JUSTIN C. JETTER (#13257)
PATRICIA E. SCHMID (#4908)
Assistant Attorney Generals
Counsel for the DIVISION OF PUBLIC UTILITIES
SEAN D. REYES (#7969)
Attorney General of Utah
160 E 300 S, 5th Floor
P.O. Box 140857
Salt Lake City, UT 84114-0857
Telephone (801) 366-0335
jjetter@utah.gov

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' RESPONSE TO ELLIS-HALL CONSULTANTS' COMMENTS**

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") Comments filed March 28th, 2014. This Response is supplemental to the Division's Response to EHC's Complaint filed on March 28, 2014. The Division remains in support of the positions taken therein and supplements with the following.

I. THE COMMISSION SHOULD DISREGARD THE FACTS INCLUDED IN EHC'S COMMENTS IN CONTRADICTION OF THE SCHEDULING ORDER.

The Commission agreed to expedite its consideration of this Complaint based on the proposal by EHC that only three dates were relevant facts to be considered. EHC's inclusion of additional facts in contradiction of the terms of the expedited schedule is inappropriate. For example EHC's introduction makes claims regarding a refusal to execute a PPA. Similarly on

page 10, EHC's claim that it had "expended significant amounts of time and money complying with the Interconnection Study and LGIA Process". These are the very type of claims that EHC chose to exclude in asking for such an expedited schedule. They are unvetted by the usual fact-finding process. As such Commission should disregard these claimed facts entirely and give them no weight.

II. THE PHASE II ORDER DOES NOT UNAMBIGUOUSLY APPLY ONLY TO FUTURE INDICATIVE PRICING REQUESTS

EHC argues that the Proxy/PDDRR method does not apply to updated pricing because of the phrasing "future indicative pricing requests" is unambiguous and the Commission is bound to interpret this language in a particular way with no deference to the Commission's own understanding of the Phase II Order. Therefore, in EHC's view, the only category of pricing to which the Proxy/PDDRR method can apply is future indicative pricing. This argument relies on a faulty premise that agency interpretation of its own order or rule is analogous to agency interpretation of statute. It ignores other phrases within the Phase II Order. Finally it would lead to both irrational and unlawful results.

EHC relies on the premise that the level of deference that is applied to agency interpretation of statues also applies to to agency interpretation of its own orders and rules. The two are logically dissimilar because an agency drafts its own orders and is certainly in the best position to interpret its intent whereas a statute is an external source of legislative language. The same is true of an agency's interpretation of its own rules. "[W]e will not disturb the agency's interpretation or application of the [rule] unless its determination exceeds the bounds of

reasonableness and rationality." *Ashcroft v. Industrial Comm'n,* 855 P.2d 267, 269-70 (Utah Ct.App.1993) (quoting *King v. Industrial Comm'n,* 850 P.2d 1281, 1286 (Utah App.1993)). [1]

The Commission's interpretation of its own Order should be given significant deference. There is no party in a better position to interpret the Commission's order than the Commission. It has already had the opportunity to interpret the Phase II Order and its application to the same circumstances when raised by Energy of Utah in the 12-035-100 docket. There is no reason to deviate from the prior decision on the same issue.

Moreover, a strict construction of the plain language does not support EHC's request. Assuming, arguendo, that the Commission's language quoted by EHC requiring the Proxy/PDDRR method be used for future pricing request did not also apply to existing projects, the plain language argument still requires updated pricing. Nowhere does the Phase II Order state that the PDDRR method applies only to future indicative pricing requests. Rather it applies both to future indicative pricing requests and to updates as required by Schedule 38.

Application only to future indicative pricing requests requires ignoring the language of the Phase II Oder which states in the Synopsis (written by the Commission) that "the Proxy/PDDRR method is approved for determining avoided costs for all small power production QFs." Similarly that Phase II Order "discontinue[s] the use of the Market Proxy method for

[1] Federal Courts similarly recognize this greater deference. *See S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement,* 620 F.3d 1227, 1236 (10th Cir. 2010) ("when an agency subsequently interprets its own order, we owe deference to this interpretation"); *See also Colo. Interstate Gas Co. v. FERC*, 791 F.2d 803, 810 (10th Cir.1986) ("An agency's interpretation of its own order is entitled to great weight."); *Consumers Energy Co. v. FERC*, 428 F.3d 1065, 1067–68 (D.C.Cir.2005) (an agency's interpretation of its own orders should be upheld "unless its interpretation is plainly erroneous or inconsistent with the order").

indicative wind QF prices and to instead use the Proxy/PDDRR method for all QFs." [2] Ignoring this language would certainly violate the requirement that "[a]ll parts of the given order… are considered relevant and meaningful." *See* EHC's Comments at 1. This language is either contradictory and ambiguous and requires interpretation or it is clear that both applies to future indicative pricing and all QFs in the process. In either event, the result is the same. QF pricing not finalized in an executed PPA is required to be updated to Proxy/PDDRR by Schedule 38.

Application only to future indicative pricing requests in an overly strict manner would also lead to an unreasonable and, frankly, absurd result. As explained in the Divisions Initial Response, there are at least three pricing stages in the process of Schedule 38; indicative, specific proposal, and final PPA pricing. Indicative pricing is very explicitly neither final nor binding. It is for planning purposes. Applying Proxy/PDDRR only to the first stage of the process would mean that the entire 12-035-100 docket was merely an exercise in providing new confusing initial pricing because the Proxy/PDDRR would not apply to specific pricing or final pricing. The QF's pricing would be updated to Market Proxy pricing at the specific pricing proposal stage by operation of Schedule 38. That is entirely illogical.

Finally, EHC's proposed interpretation requires a conclusion that its indicative pricing is valid indefinitely. While Schedule 38 explicitly states indicative pricing is not permanent, the only possible understanding of EHC's argument of entitlement is that the pricing remains good forever. It might be argued in a more complete fact-based claim that a QF who diligently pursues a PPA should have an equitable right of some type to indicative pricing being valid for a

[2] *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 on Phase II Issue; August 16, 2013, p. 18).

reasonable period of time that option is not available in to EHC because of the limited facts.[3] There are no facts to support any intermediate period. There is nothing for the Commission to rely upon.

Without such facts, the only scenario that would support EHC's request for an order requiring the Company to enter into a PPA using Market Proxy pricing is that indicative pricing requests entitle a QF to that price forever regardless of the QF's intervening actions. This outcome would result in indicative pricing becoming an effective option for a QF to exercise at any time in the future. Avoided costs change over time. Rate payers would be left at risk with no reward. It would be contrary to the public interest. And this would violate the Utah Code Ann. § 54-3-1 requirement that rates be just and reasonable.

The Commission has no facts to support any intermediate period of time and should not find that indicative pricing request are valid forever. The only reasonable conclusion is that indicative pricing requests are by nature non-binding, temporary and subject to update.

III. CONCLUSION

EHC's Comments provide no new basis for granting its request. For the reasons set forth in the Division's Response to EHC's Complaint as well as this Response to EHC's Comments, the Complaint should be dismissed.

Submitted this 11th day of April, 2014.

/s/ Justin C. Jetter

Justin C. Jetter
Assistant Attorney General
Utah Division of Public Utilities

[3] This would violate Schedule 38, but provides an example of how an argument for an intermediate period of entitlement to pricing might be made.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 11th day of April 2014, on the following:

Rocky Mountain Power:

Yvonne Hogle	yvonne.hogle@pacificorp.com
Daniel. E. Solander	daniel.solander@pacificorp.com
Eric Holje	eric.holje@pacificorp.com

Office of Consumer Services:

Brent Coleman	brentcoleman@utah.gov
Michele Beck	mbeck@utah.gov
Cheryl Murray	cmurray@utah.gov

Ellis-Hall Consultants, LLC

Mary Anne Q. Wood	mawood@woodbalmforth.com
Stephen Q. Wood	swood@woodbalmforth.com

/s/____Dennis Miller_____