- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of Rocky Mountain Power for Modification of Contract Term of PURPA Power Purchase Agreements with Qualifying Facilities	DOCKET NO. 15-035-53 ORDER

ISSUED: January 7, 2016

1. PROCEDURAL HISTORY

On May 11, 2015, PacifiCorp, doing business as Rocky Mountain Power ("PacifiCorp"), filed an application with the Commission, requesting approval to modify the maximum contract term for prospective power purchase agreements ("PPAs") with qualifying facilities ("QFs") as that term is used in the Public Utility Regulatory Policies Act of 1978 ("PURPA"). The Application asks the Commission to reduce the maximum term of a QF's PPA ("QF PPA") from 20 to three years.

On May 19, 2015, the Commission held a scheduling conference and issued a Scheduling Order and Notice of Hearing that same date. The hearing was initially set for November 4, 2015 but was subsequently changed to November 12, 2015 by order of the Commission dated August 26, 2015. The following parties sought and were granted intervention in this docket: SunEdison; Sierra Club; Utah Clean Energy ("UCE"); the Renewable Energy Coalition ("REC"); the Rocky Mountain Coalition for Renewable Energy ("RMCRE"); Sustainable Power Group; Summit Wind Power, LLC; Sage Grouse Energy Project, LLC and Ellis-Hall Consultants, LLC.

The Commission received pre-hearing direct written testimony from PacifiCorp, the Division of Public Utilities ("Division"), the Office of Consumer Services ("Office"), REC, RMCRE, Sierra Club and UCE. PacifiCorp, the Division, the Office, RMCRE and REC filed

pre-hearing written rebuttal testimony. Finally, PacifiCorp, the Division, the Office, RMCRE and UCE filed pre-hearing written surrebuttal testimony.

The Commission held a hearing on November 12, 2015 at which the following parties appeared: PacifiCorp, the Division, the Office, UCE, RMCRE, REC and Sierra Club. At the conclusion of the hearing, several parties expressed interest in filing post-hearing briefs, which the Commission allowed and required to be filed by December 9, 2015. The Commission subsequently received timely filed post-hearing briefs from PacifiCorp, the Office, the Division, UCE, Sierra Club, RMCRE and REC.

2. BACKGROUND

The Commission administers PURPA and a similar Utah statute that require PacifiCorp to purchase electricity from QFs. *See* Utah Code Ann. § 54-12-2 [hereafter we generally refer to Utah Code Ann. § 54-12-1, *et seq.* as "Chapter 12"]; 16 U.S.C. § 824a-3. Under these laws, PacifiCorp is required to purchase power from QFs at rates equivalent to PacifiCorp's avoided cost. *See* 16 U.S.C. § 824a-3 (using the term "incremental cost" synonymously with what is more commonly termed "avoided cost"); Utah Code Ann. 54-12-2(2). Additionally, federal regulations implementing PURPA offer QFs the option of providing power to PacifiCorp "over a specified term" at prices based on avoided costs calculated "at the time the obligation [to deliver the power] is incurred."[1] 18 C.F.R. § 292-304(d)(2)(ii).

Under existing Commission orders, QFs may require PacifiCorp to enter into 20-year contracts with fixed pricing based on avoided costs calculated at the time of contracting. (*See,*

[1] QFs also have the option of receiving a price based on avoided costs "at the time of delivery." 18 C.F.R. § 292-304(d)(2)(i).

e.g., Report and Order dated October 31, 2005 at 29, *In the Matter of the Application of PacifiCorp for Approval of an IRP-Based Avoided Cost Methodology for QF Projects Larger than One Megawatt*, Docket No. 03-035-14.) In its Application, PacifiCorp asks the Commission to shorten the maximum duration of a QF PPA to three years.

We do not attempt here to identify all of the arguments and evidence the parties have offered in this docket. For context, however, we briefly summarize the positions of those parties who support and oppose the Application.

2.1. PacifiCorp Maintains Its Liability under QF PPAs Has Increased Dramatically Since the Commission Approved 20-Year Contracts and that Continuing to Force PacifiCorp to Enter 20-Year QF PPAs is Inconsistent with its Resource Planning and Acquisition Policies and Practices and Will Subject Ratepayers to Undue Fixed-Price Risk.

PacifiCorp argues that continuing to require it to enter 20-year, fixed-price contracts with QFs unnecessarily subjects ratepayers to significant market risk. (*See, e.g.,* Application at 13.) PacifiCorp represents it "is seeking this modification [in the contract term] at this time as a result of a significant increase in PURPA contract requests received in 2014 and 2015[,] activity that [PacifiCorp] believes will harm customers unless" the maximum contract term is shortened. (*Id.*)

PacifiCorp's witness, Paul Clements, testified that PacifiCorp "had 1,041 megawatts of existing PURPA contracts in Utah and 2,253 megawatts of proposed QF contracts in Utah," totaling "3,294 megawatts of existing and potential Utah QF contracts." (Hr'g Tr. at 14:8-12.) Mr. Clements represented PacifiCorp's average Utah retail load in 2014 was 2,959 megawatts. (*Id.* at 14:13.) Mr. Clements further testified that, system-wide, PacifiCorp was obligated to make $2.9 billion in payments under QF PPAs and that Utah customers are projected to pay

$73.3 million under QF PPAs in 2015. (*Id.* at 14:23-15:2.) Mr. Clements emphasized that payments under QF PPAs are “a major factor in customers’ rates.” (*Id.* at 15:3-4.)

Mr. Clements further testified that, over the next 10 years, PacifiCorp is under contract to purchase 44.6 million megawatt hours (“MWhs”) from QFs at an average price of $64.13 per MWh and that the average forward price curve for the Mid-Columbia wholesale power market trading hub over the same ten years is $26.02 per MWh lower, at $38.11. (*Id.* at 18:20-19:2.) The difference amounts to nearly $1.2 billion over the ten-year period. (*Id.* at 19:3.)

PacifiCorp acknowledges the market could move in the opposite direction, resulting in fixed QF PPA prices that are ultimately below market but contends this observation is irrelevant because, in either event, customers are being forced to bear fixed-price risk to which they would not otherwise be exposed. (*See id.* at 19:13.) PacifiCorp argues, by analogy, that a series of workshops in 2011 and 2012 led to the Commission’s adoption of a hedging policy that generally precludes PacifiCorp from entering contracts to hedge natural gas and electricity costs out more than 36 months. (*Id.* at 15:8-25.)[2] PacifiCorp asserts that requiring it to enter into QF PPAs that “lock in” electricity prices for a period of 20 years is inconsistent with the hedging policy and with the rationale underlying the policy.

PacifiCorp also argues that 20-year QF PPA terms are inconsistent with its resource acquisition policies and practices and are not aligned with its Integrated Resource Plan (“IRP”) and planning cycle. Mr. Clements explained PacifiCorp “does [not] enter into a long-term transaction unless there is a need identified in the IRP” and notes its “IRP action plan is focused

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[2] Mr. Clements acknowledged the hedging policy did not preclude PacifiCorp from entering into long-term power purchases but explained that such contracts require additional stakeholder review. (Hr’g Tr. at 74:17-20.)

only on the next two to four years" because "planning uncertainties grow as you get further out in time." (*Id.* at 20:17-23.) Additionally, PacifiCorp emphasizes it "utilizes a rigorous request for proposal or RFP process whenever it acquires a long-term resource." (*Id.* at 19:21-24, 20:5-7.) By contrast, PacifiCorp does not enter long-term QF PPAs based on any projected need for the power nor are the contracts vetted through the process applicable to other long-term resource acquisitions because PacifiCorp is simply required to purchase the power. (*See id.* at 20:9-10.)

2.2. The Division Generally Shares PacifiCorp's Concerns Regarding 20-Year QF PPAs and Advocates Reducing the Maximum Contract Term to Five Years.

The Division shares PacifiCorp's concern about requiring the utility to purchase limitless quantities of intermittent QF power at prices fixed for 20 years. (*See* C. Peterson Direct Test. at 4:74-5:91.) The Division notes the large spike in existing and proposed QF PPAs and is concerned such a large volume of unplanned, potentially unnecessary QF power could require PacifiCorp "to idle much of its existing fleet during certain times of the day, keep some of it running as back-up and balancing reserves for the intermittent wind and solar resources, and sell excess power into the wholesale markets, possibly at unfavorable prices." (*Id.* at 5:85-90.) The Division concludes such a scenario would not likely "create an efficiently operating electric service system." (*Id.* at 5:90-91.) "The Division does not believe that federal and state policies contemplated the occurrence of unrestrained limitless development of renewable resources." (Hr'g Tr. at 118:25-119:3.)

The Division argues that of the parties opposed to the Application, "none have proposed an alternative solution to the potential problems faced by [PacifiCorp] other than to suggest that low avoided cost pricing would eventually discourage developers." (*Id.* at 118:3-6.) The Division

observes that low avoided cost prices should ultimately create a ceiling on the amount of QF power offered to PacifiCorp but represents "it is unknown how much potential capacity might be realized before low prices completely discourage the creation of new supply." (C. Peterson Direct Test. at 5:93-96.) The Division explains that price is not the only variable driving supply: the existence of substantial government subsidies and the downward trending cost of new QF plants also affect supply. (*Id.* at 5:98-6:101.)

The Division disagrees with those parties who assert QF developer financing is a valid consideration in setting a minimum contract term. The Division asserts it is "unaware of any statute or regulation that requires that the Commission ensure that QF projects are economically viable." (*Id.* at 11:213-215.) However, the "Division does recognize that the 20-year term is a benefit to developers and that reducing that benefit will likely reduce development." (Hr'g Tr. at 119:23-25.)

The "Division recommends that the Commission adopt a five-year contract term limit for QFs" but allow parties to propose a longer term if they can show it "is in the public interest under the specific circumstances." (C. Peterson Direct Test. at 20:411-414.) The Division recommends that energy prices be calculated and fixed as they are presently but only for a five-year term. (*Id.* at 20:418-419.) The Division proposes capacity payments be based on "the assumption that the QF will renew its contract through twenty years of service." (*Id.* at 20:417-418.) The Division suggests "[t]his proposal could be viewed as a twenty-year contract with a price reopener every five years, but giving the QF the option every five years to seek higher prices elsewhere." (*Id.* at 20:421-422.) The Division notes that it has generally been opposed to

long-term non-QF PPAs because it believes contracts longer than five years are not in the public interest. (C. Peterson Direct Test. at 16:331-17:342.)

2.3. Though the Office Shares Numerous Concerns Raised by PacifiCorp and the Division, the Office Recommends Denying the Application on Legal and Policy Grounds.

The Office shares PacifiCorp's concern about "[t]he risk to ratepayers associated with carrying long-term fixed-price contracts for power" and concedes "[i]t is uncertain whether a 20-year commitment to take all the power these QFs generate and to pay the currently calculated avoided cost prices will end up being a good outcome for ratepayers." (B. Vastag Direct Test. at 2:23-27.) The Office recognizes that "[r]atepayers, not [PacifiCorp], not the QF developer, not the QF financier, carry this risk." (*Id.* at 2:27-28.) The Office also shares PacifiCorp's concern relating to the "disconnect" between "PacifiCorp's system-wide resource planning" and the "significant amount of new long-term QF resources" which "are not being evaluated on a system basis through the [IRP] process." (*Id.* at 2:29-32.) Additionally, the Office acknowledges that "unlike a company-owned resource, QFs cannot be economically dispatched to take advantage of periods when low-priced market purchases of power are available." (Hr'g Tr. at 179:1-4.) The Office also concedes that "forecast error is an issue" with respect to the pricing in a 20-year contract but notes that other issues also exist that impact the accuracy of avoided cost calculations. (*Id.* at 182:22-25.)

Nevertheless, the Office opposes the Application on legal and policy grounds. In its Post-Hearing Brief, the Office argues that FERC regulations require that QF PPA terms be "long enough to insure investor certainty." (Office Post-Hearing Br. at 5.) Additionally, the Office challenges the notion that "ratepayers must be indifferent to any risks associated with the term of

a contract," arguing no decision from the Commission or FERC supports the doctrine of ratepayer indifference outside the context of avoided cost pricing. (*Id.* at 2.) In his submitted testimony, the Office's witness Bela Vastag more generally represented the Office is "concerned that this extreme change [in contract duration] may discourage all new QF development," which he asserts "would be contrary to Federal and State laws [that] were enacted specifically to encourage the development of small power producers or QFs." (B. Vastag Direct Test. at 1:13-16 (emphasis removed).)

In light of its legal conclusion that the contract term cannot be shortened, the Office maintains the best remedy available to alleviate the problems associated with a 20-year contract term is to ensure avoided cost modeling is as accurate as possible. (*See, e.g.* B. Vastag Surrebuttal Test. at 2:30-33.)

2.4. Four Intervenors Presented Testimony and Opposed the Application.

2.4.1. RMCRE

RMCRE is an "unincorporated, informal trade group coalition that was formed for the limited purpose of opposing the efforts of [PacifiCorp] in Utah and Wyoming to limit the maximum term of QF power purchase agreements to three years." (*See, e.g.,* H. Isern Direct Test. at 1:14-18.) RMCRE presented three witnesses. First, Kevin Higgins, RMCRE's expert witness, agreed price risk exists with respect to long-term QF PPAs but asserts "there is price risk associated with the acquisition of any long-term resource, including utility resources." (K. Higgins Direct Test. at 8:165-9:167.) Mr. Higgins argues it is not surprising that the average price under existing QF PPAs is higher than the Mid-Columbia average 10-year forward price because "market prices are currently at low levels." (*Id.*at 9:175-179.) Mr. Higgins concedes that

"[v]iewed in isolation, long-term fixed price QF contracts might appear to be inconsistent with [PacifiCorp's] financial hedging practices, which are generally limited to 36 months." (*Id.* at 7:130-132.) Mr. Higgins asserts, however, "the more apt comparison is not between [PacifiCorp's] hedging practices and long-term QF contracts, but between long-term QF contracts and [PacifiCorp's] recovery of its generation investments in rate base." (*Id.* at 7:140-143.) Mr. Higgins asserts that "the Company's own generation fleet would not fare well" when compared against the Mid-Columbia ten-year forward price. (*Id.* at 9:185-10:186.)

Next, Bryan Harris, senior development manager for SunEdison, testified "[i]n nearly all cases of which [he was] aware, project financing of QF projects has involved PPAs with much longer terms [than three years], typically twenty years." (B. Harris Direct Test. at 2:43-44.) Mr. Harris represented that "[i]n [his] opinion and experience, a three-year PPA term would almost certainly prevent project financing for almost any new renewable energy project" and "[a]lmost any term length of less than twenty years would make project financing of renewable energy projects very difficult." (*Id.* at 3:48-51.) Mr. Harris testified at hearing, however, that in an environment of higher avoided cost rates, a shorter contract length would be financeable but represented the rates "would need to be significantly higher in order to meet a three-year or a five-year contract term." (Hr'g Tr. at 241:21-242:4.)

Last, Hans Isern, a senior vice president of Sustainable Power Group ("sPower"), which is a developer, financier, owner and operator of QFs, testified that "[i]n virtually all cases of which [he was] aware, project financing of new [QF] projects requires PPAs with terms of twenty years." (H. Isern Direct Test. at 1:6-10; 3:50-51.) Mr. Isern testified sPower has successfully financed projects with 15-year PPAs and that these were in markets with either

additional state tax incentives or higher avoided cost prices. (*Id.* at 3:50-55; Hr'g Tr. at 261:6-22.)

As for its legal argument, RMCRE emphasizes Chapter 12's "Legislative Policy," declaring "it is desirable and necessary to encourage independent energy producers to competitively develop sources of electric energy not otherwise available to Utah … and to remove unnecessary barriers to energy transactions involving independent energy producers and electrical corporations." (*See, e.g.,* RMCRE Post-Hr'g Br. at 2 (quoting Utah Code Ann. § 54-12-1).) RMCRE asserts Utah's Legislative Policy "cannot be reconciled" with PacifiCorp's Application (or with the Division's alternative proposal to shorten QF PPAs to five years). (*Id.* at 3.) On the federal side, RMCRE acknowledges "federal laws do not expressly require a 20-year PPA term" but points out "nor do they expressly allow a short-term PPA." (*Id.* at 5.) Recognizing that "FERC regulations allow [state commissions] some 'latitude' in determining how FERC regulations should be 'implemented' by a state," RMCRE asserts "the manner of implementation must be 'reasonably designed to give effect to FERC's rules.'" (*Id.* at 5 (quoting *FERC v. Mississippi*, 456 U.S. 742, 751 (1982).)

2.4.2. REC

REC's director, John Lowe, testified that REC is a coalition of thirty-two members who own and operate over fifty non-intermittent small QFs, generally less than 10 megawatts. (J. Lowe Direct Test. at 4:18-20; Hr'g Tr. at 163:16-19.) REC asks the Commission deny the Application or, alternatively, to except "baseload Schedule 37 eligible QFs" from any change. (J. Lowe Direct Test. at 6:61-64.)

Mr. Lowe "agree[s] that [PacifiCorp] is facing a large number of new contract requests and recently executed contracts" and that "[t]his is a legitimate issue that warrants consideration." (*Id.* at 7:79-81.) Mr. Lowe opines "[m]anaging this problem is a challenge, but does not warrant foreclosing opportunities for small baseload projects that for years have been the heart-and-soul of local PURPA project development." (*Id.* at 7:81-83.)

REC's second witness, Nathan Rich, who is executive director of REC member Wasatch Integrated Waste Management District ("WWMD"), agreed and testified: "I understand the concern that 2,000 megawatts of new QF power would cause a problem to [PacifiCorp.]." (Hr'g Tr. at 168:6-8.) Mr. Rich provided testimony relating to an existing QF project that WWMD operates and a second project it is considering. Mr. Rich testified its existing project operates under an 11-year contract because WWMD did not wish to execute a contract with PacifiCorp that was longer in duration than the contract WWMD has with its primary vendee. (*Id.* at 169:3-10.)

Echoing the Office's arguments, REC maintains a three-year contract term violates PURPA because the federal law and the regulations promulgated under it require QFs be allowed to enter long-term contracts at a fixed price. (REC Post-Hr'g Br. at 4-5.) REC also argues establishing a three-year contract term will deny QFs the opportunity to receive fair capacity value for the electricity they provide. (*Id.* at 6-7.) REC argues that if the Commission is inclined to grant the Application, the Commission should adopt a framework that the Idaho Public Utilities Commission recently implemented whereby QFs who renew their contracts, perhaps repeatedly, after the initial term expires, should be eligible to receive capacity payments based on

the time of the original contract. (*Id.* at 8-10.) REC contends "[t]his is consistent with how utilities plan their operations and the benefits that existing QFs provide to the utilities." (*Id.* at 9.)

2.4.3. UCE

UCE offers testimony and arguments that largely parallel the arguments of other intervenors in this docket. In her written testimony, UCE witness Sarah Wright asserted that "[a] three year contract will end the development of renewable QFs in Utah because it will make it impossible for these projects to secure financing." (S. Wright Direct Test. at 5:66-67.) At hearing, Ms. Wright, who is executive director of UCE, suggested this conclusion stemmed from conversations she had with developers, and she deferred detailed questions about the subject to the developer witnesses. (*See* Hr'g Tr. at 194:17-18; 195:5-6.) Ms. Wright also asserts that natural gas prices are near all-time lows and suggests consumers are, therefore, more likely to benefit from long-term prices fixed at currently forecast avoided costs than to be injured by them. (*See, e.g.,* S. Wright Surrebuttal Test. at 10:167-172 (explaining risk associated with natural gas prices is "asymmetrical" in the existing low cost natural gas environment).)

Ms. Wright also asserts that in light of evolving environmental compliance obligations and concerns about climate change, maintaining a 20-year QF PPA contract term constitutes good public policy. (*See id.* at 11:183-12:205.)

2.4.4. Sierra Club

Sierra Club presented energy consultant Thomas Beach as its witness. Like other intervenors, Sierra Club maintains QF developers will be unable to obtain financing under a three-year PPA. (*See, e.g.,* Hr'g Tr. at 205:25-206:2.) Mr. Beach testified that avoided cost pricing leaves ratepayers indifferent "on a forecast basis." (*Id.* at 207:1-12.) Like other

intervenors, Sierra Club argues fixed-price generation protects customers against increased prices. (*Id.* at 210:2-3.)

Mr. Beach conceded that a 20-year contract term "reduces the risk of the income stream upon which financing for [QF] projects is based" and that "value [exists] in that reduction in risk to the lenders on [QF] projects." (Hr'g Tr. at 211:19-212:6.) Mr. Beach further conceded such risk is "passed on to customers of the utility" but asserts the consequence is "no different than when the utility builds any kind of plant." (*Id.* at 212:19-23.) Mr. Beach asserts "[t]here's simply no present crisis with an oversupply of renewable QFs in Utah such that the Commission needs to shorten the contract term." (*Id.* at 208:3-6.) Mr. Beach testified the market for QF development will be "self-limiting" as a result of low indicative pricing and the "stepdown" of a federal investment tax credit. (*Id.* at 208:19-209:5.)

3. DISCUSSION, FINDINGS AND CONCLUSIONS

3.1. Federal and State Law are Silent on the Issue of Contract Term, and the Utah Legislature's Policy Statement Does Not Entitle QF Developers to an Unqualified 20-Year Guaranteed Revenue Stream.

Although we appreciate the parties' efforts to strengthen their arguments by reference to Chapter 12, PURPA and FERC orders and regulations, after careful review we are confident no statute or rule prescribes a minimum term for QF PPAs. Federal regulations require QFs have the option to sell electricity "over a specified term" for a price established at the time of contracting, but the rules are silent as to how long the "specified term" must be. *See* 18 C.F.R. § 292.304(d).

The Division argues that, in another context, FERC has determined "contracts of a year or more are sufficiently long-term to meet the statutory requirement that there be 'wholesale markets for long-term sales of capacity and energy.'" (Division Post-Hr'g Br. at 3-4 (quoting

Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 17).) At the other end of the spectrum, the Office and REC argue FERC regulations require the term be sufficiently long to provide "investor certainty."

We reject the notion federal regulations require QF developers to enjoy "investor certainty." The Office quotes FERC Order 69 out of context in asserting "[t]he purpose behind fixing the avoided cost at the time of the agreement is to provide 'an investor … [the ability] to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility.'" (Office Post-Hr'g Br. at 5 (quoting Order 69, FERC Stats. & Regs. ¶ 30,128 at 30,868) (ellipses and brackets in original).) The quoted language falls under a subheading titled "Availability of Electric Utility System Cost Data" that explains FERC's basis for implementing 18 C.F.R. 292.302, which requires utilities to make data available to the public concerning their costs. The quoted language stands for the proposition that prospective QFs must have access to cost data for the purpose of assuring they have the information required to estimate the price (*i.e.,* the "avoided cost") they will receive for their power, not that QF developers have a right to risk-free returns on their investments. (*See* FERC Order No. 69, 45 Fed. Reg. 12,214, 12,218 (Feb. 25, 1980).)[3]

REC makes a similar argument, quoting Order 69 and asserting "[l]ong-term commitments are necessary because QFs have a 'need for certainty with regard to return on

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[3] Indeed, this concept is embodied in PacifiCorp's Electric Service Schedule 38 for QF contracting procedures that provides: "[a]n indicative pricing proposal provided by the Company may be used by the QF Developer to make determinations regarding project planning, financing and feasibility. However, such prices are indicative only and may be subject to change by the Company as specified herein or by the Commission. Prices and other terms and conditions are only final and binding to the extent contained in a power purchase agreement executed by both parties and approved by the Commission." Rocky Mountain Power Electric Service Schedule No. 38, State of Utah, P.S.C.U. No. 50, Sheet 38.6.

investment in new technologies.'" (REC Post-Hr'g Br. at 5 (quoting FERC Order No. 69, 45 Fed. Reg. 12,214, 12,224 (Feb. 25,1980).) Here, the quoted language is more pertinent to the issue in this docket, falling under a subheading addressing "[l]egally enforceable obligations" under 18 C.F.R. 292.304. The quoted sentence reads in full: "Many commenters have stressed the need for certainty with regard to return on investment in new technologies." (*Id.*) These commenters were responding to others who argued that "if the avoided cost of energy at the time it is supplied is less than the price provided in the contract … the purchasing utility would be required to pay a rate for purchases that would subsidize the qualifying facility at the expense of the utility's other ratepayers." (*Id.*) FERC goes on to explain that it "does not believe that … [PURPA] was intended to require a minute-by-minute evaluation of costs." (*Id.*) FERC's rejection of the need for "minute-by-minute evaluation of costs" is uncontroversial and logically follows from PURPA's requirement that QFs be allowed to sell their power at prices fixed for a "specified term." We do not read this language in Order 69 as amounting to a requirement, or even endorsement, that avoided cost pricing be fixed for multiple decades.

For its part, Sierra Club acknowledges "FERC does not provide an exact timeframe for the 'specified term,'" but argues FERC regulations require QFs to be compensated for capacity and that "a three or five year contract would not provide a QF compensation for capacity." (Sierra Club Post-Hr'g Br. at 4.) Essentially, Sierra Club argues that if QFs are not permitted to contract into what PacifiCorp calls its "resource deficiency period," *i.e.* the period of time when PacifiCorp's IRP anticipates a need to acquire a new thermal resource, they will be denied capacity value. While we certainly agree the avoided cost methodology must capture avoided capacity costs and ensure QFs are paid for them, we reject the premise that PacifiCorp's

anticipated date of acquiring a new thermal resource is dispositive of the contract duration issue. In fact, in multiple recent dockets, the Commission has addressed the issue of capacity value in the so-called "resource sufficiency period" and found that displaced market transactions for firm power capture avoided capacity costs. (*See, e.g.,* Report and Order dated September 18, 2015 at 8-9, *In the Matter of Rocky Mountain Power's Proposed Revisions to Electric Service Schedule No. 37, Avoided Cost Purchases from Qualifying Facilities*, Docket No. 15-035-T06.)

Other intervenors, particularly UCE and RMCRE, have strongly emphasized Utah's declared policy "to encourage independent energy producers to competitively develop sources of electric energy … and to remove unnecessary barriers to energy transactions involving independent energy producers and electrical corporations." Utah Code Ann. 54-12-1. We are cognizant of this policy and the policy interests underlying PURPA, but we must advance these policy interests without abdicating our primary duty to ensure the reliability of electric service and to do so "on the basis of reasonable costs." *See Garkane Power Ass'n v. Public Serv. Comm'n of Utah*, 681 P.2d 1196, 1207 (Utah 1984). Nothing in Chapter 12's policy statement suggests guaranteeing QF developers anything less than a 20-year fixed revenue stream will somehow subvert it. While we do not here attempt to draw parameters around how Chapter 12's declared policy ought to influence the Commission's implementation of Chapter 12 or PURPA, we reject the notion that it requires binding PacifiCorp and ratepayers to 20-year fixed prices, irrespective of whether such long-term commitments are otherwise in ratepayers' interest.

In summary, we conclude no federal or state statute or regulation requires a 20-year contract term. As the Supreme Court has observed, FERC regulations "afford state regulatory authorities … latitude in determining the manner in which the regulations are to be

implemented." *FERC v. Mississippi*, 456 U.S. at 751; *see also Power Resources Group v. PUC of Texas*, 422 F.3d 231, 238 (5th Cir. 2005) (observing "it is up to the States, not [FERC] to determine the specific parameters of individual QF power purchase agreements….") (quotation omitted). Similarly, Chapter 12 expressly tasks the Commission with "establish[ing] reasonable rates, terms, and conditions" for QF PPAs. Utah Code Ann. § 54-12-2(2). In the absence of additional guidance from the Utah Legislature, Congress or FERC, it falls to this Commission to exercise its discretion to establish a contract term that advances the policy interests underlying PURPA and Chapter 12 without unduly burdening ratepayers with excessive price risk.

3.2. Intervenors Did Not Offer Persuasive Evidence Showing a Reduction in the Minimum Contract Term will Render Their Projects Unviable.

No party has disputed PacifiCorp's representations concerning the volume of power it must purchase under existing QF PPAs, the volume of QF PPAs that have been proposed to PacifiCorp that remain unexecuted and the relative size of these existing and potential obligations in relation to PacifiCorp's total load. Specifically, at the time it filed the Application, PacifiCorp had 1,041 nameplate megawatts of existing PURPA contracts in Utah, which constitutes more than a third of its 2014 average Utah retail load, and 3,294 total nameplate megawatts of existing and potential Utah QF contracts. (Hr'g Tr. at 14:8-13.). If all of the proposed QF contracts came to fruition, the nameplate megawatts of the QF power would alone surpass, by a considerable margin, Utah's average retail load requirements. (*Id.*) The cost to ratepayers is significant: PacifiCorp is currently obliged on a system-wide basis to pay $2.9 billion under QF contracts over the next 10 years, and Utah ratepayers will be accountable for $73.3 million in payments under QF PPAs in 2015 alone. (*Id.* at 18:19-19:2.) Finally, although

we recognize and accept that avoided cost projections used to establish prices at the time of contracting may deviate from the actual avoided costs at the time of delivery, we are mindful that over the next 10 years the average price PacifiCorp is obliged to pay per MWh under existing QF PPAs significantly exceeds the projected market price. (*See id.*)

Nevertheless, intervenors and the Office ask the Commission to deny the Application based on their assertion that a reduction in contract duration will make financing unavailable and thereby preclude new QF development and defeat the policies underlying Chapter 12 and PURPA. As an initial matter, as we believe the discussion above makes clear, we do not read Chapter 12, PURPA or any FERC regulation to require ratepayers to subsidize QF projects to make them profitable for investors. However, even if it were incumbent on the Commission to establish contract terms that ensured the ability of QF developers to obtain financing, the record does not demonstrate QF developers will be unable to obtain financing on projects with shortened contract terms.

To be clear, we do not doubt QF developers may be able to negotiate more favorable financing with a longer guaranteed revenue stream, but the record does not substantiate the claim that a reduction in contract term will render them unable to obtain financing. It seems to us, assuming arguendo that the Commission has an obligation to ensure economic viability of QF projects, the primary question would not be whether financing will be available but rather how the terms of financing are likely to change if the duration of guaranteed revenue is reduced and whether, in light of those changes, projects can be economically viable.

While PacifiCorp's books are open to us, the Commission has no information pertaining to the finances of QFs. We are not suggesting we are entitled to such information, but the

argument that financing will not be available is not compelling absent supporting evidence. No party presented information in this docket attempting to quantify the impact a change in contract term would have on financing terms and, by extension, on the viability of future QF projects. The intervening developers might have, for instance, presented testimony and exhibits (in summary fashion or otherwise) illustrating the finances of a sampling of developments in an effort to demonstrate that less favorable credit terms would have rendered them uneconomic. They did not do so. Rather, the only evidence in the record to support the assertion that projects will not be financeable absent a 20-year contract is conclusory testimony from QF development executives, their consultants or renewable energy advocates. Even if we recognized a legal obligation to ensure QF projects are financeable, a principle we have not adopted here, we would be disinclined to rely solely on these conclusory representations as a basis to continue to impose on ratepayers the risks inherent in 20-year contracts.

3.3. While the Commission Shares PacifiCorp's and the Division's Concern that 20-Year Contract Terms Expose Customers to Undue Fixed-Price Risk, the Commission Finds the Balance of Policy Interests Favors a More Gradual Reduction in Contract Duration.

Although we find the record supports taking action to protect ratepayers against undue fixed-price risk, we believe a more measured response is appropriate than either the 85 percent reduction for which PacifiCorp advocates or the 75 percent reduction sought by the Division. Based on the information available to us at this time and the record in this docket, we believe and find the public interest will best be served by a five-year reduction, establishing a maximum contract term of 15 years.

While no party specifically advocates for a 15-year contract term, evidence in the record supports our finding. RMCRE witness Hans Isern testified that his employer, sPower, has successfully financed projects with 15-year contract terms, though he qualified his testimony by adding these projects were developed in states with “other incentives” or high avoided cost prices. (Hr’g Tr. at 261:6-22.) Similarly, Bryan Harris, testifying for SunEdison, acknowledged that there are markets in the United States where contract terms are limited to 15 years. (*Id.* at 254:16-255:11.) Mr. Harris qualified his testimony by adding those markets were more “liquid” than Utah and that developers can “readily sell the power from those projects.” (*Id.*) However, we note developers in Utah can reasonably anticipate the opportunity to continue to sell power to PacifiCorp or to some other purchaser — albeit at updated avoided cost or market prices — after the initial contract term expires.[4] Although evidence in the record supports our decision, it should be understood that our determination ultimately constitutes an exercise of our discretion. We have endeavored to balance our competing obligations to advance the policies underlying Chapter 12 and PURPA while protecting ratepayers from unreasonable costs. We believe a 15-year term strikes the appropriate balance at this time by mitigating a fair portion of the fixed-price risk ratepayers would otherwise bear while allowing QF developers and their financiers a reasonable opportunity to adjust to this more modest change in business practice.

For all of these reasons, we conclude it is just, reasonable and in the public interest to require PacifiCorp to enter QF PPAs of no longer than 15 years in duration.

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[4] We also take administrative notice that the federal investment tax credit was extended subsequent to the hearing in this matter, which undermines the testimony that the expiration of the tax credit will serve as a “self-limiting” factor in the QF market. (*See* Consolidated Appropriations Act of 2016, H.R. 2029, 114th Cong. § 301, *et seq.* (2015); Hr’g Tr. at 208:19-209:5.)

4. ORDER

PacifiCorp's Application is granted in part and denied in part. In a manner consistent with all otherwise applicable Commission orders, tariffs, statutes and regulations, PacifiCorp shall enter into purchase agreements with qualifying facilities for a duration not to exceed 15 years. This Order does not alter the terms of existing QF PPAs, but existing QF PPAs will be subject to the 15-year limit after their current term expires. As a general matter, this Order applies to any QF that has not executed a PPA with PacifiCorp as of the date of this Order. In the event a PPA has not been executed as of the date of this Order but a party nevertheless believes it possesses a legally enforceable obligation as of the date of this Order that entitles the party to a 20-year contract term, the party may submit the circumstances for Commission review. Such review will be fact-specific and conducted on a case-by-case basis.[5]

DATED at Salt Lake City, Utah, this 7th day of January, 2016.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#271270

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[5] We have not had occasion to consider the issue of whether and how a party might establish a legally enforceable obligation prior to execution of a written contract pursuant to the applicable tariff. However, we recognize parties may bring disputes before the Commission with respect to this issue to the extent they arise.

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on the 7th day of January, 2016, a true and correct copy of the foregoing was served upon the following as indicated below:

By Electronic-Mail:

Data Request Response Center (datarequest@pacificorp.com)
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____
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