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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of: **Formal Complaint of Ellis-Hall Consultants Against PacifiCorp/Rocky Mountain Power**	Docket No. 14-035-024 **Office of Consumer Services' Response to Formal Complaint of Ellis-Hall Consultants Against PacifiCorp/Rocky Mountain Power**

COMES NOW, The Office of Consumer Services ("Office") and hereby submits this Response to the Formal Complaint of Ellis-Hall Consultants ("Ellis-Hall") Against PacifiCorp/Rocky Mountain Power ("Company" or "Rocky Mountain Power") filed March 3, 2014, ("Complaint") with the Public Service Commission of Utah ("Commission"). As discussed more fully below, the Office asserts the Complaint is fatally flawed on multiple fronts and should be dismissed by the Commission.

I. The Complaint is an Untimely Motion for Reconsideration, Rehearing, or Clarification and Must be Dismissed

While Ellis-Hall has styled its request for Commission action as a "Formal Complaint", Ellis-Hall has repeatedly stated the relief requested in the Complaint is an interpretation or clarification of the Commission's language contained in the August 16, 2013, Order on Phase II Issues in Docket No. 12-035-100 ("Phase II Order") ("Our question is very, very simple. It is: What did the

Commission mean when it said 'future requests for indicative pricing?'.") Transcript of March 13, 2014, Scheduling Conference, ("Conference Tr.") 17:7-8. *See also* Conference Tr., 18:12-13; 19:12-13; 10:2-3; 10:21-22; 14:21-25. Importantly, Ellis-Hall reiterated that the current Complaint is not related to Schedule 38, or any other approved tariff. *See* Conference Tr., 15:1-4. Thus, while titled as a Formal Complaint, in substance Ellis-Hall requests review and clarification of the Phase II Order[1].

Utah Admin. Code r.746-100-11 (2013) establishes "Petitions for review or rehearing *shall* be filed *within 30 days of the issuance date of the order* …." (emphasis added). Moreover, § 63G-4-301, Utah Code Ann. (2013) only permits an "aggrieved party [to] file a written request for review *within 30 days after the issuance of the order*…." (emphasis added). The Utah Court of Appeals has held that a statutorily created time limit for seeking review of quasi-judicial administrative agency action is jurisdictional and should be the initial inquiry. *See Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569 (Utah Ct. App. 1989) ("Just as any court, the [reviewing agency] should first determine that it has jurisdiction and, if it does not, dismiss the matter. Any action beyond its jurisdiction is void.").

Ellis-Hall's current request, while characterized as a Formal Complaint, is in substance a request for the Commission to review and clarify the Phase II Order. Any such motion was due, under Commission Rules and the Utah Administrative Procedures Act, no later than September 15, 2013. The requested relief is nearly six months tardy. As such, the Commission is without jurisdiction to grant the relief requested by Ellis-Hall[2]. The Commission must dismiss the

[1] The Office acknowledges alternate requests for relief exist. However, Ellis-Hall does not contend it is seeking relief under any alternate mechanism, and has not met the requirements for pursuing such relief.

[2] The Office is also uncertain about the application of the Schedule 38 PPA negotiation framework to Ellis-Hall, and thus the Commission's authority to grant the relief requested. In its March 14,

Complaint. *See Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah Ct. App. 1987) ("Upon a determination by the Court that its jurisdiction is lacking, its authority extends no further than to dismiss the action.").

II. The Complaint is Barred by Issue Preclusion/*Stare Decisis*

If the Commission finds that it has jurisdiction to consider the Complaint, the Office submits the Complaint should be dismissed under the doctrine of *stare decisis*. The Complaint seeks relief from the Commission in the form of an order "requir[ing] PacifiCorp to execute a PPA with Ellis-Hall based on the indicative pricing provided to Ellis-Hall on May 22, 2013." Complaint, p. 2. Ellis-Hall is requesting the identical relief related to the Phase II Order previously requested by Energy of Utah, LLC ("EOU") on September 3, 2013, in Docket 12-035-100 via EOU's Petition for Rehearing and Clarification ("Petition").

As noted more fully in the Office's Response[3] to the Petition, the relief requested by EOU was vague, but appeared to request an Order from the Commission requiring the Company to honor, through a power purchase agreement ("PPA"), an indicative pricing estimate provided prior to the Phase II Order. In the Petition, EOU asserted its belief that possession of an indicative pricing estimate from Rocky Mountain Power, predating the Phase II Order and related to a wind powered Qualifying Facility, required the Company to execute a PPA incorporating the indicative pricing, notwithstanding language of the Phase II Order wherein authorization for the Market Proxy

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2014, Brief of Appellant, and the March 18, 2014, Corrected Brief of Appellant, filed with the Utah Supreme Court, Ellis-Hall describes its project as "a 125-megawatt project." As Ellis-Hall opposed development of a factual record in this matter, the Office can only rely upon this statement of fact presented to the Utah Supreme Court to further question the validity of Ellis-Hall's claim to a right of contract as a Qualifying Facility under Schedule 38, as its project appears to exceed the 80 MW threshold. *See* 18 C.F.R. § 292.204(a) (2013); Utah Code Ann. § 54-2-1(19) (2013).

[3] Filed Sept. 18, 2013, in Docket No. 12-035-100.

method was rescinded. Critically, EOU relied upon the very language quoted by Ellis-Hall in the current Complaint: "future requests for indicative pricing for wind QFs under Schedule 38 shall be calculated using the Proxy/PDDRR method." EOU asserted that that since it had pursued development efforts and PPA negotiations pursuant to indicative pricing calculated under the now-disallowed Market Proxy method, the Company should be required to execute a PPA based upon the pre-August 16, 2013, Phase II Order estimate. The Commission summarily rejected EOU's argument and denied EOU's Petition to modify or clarify the language of the Phase II Order to allow further execution of contracts incorporating pre-Phase II Order terms. Accordingly, the Commission has previously ruled on the very issue presented in the Complaint; i.e. the effect of the Phase II Order on indicative pricing estimates provided prior to the Phase II Order but not memorialized in an executed PPA.[4]

"Rules of law established by adjudication apply to the future conduct of all persons subject to the jurisdiction of an administrative agency, unless and until expressly altered by statute, rule, or agency decision." *Salt Lake Citizens Cong. v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1253 (1992). While the Utah Supreme Court has limited the application of *stare decisis* in some administrative proceedings, "[t]his limitation does not apply where administrative law making is done pursuant to formal procedures similar to those employed in judicial proceedings." *Id.* at 1252. The Commission previously ruled on the narrow issue presented in the Complaint. Ellis-Hall has failed to distinguish its circumstances from those of EOU such that the Commission can provide an

[4] Ellis-Hall requested intervention in Docket No. 12-035-100 on December 7, 2012, and the Commission granted the request January 3, 2013. Therefore, there is no question that Ellis-Hall is on notice of the Commission's disposition of EOU's Petition.

alternate ruling without acting in an arbitrary and capricious manner.[5] *See Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1164 (10th Cir. 2002) ("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure."); *Sorenson Communications, Inc. v. F.C.C.*, 567 F.3d 1215, 1223 (10th Cir. 2009) ("An agency must provide a rational explanation when it departs from an existing regulation or position."). The Complaint must be dismissed, as the precise issue presented by Ellis-Hall has been previously adjudicated by the Commission.

III. Schedule 38 Prohibits the Relief Requested by Ellis-Hall

If the Commission decides to review the merits of Ellis-Hall's arguments, the Commission should deny the Complaint. The gravamen of the Complaint falls short under a plain language reading of Schedule 38. Moreover, Ellis-Hall's contention fails to properly address and incorporate the full efforts of the Commission in Docket No. 12-035-100.

Ellis-Hall's Complaint contends that "the [Phase II] Order specifically applies only to future requests for indicative pricing for wind QFs under Schedule 38…The Order does not state that it has any application to projects that have already received indicative pricing such as Ellis-Hall's project." Complaint, p. 1. In other words, Ellis-Hall contends that since it had a pricing estimate from the Company, provided nearly ten months ago, that, notwithstanding any intervening developments, the Company (and thus ratepayers) are bound to honor the May, 2013 indicative pricing estimate with a contract. This contention is at odds with the plain language of Schedule 38.

[5] Indeed, it was Ellis-Hall who emphatically argued against development of a factual record that would have allowed such a determination.

Schedule 38 definitively states no less than four separate times that indicative pricing quotes are neither final nor binding. *See* Rocky Mountain Power, Electric Service Schedule No. 38, State of Utah ("Schedule 38") – Sections (1)(B)(3); (1)(B)(5); (1)(B)(7). Indeed, Sections (1)(B)(3) and (1)(B)(7) explicitly state: "Prices 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." Section (1)(B)(3) further specifically states that "such [indicative pricing proposals] are merely indicative and are not final and binding" until successful completion of the aforementioned PPA negotiation and approval processes.

Furthermore, Schedule 38 mandates Rocky Mountain Power "update its pricing proposals at appropriate intervals [during contract negotiations] to accommodate any changes to the Company's avoided-cost calculations, the proposed project or proposed terms of the draft power purchase agreement." Schedule 38, § I(B)(6)(c). Indeed, in denying the Company's motion to stay further implementation of the Market Proxy method during the pendency of Docket No. 12-035-100, the Commission reiterated this very requirement to ensure accurate pricing signals would be provided to developers such as Ellis-Hall in the event of changes to the calculation method or results. *See* Phase I Order, p. 17 ("Moreover, Schedule 38 is clear; [the Company] will update its pricing proposals at appropriate intervals to accommodate any changes to its avoided cost calculations, among other reasons.").

Accordingly, Ellis-Hall's contention that the Company is prohibited from updating indicative pricing estimates and obligated to execute a PPA incorporating outdated terms and conditions cannot withstand a plain language reading of Schedule 38. An order granting Ellis-Hall's requested relief would result in unjust and unreasonable rates imposed upon ratepayers, as the Commission has already determined the method used to calculate the indicative pricing estimate in Ellis-Hall's

possession violates the public interest.[6] The Complaint should be dismissed, as the requested relief conflicts with Schedule 38 and cannot produce just and reasonable rates as required by Utah Code Ann. § 54-3-1 (2013).

IV. The Commission's Orders in Docket No. 12-035-100 Preclude the Relief Requested by Ellis-Hall

A. The Market Proxy Method is No Longer Approved

In Docket No. 12-035-100, the Company requested, among other things, "consideration of proposed changes to the [then] current method for calculating avoided cost pricing for large wind qualifying facilities…[and] a motion to stay that portion of the [October 31,] 2005 Order that establishe[d] the Market Proxy method for determining indicative pricing provided to large wind QFs…." Phase I Order, p. 1. "[The Company] contend[ed] indicative pricing provided to large wind QFs based on the Market Proxy method overstate[d] [the Company's] avoided cost … [would] have significant financial impacts on its customers…[and] request[ed] an immediate stay of the use of the Market Proxy method for providing indicative pricing for large wind QFs, pending the conclusion of Phase II of" Docket No. 12-035-100. Id., p. 5.

In denying the Company's motion for a stay, the Commission put all parties on notice it would

> issue a new order on large wind QF project avoided cost methodology by mid-summer, 2013. If the evidence shows changes in methodology are warranted, we will have the opportunity to implement them for use in the calculation of indicative pricing at that time. As noted above, the indicative pricing proposals [the Company] has provided, and will continue to provide during the pendency of this docket, are not binding. Moreover, Schedule No.

[6] The Office is troubled that requiring the Company to execute the PPA requested by Ellis-Hall in the current docket may prejudice or otherwise limit a full and comprehensive prudency review of the PPA in a future docket.

> 38 is clear; [the Company] will update its pricing proposals at appropriate intervals to accommodate any changes to its avoided cost calculations, among other reasons. We acknowledge the possibility *the outcome of the Phase Two hearings and the interests of ratepayers may require the application of new avoided cost calculations for all large wind QF projects not in possession of executed power purchase agreements when the Phase Two order is issued.*

Phase I Order, pp. 17-18. (emphasis added). A complete reading of the Commission's findings and conclusions in Docket No. 12-035-100 identifies the Commission's expectation, and notice, that any modifications to the avoided cost calculation, including a possible repeal of the authorization of the Market Proxy method as applied to *on-going* contractual negotiations, would be effective "mid-summer, 2013." Id. This modification became effective under the Phase II Order, August 16, 2013. A comprehensive and appropriate reading of the Commission's findings and conclusions in Docket No. 12-035-100 prohibits the inclusion of the Market Proxy method in any contracts not executed prior to August 16, 2013. Ellis-Hall's attempt to revive the disallowed Market Proxy method through inappropriately reading the Phase II Order in a vacuum[7], dismissing the Commission's announced intent that any update to calculation methods apply to "all…projects not in possession of executed power purchase agreements…," defies the Commission's Orders in Docket No. 12-035-100, and offends the public interest. The Complaint should be dismissed.

B. <u>The Proxy/PDDRR Method is the Only Approved Calculation Method of Avoided Costs for QF PPAs not executed prior to August 16, 2013</u>

Ellis-Hall requests that the Commission "require PacifiCorp…execute a PPA with Ellis-Hall based on the indicative pricing provided to Ellis-Hall on May 22, 2013." Complaint, p. 2. Ellis-Hall asserts such a request is justified by claiming the Phase II Order

[7] A mere four lines below the Phase II Order language quoted by Ellis-Hall, the Commission declared it had made "the decision to discontinue use of the Market Proxy Method for indicative wind prices and to instead use the Proxy/PDDRR method *for all QFs*…." Phase II Order, p. 18 (emphasis added). The Office submits no ambiguity exists regarding either the intent or extent of the Commission's Orders in Docket No. 12-035-100.

> specifically applies only to future requests for indicative pricing for wind QFs under Schedule 38, stating in part: "future requests for indicative pricing for wind QFs under Schedule 38 will be calculated using the Proxy/PDDRR method." The Order does not state that it has any application to projects that have already received indicative pricing such as Ellis-Hall's project.

Complaint, p. 1. Similar to the discussion above, Ellis-Hall's argument fails to give full force and effect to the efforts on the Commission in Docket No. 12-035-100.

Section 54-12-2, Utah Code Ann. (2013) states "[t]he commission shall establish reasonable rates, terms and conditions for the purchase or sale of electricity or electrical generating capacity…between a purchasing utility and a qualifying power producer." In establishing these rates and conditions, the Commission is authorized to "devise [a] method which considers the purchasing utility's avoided costs," which the Commission did through Phase II of Docket No. 12-035-100. After issuing the Phase I Order denying the Company's Motion to Stay further application of the Market Proxy method and placing parties on notice of the potential for modification to the avoided cost calculation methods, the Commission received testimony from at least ten individuals on behalf of at least seven different parties; numerous comments from members of the public, municipalities and elected officials; and extensive post-hearing briefing regarding various calculation methods. *See generally* Docket No. 12-035-100.

Based upon evidence received in Docket No. 12-035-100, the Commission determined the Market Proxy indicative pricing method "[ran] the risk of becoming out of date." Phase I Order, p. 18. The Commission therefore "expand[ed] the application of the Proxy/PDDRR method," establishing it as the sole method for determining the avoided cost variable in QF PPAs. Id. The Commission declared the Proxy/PDDRR method would "ensure future indicative prices, and therefore QF energy and capacity payments, will reflect appropriately the costs reasonably expected

to be avoided or deferred over the term of the contract." Id. In other words, the Commission determined the Proxy/PDDRR method provided more accurate data for calculating the actual avoided costs related to QF facilities, thereby producing a more reliable value and ensuring accurate energy payments charged to, among others, residential and small business customers. This finding aligns with federal and state requirements that the Commission establish "rates for purchases [which are] just and reasonable to the electric consumer of the electric utility and in the public interest." *See* 18 C.F.R. § 292.304(a)(1) (2013); *see also* Utah Code Ann. § 54-12-2(2) (2013).

Importantly, the triggering threshold for the application of the newly approved calculation, pursuant to the notice provided by the Phase I Order, was the issuance of the Phase II Order. *See* Phase I Order, pp. 17-18. Ellis-Hall now requests the Commission act against its prior finding that the Market Proxy method violates the public interest and require the Company to incorporate this unauthorized pricing variable in a yet-to-be-executed PPA. Any further application of the disallowed Market Proxy method, as described in Docket No. 12-035-100, in a future PPA would contravene state and federal law, and offend the public interest. *See* Utah Code Ann. § 54-12-2(2) (2012); 16 U.S.C.A. § 824a-3(b)(1) (2013). *See also* 18 C.F.R. § 292.304(a)(1) (2013). In order to maintain compliance with federal and state laws and regulations, the Complaint must be dismissed.

V. Conclusion

As discussed above, Ellis-Hall's Formal Complaint is defective for a multitude of reasons and must be dismissed. The Commission is barred from granting the relief requested, as it has no jurisdiction to do so, and can only deny Ellis-Hall its relief without committing reversible error by acting in an arbitrary and capricious manner. Furthermore, Commission approved tariff language,

Commission precedent, and federal and state law prohibit the relief requested by Ellis-Hall. Accordingly, the Office requests the Complaint be dismissed in its entirety.

Submitted this 28th day of March, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Office of Consumer Services' Response to Formal Complaint of Ellis-Hall Consultants Against PacifiCorp/Rocky Mountain Power, Docket No. 14-035-024 was sent to the following individuals in the manner identified below, this 28th day of March, 2014.

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