

UNITED STATES OF AMERICA 104 FERC ¶ 61,126
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Investigation of Certain Enron-Affiliated QFs Docket Nos. EL03-17-000

Zond Windsystems Holding Company QF87-365-005
Victory Garden Phase IV Partnership QF90-43-004
Sky River Partnership QF91-59-005

and

Southern California Edison Company EL03-19-000

v.

Enron Generating Facilities:

 Victory Garden Phase IV Partnership QF90-43-005
 Sky River Partnership QF91-59-006
 Cabazon Power Partners LLC QF95-186-005
 Zond Windsystems Partners, Ltd. Series 85-A QF85-687-
002
 Zond Windsystems Partners, Ltd. Series 85-B QF85-686-
002

Cabazon Power Partners LLC ER03-521-000
Enron Wind Systems, LLC ER03-522-
000
Zond Windsystems Partners, Ltd. Series 85-A ER03-523-000
Zond Windsystems Partners, Ltd. Series 85-B ER03-524-000
Sky River Partnership ER03-525-000
Victory Garden Phase IV Partnership ER03-526-000
ZWHC LLC ER03-527-000
Painted Hills Wind Developers ER03-528-000

ORDER APPROVING UNCONTESTED OFFERS OF SETTLEMENT

(Issued July 25, 2003)

1. In this order we approve two settlement agreements filed in these proceedings. Related to the approval of one of those agreements, we are also accepting for filing power purchase agreements (PPAs). This order benefits customers by providing for a reduction in rates.

Background

2. On October 24, 2002 in Docket No. EL03-17-000, the Commission initiated an investigation into Enron Corporation (Enron) and its ownership of three small power production facilities which claimed qualifying facility (QF) status. Investigation of Certain Enron-Affiliated QFs, 101 FERC ¶ 61,076 (2002) (October 24 Order). The Commission stated that:

It has come to the attention of the Commission that in criminal and civil proceedings in the United States District Court for the Southern District of Texas, the United States of America through its Department of Justice, and the United States Securities and Exchange Commission (SEC), have alleged that in 1997 Enron improperly retained QF benefits for these facilities by fraudulently transferring its ownership in the QFs to partnerships indirectly controlled by Enron.^[1]

3. The Commission set for hearing the issue of whether Zond Windsystems Holding Company (Zond Windsystems), Victory Garden Phase IV Partnership (Victory Garden), and Sky River Partnership (Sky River) failed to conform with the representations presented in their 1997 applications for re-certification as QFs, i.e., whether the Enron affiliates actually transferred their ownership interests in the facilities, and thus whether those QF certifications can be relied on. The Commission also set for hearing the issue of whether each facility actually satisfied the Commission's ownership requirements for QF status following Enron's merger with Portland General Corporation.²

4. A few days later, on October 28, 2002, Southern California Edison Company (SoCal Edison) filed a petition in Docket No. EL03-19-000, et al., raising questions concerning Enron's compliance with the Commission's QF ownership regulations, including issues already set for hearing in the October 24 Order. The SoCal Edison petition, however, was broader in scope. For example, the SoCal Edison petition raised allegations concerning other Enron-affiliated generating projects, and to other time periods. The SoCal Edison petition also challenged Enron's claim of satisfaction of the

¹101 FERC ¶ 61,076 at P 1.

²Id. at P 16.

ownership requirements for QF status based on Enron's claimed "good faith" application for exemption from certain provisions of the Public Utility Holding Company Act of 1935 (PUHCA), 15 U.S.C. § 79 et seq. (2000).

5. In response to SoCal Edison's petition, the Commission, on December 19, 2002, set for hearing the issue of:

whether Victory Garden Phase IV Partnership, Sky River Partnership, Cabazon Power Partners LLC, Zond Windsystems Partners, Ltd. Series 85-A, and Zond Windsystems Partners, Ltd. Series 85-B have satisfied the ownership criteria for QF status since the Enron/Portland General merger.^[3]

6. The Commission consolidated the proceedings in Docket Nos. EL03-17-000 and EL03-19-000, for purposes of hearing and decision. In each case, the Commission indicated that, following the Initial Decision, if the Commission found that the QFs involved had failed to conform to QF ownership requirements, the Commission would "then establish appropriate remedies."

The Master Agreement

7. On January 31, 2003, SoCal Edison, Enron Wind LLC (Enron Wind), ESI Sky River Limited Partnership and ESI VS Limited Partnership (jointly ESI),⁴ and eight windfarm facilities that sell power to Edison under PPAs⁵ filed what they refer to as the Master Agreement. The Master Agreement is a settlement of the remedy phase of this proceeding. It consists primarily of a buy-down of the windfarm facilities' PPAs on a going-forward basis. According to SoCal Edison, the Master Agreement will produce an immediate benefit to California ratepayers of approximately \$11 million and an additional \$41 to \$47 million on a net present value basis, by reducing rates paid by SoCal Edison to the eight windfarm facilities that sell power to Edison under the PPAs.

³Southern California Edison Company v. Enron Generating Facilities, et al., 101 FERC ¶ 61,313 at P 31 (2002).

⁴ESI are wholly-owned subsidiaries of the FPL Group, an electric utility holding company.

⁵Cabazon Power Partners, LLC, Enron Wind Systems, LLC, Zond Windsystems Partners, Ltd., Series 85-A, Zond Windsystems Partners, Ltd., Series 85-B, Sky River Partnership, Victory Garden Phase IV Partnership, ZWHC LLC, and Painted Hills Wind Developers.

8. The PPA Sellers also submitted amended PPAs, as required by the Master Agreement.⁶ The parties to the Master Settlement request that the amended PPAs be designated as Commission rate schedules to ensure continuity of service should any of the windfarm facilities lose QF status.⁷

The Consent Agreement

9. After the Master Agreement was filed, the presiding administrative law judge in these proceedings suggested to the parties that the Master Agreement may be deficient as a comprehensive settlement of the proceedings because it did not address the issue of the facilities' QF status. The judge suggested that some form of supplemental stipulation and consent agreement specifically detailing the facilities' compliance with the ownership requirements for QF certification should be considered, and that he was disinclined to recommend approval of the Master Agreement without an answer to the QF certification issues.

10. On April 15, 2003, Commission Trial Staff, the eight windfarm facilities with PPAs with Edison, Enron Wind, and ESI filed what is referred to as the Consent Agreement. The Consent Agreement lists the evidence that the facilities may not have been QFs. The Consent Agreement also notes that key witnesses are unavailable in these proceedings until after the criminal trial against Andrew Fastow, a senior Enron officer, is held, and that certain documentary evidence in the control of the Department of Justice was protected as grand jury material and could not be made available for use in these proceedings. The Consent Agreement therefore does not provide a definitive answer as to the compliance of the facilities with the requirements for QF status. In this regard, the

⁶The Commission docketed the amended PPAs in Docket Nos. ER03-521-000, ER03-522-000, ER03-523-000, ER03-524-000, ER03-525-000, ER03-526-000, ER03-527-000 and ER03-528-000.

⁷The parties to the Master Agreement request that the amended PPAs be accepted, to become effective on the date, if any, that any project under the applicable PPA loses its QF status.

facilities neither admit nor deny compliance with the Public Utility Regulatory Policies Act of 1978 (PURPA)⁸ and the Commission's implementing regulations.⁹

Presiding Judge's Certification of Uncontested Offer(s) of Settlement and Recommendations Concerning Commission Consideration

11. On June 10, 2003, the judge certified both settlements as uncontested. Investigation of Certain Enron-Affiliated QFs, et al., 103 FERC ¶ 63,046 (2003).

12. While the judge recommended that the Master Agreement be approved, he recommended that Consent Agreement be rejected. The judge reasoned that the Commission's QF certification process relies "on the utmost owner/operator good faith in ensuring the veracity" of self-certifications. He stated that "[w]here, as here, that veracity is seriously suspect, the efficacy and legitimacy of the entire QF certification procedure is called to question, and the vital public interests that PURPA was intended to promote – threatened." 103 FERC ¶ 63,046 at P19.

13. The judge noted that the Consent Agreement "trumpets the claim" that the \$51 to \$58 million ratepayer benefit provided by the Master Agreement is "greater than any remedy likely to be imposed by the Commission." The judge nevertheless concluded that the Consent Agreement fails, because "[a]t their collective core, these cases transcend economic analysis and ratepayer benefits. They concern the crucial Commission, electric industry and public interests in ensuring the fundamental integrity of the PURPA QF certification scheme." 103 FERC ¶ 63,046 at P22. The judge thus recommended that the Commission reject at least the Consent Agreement, and reject both agreements if the Commission found that they must be considered as a single, non-severable agreement. 103 FERC ¶ 63,046 at P 22-23.

Comments

14. Following the judge's certification, comments to his recommendation were filed by Commission Trial Staff; SoCal Edison; ESI; and ZWHC LLC and Enron Windsystems LLC. Each urges Commission approval of both the Master Agreement and the Consent Agreement. Each also agrees that the two agreements can be severed and that the Master Agreement can be approved without approval of the Consent Agreement. Each further points out that the Master Agreement only becomes effective with approvals

⁸16 U.S.C. §§ 796(17), 824a-3 (2000).

⁹18 C.F.R. Part 292 (2003).

Docket No. EL03-17-000, et al.

- 6 -

from the Bankruptcy Court, the California Public Utilities Commission, and this Commission by July 25, 2003, and that the Bankruptcy Court and the California Public Utilities Commission have already approved the Settlement Agreement.

15. Californians for Renewable Energy, Inc. (CARE) filed what it characterizes as a "protest" to Commission Trial Staff's comments in support of the Consent Agreement. CARE claims that Trial Staff incorrectly claims that no party opposed the Master Agreement and Consent Agreement. CARE claims that it filed comments, in which it argued that the Commission should not approve the settlements, but should reject them and then require that any refunds come from Enron's former executives. Concerned by Enron's trading strategies in California, CARE reiterates here that the settlements should be rejected so that the Commission can more broadly "seek refunds from respondents of all profits made in excess of the cost of service provided and execute changes to all bilateral agreements to return them to a cost basis, as CARE contends these Parties have voluntarily waived their market based rate authority by participating in these trading strategies." CARE Protest at 4.

16. Subsequently, on July 14, 2003, CARE filed to withdraw its protest, essentially conceding that originally it did not properly file its comments and that it is thus not able to claim that Trial Staff erred in characterizing the Master Agreement and the Consent Agreement as unopposed. CARE explains, however, that both Enron and SoCal Edison "appear to have participated in activities. . . that constitute gaming and/or anomalous market behavior" and that "disgorgement of unjust profits and. . . other, additional, appropriate non-monetary remedies" are warranted. Withdrawal at 6; accord Id. at 8-9.

Discussion

17. We find both the Master Agreement and the Consent Agreement in the public interest and will approve them.¹⁰ The Commission's approval of these settlements does not constitute approval of, or a precedent regarding any principle or issue in these proceedings.

¹⁰In addition, the amended PPAs submitted in Docket No. ER03-521-000, et al., which are uncontested, are accepted for filing and are made effective on the date that any project under a PPA is determined to have lost its QF status, and thus that project has lost its exemption from Section 205 of the FPA. See 18 C.F.R. § 292.601(c) (2003). We note that their acceptance is consistent with the Commission's acceptance of similar Section 205 applications submitted by other QFs. See, e.g., Indeck-Olean Limited Partnership, 87 FERC ¶ 61,305 (1999).

18. As discussed above, the Commission instituted proceedings in these consolidated dockets to determine whether the Enron windfarm facilities had complied with the requirements for QF status. In instituting the investigation into their QF status, the Commission noted that, in the past, when it found that a QF had failed to comply with the requirements for QF status, it had revoked some of the benefits of QF status. Specifically, the Commission revoked the QF exemption from Section 205 of the Federal Power Act, determined that the QF was not entitled to charge QF avoided-cost rates during the period it failed to comply with the requirements for QF status, redetermined the applicable rates, and ordered refunds. See 101 FERC ¶ 61,076 at P 15.

19. In initiating the instant dockets, the Commission indicated that it would establish appropriate remedies following review of an Initial Decision on the facilities' QF status. Here, the parties have settled the remedy phase of this proceeding without litigating the QF status of the facilities. The remedy, contained in the Master Agreement, is described by all parties – including both the windfarm facilities and the electric utility that purchases their output – as providing ratepayers, on a current value basis, approximately what the Commission has in the past determined to be the appropriate remedy for failure to maintain QF status. Under these circumstances, it is in the public interest to approve the Master Agreement.

20. Regarding the Consent Agreement, as discussed above, the participants, through the settlement process, have fashioned a remedy that provides ratepayers approximately what they would have received on a present value basis if the case had been fully litigated and the windfarm facilities were found not to be QFs. In light of this remedy, we do not think that litigating the QF status of these windfarm facilities, is the best use of Commission resources at this time; that is, we will exercise our prosecutorial discretion and not pursue this matter further.

21. Nevertheless, we understand, and agree with, the judge's concern with preserving "the efficacy and legitimacy of the entire QF certification procedure." 103 FERC ¶ 63,046 at P19. We expect QF filings, whether for self-certification or Commission certification, see 18 C.F.R. § 292.207 (2003), to be complete, accurate, and truthful. Indeed, our Form 556, required to be filed for self-certification or Commission certification, see 18 C.F.R. §§ 292.207(a)(1)(ii), .207(b)(2) (2003), must contain a signature "evidencing [the] accuracy and authenticity of [the] information provided." See 18 C.F.R. § 131.80 (2003). (Beyond QF filings, we expect every filing, including every pleading, filed with us to be complete, accurate and truthful. In this regard, Rule 2005 of our Rules of Practice and Procedure expressly provides that every filing must be signed, and that signature constitutes certification that the signer has read the filing and knows the contents and that the contents are true as stated to the signer's best knowledge

Docket No. EL03-17-000, et al.

- 8 -

and belief.¹¹ See 18 C.F.R. § 385.2005(a) (2003).¹² Consistent with the judge's concern with the legitimacy of the QF certification procedure, the Commission has been reviewing its QF files to determine whether other facilities, claiming QF status, do not meet the criteria for QF status.¹³ As a result, we have set for hearing the issue of whether several cogeneration facilities, in fact, satisfied the statutory and regulatory requirements for QF status.¹⁴ In addition, Commission staff has recently undertaken an audit of QF self-certifications and QF requests for Commission certification in order to ensure the veracity of the representations made to the Commission concerning QF ownership and control.¹⁵

¹¹There are additional, similar requirements for attestation for cost and other data supporting rate change filings made under Part 35 of our regulations. See 18 C.F.R. § 35.13(d)(6) (2003). Both Part 33 and Part 34 filings similarly must be verified. Compare 18 C.F.R. § 33.7 (2003) and 18 C.F.R. § 34.8 (2003) with 18 C.F.R. § 385.2005(b) (2003).

¹²Our regulations also require that persons appearing before the Commission or a presiding judge must conform to certain standards of ethical conduct, see 18 C.F.R. § 385.2101(c) (2003), and they may lose the privilege of appearing or practicing before the Commission, either temporarily or permanently, if they are found to have engaged in unethical or improper professional conduct. See 18 C.F.R. § 385.2102(a)(2) (2003).

¹³Investigation of Certain Enron-Affiliated QFs, 102 FERC ¶ 61,199 at P 1, 11 (2002); Investigation of Certain Enron-Affiliated QFs, 103 FERC ¶ 61,122 at P 1, 13 (2002).

¹⁴Id.

¹⁵Id. On June 19, 2003, audit letters were sent to ten facilities claiming QF status, requesting that each confirm: (1) the current accuracy of ownership information contained in the filing selected for review; (2) that the facility is still not controlled or owned more than 50 percent by an electric utility, or electric utility holding company, or a combination thereof; (3) that the facility meets the ownership requirements of the Commission's regulations and the enabling statutes; and (4) that any transfers of ownership referred to in the filing selected for review did in fact occur as described in that filing.

Those claiming QF status were directed to document the representations with (1) narrative explanations of the current control over and ownership of the facility, (2) corporate ownership chart(s) showing all upstream owners of the facility (and identifying

(continued...)

Docket No. EL03-17-000, et al.

- 9 -

22. We now turn to CARE's filings. CARE raises concerns, not about the appropriate remedy for a QF that may not, in fact, have been a QF, but more generally about Enron's actions in Western energy markets. The Commission has addressed, and is addressing, these matters. On June 25, 2003, the Commission revoked Enron's market-based rate authority.¹⁶ On June 25, 2003, the Commission also initiated show cause proceedings against Enron and others (including SoCal Edison) for alleged gaming and anomalous market behavior.¹⁷ Finally, as the parties acknowledge, the remedy agreed to here is consistent with what the Commission has ordered for other QFs that failed to maintain their QF status.

The Commission orders:

(A) The Master Agreement and the Consent Agreement are hereby approved, as discussed in the body of this order.

(B) The PPAs, and the proposed rate schedule designations shown in the Appendix to this order, are hereby accepted for filing, to become effective for a facility on the date that that facility loses its QF status.

(C) The facility selling power pursuant to the PPAs accepted in this order, shall inform the Commission of any loss of QF status within 30 days of determining that loss, and that the PPA has thus become effective as a Commission-jurisdictional rate schedule.

¹⁵(...continued)

those that are electric utilities or electric utility holding companies), and (3) evidence showing that any reported transfers of ownership have occurred. The explanations and charts were to identify the percentage of ownership, whether it is an equity ownership or not, and whether it is as a general partner or a limited partner, if applicable. Moreover, if there have been any changes to the ownership of the QF since the most recent filing, those claiming QF status were required to describe those changes in detail, providing supporting documentation. See, e.g., June 19, 2003 audit letter in Docket No. QF86-291-003.

¹⁶Enron Power Marketing, Inc. and Enron Energy Services, Inc., 103 FERC ¶ 61,343 (2003).

¹⁷Enron Power Marketing, Inc. and Enron Energy Services Inc., et al., 103 FERC ¶ 61,346 (2003); American Electric Power Service Corporation, et al., 103 FERC ¶ 61,345 (2003).

Docket No. EL03-17-000, et al.

- 10 -

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

APPENDIX

Power Purchase Agreements
Accepted to become effective for a facility on the date that facility loses its QF status

Cabazon Power Partners, LLC
ER03-521-000

FERC Rate Schedule No. 1, Original Sheet Nos. 1-102

Enron Wind Systems, LLC
ER03-522-000

FERC Rate Schedule No. 1, Original Sheet Nos. 1-64
FERC Rate Schedule No. 2, Original Sheet Nos. 1-88
FERC Rate Schedule No. 3, Original Sheet Nos. 1-86
FERC Rate Schedule No. 4, Original Sheet Nos. 1-94
FERC Rate Schedule No. 5, Original Sheet Nos. 1-103

Zond Windsystems Partners, Ltd. Series 85-A
ER03-523-000

FERC Rate Schedule No. 1, Original Sheet Nos. 1-107

Zond Windsystems Partners, Ltd. Series 85-B
ER03-524-000

FERC Rate Schedule No. 1, Original Sheet Nos. 1-94

Sky River Partnership
ER03-525-000

Docket No. EL03-17-000, et al.

- 11 -

FERC Rate Schedule No. 1, Original Sheet Nos. 1-174
FERC Rate Schedule No. 2, Original Sheet Nos. 1-177
FERC Rate Schedule No. 3, Original Sheet Nos. 1-175

Victory Garden Phase IV Partnership

ER03-526-000

FERC Rate Schedule No. 1, Original Sheet Nos. 1-101
FERC Rate Schedule No. 2, Original Sheet Nos. 1-97
FERC Rate Schedule No. 3, Original Sheet Nos. 1-127
FERC Rate Schedule No. 4, Original Sheet Nos. 1-81

ZWHC LLC

ER03-527-000

FERC Rate Schedule No. 1, Original Sheet Nos. 1-91
FERC Rate Schedule No. 2, Original Sheet Nos. 1-81
FERC Rate Schedule No. 3, Original Sheet Nos. 1-80
FERC Rate Schedule No. 4, Original Sheet Nos. 1-81

Painted Hills Wind Developers

ER03-528-000

FERC Rate Schedule No. 1, Original Sheet Nos. 1-162