller and (enter electric company name) acknowledge that the rates, terms and conditions specified in this agreement and the related tariffs are being investigated by the Oregon Public Utility Commission. Upon a decision by the Oregon Public Utility Commission in the investigation, the (electric company name) will notify the seller within ten calendar days. ~~If the rates resulting from the investigation are higher than the rates in effect during the initial period, the (electric company name), pursuant to the investigation, may be required to refund, with interest, the difference to the seller.~~ The seller shall have thirty calendar days from the effective date of the revised standard contract and tariffs complying with the Commission’s order to amend this agreement if the seller so chooses to adopt the revised standard contract and/or the revised rates, terms and conditions in the tariff approved by the Oregon Public Utility Commission as a result of the investigation.¹⁰

DISCUSSION

We directed parties to consider the question of whether the utilities’ compliance filings in the first phase of this proceeding should be effective “subject to refund” during our investigation of these filings. We did so because there appeared to be some dispute on the matter. There no longer appears to be any dispute, however, amongst Staff and the parties responding to this question. Staff, PGE and Idaho Power now agree that ORS 757.214(4) is inapplicable, by its plain language, and does not authorize a true-up between the statute at issue as to whether it authorizes a true-up

⁹ Staff’s Response to PGE’s and Idaho Power’s Opening Briefs Regarding the Commission’s Authority Under ORS 757.215(4) (Staff Response), p. 1.

¹⁰ *Id.*

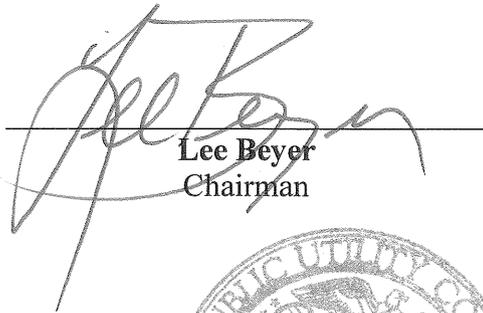
between rates paid to QFs under tariffs and standard contracts allowed to go into effect during an investigation and rates approved at the conclusion of the investigation. We find this point of concurrence to be a satisfactory resolution of the question that we directed parties to take up at the outset of our investigation of the utilities' compliance filings and we discern no reason to further consider the question. Accordingly, Order No. 05-899 is modified as proposed by Staff. The remainder of the order is unchanged.

ORDER

IT IS ORDERED that:

1. Idaho Power Company, Pacific Power & Light and Portland General Electric Company shall revise standard contracts to modify the provision regarding investigation of the standard contracts and related filings to remove the reference to possible refund, as recommended by Staff.
2. Order No. 05-899 is modified consistent with the terms of this order.

Made, entered, and effective OCT 04 2005.



Lee Beyer
Chairman



John Savage
Commissioner



Ray Baum
Commissioner



A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.