BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING

IN THE MATTER OF THE POWER PURCHASE AGREEMENT BETWEEN PACIFICORP AND PIONEER WIND PARK 1, LLC	)))	Docket No. 20000-450-EK-14 (Record No. 13843)

ORDER DENYING INTERVENTION
(Issued December 1, 2014)

This matter is before the Wyoming Public Service Commission (Commission) upon Northern Laramie Range Alliance's (NLRA) *Petition For Leave to Intervene and Request for Hearing* (*Petition*), Pioneer Wind Park I, LLC's (Pioneer) *Response to Northern Laramie Range Alliance's Petition for Leave to Intervene and Request for Hearing* (*Pioneer Response*) and Rocky Mountain Power's (RMP or the Company) *Response to Northern Laramie Range Alliance's Petition for Leave to Intervene and Request for Hearing* (*RMP Response*) filed in the above-docketed matter pursuant to Section 113 of the Commission's Rules.

The Commission, having considered the *Petition*, *Pioneer Response*, *RMP Response*, the arguments of counsel, its files regarding RMP, applicable Wyoming utility law, and being otherwise fully advised in the premises, FINDS AND CONCLUDES:

1. On April 17, 2014, RMP filed its *Purchase Power Agreement Contract Filing* requesting the Commission, in accordance with its statutory authority, [i] accept the Power Purchase Agreement (the Pioneer PPA) between PacifiCorp and Pioneer for the purchase of electricity and associated environmental attributes in Wyoming, and [ii] protect the Pioneer PPA as a confidential document. RMP's filing included a *Petition for Confidential Treatment* of the Pioneer PPA pursuant to Section 120 of the Commission's Rules and Regulations. RMP stated the Pioneer PPA was filed pursuant to W.S. § 37-3-111, and Section 218 of the Commission's Rules and Regulations.

2. In its filing, RMP stated that Pioneer intends to operate Pioneer Wind Park I as a Qualifying Facility (QF) under the terms of the Public Utility Regulatory Policies Act of 1978 (PURPA). PURPA requires public utilities to purchase energy and/or capacity provided by QFs at the purchasing utility's avoided cost. PURPA delegates to states the authority to adopt and implement an avoided cost methodology the utility must use when calculating the rate at which it will purchase power from a QF. Those rates must be just and reasonable, in the public interest, and must not exceed the cost of electricity for incremental power that the utility would have purchased or generated itself. The Commission adopted Rule 317 to implement PURPA. RMP's Tariff Schedule 38, Avoided Cost Purchases from Non-Standard Qualifying Facilities, established the process and procedures under which RMP operates in the context of specific QF PPAs. RMP stated in the filing that it was not seeking a determination at this time of the rate making considerations related to the PPA, but would address the consideration of cost recovery related to the PPA in an appropriate future rate case application.

3. On May 1, 2014, NLRA filed its *Petition* asserting, *inter alia,* it is a citizens' group with more than 900 members.[1] NLRA states a large majority of its members are residents and citizens of Converse, Albany and Natrona Counties in central Wyoming. The residents of these counties are within the service area of, and purchase electricity from, RMP. In support of its *Petition*, NLRA asserted both PURPA and Wyoming statute require the Commission to review the terms of PPAs offered QFs prior to accepting the contract for filing to ensure the PPA complies with the ratepayer indifference standard. NLRA argued that the Commission must follow through on its federal mandate to implement PURPA under state authority to ensure the rates offered the QF in a PPA meet PURPA's standard for holding ratepayers harmless, prior to accepting it for filing. NLRA further stated that if the PPA is accepted without review by the Commission for compliance with PURPA's standard, its members could be directly affected by an increase in electric rates if the contract provisions are higher than the true, incremental avoided costs. NLRA asserted in its *Petition* that it has a direct interest in this matter that cannot be adequately protected by any other parties, as contemplated by Commission Rule 113. NLRA further stated its intervention was timely and would not unduly broaden the issues in this matter.

4. On May 15, 2014, Pioneer filed its *Response* to NLRA's *Petition.* In support of its *Response,* it argued that the Commission's practice is to accept PPAs for filing while expressly stating its acceptance of a PPA does not constitute the Commission's determination of any utility rate making issues whatsoever, which issues are expressly reserved for decision until they are presented to the Commission in appropriate proceedings. Pioneer stated the Commission's practice is consistent with the requirements of Commission Rule 218 and W.S. § 37-3-111 and is consistent with RMP's statement in its filing that it was not seeking a determination at this time of the rate making considerations related to the PPA. Instead, RMP stated it would address the consideration of cost recovery related to the PPA in an appropriate future rate case application. Pioneer urged the Commission to continue this practice stating it would make NLRA's *Petition* moot, but would preserve NLRA's argument until the appropriate proceeding determined whether to include the costs associated with the PPA in rates. Pioneer further argued that NLRA's members would not be directly affected by this approach because any decision regarding ratemaking treatment would not occur until those issues were brought forth in a future ratemaking proceeding.

5. On May 16, 2014, RMP filed its *Response* stating it did not oppose NLRA's *Petition* or object to its participation in the matter, but it does not believe that the Commission needs assistance from the Company to properly interpret Wyoming statues and its own Rules.

6. NLRA's *Petition* and *Objection*, Pioneer's *Response*, and RMP's *Petition for Confidential Treatment* and its *Response,* came before the Commission for consideration pursuant to due notice at its May 20, 2014, open meeting. Paul Clements and Daniel Solander appeared and participated by telephone on behalf of RMP. Crystal McDonough appeared in person for NLRA. Thor Nelson and Emanuel Cocian appeared by telephone on behalf of Pioneer. McDonough summarized and reiterated the interests of NLRA as set forth in its *Petition*. NLRA requested the Commission grant its *Petition,* arguing to deny it would adversely affect NLRA

[1] Also on May 1, 2014, NLRA filed an *Objection to Petition for Confidential Treatment (Objection).* The *Objection* was tabled on May 20, 2014 pending additional filings by the parties and determination by the Commission. On September 3, 2014, the Commission issued its *Order Granting in Part and Denying in Part Confidential Treatment.*

because once a PPA is accepted for filing, the rate that is paid to the QF is set and cannot be undone regardless of whether that rate complies with PURPA QF requirements.

7. When asked whether NLRA would characterize RMP's contract filing as either an application, petition, formal complaint or motion as set out in Commission Rule 113(a) for the purposes of granting intervention, NLRA stated that those items require the Commission to act and in this instance, the Commission would be acting by accepting the filing which will impact NLRA rate payers. NLRA further argued that because the rates are ultimately passed on to ratepayers, ratepayers could be considered a *de facto* party to the contract between the QF and the Company, in which they have a vested interest, and therefore, should be allowed to intervene. When asked whether NLRA was asserting that Commission Rule 317 was not properly promulgated under PURPA, NLRA stated it was not, but believes the Commission has broader authority delegated from PURPA than just that stated in its statutes and Rules.

8. Regarding NLRA's *Petition*, Solander stated that RMP did not oppose the intervention request. However, he noted this was a contract filing and not an application; accordingly, RMP does not request approval of the PPA from the Commission for its contract filing. Nelson argued against the *Petition* on behalf of Pioneer and stated that the PPA was being treated similarly to the Commission's regular treatment of contract filings. Pioneer agreed with RMP that this was not an application for which RMP was seeking Commission approval. Nelson stated that the issues NLRA raises are fully preserved by the processes the Commission has in place and can be raised in an appropriate proceeding. Pioneer argued that NLRA was asking for a departure from the historical treatment of contracts that are filed with the Commission and the Commission should act using its standard procedure.

9. W.S. § 37-3-111 provides:

> Every public utility shall file with the commission copies of contracts, agreements or arrangements to which it may be a party, as the commission may designate. Every public utility shall, whenever required by the commission, file with the commission statements of passes, tickets, mileage books or franks, issued by the public utility, free or at rates lower than those open to the public in general, or of other authorization of service free or at reduced rates, these statements to cover the periods of time and classes of service, and to include information connected with the issuance thereof, as the commission may prescribe.

10. W.S. § 16-3-101(a) of the Wyoming Administrative Procedure Act provides in pertinent part:

> (i) "Agency" means any authority, bureau, board, commission, department, division, officer or employee of the state, a county, city or town or other political subdivision for the state, except the governing body of a city or town, the state legislature, the University of Wyoming and the judiciary;

(ii) "Contested Case" means a proceeding including but not restricted to ratemaking, price fixing and licensing, in which legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing but excludes designations under W.S. 9-2-1022(h)(i).

11. Commission Rule § 113(a) governs intervention. It provides:

Any person or entity affected by any application, petition, formal complaint or motion filed before the Commission and who seeks to become an intervenor in any proceedings involving the same, shall petition for leave to intervene in such proceedings prior to or at a time set by the Commission in its notice of hearing, but not thereafter except for good cause shown. The petition shall set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceedings; and, if affirmative relief is sought, the same shall conform to the requirements for a formal application, complaint or petition.

12. Commission Rule § 218 governs the filing of contracts. It provides:

Every utility shall file with the Commission one copy of all special contracts which govern the sale by the utility of public utility service or the purchase by the utility of a utility commodity for resale. If the utility has numerous sale or purchase contracts which are in all essentials similar, the utility may request to file a selected one or a few in lieu of filing all such contracts.

13. Commission Rule § 317. Regulations Applicable to Arrangements Between Electric Utilities and Qualifying Cogeneration and Small Power Production Facilities Under Sections 201 and 210 of the Public Utilities Regulatory Policies Act of 1978, PL 95-617 (PURPA), amended. Rule § 317(c) provides:

(c) Filing of purchase and sale rates and contracts.

(i) All utility rates, regulations, tariffs and contracts covering the sales and purchases between qualifying facilities and electric utilities shall be filed with the Commission pursuant to the requirements of Chapter I.

(ii) Nothing in these rules:

(A) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by these rules; or

(B) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.

14. Commission Rule Section 113(a) provides that any person or entity affected by any ***application, petition, formal complaint or motion*** filed before the Commission may petition the Commission for leave to intervene. However, RMP's PPA filing is a contract filing.[2] It is not "an application, petition, formal complaint or motion filed before the Commission" for which NLRA is provided a right or opportunity to intervene. Nor is the filing of a PPA a "contested case" as defined by Wyoming's Administrative Procedure Act for which a trial-type hearing must be provided.

15. Having concluded that filing of the Pioneer PPA by RMP did not initiate a contested case proceeding and that there is no right or opportunity for NLRA to intervene in this limited-purpose contract filing under applicable statutes or rules, it is not necessary to address NLRA's argument that both PURPA and Wyoming statue require that the Commission review the terms of PPAs offered QFs to ensure the PPA complies with the ratepayer standard for holding ratepayers harmless prior to accepting it for filing. Nevertheless, we do so for the benefit of NLRA and others who may be interested in understanding the treatment of QF PPAs filed pursuant to Section 218.

16. The Commission disagrees that the process urged by NLRA is required by either Wyoming or federal law.[3] In its *Order Granting Petition for Declaratory Judgment in Part*, 145 FERC ¶ 61,215 Docket No. EL14-1-000 (Issued December 16, 2013), resolving a dispute between NLRA and Pioneer (Wasatch Wind), *(Declaratory Judgment Order)* F.E.R.C. held at ¶ 41:

> We note that it is the state's responsibility in the first instance to determine an avoided cost rate consistent with the Commission's PURPA rgulations.[80]" FN 80: "*Council of the City of New Orleans, Louisiana*, 145 FERC ¶ 61,057, at P 30

[2]Contracts are not *approved* in proceedings initiated by filings required by Section 218. These are, rather, notice filings that inform the Commission and other interested parties of the contractual relationships formed by utilities. Such filings may precipitate additional inquiry by the Commission and might form the basis of a complaint under Section 114 of the Rules. Rate proceedings, however, provide the venue for consideration of costs incurred by utilities, including costs associated with QF PPAs. In rate proceedings, all imprudently incurred costs are subject to disallowance. Payment for QF produced power at rates in excess of the avoided cost, absent extraordinary justification, would expose the utility to a finding of imprudence.

[3] The U.S. Supreme Court held in *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982), that the challenged PURPA provisions do not impinge state sovereignty in violation of the Tenth Amendment. It determined insofar as § 210 authorizes the FERC to exempt qualified power facilities from state laws and regulations, it does nothing more than preempt conflicting state enactments in the traditional way. *Id.* at 758-771. With respect to § 210's requirement that state authorities implement FERC's rules, the statute and its implementing regulations simply require state commissions to settle disputes arising under the statute, the very type of adjudicatory activity customarily engaged in by the Mississippi Public Service Commission. *Id.* at 759-761. The "mandatory consideration" provisions of Titles I and III do not involve the compelled exercise of Mississippi's sovereign powers or set a mandatory agenda to be considered in all events by state legislative or administrative decision makers, but simply establish requirements for continued state activity in an otherwise preemptible field. *Id.* at 761-770. Similarly, the procedural requirements of Titles I and III do not compel the exercise of a State's sovereign power. If Congress may require a state administrative body to consider proposed federal regulations as a condition to its continued involvement in a preemptible field, it may require the use of certain procedural minima during that body's deliberations on the subject. "The procedural requirements obviously do not compel the exercise of the State's sovereign powers, and do not purport to set standards to be followed in all areas of the state commission's endeavors." *Id.* at 770-771.

(2013); *see Ca. Public Util. Comm'n,* 133 FERC ¶ 61,059, at P 24 (2010)(explaining that the determinations that a state commission makes to implement the rate provisions of Section 210 of PURPA are by their nature fact-specific and include consideration of many factors, that the Commission is reluctant to second guess a state commission's determinations, and therefore the Commission's regulations provide state commissions with guidelines on factors to take into account, to the extent practicable, in determining a utility's avoided cost of acquiring the next unit of generation)(citing *Am. REF-FUEL Co. of Hempstead,* 47 FERC ¶ 61,161, at 61,533 (1989); *Signal Shasta,* 41 FERC 61,712 (1993)); *see also Policy Statement Regarding the Commission's Enforcement Role under Section 210 of the Public Utility Regulatory Policies Act of 1978,* 23 FERC ¶ 61,304 at 61,646 (1983)(The Commission's regulations allow the States...a wide degree of latitude in establishing an implementation plan. Such latitude is necessary in order for implementation to accommodate local conditions and concerns, so long as the final plan is consistent with statutory requirements."

17. The Commission is in compliance with PURPA having established its implementation plan through proper promulgation of Section 317 of the Rules. Section 317 establishes the process by which the Commission determines the avoided cost rates for QF's. The Commission previously approved RMP's Schedule 38 which provides contract and pricing protocols for the Company's purchases of energy and/or capacity from independently owned generating facilities larger than 10 MW in nameplate capacity that qualify for the "mandatory purchase" provision of PURPA. Additionally, following a contested case proceeding in which NLRA participated, and for which portions were addressed by F.E.R.C. in its *Declaratory Judgment Order,* the Commission recently approved the Parties' stipulation agreeing that RMP's Schedule 38 should be amended to allow the Company to clearly specify that it may offer a dual pricing stream. One stream would take effect immediately and continue so long as transmission constraints exist; the second stream would take effect when and if additional transmission is "energized and placed into service." (*See* Docket No. 20000-435-EA-13, *Order* issued August 18, 2014).

18. Section 317 outlines the PPA contract filing process under subsection (c). In accepting a PPA for filing, the Commission explicitly disclaims any ratemaking implications, preserving those issues for determination for a future rate proceeding, at which time all issues related to whether avoided costs have been properly determined and are appropriately charged to ratepayers can be considered and disallowed if imprudent or not in the public interest.

19. NLRA cited the examples of Utah and Idaho where those states' Commissions examine PPAs from QFs for compliance with PURPA before being accepted for filing.[4] NLRA stated that the Utah Commission reviews these contracts under the Utah Electric Service Schedule 38 for QFs greater than 1,000 kW and for Small Power Production facilities greater than 3,000 kW. Idaho, much like Wyoming, does not have state statutory authority or a tariff which states the process for QF PPA reviews, however the Idaho Commission relies on the authority granted under

[4] Utah has a significantly different statutory and regulatory structure than Wyoming. It provides for review and approval or rejection of virtually all utility contracts, including PPA's.

PURPA as well as the U.S. Supreme Court in *F.E.R.C. v. Mississippi,* 456 U.S. 742 (1982) to engage in a PPA review and approval process, which process was determined lawful by the Idaho Supreme Court. NLRA referenced *F.E.R.C. v. Mississippi* as support for the proposition that the Commission must review the PPA for compliance with the ratepayer standard prior to accepting the PPA for filing. We note that the flexibility and discretion provided to the states in the implementation of PURPA virtually guarantees variety in the procedures adopted by individual states. These differences do not equate to inadequacy of the process employed by the Commission, nor require the Commission to mimic proceedings conducted in other states.

20. The process in place to determine the avoided cost rate and its ratepayer impact is consistent with Wyoming's statutes and rules, PURPA's regulations, the cases interpreting them, and with the public interest. Given that RMP's filing is simply a contract filing and the Commission's acceptance of a PPA for filing does not impact customer rates, the Commission finds NLRA has not stated grounds sufficient to intervene at this time. NLRA's interest in seeing that its members are indifferent to the rates paid for power produced by Pioneer under the PPA as compared to alternative production of power, will be fully protected by the contested case procedure available in ratemaking proceedings. Therefore, based on the representations of RMP, Pioneer, and NLRA, the *Petition*, Pioneer's *Response* and RMP's *Response*, the Commission concludes that NLRA's *Petition* should be denied.

IT IS THEREFORE ORDERED:

1. Pursuant to open meeting action taken on May 20, 2014, Northern Laramie Range Alliance's *Petition for Leave to Intervene and Request for Hearing* is denied.

2. This *Order* is effective immediately.

MADE and ENTERED at Cheyenne, Wyoming, on December 1, 2014.

PUBLIC SERVICE COMMISSION OF WYOMING

ALAN B. MINIER, Chairman

WILLIAM F. RUSSELL, Deputy Chairman

(SEAL)

Attest:

LORI L. BRAND, Assistant Secretary