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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| IN THE MATTER OF THE FORMAL COMPLAINT OF ELLIS-HALL CONSULTANTS AGAINST PACIFICORP/ROCKY MOUNTAIN POWER | Docket No. 14-035-24<br><br>***PETITION FOR REVIEW OR REHEARING*** |

## INTRODUCTION

If plain English means anything, the Commission must reconsider its April 25, 2014 Order (the "Present Order") dismissing the complaint of Ellis Hall Consultants, LLC ("Ellis-Hall"). Indeed, if the integrity and consistency of the Commission's decisions mean anything, the Commission must reconsider the Present Order.

Pursuant to Utah Code Ann. § 54-7-15, R746-100-11, and § 63G-4-301, Ellis-Hall seeks the following relief.

1. **The Commission should address the question which was presented, instead of avoiding it to reach a result entirely at odds with the plain language and intent of the Commission's prior orders.**

The Commission was asked to explain and apply its own language from its August 16, 2013 Order, which states, "We therefore discontinue use of the Market Proxy method for determining indicative prices for Schedule 38 wind QFs **going forward** . . . . Therefore, **future requests for indicative pricing** for wind QFs under Schedule 38 will be calculated using the Proxy/ PDDRR method." (Emphasis added.)

Instead of applying this plain language, the Commission avoided it. Instead, the Commission wrongly conflated the notion of "updating" indicative pricing using the Market Proxy method, with abandoning the Market Proxy method altogether when requests for indicative pricing have already been made – the very thing the Commission had previously held PacifiCorp could not do.

By this semantic maneuver, the Commission has given PacifiCorp the power to do, selectively and at its whim, what the Commission has previously and repeatedly recognized as unfair and wrong.

The Commission should hold that the plain meaning of the Commission's August 16, 2013 Order instructs PacifiCorp to discontinue use of the Market Proxy method for determining indicative pricing only for "future requests for indicative pricing," meaning, clearly, requests for indicative pricing made after August 16, 2013, and not Ellis-Hall's request for indicative pricing, which was made prior to May 22, 2013.

**2. If the Commission wishes to address issues not raised by Ellis-Hall, Ellis-Hall should be given an opportunity to fully address those issues.**

If the Commission determines that the scope of Ellis-Hall's formal complaint should be expanded to determine whether PacifiCorp properly altered Ellis-Hall's indicative pricing under Schedule 38, Ellis-Hall should be given the opportunity for additional time, fact finding, and a

hearing on this issue, including presenting evidence that PacifiCorp applied Schedule 38 in a discriminatory manner.

The legal and factual grounds for this relief are more fully set forth herein.

## ARGUMENT

### I. THE PRESENT ORDER IGNORES THE PLAIN LANGUAGE AND INTENT OF PRIOR ORDERS AND SIMPLY ADOPTS PACIFICORP'S SELF-INTERESTED, BUT ILLOGICAL, ARGUMENT.

Ellis-Hall's complaint centers on a dispute between Ellis-Hall and PacifiCorp regarding the meaning of the Commission's August 13, 2013 Order, which allowed PacifiCorp to abandon the Market Proxy method for pricing wind power purchases and to adopt the Partial Displacement Differential Revenue Requirement ("PDDRR") method, which is more profitable for PacifiCorp. However, because wind power developers rely on indicative pricing when developing their projects, the August 13, 2013 Order states, "We therefore discontinue use of the Market Proxy method for determining indicative prices for Schedule 38 wind QFs **going forward** . . . . Therefore, **future requests for indicative pricing** for wind QFs under Schedule 38 will be calculated using the Proxy/ PDDRR method." (Emphasis added.)

Instead of applying this plain language, PacifiCorp took the position that Ellis-Hall's indicative pricing, issued prior to August 13, 2013, was invalid because it employed the Market Proxy method.

#### A. The Commission's Prior Orders – Read According to Black Letter Utah Law -- Make Clear That PacifiCorp Was Not Allowed to Unfairly Change Methodologies for Developers Who Had Already Received Indicative Pricing.

As a first step in negotiating a power purchase agreement ("PPA") with PacifiCorp, the Rocky Mountain Power Electric Service Schedule No. 38, State of Utah ("Schedule 38") requires a wind power developer to submit certain information to PacifiCorp, in order to obtain "indicative pricing" for the power they propose to sell to PacifiCorp. Schedule 38 at ¶ I.B.2. Schedule 38 then provides,

> Within 30 days following receipt of all information required in Paragraph 2, the Company will provide the owner with an indicative pricing proposal, which may include other indicative terms and conditions, tailored to the individual characteristics of the proposed project. **Such proposal may be used by the owner to make determinations regarding project planning, financing and feasibility.** . . .

*Id.* at ¶ I.B.3. That paragraph also requires PacifiCorp to "provide with the indicative prices a description of the methodology used to develop the prices." *Id.*

It is undisputed that Ellis-Hall requested, and was provided, indicative pricing on May 22, 2013, and that that pricing was calculated using the Market Proxy Method. Ellis-Hall then proceeded to "make determinations regarding project planning, financing and feasibility, relying on that indicative pricing."

It is also undisputed that there had never been a designated "expiration date" on indicative pricing, and no requirement that a developer seek an "update" after some designated period of time has elapsed. Schedule 38 simply anticipates that the developer will decide whether the project is feasible and, if so, proceed to negotiate a PPA. Schedule 38 at ¶ I.B.4. Ellis-Hall did so. Any delays were caused, not by Ellis-Hall, but by discriminatory requirements placed upon Ellis-Hall by PacifiCorp, which are being addressed in another proceeding currently before the Utah Supreme Court.

It is important to consider some of the Commission's prior orders regarding indicative pricing, to understand how the Present Order offends both their language and their intent.

In Docket No. 12-035-100, PacifiCorp applied to change methodologies for determining pricing. Specifically, PacifiCorp sought to abandon the Market Proxy method in favor of the PDDRR method, which results in lower payments to the wind power developers.

In connection with that proceeding, PacifiCorp moved to "stay" the 2005 Order requiring the utilization of the Market Proxy method for indicative pricing while the Commission determined whether to allow PacifiCorp to change to the PDDRR method. Phase One of Docket

No. 12-035-100 consisted of the consideration of PacifiCorp's request for a stay. Phase Two consisted of consideration of PacifiCorp's request to abandon the Market Proxy method.

In connection with the Phase One request for a stay, Paul Clements of PacifiCorp summarized the company's request as follows:

> The Company is requesting that the Commission stay the application of the October 31, 2005 Order in Docket No. 03-035-14 (2005 Order) for indicative pricing based on the Market Proxy method to any wind QF in excess of three (3) megawatts pending final resolution of this docket. Wind QFs that request indicative pricing **(either new requests or updates to previous requests), after October 9, 2012, the date the Company filed its Request for Motion to Stay Agency Action, but prior to the resolution of this docket**, will receive indicative pricing based on the Proxy/Partial Displacement Differential Revenue Requirement (PDDRR) Method.

Exhibit 1, Docket No. 12-035-100, Direct Testimony of Paul H. Clements, November 16, 2012, at 2 (Emphasis added).

The Commission denied PacifiCorp's request for the foregoing stay in a December 20, 2012 Order, attached as Exhibit 2. As part of that denial, the Commission noted that PacifiCorp's position "ignores the practical realities of bringing a large wind QF project from inception to conclusion, in assuming all five projects in the queue would be able to negotiate power purchase agreements before our order in Phase Two." Exhibit 2, December 20, 2012 Order at 17. Ellis-Hall was one of the "projects in the queue."

Significantly, the Division supported PacifiCorp's request for a stay, proposing that projects in the queue could qualify for an exemption from the stay "only if: 1) the project has a signed power purchase agreement with RMP by September 1, 2013, and 2) the project can demonstrate it had applied for an interconnection agreement with RMP as of October 9, 2012." Exhibit 2, December 20, 2012 Order at 8. The Commission did not adopt this position.

The inescapable result of this Commission's December 20, 2012, denial of PacifiCorp's request for stay is that developers who make "either new requests or updates to previous requests

after October 9, 2012, the date the Company filed its Request for Motion to Stay Agency Action, but prior to the resolution of this docket [No. 12-035-100]" are entitled to pricing calculated by the Market Proxy method.[1]

This reading was confirmed by the Commission's language in its Phase Two order, which adopted the PDDRR method only "going forward," and for "future requests for indicative pricing." The August 13, 2013 Order states in pertinent part:

> The Commission finds it appropriate **to discontinue the use of the market proxy method for determining indicative prices for large wind QFs going forward** . . . .**Future requests for indicative pricing** for large wind QFs will, the commission rules, be calculated using the Proxy/PDDRR method, which has been used for other QFs previously. . . .
>
> We therefore discontinue use of the Market Proxy method **for determining indicative prices for Schedule 38 wind QFs going forward** . . . 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. . . .
>
> **Future requests for indicative pricing** for wind QFs under Schedule 38 shall be calculated using the Proxy/PDDRR method. . . . (Emphasis added.)

Utah law uniformly holds that language contained in orders, regulations and statutes is to be interpreted by their plain meaning and language. *See, e.g.*, *Thomas v. Color Country Mgmt.*, 2004 UT 12 ¶ 9, 84 P.3d 1201 (stating "we look first at the plain meaning of the regulatory language, and give effect to that meaning unless the language is ambiguous."); *State v. Burns*, 2000 UT 56,¶ 25, 4 P.3d 795 ("Our primary goal in interpreting statutes is to give effect to the

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[1] PacifiCorp and the Commission attempt to justify PacifiCorp's position by citing language from the Commission's December 20, 2012 order in Docket No. 12-035-100 at 17-18, where the Commission "acknowledge[d] 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." PacifiCorp's reliance on the Commission's statement in its December 20, 2012 Order is erroneous as a matter of law.

First, the fact that the Commission expressed the ***possibility*** that it might require the application of new avoided cost calculations for all QF projects not in possession of executed PPA is irrelevant because the Commission ultimately did not do so in its August 16, 2013 Order. Under the plain and unambiguous language of the Commission's August 16, 2013 Order, the Order applies to ***future requests for indicative pricing***.

legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve.").

All parts of the given order, regulation or statute are considered relevant and meaningful, and it is presumed that the drafter used each term advisedly and according to its ordinary meaning. *See State v. Maestas*, 2002 UT 123,¶ 52, 63 P.3d 621; *see also State v. Rincon*, 293 P.3d 1142, 1145 (Utah App. 2012) (citing *Amax Magnesium Corp. v. Utah State Tax Comm'n*, 796 P.2d 1256, 1258 (Utah 1990) (recognizing that it should be assumed that "the words and phrases used [] were chosen carefully and advisedly.")).

Even where technical language is used, Utah courts will defer to an "agency's interpretation of its own regulation only if it is a reasonable interpretation of the regulatory language." *State v. Mooney*, 98 P.3d 420, 427 (Utah 2004).

Under Utah law "[r]ules 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) (emphasis added).

Applying these rules, it is clear that the Present Order is inconsistent with the plain language and intent of the Commission's prior orders regarding the use of the PDDRR method for indicative pricing, and that Ellis-Hall was entitled to retain its indicative pricing based upon the Market Proxy method. Indeed, the Present Order violates the foregoing rules.

### B. No One Contends That "Indicative" Pricing Is "Final," but It Should Clearly Be Indicative of What The Final Pricing Will Be.

In order to avoid the plain language of its prior orders, the Present Order makes a point that no one disputes: Indicative pricing is not final pricing. But, indicative pricing is obviously

intended to be "indicative" of what the final pricing will be. Otherwise, indicative pricing would be of no use in determining whether a project is feasible.

If PacifiCorp was always free to abandon the Market Proxy method as soon as the PDDRR method was adopted by the Commission, and to apply the PDDRR method to developers who had already received indicative pricing under the Market Proxy method, it would not have been necessary for PacifiCorp to move for a stay.

But, PacifiCorp did so move because everyone understood that Schedule 38 requires PacifiCorp to adopt a methodology when issuing indicative pricing, and further understood that developers would be relying upon that indicative pricing as they moved forward in development.

Both PacifiCorp and the Commission understood the fundamental unfairness of allowing PacifiCorp to make sweeping changes that would render a feasible project unfeasible, when the project was already under development.

Thus, the stay was denied.

Therefore, the argument about the non-finality of indicative pricing is simply illogical, in light of the prior behavior of both PacifiCorp and the Commission.

### C. PacifiCorp Did Not "Update" or "Recalculate" Ellis-Hall's Indicative Pricing, It Canceled It and Tried to Force Ellis-Hall to Request New Pricing.

The Commission's Order dismisses Ellis-Hall's complaint based on its determination that "indicative pricing" is not a final guaranteed price, and that under Schedule 38 PacifiCorp may "update its pricing proposals at appropriate intervals to accommodate any changes to its avoided cost calculations, among other reasons."[2] This issue, as noted above, was not the issue raised in Ellis-Hall's formal complaint. In any event, the Commission's determination that Schedule 38

[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*, Dec. 20, 2012 Order, Docket No. 12-035-1002012 WL 6770997 (Utah P.S.C.), 9.

permits PacifiCorp to unilaterally impose a different pricing methodology that is inconsistent with the limitations imposed by the Commission's August 16, 2013 Order was erroneous.

This holding overlooks the fact that PacifiCorp never purported to "update" its pricing. Rather, in a letter issued shortly after the August 13, 2013, Phase Two Order, PacifiCorp sent Ellis-Hall a letter, Exhibit 3. Exhibit 3 tells Ellis-Hall that its indicative pricing is "no longer valid," and attempts to force Ellis-Hall to request "updated" pricing. By this ruse, PacifiCorp tried to force Ellis-Hall into the status of a developer seeking a "future request for indicative pricing." This ruse, by itself, indicates that PacifiCorp knew its actions ran afoul of the Commission's prior orders.

Furthermore, while Schedule 38 does permit PacifiCorp to "update its pricing proposals at appropriate intervals to accommodate any changes to the Company's avoided-cost calculations," Schedule 38 at ¶ II.B.6(c), Schedule 38 also requires PacifiCorp to commit to a methodology. *Id.* at ¶ II.B.3. Nothing in Schedule 38 allowed PacifiCorp to change methodologies as part of its "update." Rather, PacifiCorp was required to file an application specifically to make this change of methodology.

Permitting PacifiCorp to unilaterally – and selectively – 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 in reliance on the indicative pricing it received would lead to uncertainty for QF applicants and impose unrecoverable financial burdens on QFs. Such a determination is not fair, is not in the public interest and is contrary to PURPA's fundamental purposes.

In addition, the Commission has already determined that PacifiCorp cannot unilaterally change its pricing methodology in the Commission's December 20, 2012 Order, when

PacifiCorp attempted to retroactively apply the PDDRR pricing to Wasatch Wind as well as other QF applicants. Wasatch Wind correctly argued that "**nothing in Schedule No. 38 or Commission orders suggests the approved avoided cost methodology may be abruptly withdrawn or retracted retroactively**."[3] The Commission agreed and denied PacifiCorp's request. The Commission's December 20, 2012 Order makes clear that Schedule 38 does not permit PacifiCorp to unilaterally change pricing methodology because the Commission denied PacifiCorp's request to do exactly that.

Furthermore, permitting PacifiCorp to unilaterally change pricing methodology would be contrary to the requirement that Schedule 38 be strictly construed against PacifiCorp. *Josephson v. Mountain Bell*, 576 P.2d 850, 852 (Utah 1978).

As noted above, Ellis-Hall was one of the five projects "in the queue" mentioned in the Commission's Order.[4] The Division previously "expresses general support for a stay of the Market Proxy method for **wind QFs 'not in the queue' i.e., those that have not requested indicative pricing prior to the filing of RMP's Motion**."

Permitting PacifiCorp to unilaterally change pricing methodology after Ellis-Hall expended significant amounts of time and money complying with the Interconnection Study and LGIA processes in reliance on the indicative pricing it received from PacifiCorp is inconsistent with the plain language of the Commission's Orders, Schedule 38, and is contrary to the public interest.

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[3] *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*, Dec. 20, 2012 Order, Docket No. 12-035-100, 2012 WL 6770997 (Utah P.S.C.), at 5, 6.

[4] Ellis-Hall entered the Queue on March 26, 2012. *See* PacifiCorp Generation Interconnection Queue, http://www.oasis.oati.com/PPW/PPWdocs/pacificorplgiaq.htm, at Queue #420.

## II. THE COMMISSION'S ORDER DID NOT ADDRESS THE ISSUE RAISED IN ELLIS-HALL'S FORMAL COMPLAINT, BUT INSTEAD DISMISSED ELLIS-HALL'S COMPLAINT BY RULING ON AN ISSUE THAT WAS NOT BEFORE THE COMMISSION AND WHICH THE HEARING OFFICER PREVIOUSLY DECIDED WAS OUTSIDE THE SCOPE OF THE PROCEEDING.

The Commission erred in dismissing Ellis-Hall's complaint based on a determination of an issue that was not properly before the Commission. The issue raised by Ellis-Hall's complaint was summarized by the Hearing Officer at the March 13, 2014 status conference, as follows:

> THE HEARING OFFICER: So returning to the motion for expedited hearing, ***Ellis-Hall states the question is simply the correct application of the Commission's August 16, 2013 order and docket 12-035-100, which states in part future requests for indicative pricing for one QF. QFs under Schedule 38 will be calculated using the proxy PDR method***.
>
> Based upon the Ellis-Hall's reading of the order, they assert that because they had indicative pricing before that order was issued, they are entitled to that indicative pricing.[5]

At the March 13, 2014 status conference, the Division attempted to expand the scope of Ellis-Hall complaint beyond the question of the correct application of the language ***"future requests for indicative pricing"*** to a separate issue of whether the indicative pricing Ellis-Hall received was "final" pricing pursuant to Schedule 38. The Hearing Officer rejected the Division's attempt to expand the scope of the proceeding. *See* Exhibit 4, Scheduling Conference Hearing Proceedings, at 17-20.

As the hearing officer recognized, the scope of Ellis-Hall's complaint was limited to the correct interpretation of the Commission's August 16, 2013 Order, instructing PacifiCorp to discontinue use of the Market Proxy method for determining indicative pricing for "future requests for indicative pricing." Ellis-Hall argues that it did not qualify as a "future request for

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[5] March 13, 2014, Docket No. 14-035-24, Transcript, at 7:15-8:4.

indicative pricing" because Ellis-Hall received indicative pricing pursuant to Schedule 38 on May 22, 2013. The issue of whether Ellis-Hall's whether "indicative pricing" is final pricing was not before the Commission. And, as the Hearing Officer noted, a determination of that issue would require "***additional time, fact finding, and a hearing.***"

Notwithstanding the Hearing Officer's determination, the Commission based its decision on the very issue the Hearing Officer determined was outside the scope of the proceeding and would necessitate "***additional time, fact finding, and a hearing***" stating:

> ***[T]his sentence in no way alters the requirement of Schedule 38 for PacifiCorp to update pricing to reflect changes to avoided cost calculations. As discussed in detail by PacifiCorp, the Division and the Office, indicative pricing provided to prospective QFs under Schedule 38 is intended to be used for planning and is neither final nor binding.***

April 25, 2014 Order at 19-20.

Tellingly, the Commission's Order never interpreted or applied the language "future requests for indicative pricing for wind QFs under Schedule 38 will be calculated using the Proxy/PDDRR method. . ." Instead, the Commission ignored that language and determined that its August 16, 2013 Order did not alter the fact that "indicative pricing" is not final pricing and that PacifiCorp has the ability to update indicative pricing under Schedule 38. This determination was not only in error because it was outside the scope of the proceeding set by the hearing officer, it also expanded the scope to determined an issue without giving Ellis-Hall the opportunity for "***additional time, fact finding, and a hearing.***"

If the Commission expands the scope of Ellis-Hall's complaint, at a minimum Ellis-Hall should have opportunity to present evidence that allowing PacifiCorp to update Ellis-Hall's indicative pricing under Schedule 38, would constitute a continuation of the discrimination conduct currently before the Utah Supreme Court. It would also violate PURPA as well as Utah law's requirement that Schedule 38's terms be strictly construed against PacifiCorp.

## CONCLUSION

For the foregoing reasons, Ellis-Hall respectfully requests that the Commission reconsider its April 25, 2014 Order.

DATED this 27th day of May, 2014.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2014 a true and correct copy of the forgoing was served upon the following as indicated below:

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