

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1449

INTERNATIONAL PAPER COMPANY,

Complainant,

vs.

PACIFICORP, dba PACIFIC POWER,

Defendant.

ORDER

DISPOSITION: MOTION TO DISMISS GRANTED; COMPLAINT DISMISSED WITHOUT PREJUDICE; MOTIONS FOR WAIVER OF RULE AND FOR EXTENSION OF TIME DISMISSED AS MOOT; MOTION TO STRIKE DENIED

I. INTRODUCTION

On September 4, 2009, International Paper Company (International Paper) filed a Complaint with the Public Utility Commission of Oregon (Commission) requesting that we order PacifiCorp, dba Pacific Power (PacifiCorp or the Company) to execute a Power Purchase Agreement (PPA) with the pricing proposed by PacifiCorp before its avoided cost rates were revised. PacifiCorp moved to dismiss the Complaint on various grounds, including the failure of the parties' negotiations to trigger a legally enforceable obligation (LEO).

We find that International Paper's allegations fail to show that PacifiCorp acted in contravention of applicable statutes, tariffs, or rules when it withdrew pricing terms with the intent to include the Company's current rates in the parties' final, executed agreement. We therefore grant PacifiCorp's motion to dismiss International Paper's Complaint for failure to state a claim upon which relief may be granted. Because the underlying Complaint is dismissed, International Paper's motion for waiver of the 60-day waiting period required under Oregon Administrative Rule 860-029-0100(5)(a) and PacifiCorp's motion for extension of time to respond to the Complaint are dismissed as moot. We also deny International Paper's motion to strike the testimony from PacifiCorp's reply brief.

II. PROCEDURAL HISTORY

Both sides submitted extensive briefing in this case. International Paper filed a Complaint with supporting exhibits and testimony; a motion for waiver of the 60- day waiting period under OAR 860-029-0100(5)(a) and for leave to file complaint; a motion for expedited consideration of its rule waiver motion; a motion to strike the direct testimony from PacifiCorp's reply; and responses and replies to PacifiCorp's motions and oppositions. PacifiCorp filed a response in opposition to International Paper's motion for expedited consideration and motion for clarification or extension of time to answer the Complaint; a motion to dismiss the Complaint and response in opposition to motion for waiver of rule; a motion for extension of time to answer; and a reply to International Paper's response in opposition to PacifiCorp's motion to dismiss. An Administrative Law Judge issued two rulings, the first denying International Paper's motion for expedited review, and the second clarifying the calculated due date for PacifiCorp's response to International Paper's request for waiver of OAR 860-029-0100(5)(a). The parties also submitted informal letters concerning the announced closure of International Paper's Albany plant.

III. DISCUSSION

A. Legal Standard

In 1978, Congress enacted the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. § 824a-3, to encourage alternative forms of energy production. PURPA §§ 201 and 210 encourage resource competition and the development of cogeneration and renewable energy technologies by non-utility power producers called "qualifying facilities," or QFs. PURPA § 210(a) requires the Federal Energy Regulatory Commission (FERC) to prescribe rules implementing the legislation, specifically to encourage QFs and to require utilities to offer to purchase electric energy from QFs. 16 U.S.C. 824a-3(a). In response to the requirements of PURPA and FERC, Oregon has enacted legislation governing small power producers and has administrative rules that parallel PURPA and its regulations. *See* ORS 758.505 et seq., OAR 860-029-0001 et seq.¹

¹ Oregon's administrative rules regarding QFs have been modified several times since their implementation. Our statutes and rules provide the following guidelines for utility negotiations with QFs:

Triggering a legally enforceable obligation:

ORS 758.525(2) states that an electric utility shall offer to purchase energy or energy and capacity from a QF, and that at the option of the QF, such prices may be based on

- (a) The avoided costs calculated at the time of delivery; or
- (b) The projected avoided costs calculated at the time the legal obligation to purchase the energy or energy and capacity is incurred.

OAR 860-029-0010(29) provides that the "'time the obligation to purchase the energy capacity or energy and capacity is incurred' means the earlier of

- (a) The date on which a binding, written obligation is entered into between a qualifying facility and a public utility to deliver energy, capacity, or energy and capacity; or
- (b) The date agreed to, in writing, by the qualifying facility and the electric utility as the date the obligation is incurred for the purposes of calculating the applicable rate."

In 2005 and 2007, we issued orders implementing new policies and procedures to more effectively accomplish PURPA's goals.² Our "overriding goal" was "to accurately assess avoided costs on an ongoing basis."³ In Order No. 07-360, we adopted guidelines for negotiated contracts between utilities and large QFs.⁴ We intended "to encourage the economically efficient development of QFs, while protecting ratepayers by ensuring that utilities incur costs no greater than they would have incurred in lieu of purchasing QF power (avoided costs)."⁵

In Order No. 07-360, we adopted Pacific Power & Light Company Oregon Schedule 38 (Schedule 38) as the utility's publication of its policy for QF negotiations. Schedule 38 requires PacifiCorp to respond in good faith to QF proposals and modifications, to not unreasonably delay negotiations, and to update its pricing proposals at appropriate intervals to accommodate changes to avoided cost calculations. In the final step during negotiations, "[w]hen both parties are in full agreement as to all terms and conditions of the [PPA], the Company will prepare and forward to the owner a final, executable version of the agreement within 15 business days." Schedule 38 notes that unless clearly indicated, a draft PPA "shall not be construed as a binding proposal by the Company," and that prices in the PPA "will not be final and binding until the [PPA] has been executed by both parties."

Utility's duty to inform QF of contract and cost terms: OAR 860-029-0005(3) states that within 30 days following the initial contact between a prospective QF and a public utility, the public utility "shall submit informational documents, approved by the Commission, to the qualifying facility which state:

- (a) The public utility's internal procedural requirements and information needs;
- (b) Any contract offered by the public utility is subject to negotiation;
- (c) Avoided costs are subject to change pursuant to OAR 860-029-0080(3) [governing utility's submission of draft avoided cost information to the Commission]; and
- (d) That the avoided costs actually paid to a qualifying facility will depend on the quality and quantity of power to be delivered to the public utility..."

Utility's duty to negotiate in good faith: OAR 860-029-0040 provides that rates for purchases by public utilities shall "be just and reasonable to the public utility's customers and in the public interest," OAR 860-029-0040(1)(a). If a utility fails to make a good faith effort to comply with a QF's request to transmit energy, the utility is required to purchase the QF's energy at the higher of the electric utility's avoided cost, or the index rate. See ORS 758.545(a)(b). Per ORS 758.545(2), "good faith effort" "shall be demonstrated by the electric utility's publication of a generally applicable, reasonable policy of the electric utility to allow a qualifying facility to use the electric utility's facilities on a cost-related basis."

² See Order Nos. 05-584 and 07-360 (Docket UM 1129, Investigation Relating to Electric Utility Purchases from Qualifying Facilities).

³ Order No. 05-584 at 29.

⁴ Order No. 07-360 at 1.

⁵ *Id.* (emphasis in original).

B. Facts

International Paper owns a QF in Albany, Oregon, and sells the QF output to PacifiCorp under the terms of an existing PPA executed on December 10, 2007 and expiring on December 31, 2009 (the 2007 PPA). Assuming the truth of all allegations in the Complaint, and giving International Paper the benefit of all favorable inferences that may be drawn from those allegations, the following events occurred during the parties' negotiations⁶:

- On May 29, International Paper initiated the process for negotiating a renewed PPA. International Paper notified PacifiCorp by email that all pertinent QF information was virtually unchanged, and requested an indicative pricing proposal pursuant to PacifiCorp Schedule 38.
- On June 1, PacifiCorp furnished a preliminary statement of proposed terms, with pricing based on Schedule 37 rates in effect at that time.
- On June 5, International Paper confirmed PacifiCorp's proposed terms.
- On July 1, PacifiCorp furnished an indicative pricing proposal. Schedule 38 requires provision of an indicative pricing proposal within 30 days; PacifiCorp furnished its proposal within 33 days. The proposal's terms were consistent with the parties' 2007 PPA and Schedule 37 rates.
- On July 9, PacifiCorp filed Advice No. 09-012 before this Commission, in which it requested revision of its Schedule 37 standard rates for avoided cost purchases.⁷
- On July 10, International Paper submitted a written request that PacifiCorp prepare a draft PPA pursuant to the provisions of Schedule 38.
- On August 10, PacifiCorp submitted a draft PPA ("Draft I") to International Paper, with nearly the same pricing terms as the parties' 2007 PPA.
- On August 11, International Paper submitted written commentary, offering minor changes, and no substantive changes to the pricing terms. International Paper was prepared to sign a renewed contract based on Draft I.
- On August 13, PacifiCorp submitted a draft PPA ("Draft II"), with the same pricing terms as Draft I. Draft II addressed changes to very minor terms that did not substantively affect pricing.
- On August 19, International Paper confirmed Draft II's changes and requested in writing that PacifiCorp provide a final contract for execution.
- On August 20, Commission Staff (Staff) issued a report recommending that the Commission allow PacifiCorp's revised rates to take effect on August 26.
- On August 21, PacifiCorp submitted a third draft PPA ("Draft III"). Draft III had no specific pricing terms. Instead, PacifiCorp offered to finalize pricing per Commission instructions resulting from the Commission's public meeting scheduled on August 25. PacifiCorp indicated it would freeze all further pricing negotiations until Commission investigations into PacifiCorp's newly revised avoided cost rates were completed.

⁶ All events occurred in 2009.

⁷ PacifiCorp's Oregon Tariff Schedule 37 contains standard rates for avoided cost purchases from QFs with a nameplate capacity of 10,000 kW or less. Schedule 38 addresses QFs of greater than 10,000 kW such as International Paper's plant, and uses Schedule 37 rates as a starting point for PPA price negotiation.

- On September 1, PacifiCorp left a voice mail with International Paper asking for comments on Draft III. PacifiCorp did not alter its position on freezing pricing terms.
- On September 3, International Paper sent a formal letter to PacifiCorp confirming that it was ready, willing and able to obligate itself to provide power under a renewed PPA as of August 11, the date International Paper argued that PacifiCorp's obligation to purchase power was incurred.
- On September 4, PacifiCorp responded to International Paper's letter. PacifiCorp did not agree to supply International Paper with an executable PPA, or to negotiate pricing terms. International Paper filed its Complaint the same day.
- On September 9, PacifiCorp's new Schedule 37 avoided cost rates went into effect.

C. Issues

1. *Obligation to Purchase Power*

a. *Parties' Positions*

International Paper argues that under OAR 860-029-0010(29)(b), a legally enforceable obligation to purchase power arose on August 19, when International Paper agreed to all terms and conditions in PacifiCorp's Draft II and requested that PacifiCorp supply an executable agreement. International Paper states "PacifiCorp made an offer via the second draft PPA that International Paper accepted – resulting in full agreement of all conditions and terms in the second draft PPA." Per International Paper, the date an obligation is incurred for purposes of calculating the applicable rate "is simply the date the QF provided written consent to PacifiCorp's terms." International Paper states that if OAR 860-029-0010(29)(b) is not given effect by allowing a legally enforceable obligation to arise through QF acceptance of PacifiCorp's offers, then Section B.5 of PacifiCorp's Schedule 38 will become a dead letter,⁸ and the Oregon Court of Appeal's decision in *Snow Mountain Pine Co. v. Mauldin*, 84 Or App 590 (1987), will be contravened. International Paper notes that if an LEO is not recognized until a final PPA is actually executed, PacifiCorp may simply delay and freeze negotiations indefinitely, until new rates go into effect.

PacifiCorp argues that Schedule 38, OAR 860-029-0100, and the Commission's orders in UM 1129 have created a comprehensive regulatory scheme that establishes a series of negotiation milestones and dispute resolution prerequisites which must be satisfied before a QF may unilaterally establish a LEO requiring a public utility to purchase the QF's output. PacifiCorp states that International Paper did not complete the required milestones before PacifiCorp's new Schedule 37 rates became effective, and that International is not entitled to a new PPA with prices based on PacifiCorp's old Schedule 37 rates. PacifiCorp notes that the parties did not have a written agreement under OAR 860-029-0010(29), and that the Commission's rules and Schedule 38 do not intend draft PPAs to be binding on either party. PacifiCorp also notes that the court in *Snow Mountain Pine*, *supra*, relied on a previous version of OAR 860-029-0010, and that its holding is inapplicable to the current statute, as well as to the Commission's more recent orders in UM 1129. PacifiCorp notes that the Commission's policies are furthered by a streamlined negotiation process. Finally, PacifiCorp states that its Draft III did not contain purchase prices "because there was

⁸ PacifiCorp's Schedule 38.B.5 requires that in PPA negotiations, PacifiCorp "will not unreasonably delay negotiations and will respond in good faith to" proposals.

considerable uncertainty at the time regarding which published avoided cost rate in [Schedule 37] would be in effect at the conclusion of the negotiations.”

b. Resolution

We find that International Paper fails to allege facts sufficient to constitute a claim that a legally enforceable agreement was triggered by the parties’ negotiations. International Paper does not allege that the parties had either a binding, written obligation to deliver energy or an agreement in writing as to a date an obligation was incurred, as required by OAR 860-029-0010(29). Instead, International Paper argues that an LEO was triggered when it accepted the terms of PacifiCorp’s second draft PPA. This argument fails because acceptance of a draft PPA under Schedule 38 does not substitute for a written agreement between the parties as to a date an obligation was incurred. Schedule 38 states that draft PPAs are not intended as binding contracts, and that pricing terms remain negotiable until execution. Unlike common law contract negotiations which rely on offer and acceptance, QF obligations are created by statutes and Commission rules; International Paper’s “acceptance” of PacifiCorp’s draft PPA does not, on its own, trigger an obligation.

International Paper’s reliance on the court’s ruling in *Snow Mountain Pine, supra*, is misplaced because that ruling relied on a previous version of OAR 860-029-0010. *See Snow Mountain Pine*, 84 Or App at 599, *citing* OAR 860-29-010 (defining the “time the obligation is incurred” as the date on which a binding obligation first exists to deliver energy, and noting that the “date on which the qualifying facility obligates itself to deliver energy fixes the date on which the ‘avoided costs’ are determined”). The definition of “time the obligation is incurred” has since changed, and now looks to either an executed agreement or a written agreement between the parties as to the date an LEO was triggered.

International Paper’s concern that QFs will be left without recourse is also misplaced. PacifiCorp is required both by Commission rule and by its own Schedule 38 to negotiate in good faith. If PacifiCorp negotiates in bad faith or with undue delay, a QF may file a complaint with the Commission, and if the Commission finds bad faith or undue delay, we may conclude that a LEO was incurred in the absence of a written agreement between the parties. As we note in section C.2.b below, we do not find bad faith or undue delay in this case.

Our conclusion here is in line with our goal, as stated in our UM 1129 orders, to impose current and accurate rates on utility customers. As Staff noted in its Report on PacifiCorp’s Advice Filing 09-012, suspending PacifiCorp’s filing pending investigation of the reasonableness of its revised rates “would leave the current higher avoided costs in place, potentially harming customers.”

2. Bad Faith and Unreasonable Delay

a. Parties’ Positions

International Paper argues that PacifiCorp’s unilateral freezing of pricing negotiations and refusal to offer specific pricing terms until Commission investigations were completed violates

the Commission's order that utilities may not unreasonably delay negotiations, and must respond in good faith to all QF proposals. International Paper also alleges that PacifiCorp submitted its indicative pricing proposal more than 30 days after International Paper requested it, which violated PacifiCorp's Schedule 38.

PacifiCorp states that International Paper's May 29 request to initiate negotiations was incomplete, and that International Paper did not submit a proper request until June 5. As a result, PacifiCorp alleges that it supplied the required indicative pricing proposal within 24 days, and that it was in compliance with Commission rules. PacifiCorp argues that its negotiations after providing the pricing proposal also complied with the Commission's rules, and that because all Commission and Schedule 38 milestones were not reached, there was no LEO and no duty on PacifiCorp's part to supply an executable agreement 15 days after International Paper's acceptance of PacifiCorp's Draft II. PacifiCorp also states that it properly withdrew pricing terms from its Draft III, because its rates were being reviewed by the Commission and it was unclear what rates would be in effect by the time the parties' negotiations were complete.

b. Resolution

Assuming the truth of International Paper's allegations, we find that PacifiCorp's three-day delay in providing an indicative pricing proposal and subsequent withdrawal of pricing terms from its third draft PPA did not rise to the level of bad faith or undue delay. As a result, we conclude that International Paper fails to allege facts sufficient to constitute a claim that PacifiCorp acted in bad faith, with undue delay, or otherwise in contravention of Commission statutes or orders.

PacifiCorp appears to have intended to comply with our rules and its own Schedule requiring that the utility update its pricing to reflect current avoided costs. See OAR 860-029-0005(3) (requiring a utility to inform QFs that avoided costs are subject to change pursuant to the utility's submission of draft avoided cost information to the Commission); Schedule 38.B.5(c). The timeline of negotiations weighs against a finding of undue delay: on August 19, International Paper requested an executed agreement; on August 20, Commission Staff recommended allowing PacifiCorp's new rates to take effect; on August 21, PacifiCorp provided its third draft PPA with prices suspended pending the Commission's order in Advice No. 09-012; and on September 9, PacifiCorp's new rates went into effect. International Paper also fails to allege facts demonstrating that both parties were in full agreement, and that PacifiCorp therefore failed in its duty to prepare and forward an executable PPA within 15 business days of the agreement. PacifiCorp's second draft PPA was a draft, not a binding offer, and International Paper does not allege that the draft was accompanied by language from PacifiCorp indicating that it intended the draft to be binding to both parties.

3. Failure to Provide Comprehensive and Specific Pricing Terms

a. Parties' Positions

International Paper states that Schedule 38 obligates PacifiCorp to provide a draft PPA containing "a comprehensive set of proposed terms and conditions, including specific pricing

for purchases,” and that by removing specific pricing terms from Draft III, PacifiCorp breached its negotiation duty.

PacifiCorp states that it withdrew pricing terms while there was uncertainty regarding what terms would apply to the parties’ final agreement.

b. Resolution

We find that International Paper’s allegations fail to support a claim that PacifiCorp failed to meet Commission or Schedule 38 rules. PacifiCorp is obligated by Schedule 38 and by Commission rules to update its proposals with current prices. It withdrew pricing terms after Commission Staff’s report recommended issuing new rates within a week. Given the circumstances, we find no wrongdoing by PacifiCorp.

4. *Illegal Modification of Pricing Terms*

a. Parties’ Positions

International Paper states that the Commission requires PacifiCorp’s avoided costs to be based upon yearly avoided costs, as approved by the Commission in Schedule 37. International Paper notes that per Order 07-360, PacifiCorp must first seek approval for any other modifications to Schedule 37 rates, and argues that PacifiCorp had not sought such approval prior to the time the parties agreed to a PPA. International Paper states that offering unknown future rates is not an allowed rate modification type under federal or Oregon law. International Paper states that under Oregon law, a utility has an obligation to purchase power from a QF as soon as a QF obligates itself to provide power, and the rate for purchase must be calculated according to a utility’s actual avoided costs on the date an obligation is incurred. As International Paper satisfied all procedural negotiation obligations, the purchase rate for the parties’ PPA must be calculated at the time International Paper agreed to Draft II.

PacifiCorp argues that no LEO was triggered in this case, and that it withdrew pricing terms in response to Commission Staff’s report recommending that new rates be approved within a week.

b. Resolution

We find that International Paper fails to state a claim of illegal price modification. PacifiCorp did not withdraw its previous prices in order to unilaterally impose new, unapproved rates. Instead, it withdrew its Schedule 37 prices shortly after Commission Staff issued a report recommending approval of new rates on a very short timeline. Again, we do not foreclose QFs from raising the issue of timeliness or unilateral withdrawal of pricing terms in the future. In this case, however, we find no wrongdoing.

5. *Conclusion*

Assuming the truth of all allegations in International Paper's Complaint, and giving International Paper the benefit of all favorable inferences that may be drawn from those allegations, we determine that International Paper's complaint fails to state ultimate facts sufficient to constitute any claim for relief. International Paper's Complaint will be dismissed without prejudice. If International Paper has additional facts demonstrating bad faith, undue delay, or other wrongdoing on PacifiCorp's part, it may file an amended complaint with new allegations.

Our determination is limited to the facts as alleged by International Paper. We do not foreclose QFs from arguing the issue of timeliness in the future. PacifiCorp filed Advice No. 09-012 on July 9, but the Company apparently made no reference to that filing in its negotiations with International Paper until August 21. In the future, PacifiCorp should take care to advise QFs of the status of its avoided costs, including its submission of advice filings requesting that the Commission change its rates. *See* OAR 860-029-0005(3), OAR 860-029-0080.

D. **Procedural Issues**

Because International Paper's underlying Complaint is dismissed, we also dismiss as moot International Paper's motion for waiver of the 60-day waiting provision set forth in OAR 860-029-0100(5)(a) and PacifiCorp's motion for extension of time to answer International Paper's Complaint.

International Paper also filed a motion to strike the direct testimony PacifiCorp filed in support of its reply brief. The testimony addresses factual disputes between the parties about the course of their negotiations. Because this matter comes before us on a motion to dismiss, we assume the truth of all allegations in the briefing of the non-moving party, International Paper. We do not rely on PacifiCorp's testimony in reaching our decision to dismiss International Paper's complaint. The motion to strike is denied.

Finally, we note that the parties submitted informal letters concerning the announced closure of the plant for which International Paper requests a PPA. International Paper states that it does not intend to withdraw its complaint. We did not consider the plant's possible closure in this order, and instead examined the parties' briefs on the merits.

IV. **ORDER**

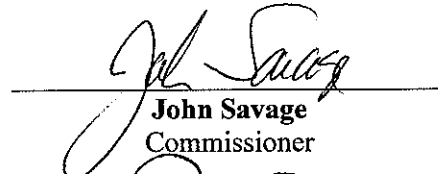
IT IS ORDERED that:

1. PacifiCorp, dba Pacific Power's Motion to Dismiss International Paper Company's Complaint is granted; and Motion for Extension of Time to Answer is dismissed as moot.

2. International Paper Company's Complaint is dismissed without prejudice; Motions for Waiver of OAR 860-029-0100 (5)(a) and Leave to file Complaint are dismissed as moot; and Expedited Motion to Strike Direct Testimony of Jon Schroeder or Alternately to Accept International Paper's Complaint and Direct PacifiCorp to File an Answer, is denied.

Made, entered, and effective NOV 04 2009.


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 by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.