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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 Parties' Initial Comments/Briefs Re Complaint of Ellis-Hall Consultants Against PacifiCorp/Rocky Mountain Power**

COMES NOW, the Office of Consumer Services ("Office") and hereby submits this Response to Ellis-Hall Consultants' ("Ellis-Hall") Comments ("Ellis-Hall's Comments" or "Comments"), the Division of Public Utilities' Initial Response to Ellis-Hall Consultants' Complaint ("DPU's Response"), and Rocky Mountain Power's Response to the Formal Complaint of Ellis-Hall Consultants ("RMP's Response") (collectively "Parties' Initial Briefs"). As the DPU's Response and RMP's Response align with the Office's initial position presented in the Office's Response to Formal Complaint of Ellis-Hall Consultants Against PacifiCorp/Rocky Mountain Power ("Office's Initial Brief"), this Response will focus on arguments contained in Ellis-Hall's Comments.

Initially, the Office objects to the inclusion of facts and discussion in the Introduction of Ellis-Hall's Comments that are beyond the scope of the narrow issue presented to the Public Service Commission of Utah ("Commission") in the current docket. Ellis-Hall itself states that the claims of disparate treatment "are not at issue here", but then proceeds to present facts and arguments related

to its claim of disparate treatment and "wrongful delay[]" in negotiating a power purchase agreement ("PPA"). Ellis-Hall's Comments, p. 2. *See also* Transcript of Scheduling Conference Hearing Proceedings, March 13, 2014 ("Tr."), 14:16-20. Ellis-Hall specifically enunciated, reiterated, and reinforced the narrow scope of the issue presently before the Commission during the Scheduling Conference. *See* Tr.7:24-8:4; 10:2-3, 21-22; 11:5-6; 14: 21-25. Facts related to claims of disparate treatment and wrongful delay have not been fully developed by the parties, and all discussion of these issues is beyond the scope of the present docket. The Office objects to the inclusion of these facts and related arguments, and requests they be stricken from the record.

ARGUMENT

I. THE "FORMAL COMPLAINT" IS IN FACT AN UNTIMELY MOTION FOR REVIEW, RECONSIDERATION OR CLARIFICATION

As discussed more fully in the Office's Initial Brief, the Commission does not have jurisdiction to grant the relief requested by Ellis-Hall and must dismiss the Complaint. In its Comments, Ellis-Hall has presented a menagerie of citations, generally quoting the Commission's efforts to summarize various parties' litigation positions or other non-authoritative dicta, in an attempt to support of interpretation of the Commission's Order on Phase II Issues in Docket No. 12-035-100 ("Phase II Order"). Critically, the Comments confirm what Ellis-Hall in fact seeks is a clarification of the Phase II Order, wherein the Commission stated

> We therefore discontinue use of the Market Proxy method for determining indicative prices for Schedule 38 wind QFs going forward and expand the application of the Proxy/PDDRR method to include wind QFs seeking indicative pricing…Therefore, future requests for indicative pricing for wind QFs under Schedule 38 will be calculated using the Proxy/PDDRR method as has been the case for other QFs previously.

Phase II Order, p. 18. While Commission rules do not provide for a motion for clarification[1], any request for a review and/or rehearing of the Phase II Order requesting more specific language addressing the status of an indicative pricing estimate pre-dating the Phase II Order was due no later than September 15, 2013. The Complaint must be dismissed as the Commission has no jurisdiction to take any alternate action.

II. THE EFFECT OF THE COMMISSION'S ORDER ON INDICATIVE PRICING QUOTES

Ellis-Hall argues that the changes in the avoided cost calculation method announced by the Phase II Order do not apply to it because "Ellis-Hall's project does not qualify as a 'future request for indicative pricing.'" Comments, p. 8. Specifically, Ellis-Hall proposes that, since it received its indicative pricing prior to the Phase II Order and has not requested an update to the ten month old estimate, it is entitled to begin contract negotiations incorporating this pricing term. Ellis-Hall's position is premised on one key, and fatally flawed, assumption: an indicative pricing estimate is good indefinitely. As discussed below, this assumption conflicts with federal and state utility ratemaking law. Accordingly, Ellis-Hall's premise fails and the Complaint must be dismissed.

The Office submits that indicative pricing proposals provided by the Company prior to August 16, 2013, ("pre-exiting indicative price quote") have three possible outcomes in light of the Phase II Order: 1) all pre-exiting indicative price quotes not memorialized in executed PPAs were terminated pursuant to the Phase II Order; 2) a pre-existing indicative price quote was valid for a reasonable amount of time; and 3) a pre-exiting indicative pricing quote is valid in perpetuity, regardless of intervening factors, such as the Phase II Order. In the present docket, only the first

[1] *See* Utah Code Ann. § 54-7-15 (2013), Utah Admin. Code r.746-100-11.F (2013).

option – cancellation by operation of the Phase II Order – is a viable option and available to the Commission. Accordingly, Ellis-Hall's claim fails.

The second option – an indicative pricing estimate remaining valid for a reasonable amount of time – is a decision that is precluded in the current docket. Ellis-Hall prevented development of facts sufficient to determine the reasonableness of the actions of the Company and/or Ellis-Hall in any contract discussions. Furthermore, the issue presented to the Commission was characterized as a legal issue, and not dependent upon individual circumstances. Thus, no decision quantifying a reasonable period of time of validity or the reasonable nature of Ellis-Hall's efforts to secure a PPA can be made by the Commission.

The third option – an indicative priding estimate is valid indefinitely – is also not available, pursuant to Ellis-Hall's own statements, as well as state and federal law and related principles of utility ratemaking. Utah law requires "all charges made, demanded, or received by any public utility…shall be just and reasonable." Utah Code Ann. § 54-3-1 (2013). Similarly, federal law requires that, in purchasing energy from qualifying facilities, electric utilities shall only pay rates that are "just and reasonable to the electric consumers of the electric energy and in the public interest." 16 U.S.C.A § 824a-3(b)(1). Furthermore, Utah law forbids establishing utility rates while ignoring the possibility, or actual existence, of significant changes in circumstances. *See Utah State Bd. of Regents v. Utah Public Service Commission*, 583 P.2d 609 (1978). There is no debate as to the existence of a significant change of circumstance; "the decision to discontinue use of the Market Proxy method for indicative wind QF prices and to instead use the Proxy/PDDRR method for all QFs." Phase II Order, p. 18. Finding a pre-Phase II Order indicative pricing quote to be viable notwithstanding intervening, fundamental modifications to the underlying calculation formula would

result in unjust, unreasonable, and unlawful rates to be imposed upon ratepayers in contravention of federal and state law. *See e.g. Utah State Bd. of Regents*, 583 P.2d 609.

Moreover, Ellis-Hall has specifically announced it is not requesting the Commission make a finding that a pre-Phase II Order indicative pricing quote is valid forever. *See* Tr. 19:23-20:2 ("But that doesn't mean that we are asserting that our indicative pricing…is good forever. We're not making that request. That's not before the Commission right now."). The Utah Court of Appeals has held that a determination of matters outside of the issues of the case will have no force or effect. *See In re Estate of Waters*, 2001 UT App. 164, 29 P.3d 2 (Utah Ct. App. 2001); *citing Combe v. Warren's Family Drive-Inns, Inc.,* 680 P.2d 733 (Utah 1984). The requisite presumption for Ellis-Hall's assertion that its project is not a future request for indicative pricing – the assumption that an indicative pricing estimate is valid indefinitely – violates state and federal ratemaking laws, as well as Utah law limiting the relief the Commission may grant in this matter.

The only option remaining is a determination that the indicative pricing quote terminated by operation of the Phase II Order. This is the same result the Commission previously reached when another party presented the very argument currently proposed by Ellis-Hall. *See* Order Denying Energy of Utah LLC's Petition for Review, Rehearing and Clarification, issued September 23, 2013, Docket No. 12-035-100. Ellis-Hall's argument that the Company has contradicted the Commission's Orders and Schedule 38 is fatally flawed and should be dismissed.

III. THE EQUITY OF THE COMPANY'S UPDATE

Finally, Ellis-Hall contends the Commission prohibited an abrupt change or retraction of an existing avoided cost calculation method in denying the Company's motion for stay in Phase I of Docket No. 12-035-100. Ellis-Hall further claims the Company's application of the Phase II Order

is unfair to Ellis-Hall given its development efforts. Ellis-Hall asserts it was one of the five projects in the queue mentioned by the Commission in the December 20, 2012, Order on Motion to Stay Agency Action ("Phase I Order"), and further claims it is not fair for the Company to be allowed to "unilaterally change indicative pricing at the last minute and after a QF applicant has paid PacifiCorp hundreds of thousands of dollars to study and approve its project…." Comments, p. 10. However, none of the three stipulated facts available in this case support these contentions.

The citation referenced in the Comments does not name Ellis-Hall as the queue holder for position 420 in the PacifiCorp Generation Interconnection Queue, but rather identifies Monticello Wind, LLC. No information exists in the present docket to connect Ellis-Hall with Monticello Wind, LLC.[2] The amounts of money, if any, paid by Ellis-Hall in an effort to advance its proposed project, and any claimed approval of any portion of the project, are not supported by the three stipulated facts available in this matter. The Office was specifically prevented by Ellis-Hall from exploring just this type of factual record in this matter. Accordingly, the Office submits these claims should be stricken from the record, as beyond the scope of the present docket.

For the reasons stated herein, and in the Office's Initial Brief, the Complaint should be dismissed in its entirety.

Submitted this 11th day of April, 2014.

/s/ Brent Coleman
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[2] If in fact Ellis-Hall is the parent party to Monticello Wind, LLC, the information contained in the PacifiCorp Generation Interconnection Queue casts further doubt on Ellis-Hall's ability to seek a contract under Schedule 38, as the identified output for Q# 420, claimed by Ellis-Hall, is 140MW, above the 80 MW threshold.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Office of Consumer Services' Response to Parties' Initial Comments/Briefs Re Complaint of Ellis-Hall Consultants Against PacifiCorp/Rocky Mountain Power was sent to the following individuals in the manner identified below, this 11th day of April, 2014.

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