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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE FORMAL COMPLAINT OF ELLIS-HALL CONSULTANTS AGAINST PACIFICORP/ROCKY MOUNTAIN POWER	Docket No. 14-035-24 **DIVISION OF PUBLIC UTILITIES' INITIAL RESPONSE TO ELLIS-HALL CONSULTANTS' COMPLAINT**

Pursuant to Utah Code Ann. § 54-4a-1 and Utah Admin. Code r746-100-4 the Division of Public Utilities ("Division") submits this following Response to Ellis-Hall Consultants' ("EHC") Complaint ("Complaint") filed March 3, 2014 against PacifiCorp/Rocky Mountain Power ("Company"). The Commission should deny the requested relief and dismiss EHC's Complaint.

The same issue has already been before the Commission in Docket No. 13-035-100,[1] a proceeding in which EHC was a party.[2] The Commission's ruling denying Energy of Utah's

[1] *See In the Matter of the Application of Rocky Mountain Power for Approval of Changes to Renewable Avoided Cost Methodology for Qualifying Facilities Projects Larger than Three Megawatts,* Docket No. 12-035-100 (Order Denying Energy of Utah LLC's Petition for Review, Rehearing and Clarification; September 23, 2013).
[2] *See* Docket No. 12-035-100 (Order Granting Intervention of Ellis-Hall Consultants, LLC; January 3, 2013).

("EOU") Petition was correct.[3] When read in context of the requirements of Rocky Mountain Power Electric Service Schedule No. 38 ("Schedule 38") and the Order on Motion to Stay in the 12-035-100 docket ("Stay Order")[4], the only reasonable interpretation of the Order on Phase II Issues[5] ("Phase II Order") is that all qualifying small power production facility ("QF") pricing going forward - except already executed power purchase agreements ("PPA") - must be calculated using the Proxy/PDDRR method.

A Commission ruling allowing EHC to proceed with the Market Proxy method of calculating avoided cost for its proposed QF project(s)[6] would be unreasonably prejudicial to EOU and others who relied upon the Commission's prior orders. It would create uncertainty among QFs as to the nature of indicative pricing which is nonbinding and updated by operation of Schedule 38. Finally, such a ruling would result in unjust and unreasonable rates contrary to statutory requirements. For these reasons the Commission should deny the requested relief and dismiss EHC's Complaint.

[3]Docket No. 12-035-100 (Order Denying Energy of Utah LLC's Petition for Review, Rehearing and Clarification; September 23, 2013).
[4] Docket No. 12-035-100 (Order on Motion to Stay; Agency Action; December 20, 2012).
[5] Docket No. 12-035-100 (Order on Phase II Issue; August 16, 2013).
[6] It is uncertain based on the facts available whether EHC has one or two QF projects it wishes to advance with Proxy pricing. In EHC's Brief of Appellant filed in *Ellis-Hall Consultants v Public Service Commission of Utah*, Case No. 20131146-SC at p.15 EHC states that its "project is a 125-megawatt project." A 125 megawatt project is not a qualifying facility and Schedule 38 would not apply. It is the understanding of the Division that EHC may have two QF projects for which it may wish to receive Market Proxy pricing, however the Division does not have information available to verify whether this is the case and whether both had received indicative pricing prior to the Phase II Order.

INTRODUCTION

EHC filed a formal Complaint against RMP requesting that the Commission order the company to "execute a PPA with Ellis-Hall based on the indicative pricing provided to Ellis-Hall on May 22, 2013." During the March 3, 2014 scheduling conference, the Commission - at the request of EHC - narrowed the scope of the proceeding. As stated by EHC's counsel Mr. Wood at the March 13, 2014 scheduling conference, EHC's new request seeks an interpretation of the Phase II Order. "Our question is very, very simple. It is what did the Commission mean when it said future requests for indicative pricing." [7][8]

Pursuant to the request for expedited treatment and the now narrow legal issue, the Commission limited the facts to three relevant dates:

May 22, 2013 - the date EHC received indicative pricing;

August 16, 2013 – the date the Commission issued its Phase II Order; and

August 27, 2013 - the date RMP notified EHC that the indicative pricing provided prior

[7] Scheduling Conference Transcript p. 17 Lines 7-8

[8] When EHC circumscribed the issue to be "what did the Commission mean when it said future requests for indicative pricing," it appears that EHC may have inadvertently changed its request from a complaint under Utah Code Ann. § 54-7-9 requiring a specific claimed violation of any law, rule, or order into a request for a declaratory order regarding interpretation of a Commission order. This is of interest because under Utah Code Ann. § 63G-4-503 "[u]nless the petitioner and the agency agree in writing to an extension, if an agency has not issued a declaratory order within 60 days after receipt of the petition for a declaratory order, the petition is denied." While the Division disagrees with EHC's position, it believes a Commission order is preferable to a time based statutory denial. EHC's Complaint was filed on March 3, 2014. Sixty days from that date is May 2, 2014.

to the Phase II Order was no longer valid.

ARGUMENT

I. The Commission Has Already Ruled on the Same Legal Issue.

In its Order Denying Energy of Utah LLC's Petition for Review, Rehearing and Clarification, the same legal argument made in this Complaint was ruled on by the Commission. "To paraphrase the Utah Supreme Court, 'the Commission's [prior decisions concerning … have] a binding legal effect under the doctrine of stare decisis. The adjudication of every case requires the application of one or more rules of law. . . . [which] necessarily governs all subsequent cases properly falling within the scope of the rule. This is so even when the particular facts in subsequent cases are different and res judicata does not apply."[9]

On September 5, 2013 EOU submitted a Petition for Review, Rehearing and Clarification.[10] EOU had requested and received indicative pricing under Schedule 38 prior to the Phase II Order. EOU represented to the Commission, unopposed, that PPA negotiations were completed prior to the Phase II Order, but the PPA had not yet been executed by the Company. EOU argued in effect that "all of [EOU's] responsibilities in the PPA execution process were met prior to the [Order]."[11]

Based on these facts EOU argued that "[t]he Commission's [Phase II Order], directed the

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[9] *In the Matter of the Division's Annual Review and Evaluation of the Electric Lifeline Program, HELP In the Matter of: HELP, Electric Lifeline Program Evaluation*, Docket Nos. 03-035-01, 04-035-21(Order on Various Procedural Motions and Petitions; August 1, 2005) citing to *Salt Lake Citizens Congress v. Mountain States Telephone and Telegraph Co*., 846 P.2d 1245, 1252 (Utah 1992).

[10] Docket No. 12-035-100 (EOU's Petition for Review, Rehearing and Clarification; Sept. 5, 2013).

[11] *Id*. at 2.

Company to utilize PDDRR method pricing for all future pricing requests under Schedule 38. On August 23 of 2013, PacifiCorp indicated to South Mountain Wind LLC its intent to re-price using the PDDRR method, impacting our ability to continue development."[12] EOU requested the same interpretation sought by EHC allowing it to continue with the Market Proxy pricing.

The Commission denied EOU's Petition with the brief conclusion that "[b]ased on a review of the Petition and responses filed by PacifiCorp and the Office, the Petition is denied."[13] Both the Company's and the Office of Consumer Services' filings explained why, taken in context of the history of Schedule 38 and prior Stay Order in the Docket, the Market Proxy pricing method was no longer valid. [14] The Commission agreed and denied EOU's Petition. EOU was not entitled to its pre Phase II Order indicative pricing.

The three facts (the three dates stated above) that the Commission allowed the parties to use here do not support any basis for EHC being granted what EOU was denied. There is no reasonable basis for differentiating between the two situations. The legal issue of whether the Phase II Order language should be interpreted to allow prior indicative pricing to be used has been answered in the negative. The Commission should deny the relief sought on the basis of stare decisis.

II. The Phase II Order Read in Context Can Only Be Interpreted to Mean All QF Pricing Not Included in an Executed PPA Must Be Updated.

[12] *Id*. at 1 (emphasis in original).
[13] Docket No. 12-035-100 (Order Denying Energy of Utah LLC's Petition for Review, Rehearing and Clarification; September 23, 2013).
[14] *See* Docket No. 12-035-100 (Rocky Mountain Power's Response to EOU's Petition for Review, Rehearing and Clarification; September 18, 2013 and OCS's Response to EOU's Petition for Review, Rehearing and Clarification; September 18, 2013).

The Phase II Order language in complete isolation is somewhat difficult to apply to QF projects. When read in context, understanding of the nature of indicative pricing and the Stay Order, the Phase II Order intent and application become clear. The Phase II Order intended to update all existing QF pricing not contained in an executed PPA.

The prior guidance in the Stay Order clarifies the intent of the Phase II Order. The decision not to stay the existing pricing was based, in part, on the continuing responsibility of RMP to update pricing for projects yet to have executed PPAs. The Commission recognized that it may be premature to change pricing calculations immediately before it had evaluated alternatives. Rather than staying existing QF processes it decided to allow the previous method to remain in place temporarily to provide indicative pricing to QFs in the interim.

The risk to rate payers was limited because the pricing for QFs would be updated to reflect the outcome of the Docket. The Commission further recognized that QFs would not be taken by surprise. Rather the Commission recognized that it had "placed market participants on notice of the schedule" the end of which would result in an order likely to change avoided cost calculations.[15] The Commission removed any ambiguity as to the effect of a change in method or to whom it might apply stating, "Schedule No. 38 is clear; RMP will update its pricing proposals at appropriate intervals to accommodate any changes to its avoided costs calculations… [T]he outcome of the Phase Two hearings… may require the application of new avoided costs calculations for all large wind QF projects not in possession of executed power purchase agreements."[16]

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[15] Docket No. 12-035-100 (Order on Motion to Stay Agency Action; December 20, 2012 p. 14).
[16] While the Commission stated that it "may" require pricing updates with a new method, read in context the word "may" related to the probability that there would be a change in calculation

EHC was on notice that its indicative pricing was subject to being updated to a new method as the result of Phase II Order if it did not have an executed PPA by that time. The Phase II Order, read in context with the prior Stay Order should be interpreted to mean that the new pricing method applies to all QFs without executed PPAs.

Strictly applying the PDDRR method only to future indicative pricing requests would lead only to confusion and uncertainty. Indicative pricing is for initial planning purposes only. Schedule 38 is clear that "such prices are merely indicative and are not final and binding." [17] Indicative pricing is not even the pre-final pricing. After the indicative pricing, if the QF wishes to proceed the Company provides a draft PPA containing a "specific pricing proposal."[18] Although provided after the indicative pricing, the specific pricing proposal "shall not be construed as a binding proposal."[19] Even after providing the specific pricing proposal in a draft PPA Schedule 38 requires the Company to "update its pricing proposals at appropriate intervals to accommodate any changes to the Company's avoided-cost calculations." [20]

Schedule 38 states twice in different parts that pricing and terms are "only final and binding to the extent contained in a power purchase agreement executed by both parties and approved by the Commission" and that "[p]rices and other terms and conditions in the power purchase agreement will not be final and binding until the power purchase agreement has been executed by both parties and approved by the Commission."[21] It's difficult to parse the language

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method not whether the change might require pricing updates. Schedule 38 is clear that pricing updates are required by a change in method.

[17] Rocky Mountain Power Electric Service Schedule No. 38(I)(B)(3)

[18] Schedule No. 38(I)(B)(5)

[19] *Id*

[20] Schedule No. 38(I)(B)(6)(c)

[21] Schedule No. 38(I)(B)(3), (I)(B)(7)

in Schedule 38 in any way that doesn't require the new pricing method to be applied to QFs via updated pricing. Indeed, if the utility were not to update its pricing, the Division would likely challenge the utility's recovery in rates of any amount paid to the QF above the updated pricing.

The alternative view that the PDDRR method should be strictly limited only to future indicative pricing requests would make little sense. Indicative pricing is not final pricing. The entire purpose of the 12-035-100 Docket was to set pricing that accurately reflected the utility's avoided costs for new QF projects. Applying the new pricing method only to a pricing term that is not the final price would be of little value. How would specific pricing proposals be calculated? How would final pricing be negotiated?

The effect of an interpretation that only future indicative pricing shall be calculated using the PDDRR method results in QFs receiving a PDDRR based indicative price for planning that differs from the Market Proxy method for specific and final pricing terms. The Company would presumably update the pricing for the specific pricing proposal to the Market Proxy method resulting from Docket No. 06-035-21 as required by Schedule 38. This would be illogical. The only reasonable interpretation is that the PDDRR method applies to all pricing under Schedule 38 not yet fixed as a term of an executed PPA on the date of the Phase II Order.

With the foundational understanding that indicative pricing is updated during the process and the Commission's warning that QF projects without executed PPAs would be subject to new pricing calculations, the Phase II Order requiring future requests for indicative pricing was changing the method of pricing calculation. The Commission discontinued the use of the Market Proxy method and chose to "instead use the Proxy/PDDRR method for all QFs." RMP is therefore required by Schedule 38 to update its non-binding pricing to reflect the current avoided

costs.

CONCLUSION

The Commission should deny the relief requested and dismiss the Complaint. The Commission has already reviewed the same legal issue applied to effectively the same facts. The precedent of the previous decision governs. The Commission should dismiss the Complaint on this ground alone. If the Commission wishes to further clarify the application of the Phase II Order, it must recognize that it was not written in isolation, but rather as a final decision in context of an ongoing regulatory proceeding. When reviewed with the broader view of the Commission's previous guidance, Schedule 38 and the ultimate goals of matching pricing with avoided costs, the proper interpretation is to apply the PDDRR method to all QF pricing that had not been part of an executed PPA at the time of the Phase II Order. For these reasons the Commission should deny the requested relief and dismiss EHC's Complaint.

Submitted this 28th day of March, 2014.

/s/ Justin C. Jetter

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 28th day of March 2014, on the following:

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