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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE PETITION OF
WASATCH WIND, LLC FOR APPROVAL OF
A CONTRACT FOR THE SALE OF
CAPACITY AND ENERGY FROM THEIR
PROPOSED QF FACILITIES

Docket No. 06-035-42

PREFILED TESTIMONY OF TRACY LIVINGSTON

Wasatch Wind hereby submits the Prefiled Testimony of Tracy Livingston in this docket.

DATED this 15th day of May, 2006.

Tracy Livingston

/s/ _____
Tracy Livingston
Wasatch Wind, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by United States mail, postage prepaid, or by email this 15th, May 2006 to the following:

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PREFILED TESTIMONY

Of

**Tracy Livingston
Wasatch Wind, LLC**

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QF FACILITIES

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May 15, 2006

3 **BACKGROUND**

4 **Q. Please state your name and occupation.**

5 A. My name is Tracy Livingston. I am the Manager of Wasatch Wind, LLC, a wind
6 project development company, manager of Spanish Fork Wind Park 2, LLC a
7 special purpose entity, and CEO of Wind Tower Composites, LLC a technology
8 engineering firm funded by the US Department of Energy and the California
9 Energy Commission to develop next generation, lower cost, multi megawatt class
10 wind turbine towers. All companies are located in Heber City, UT

11 **Q. On whose behalf are you filing testimony in this Docket?**

12 A. Wasatch Wind, LLC

13 **Q. Have you submitted testimony to this Commission before?**

14 A. Yes in Docket 03-35-14.

15 **Q. What is the status of your Spanish Fork wind project?**

16 A. WW has been monitoring wind resources at the mouth of Spanish Fork Canyon in
17 the industrial zone of Spanish Fork City for the past 1.5 years for the purpose of
18 building, owning, and operating a wind farm of 18.9 MW as a special purpose
19 entity called Spanish Fork Wind Park 2, LLC. In addition to the recent data, 3
20 years of historical wind data from one of our partner companies with a permanent
21 facility and two towers at the site have been evaluated to establish long term
22 energy predictability. Analysis shows that wind predictability and capacity factor
23 due to the strong diurnal nature at the site is superior to the more typical non-
24 diurnal wind farms being governed by macro weather events. The project was

25 recently relocated closer to the mouth of Spanish Fork Canyon due to objections
26 by some residents of Spanish Fork City that the wind farm will be too close to the
27 residents. With the move, the support from the community has been
28 overwhelming positive. The city mayor and the city council have been fully
29 supportive and cooperative and have also provided land for several of the
30 turbines. Wasatch Wind i.e. Spanish Fork Wind Park 2, LLC has filed an
31 interconnect agreement with the Company per “FERC Docket No. RM02-12-000;
32 Order No. 2006” regarding interconnect procedures for small generators of less
33 than 20 MW. The Company has also provided a method for indicative pricing
34 that Wasatch Wind finds acceptable pending the outcome of a recent Docket
35 initiated by Pioneer Wind.

36 **Q: Are their any other barriers to project completion.**

37 **A:** Yes. The Company offered Wasatch Wind a PPA nearly identical to the 64.5 MW
38 proxy wind farm PPA. Wasatch Wind and the Spanish Fork project as a small
39 (less than 20 MW) wind farm cannot proceed with a firm energy contract that is
40 more suitable for a large wind farm. Our financial and turbine availability
41 metrics are different thus requiring a different contract. The Company has stated
42 it is unable to agree to a contract with substantive differences to the proxy.

43 **Q: What is your summary recommendation to the Commission that will allow**
44 **Wasatch Wind to proceed with an 18.9 MW wind farm at Spanish Fork?**

45 **A:** It’s really quite simple. The commission should rule that small wind projects of
46 20 MW or less as an intermittent resource should be approved to use non-firm

47 contracts typically used by the Company for some other non-firm QF's and should
48 further clarify that the proxy method as previously defined by the commission
49 should be used only as a determiner of price and is not to be construed as a
50 determiner of contract provisions.

51 **Q: What are your specific recommendations?**

52 **A:** The commission should order the company to negotiate a good faith non-firm
53 energy contract similar to the Tesoro and Kennecott QF contracts for 20 MW and
54 smaller projects using the proxy pricing and recommended adjusters from the
55 previous related dockets.

56 **Q: Do you have an alternative recommendation to the Commission?**

57 **A:** Yes I do. The commission could rule that wind power is a non-firm resource and
58 as such require that the liquidated damages, and associated contract provisions be
59 removed from the present contract for 20 MW and smaller wind projects, be
60 allowed to receive the proxy pricing, and then make a further decision regarding
61 the necessity of the amount of security provisions.

62 **Q: What provisions of the Company provided PPA are barriers for Wasatch**
63 **Wind?**

64 **A:** There are several. Liquidated damages are the most egregious with several other
65 contract provisions directly tied to this requirement. These "associated
66 provisions" include: turbine mechanical availability, delay damages, guaranteed
67 commercial operation date, and cost to cover. These related provisions are found
68 in the Companies firm power PPA's but are not necessary and have not been

69 required in non firm Company contracts.

70 **Q: Are there any other alternatives to reaching an agreement with the**
71 **Company?**

72 **A:** Not in my opinion. Company negotiators have stated that alternative contract
73 clauses that make adjustments to liquidated damages or “associated provisions”
74 would be considered if Wasatch Wind would be willing to agree to a downward
75 price adjustment. This appears to be an egregious interpretation by the Company
76 of the Order in Docket 03-35-14. The Company has stated in negotiations that
77 Wasatch Wind must accept nearly all the major provisions of the firm power
78 proxy contract including liquidated damages and associated provisions in order to
79 receive the proxy price (adjusted for on peak/off peak delivery). The Company has
80 stated they are unable to move beyond this point.

81 **Q: In your opinion should non-firm contracts be structured differently than**
82 **firm contracts?**

83 **A: Yes, a firm resource provides capacity value to the utility. The pricing of such**
84 **contracts usually includes a capacity payment and an energy payment. Such a**
85 **pricing structure puts the utility and its ratepayers at risk if the producer fails to**
86 **deliver power. This is especially true if the contract has a capacity payment. The**
87 **utility needs contractual assurances that the producer will provide power**
88 **according to the contract. These firm contracts generally include a penalty for**
89 **non-delivery of power, this protects the purchaser of power against the potential**
90 **for non-delivery. However wind resources are regarded as non-firm resources and**

91 under the current RFP contract proxy method do not receive an explicit capacity
92 payment. The wind resource is only paid when it provides power.

93 **Q: Is there capacity value associated with wind resources?**

94

95 ~~**Q: What are the specific alternatives suggested by the Company?**~~

96 ~~**A: The Company stated in a recent Settlement Conference that because there is an**~~
97 ~~**implied capacity value in the proxy resource, the new QF should also be expected**~~
98 ~~**to use a similar (and almost identical) firm resource contract in order to capture**~~
99 ~~**that implied value for a wind project. The next jump in logic is that since capacity**~~
100 ~~**has value that a non firm contract must be adjusted using this value. This logic is**~~
101 ~~**tenuous as no clearly defined price for capacity (or even if there is one) has been**~~
102 ~~**reached in previous proceedings. The Company's argument for price adjustments**~~
103 ~~**to justify the use of a non firm wind QF contract is the wrong approach for small**~~
104 ~~**wind projects as no clear evidence to the validity, the amount, or a simple method**~~
105 ~~**on how to make the capacity adjustment has been forthcoming in negotiations or**~~
106 ~~**agreed to in the previous Docket 03-35-14.**~~

107 A: In Docket No. 03-035-14, some parties argued that capacity value should be
108 studied further; others stated that a 20 percent value was appropriate, while others
109 said it should equal the capacity factor of the plant, and some said it should not be
110 considered at all. For example, Bruce Griswold in testimony under Docket No.
111 03-35-14 stated, "Under the Company's proposal, the Company will pay twenty
112 (20) percent of the avoided capacity costs as determined using the Commission

113 approved avoided cost methodology for QF projects over 3 MW.” He further
114 states, “The Company proposes that a wind QF resource receive a volumetric
115 price structured as on-peak and off-peak prices where the 20% capacity payment
116 would be included only within on-peak hours. In order for the wind QF to receive
117 the full 20% capacity payment in the on-peak energy price, it would need to
118 maintain a 35% wind capacity factor.” This method was disputed vigorously with
119 little agreement. Of note, the proxy resource’s capacity factor is lower than Mr.
120 Griswold’s threshold and since it is suggested by him that the value is only for on
121 peak hours, even the company places little value on this capacity.

122 We understood that the final Order in 03-35-14 for using the proxy pricing
123 was based on creating a simple pricing method for wind QF’s. The Order has
124 achieved this goal. If the Company was allowed to make adjusters to the contract
125 price, then the development of a methodology for determining this adjustment
126 whether it be based on risk allocation or a capacity difference, would clearly
127 devolve into another endless debate. We would be in proceedings yet again. We
128 are already near the limit of what can be absorbed from a resource and financial
129 prospective. Yet the debate of this controversial issue would continue the delay.
130 Not to mention the action of which could unduly delay integration of small wind
131 projects at competitive prices into the system.

132 **Q: Are the capacity values of the Spanish Fork and the Proxy projects similar?**

133 **A:** No one seems to know and that is my point. No agreed analysis can be completed
134 by the Company to put a relative value on this capacity portion. Considering the

135 contract is structured to imply a price for energy and a price for capacity with an
136 unknown explicit value for that capacity and an inability to separate the capacity
137 value with no method by the company to adjust the value of that capacity as a
138 function of energy predictability, then improper pricing signals are the result and
139 the method leaves confusion on how to make an adjustment.

140 **Q: Does the Commission need only to clarify the Order in Docket 03-35-14**
141 **stating that the proxy plant comparisons are for pricing only to enable the**
142 **contract negotiations to proceed?**

143 **A:** I do not believe it will be enough. In our early negotiations with the Company, I
144 believed this simple clarification would be sufficient. Statements were made by
145 Company personnel saying our contract must be nearly identical to the proxy
146 contract and that contract terms and pricing were inextricably combined and
147 therefore less this clarification they could not proceed with significant contract
148 changes. Therefore, I believed a pricing clarification from the Commission would
149 then give the Company the ability to disconnect pricing from contract terms and
150 thereby negotiate different terms suitable for small wind. However this is a
151 necessary but not sufficient condition for a successfully negotiated contract with a
152 small, under 20 MWs, wind producer. We believe that the Commission should
153 make an explicit finding that small non-firm wind resources should receive
154 similar contract terms that were granted to other non-firm providers such as
155 Tesoro. In the alternative, the Commission could find that liquidated damages for
156 non-firm power is inappropriate contract condition. Such an explicit finding will

157 help streamline the contractual negotiations and lead to a greater number of
158 successfully completed small wind contracts. ~~However, in the Settlement~~
159 ~~Conference we were told that even with that clarification, the contract needs to~~
160 ~~have “good commercial terms” and we were told that firm power provisions~~
161 ~~would not be changed in a meaningful way by the Company thus leading us to the~~
162 ~~conclusion that further Commission direction to specifically require the Company~~
163 ~~to make adjustment to contract provisions or allow the use of a non-firm PPA~~
164 ~~would be necessary.~~

165

166 **Q: Why would small wind farm development be hampered if the contract was**
167 **not changed to a standard non-firm type?**

168 In general, project development costs (those prior to construction) are nearly the
169 same for a small project versus a large one. As such, these costs are a larger
170 percentage of the projects total costs for a small wind farm. Therefore, in order
171 for a small wind farm to be viable, other costs such as contract provisions and
172 even the very act of PPA negotiation and regulatory issues must be streamlined
173 for the small project to be on equal financial terms with the large ones. This
174 process for Wasatch Wind has been expensive, long, and difficult and now we are
175 being asked to absorb liquidated damage provisions that are also more difficult for
176 a small wind farm. The combination is more than a small project can absorb.
177 One of our investors is providing testimony in this docket of the problems that a
178 firm power contract creates for a small wind project. Based on our discussions

179 with other investors as well, small projects have difficulty absorbing the
180 undefined costs associated with the risks of liquidated damages especially in states
181 with regulatory and PPA difficulties.

182 **Q: Do you personally have knowledge of particular small wind projects that**
183 **would be hampered in addition to the Spanish Fork project?**

184 **A:** Yes. The Spanish Fork site appears to have similar winds to at least three
185 other canyon sites in Utah with diurnal wind patterns. At this time, the likelihood
186 that these sites are viable from a wind resource and land logistics issue is high.
187 Each site is also constrained in size due to site logistics thus all three would be
188 smaller than 20 MW's each. Since the winds and thus the financial metrics are
189 similar to the Spanish Fork site, the contract issues will be the same.

190 **Q: Would no action in this Docket be considered rate payer neutral?**

191 **A:** No. Doing nothing will mean that small wind projects will be delayed or
192 canceled in Utah because of insurmountable contract terms thus hampering the
193 Company's efforts in reaching its IRP goals for wind projects. This delay will
194 thus subject the ratepayers to greater portfolio risk as the IPR has already deemed
195 that 1400 MW's of wind are the appropriate balance. This also means losing
196 valuable economic development benefits Governor Huntsman has stressed are so
197 important in rural Utah via construction, operation, and tax base increases from
198 wind farm development.

199 **Q: Why do you believe the use of a non-firm contract is a fair proposal?**

200 **A:** Non-firm contract provisions should apply to small wind projects because of the

201 importance of keeping contracts simple yet reasonably fair and accurate to achieve
202 minimal administrative and overhead burden for the Company, the Commission,
203 the Division and the Committee all while providing equal and fair opportunity for
204 small wind farm developers while maintaining rate neutrality. I believe Wasatch
205 Wind's proposal accomplishes all that and yet keeps in place the motivations for
206 the wind farm owner to produce power.

207 **Q: Can you provide some background for specific examples of the Companies**
208 **use of firm power PPA's?**

209 **A:** A sample PPA can be obtained from PacifiCorp at
210 <http://www.pacificorp.com/File/File25896.pdf>. We understand that this
211 Company provided contract was approved by the Commission as a framework for
212 negotiations for QF's by an Order issued in DOCKET NO. 03-35-15 on August
213 26, 2003. The Order stated in part,

214 "The Commission finds that the proposed generic PPA provides a
215 reasonable basis for negotiations with Large QFs, and that it would be in the
216 public interest for the Commission to approve the proposed generic PPA."

217 We believe the intent of the Generic PPA was to allow large QF's
218 delivering firm power to have a baseline for negotiations. These contracts include
219 liquidated damages and related provisions which make sense for firm power
220 deliveries as witnessed by several larger QF contracts entered into by the
221 Company including Desert Power and Sunnyside Cogen. Both these contracts
222 appear to be patterned after the Generic PPA as they include many of the

223 liquidated damages, performance, security, and default provisions previously
224 mentioned and include firm power obligations by the QF.

225 **Q: Has the company used different QF contracts for non-firm power?**

226 **A:** Yes in at least two cases in the past year entirely different contracts were used for
227 these non-firm power QF's. The contracts were with Tesoro signed by the
228 Company on January 9, 2006 for a 25 MW gas fired co-generation facility located
229 in Salt Lake City, Utah and another contract with Kennecott signed on December
230 20, 2005 for up to 31.8 MW from a waste heat fired co-generation facility located
231 in Magna, Utah. Neither of these contracts have provisions for liquidated
232 damages, availability requirements, delay damages, commercial operation start
233 date penalties, Cost to Cover provisions, etc. Although I have not reviewed the
234 US Magnesium contract, I have been told that it also is a non-firm PPA without
235 these provisions as well. The consistent message here is that non-firm power
236 requires a different type of contract.

237 **Q: Have other parties testified previously that wind is a "non-firm resource"?**

238 **A:** Yes. Among others, Phil Hayet in docket no. 03-035-14, testimony dated 12 April
239 2004 states, "The Company is correct that wind generation is intermittent (non-
240 firm) and should not be afforded the same treatment as firm QF resources." I concur
241 with this statement.

242 **Q: Would the Company be at significant risk of energy non delivery from the**
243 **wind farm without the penalties of liquidated damages and associated**
244 **provisions in the contract?**

245 **A:** No. Provisions to cover liquidated damages have historically been used to ensure
246 that fossil fuel generators continue to deliver power under firm energy contracts.
247 For example, a fuel generator without a tolling arrangement that under predicts
248 future fuel costs has a strong incentive to stop producing as the costs of the fuel
249 place them in a negative financial situation. In this case, the liquidated damages
250 provisions are crucial. In fact damage provisions tend to be significant to avoid
251 non-delivery at times when the Company must depend on the QF for delivery.
252 These provisions also help ensure that generators strongly consider the
253 implications of fixed price contracts before entering into a PPA. The issue with a
254 wind plant is vastly different. More than 70% typically of the cost of power from
255 a wind plant consists of sunk capital costs with the remainder consisting of
256 variable costs associated with maintenance, administration, and land owner
257 royalties, none of which is dependent on fuel. This is contrasted to fossil plants
258 where most of the energy costs are for fuel. Thus wind plant owners are entirely
259 driven by a necessity to keep turbines operational to cover the capital costs and
260 achieve the expected return on investment i.e. the greater diligence to keep wind
261 turbines mechanically ready, the more energy will be produced, and therefore the
262 higher the return. This is always true.

263 **Q: Are there any other remaining provisions that are difficult?**

264 **A:** Yes there are. The provided PPA requires that the Project Development Security
265 be in place within 10 days after the Effective Date i.e. after Parties and
266 Commission approval. This is to cover the costs associated with the project not

267 being able to achieve operation by the Expected Commercial Operation Date.
268 This short time frame is egregious, and doesn't capture the reasonable purpose of
269 this clause even in a firm wind energy contract. For example, if two identical
270 projects entered into a contract on the same day and one project had a three year
271 time frame to Operation and the other a one year time frame, do both have the
272 same risk of non-performance at the date of contract signing? While the answer is
273 clearly no, the risk is similar at the time that both projects are within one year of
274 operation. For a small project using a non-firm contract, security provisions are
275 not necessary as the intent is that capacity is available on the system whether the
276 wind farm is in place or not. If the Commission MUST require this security and
277 believes there is some increasing risk to the Company and/or ratepayers as the
278 Expected Commercial Operation Date comes closer then we suggest a method
279 similar to some other wind contracts. We propose that within one year of
280 Expected Commercial Operation Date that the security funding begins as a linear
281 escalator starting at zero at one year from operation date to full security funding at
282 time of Expected Commercial Operation Date as updated on quarterly basis.

283 **Q: Why does the Project Development Security provision presently hinder your**
284 **project?**

285 **A:** Small wind projects are typically developed by firms that ultimately do not
286 provide the final project construction or final capital takeouts as they either do not
287 have the resources or the capability of effectively using the federal production tax
288 credit. Therefore, only after the site development work is nearly completed and

289 the PPA has been signed are these investors willing to negotiate an interest in a
290 wind project. The good news is that these investors are readily available and
291 willing to negotiate but in general they are unwilling to negotiate prior to the local
292 developer on a small project signing a PPA. There are just too many projects in
293 states where contracts have been able to be signed by local developers and utilities
294 because the contracts do not have an imminent security provision.

295 **Q: Did you bid into the most recent RFP?**

296 **A:** Yes we did because of encouragement from PacifiCorp from two sources. The
297 first encouragement was based on Bruce Griswolds surebuttal testimony in
298 Docket No. 03-35-14 where he states, “PacifiCorp’s alternative proposal is that
299 the Commission could require that all renewable QF’s (over the Schedule 37
300 threshold) participate in renewable RFP’s.” and second that we were encouraged
301 to participate by PacifiCorp personnel during the negotiation process.

302 **Q: Were you accepted as a qualified bidder?**

303 **A:** No. We did not meet the minimum annual energy delivery requirements of
304 70,000 MWh which is equivalent to an approximately 20 MW capacity wind
305 farm.

306 **Q: Where does that leave the 18.9 MW Spanish Fork Project?**

307 **A:** We are left in contract limbo. We are too small to participate in the RFP process
308 and yet because we are small we need different contract provisions for success in
309 the QF proxy process.

310 **Q: If 20 MW or smaller projects receive non-firm contracts doesn’t that create a**

311 **bias against larger wind QF's subject to firm contract provisions?**

312 **A:** **No.** Larger QF's have the opportunity to bid into the RFP. As part of this RFP
313 process the bidder also has the opportunity to adjust contract terms. While the
314 company may chose bidders that are willing to accept firm power contract
315 provisions, they are also under obligation to consider all viable bidder offers in a
316 competitive process gauged against the requirements of the IRP. Less than 20
317 MW wind projects are unable to participate in this process.

318 **Q:** **Does this conclude your testimony**

319 **A:** Yes it does.