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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of the Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Thayn Hydro, LLC	Docket No. 16-035-04  <b>INITIAL BRIEF OF THAYN HYDRO, L.L.C.</b>
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**1. INTRODUCTION**

In response to the to the Provisional Conclusion of Law issued by the Public Service Commission of Utah (“**Commission**”) on March 4, 2016, and the First Amended Scheduling Order And Notice Of Hearing issued by the Commission on March 16, 2016, Thayn Hydro, L.L.C. (“**Thayn Hydro**”) hereby files its initial legal brief in response to the Application and Request for Expedited Approval (“**Application**”) filed by PacifiCorp, d/b/a Rocky Mountain Power (“**PacifiCorp**” or the “**Company**”), on February 4, 2016. The Provisional Conclusion of Law stated “In the absence of a showing that a [legally enforceable obligation] existed that entitles Thayn to otherwise outdated terms or prices, the Commission will not order RMP to enter into a PPA using pricing or terms contrary to the applicable tariff.”<sup>1</sup> This brief will (1) outline the standards that the Commission should use to determine whether a legally enforceable obligation (“**LEO**”) existed as of a certain date that would allow a QF to sell power to a public utility and (2)

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<sup>1</sup> Provisional Conclusion of Law at 4 (March 4, 2016).

show that Thayn Hydro and PacifiCorp had established a LEO prior to the change in Schedule 37 rates in September 2015.

As a preliminary matter, Thayn Hydro believes that the current situation between Thayn Hydro and PacifiCorp is analogous to the facts reviewed by the Commission in Docket No. 15-035-70, *In the Matter of the Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Three Peaks Power, LLC*.<sup>2</sup> In that Order, the Commission found that extenuating circumstances justified approving a PPA under the terms of the then-superseded Schedule 38 and the Commission explicitly made no finding relating to the existence of a LEO. Although this brief shows that a LEO indeed existed prior to the SCH 37 Order, Thayn Hydro believes that the Commission could decide this matter under similar “extenuating circumstances” logic without addressing the LEO issue. This is essentially the approach advocated by PacifiCorp in the Application.

Thayn Hydro also believes that the Commission need not resolve LEO-related issues in this proceeding. As explained in this brief, the existence of a LEO can depend on many factors, including the extent of negotiations, whether the QF committed to sell power, whether there were and what outstanding issues remained, the utility’s behavior and actions, and the different types of QF (e.g., an already operating Schedule 37 QF selling power to the utility, a new Schedule 37 QF, a large Schedule 38 QF, etc.). Thayn Hydro’s circumstances are some of the easiest to conclude that a LEO existed because it was a renewing QF that had already been selling power, had been negotiating for a long period of time, had committed itself to sell power, and the PPA could have and should have been signed before the rates changed. The Commission does not need to establish overarching LEO policies that apply to other circumstances in this particular docket, or penalize

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<sup>2</sup> See Order (December 2, 2015).

PacifiCorp for not finalizing the PPA as quickly as it should have. Instead, Thayn Hydro recommends that, if the Commission wishes to enunciate broader policies, then it should open a separate and future proceeding that would allow more impacted parties to participate and the consideration of more circumstances in which LEOs may arise.

## 2. BACKGROUND

Thayn Hydro operates a small 575 KW hydroelectric power generation facility just outside of Green River, UT (the “**Facility**”). The Facility is a Qualifying Facility (“**QF**”) under the Public Utility Regulatory Policies Act (“**PURPA**”). Thayn Hydro previously entered into a 20-year PPA with PacifiCorp that expired at the end of 2015. This docket was born out of an informal complaint (the “**Complaint**”) filed by Thayn Hydro with the Utah Division of Public Utilities (the “**Division**”) on November 27, 2015 regarding negotiations between Thayn Hydro and PacifiCorp for a renewal power purchase agreement (“**PPA**”) for the output of the Facility. Due to a variety of circumstances, which are described in some detail in this brief, the PPA was not fully executed prior to the Commission’s order approving new Schedule 37 pricing, issued and effective September 18, 2015 (“**SCH 37 Order**”). The SCH 37 Order significantly reduced the Schedule 37 pricing that governs the purchase of power from Thayn Hydro by PacifiCorp.

Thayn Hydro first contacted John Younie at PacifiCorp about renewing the existing PPA on July 7, 2015. During the proceeding weeks, Thayn Hydro and John Younie, along with other PacifiCorp personnel, negotiated the terms of a renewal PPA, and Thayn Hydro provided various documents and information to PacifiCorp in response to PacifiCorp requests. John Younie, in a phone conversation on July 22, 2015 with Rick Kaster of Thayn Hydro, stated that Thayn Hydro could lock in the then-effective Schedule 37 rates by sending an email to PacifiCorp stating such. Rick Kaster, on behalf of Thayn Hydro, sent that email as requested on July 22, 2015, stating “[a]s

per our phone conversation today, Thayn Hydro LLC would like to commit to a 20 year non-levelized contract based on the Schedule 37 (EFFECTIVE: February 20, 2015) rates.”<sup>3</sup> At that point, based on statements by John Younie on behalf of PacifiCorp, Thayn Hydro believed its commitment to sell power to PacifiCorp was clear and that the issue of pricing for the new PPA was settled. By the end of July, Thayn Hydro had submitted all information requested by PacifiCorp to finalize the renewal PPA. On August 4, 2015, John Younie emailed Rick Kaster and stated, “I submitted the deal internally for review and approval today. We should be ready to sign the PPA in about a month.”<sup>4</sup> The PPA in question included the then-effective Schedule 37 rates. On August 29, 2015, John Younie contacted Thayn Hydro and informed Thayn Hydro that his last day as a PacifiCorp employee would be September 1, 2015, and that Thayn Hydro should contact Bruce Griswold at PacifiCorp to continue the PPA renewal process. On September 1, 2015, Thayn Hydro contacted Bruce Griswold to determine the appropriate person to contact about the PPA renewal. PacifiCorp did not contact Thayn Hydro until September 16, 2015, a mere 2 days prior to the SCH 37 Order modifying the rates applicable to the PPA. After the Schedule 37 rates changed, PacifiCorp informed Thayn Hydro that PacifiCorp would not sign a PPA with the old Schedule 37 pricing. At that point, Thayn Hydro filed the complaint with the Division regarding the pricing applicable to the renewal PPA.

After committing to sell its net output to PacifiCorp, Thayn Hydro did inquire about the necessity about the large increase in liability insurance requirements; however, this was a simple question about whether a \$5 million umbrella policy was truly necessary after operating for more than 20 years without an umbrella policy on top of Thayn Hydro’s regular liability insurance coverage. This question went unanswered from July 17, 2015 until September 17,

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<sup>3</sup> Email from Rick Kaster to John Younie, attached hereto as Exhibit A (July 22, 2015).

<sup>4</sup> Email from John Younie to Rick Kaster, attached hereto as Exhibit B (Aug. 4, 2015).

2015, at which time Thayn Hydro again asked the question. Within less than two weeks from that date, PacifiCorp determined that a \$3 million umbrella policy would be acceptable. These discussions in no way compromised Thayn Hydro's commitment to sell power to PacifiCorp. As a general principle of contracts, an acceptance that requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made contingent on the other party accepting the changed terms.<sup>5</sup> Thayn Hydro's inquiry about the insurance requirements cannot and should not be interpreted to mean that Thayn Hydro was unwilling to sign the renewal PPA that was in the final stages of review by PacifiCorp. If anything, these discussions should reinforce Thayn Hydro's commitment to sell power to PacifiCorp as they show Thayn Hydro's concern with complying with the provisions in the PPA. Such discussions were not intended to be renegotiations of the PPA and Thayn Hydro did not at any point suggest that the insurance requirements would prevent Thayn Hydro from signing the renewal PPA. Due to the unnecessary delays by PacifiCorp in finalizing the renewal PPA, Thayn Hydro was not presented with the chance to sign the renewal PPA prior to the SCH 37 Order.

In the interim, the Commission also issued its Order in Docket No. 15-035-53 reducing the maximum contract term for all QF PPAs from 20 years to 15 years.<sup>6</sup>

After discussing the matter, PacifiCorp and Thayn Hydro agreed that PacifiCorp would submit the renewal PPA to the Commission for approval and for determination of the proper pricing and term applicable to the renewal PPA. PacifiCorp's initial filing in this docket, as well as Thayn Hydro's request for intervention and comments, are the result of that cooperative determination. In the Application, PacifiCorp states that it is "just and reasonable" for Thayn Hydro to receive the

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<sup>5</sup> RESTATEMENT (SECOND) OF CONTRACTS, § 61 ("An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms.")

<sup>6</sup> Order at 19 (January 7, 2016).

Schedule 37 pricing that was in effect immediately prior to the SCH 37 Order and that it is “just and reasonable” for the renewal PPA to be for a 20-year term.<sup>7</sup>

### 3. ARGUMENT

#### 3.1. A QF Has the Legal Right to Sell Power to a Utility Prior to a Written Contract In Certain Circumstances

PacifiCorp has an obligation to purchase the net output of a QF pursuant to a contract or a “legally enforceable obligation.”<sup>8</sup> A QF can require a utility to purchase its power even if the utility has refused to enter into a contract.<sup>9</sup> The Federal Energy Regulatory Commission (“FERC”) has established that PURPA allows a QF to sell to a utility under two commercial scenarios: (1) under a contract (i.e., a PPA); or (2) through a non-contractual, but binding LEO.<sup>10</sup> The LEO is an important concept for a number of reasons. First, it acts to prevent the utility from avoiding purchases from a QF by intentionally or inadvertently refusing to sign, or delaying the signing of, a PPA with the QF.<sup>11</sup> Second, it acts as a threshold standard a QF must meet in order to qualify to sell to a utility (at a given avoided cost). Thus, the LEO acts to protect both the QF and the utility (and ultimately the utility customers that will bear the costs of avoided cost purchases from QFs).

As FERC has explained,

[T]he phrase legally enforceable obligation is broader than simply a contract between an electric utility and a QF and . . . the phrase is used to prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract, or . . .

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<sup>7</sup> Application at 5.

<sup>8</sup> 18 CFR § 292.304(d); *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. 12,214, 12,224, FERC Order No. 69 (Feb. 25, 1980).

<sup>9</sup> *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 at P 24 (2012); *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 at P 38 (2013) (*Grouse Creek*).

<sup>10</sup> *Grouse Creek*, 142 FERC ¶ 61,187 at P 36 (2013). A QF may also sell generation on an “as available” basis, a scenario not at issue here. *Id.* at P 40.

<sup>11</sup> FERC Order No. 69 at 12,224.

delaying the signing of a contract, so that a later and lower avoided cost is applicable.<sup>12</sup>

In other words, the purpose of a LEO is not to allow a QF to prematurely lock in an avoided cost rate, avoid providing mandated informational requirements, or bypass legitimate timelines and procedures laid out by a state commission for establishing the right to a PPA. Rather, a LEO is to give a QF recourse when a utility actually refuses to sign a contract or delays doing so. As FERC emphasized, this option to sell via a LEO was “specifically adopted to prevent utilities from circumventing the requirement of PURPA that utilities purchase energy and capacity from QFs.”<sup>13</sup>

FERC has ruled, “It is up to the States, not [FERC], to determine the specific parameters of individual QF power purchase agreements, including the date at which a LEO is incurred under State law.”<sup>14</sup> PURPA does not define precisely when a LEO arises, nor does a LEO arise in a vacuum: it arises when a state commission says it does, so long as the state commission stays within the bounds of federal precedent. Under PURPA’s scheme of dual state and federal enforcement, the issue of when a LEO arises has been explicitly delegated to the Commission.<sup>15</sup> While FERC’s rulings delineate the outer limits of a LEO, they do not usurp the state’s discretion to define the specific point in time when a LEO arises.

The determination of whether a LEO was created for a Schedule 37 QF rests on the question of whether the QF committed itself to sell power to the utility. Indeed, the existence of a LEO as it relates to a Schedule 37 QF is perhaps the simplest possible application of the LEO concept. The issue of whether a LEO exists is a potentially complex question as the

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<sup>12</sup> *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P 36 (2011) (*Cedar Creek*).

<sup>13</sup> *Id.* at P 32; see *Virginia Electric and Power Co.*, 151 FERC ¶ 61,038, P 24 (2015) (“the requirement that a QF can sell and a utility must purchase pursuant to a legally enforceable obligation were specifically adopted to prevent utilities from circumventing the requirement of PURPA that utilities purchase energy and capacity from QFs”).

<sup>14</sup> *West Penn Power Co.*, 71 FERC ¶ 61,153 at 61,495 (1995) (*West Penn*).

<sup>15</sup> *Id.*

development of a new QF can be a complex process and necessarily involves significant capital investment and multiple regulatory approvals.

Negotiating a renewal PPA for an existing and currently operating Schedule 37 QF, however, is a much simpler process, as the pricing for such a PPA is already established. In addition to the pricing question, an existing Schedule 37 QF eliminates the potentially legitimate concerns that a utility may have about the viability of the project, the timing of the development, financing, the ability of the QF to successfully operate the project, and numerous other matters. Additionally, an existing Schedule 37 QF means that an interconnection agreement is likely already in place and the utility likely has no reasonable concerns about the operation of the QF. Existing QFs also have already been selling power to the utility under a PPA, and negotiation of the follow on PPA should be a far simpler and streamlined process. For example, for many existing QFs, the new PPA simply replaces the pricing terms with few, if any, other substantive contract term changes.

Accordingly, the requirements for establishing the existence of a LEO for an existing Schedule 37 QF must necessarily be different than those for a yet-to-be-developed Schedule 37 QF and for Schedule 38 QFs. This brief only addresses the appropriate standards for determining the existence of a LEO for an existing Schedule 37 QF. Further review by the Commission is likely necessary to determine the appropriate standards for new Schedule 37 QFs and for Schedule 38 QFs.

At a basic level, a QF must commit itself to sell power to a utility in order to create a LEO. FERC has repeatedly stated that “a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts



or in non-contractual, but binding, legally enforceable obligations.”<sup>16</sup> Although the analysis to determine the existence of a LEO can be much more in depth in certain situations, at its core the LEO determination hinges on the question of whether the QF committed to sell its output to the utility. FERC has stated that extensive negotiations between the parties to a PPA can be persuasive and point to the reasonable conclusion that a QF has committed to sell its output to the purchasing utility.<sup>17</sup> FERC has also ruled that requiring actual execution of a PPA is too stringent a requirement because a LEO can be created earlier in the PPA negotiation process.<sup>18</sup>

### **3.2. Thayn Hydro Created a Legally Enforceable Obligation Prior to the Schedule 37 Rate Change**

Thayn Hydro committed itself to sell power to PacifiCorp prior to the SCH 37 Order. By committing itself to sell power to PacifiCorp, Thayn Hydro created a LEO prior to the SCH 37 Order changing the rates at which Thayn Hydro could sell its output. In order to determine the point at which Thayn Hydro committed to sell its net output and created a LEO in this situation, it is helpful to understand the facts of the case.

The process for renewing a Schedule 37 PPA is relatively straightforward. Unlike Schedule 38 PPAs, Schedule 37 PPAs in Utah are not governed by procedures outlined in an applicable tariff. As PacifiCorp noted in its response to the Complaint, Schedule 38, which outlines the procedures applicable to Schedule 38 PPAs, provides for up to 21 days for PacifiCorp’s management review process.<sup>19</sup> However, PacifiCorp’s own experience shows that renewal PPAs can be negotiated and executed in a matter of days or weeks.

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<sup>16</sup> *Grouse Creek*, 142 FERC ¶ 61,187 at P 36 (quoting *Cedar Creek*, 137 FERC ¶ 61,006 at P 32).

<sup>17</sup> *See Cedar Creek*, 137 FERC ¶ 61,006 at P 39.

<sup>18</sup> *See id.* at P 41 (“In conclusion, we find that the Idaho PUC’s June 8 Order, limiting the methods by which a legally enforceable obligation may be incurred to only a fully-executed contract, is inconsistent with our regulations implementing PURPA.”).

<sup>19</sup> Section 5(k) of Rocky Mountain Power Utah Electric Service Schedule No. 38 provides that

Thayn Hydro's current situation is remarkably simple compared to many other PPAs because the rates for the PPA are already set by Schedule 37 and the PPA is a renewal agreement for an existing and operating QF. Negotiations regarding the correct avoided cost price for a specific QF can be the most contentious and difficult. As Thayn Hydro is eligible for Commission-approved rates, there was no need for any price negotiations, which should significantly shorten the negotiation timeline.

The fact that Thayn Hydro is an existing and operating QF means that any technical issues with integrating the QF with the PacifiCorp system have long been resolved, an interconnection agreement is already in place, there are no questions about the availability of financing or the timeline for development, and any concerns that PacifiCorp might have regarding the operation of a QF can be eliminated by reviewing the long and successful operation history of the Facility.

Thayn Hydro committed itself to sell power to PacifiCorp on July 22, 2015, when Thayn Hydro sent an email to PacifiCorp specifically stating that it was committing itself to sell power at the then-effective Schedule 37 rates, as requested by John Younie. However, the facts of this case only require the Commission to make a determination of whether a LEO existed prior to the SCH 37 Order. In other words, the Commission need not specifically state the exact date when a LEO was committed, but only conclude that it was created before the SCH 37 order was issued. As Thayn Hydro committed so far in advance of the rate change, the Commission does not need to address or resolve LEO issues in other circumstances.

By working backwards in time from the date of the SCH 37 Order, the Commission can also find that a LEO was created no later than August 4, 2015, when the negotiated PPA between

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the "Company must Complete all internal reviews and approvals within twenty-one (21) days after agreement is reached on a proposed final version of a power purchase agreement."

Thayn Hydro and PacifiCorp was submitted for PacifiCorp internal approval. At this point, Thayn Hydro and PacifiCorp had agreed to all material terms of the PPA and the Thayn Hydro had committed to sell its output to PacifiCorp. Also, at this point the PPA process was entirely out of the hands of Thayn Hydro and entirely in control of the utility.

Notably, a determination that a LEO existed at this point in the process is supported by PacifiCorp's own filing before the Public Utility Commission of Oregon in Docket UM 1610. In its prehearing brief, filed September 2, 2015, PacifiCorp, d/b/a Pacific Power, recommended that the Oregon PUC determine that a LEO exists "when a QF approves a final draft PPA under section B(5) on page 10 of the Company's [Oregon] Schedule 37—the point in time when a QF has provided all project information required by the PPA and accepted a final draft agreement."<sup>20</sup> The referenced paragraph B(5) describes a QF's final review of a draft PPA—after submission of all information requested by PacifiCorp—and gives it the option to either approve the draft PPA or submit comments or proposed changes to PacifiCorp.<sup>21</sup> The next step in the process, described in paragraph B(6), requires that PacifiCorp prepare an execution copy of the PPA within 15 business days.<sup>22</sup> Paragraph B(6) of Oregon Schedule 37 describes PacifiCorp's final review and approval process before a PPA is ready to be executed; this is precisely the point in the process where the Thayn Hydro PPA seems to have stalled. FERC has

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<sup>20</sup> PacifiCorp's Prehearing Brief, Public Utility Commission of Oregon, Docket No. UM 1610 Phase II, at 38 (Sept. 2, 2015) (emphasis added).

<sup>21</sup> Pacific Power Oregon Schedule 37 at B(5) ("After reviewing the final draft power purchase agreement, the owner may either prepare another set of written comments and proposals or approve the final draft power purchase agreement. If the owner prepares written comments and proposals the Company will respond in 15 business days to those comments and proposals.").

<sup>22</sup> Pacific Power Oregon Schedule 37 at B(6) ("When both parties are in full agreement as to all terms and conditions of the draft power purchase agreement, the Company will prepare and forward to the owner within 15 business days, a final executable version of the agreement. Following the Company's execution a completely executed copy will be returned to the owner. 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.").

identified this as the point in the PPA process when, at a minimum, a LEO is created.<sup>23</sup> FERC ruled that requiring actual execution of a PPA is too stringent a standard for finding that a LEO exists. PacifiCorp's final review and generation of an execution copy of a PPA is the step immediately preceding execution; thus, an LEO is created, at a minimum, at this point in the process.

As of the date the renewal PPA was submitted for internal PacifiCorp review and approval, Thayn Hydro had been in weeks of negotiations with PacifiCorp including numerous emails and phone calls with both John Younie and Bruce Griswold, had exchanged drafts of the renewal PPA, and had agreed to all material terms of the PPA such that both Thayn Hydro and John Younie believed that the PPA was awaiting internal approvals from PacifiCorp. At no point in this process did Thayn Hydro waiver from its intention and commitment to sell its output to PacifiCorp. Indeed, on multiple occasions, Thayn Hydro expressed its desire to expedite the PPA negotiation process and execute the renewal PPA as soon as possible.

By any reasonable standard, the internal approval process should have been completed long before the SCH 37 Order. The process for renewing a Schedule 37 PPA is straightforward. Unlike Schedule 38 PPAs, Schedule 37 PPAs in Utah are not governed by procedures outlined in an applicable tariff. However, PacifiCorp's own experience shows that PPA renewals need not take an extended period of time. Indeed, John Younie stated in his email of August 4, 2015 to Thayn Hydro that the PPA had been submitted for internal review and that PacifiCorp "should be ready to sign the PPA in about a month."<sup>24</sup> Additionally, as PacifiCorp noted in its response to the Complaint, Schedule 38, which outlines the procedures applicable to Schedule 38 PPAs,

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<sup>23</sup> See *Cedar Creek*, 137 FERC ¶ 61,006 at P 41.

<sup>24</sup> Email from John Younie to Rick Kaster, attached hereto as Exhibit B (Aug. 4, 2015).

provides for up to 21 days for PacifiCorp’s management review process.<sup>25</sup> Although not binding on PPAs for Utah QFs, PacifiCorp’s Oregon Schedule No. 37 requires that PacifiCorp, d/b/a Pacific Power, provide a final draft PPA within 15 business days.<sup>26</sup>

Had PacifiCorp completed its internal approval process in a timely manner and provided Thayn Hydro with a final approved renewal PPA, it’s likely that the parties would have executed that PPA well in advance of the SCH 37 Order and this docket would not exist. Between the date that John Younie submitted the PPA for internal PacifiCorp approval and the date of the SCH 37 Order, PacifiCorp had approximately 6 weeks—32 business days—during which to review the PPA with Thayn Hydro. However, instead of moving the process forward, PacifiCorp essentially ignored Thayn Hydro; the only communication Thayn Hydro received between August 4, 2015 and September 16, 2015 was an email from John Younie informing Thayn Hydro that he was leaving PacifiCorp effective September 1, 2015. On September 16, 2015, Thayn Hydro received a voicemail from Kyle Moore stating that he would be replacing John Younie as Thayn Hydro’s contact at PacifiCorp. Then on September 18, 2015, the Commission issued the SCH 37 Order. Protecting QFs from such delays by utilities is one of the key reasons that the LEO principle exists: FERC explained that:

[T]he phrase legally enforceable obligation is broader than simply a contract between an electric utility and a QF and . . . the phrase is used to *prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract, or . . . delaying the signing of a contract, so that a later and lower avoided cost is applicable.*<sup>27</sup>

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<sup>25</sup> Rocky Mountain Power Utah Electric Service Schedule No. 38 at 5(k) (“Company must Complete all internal reviews and approvals within twenty-one (21) days after agreement is reached on a proposed final version of a power purchase agreement.”).

<sup>26</sup> Pacific Power Oregon Schedule 37 at B.4.

<sup>27</sup> See *Cedar Creek*, 137 FERC ¶ 61,006 at P 36 (2011) (emphasis added).

Despite its obvious and explicitly communicated commitment to sell its output to PacifiCorp, Thayn Hydro has been the victim of delays by PacifiCorp—precisely the type of delays that the LEO concept exists to address. Additionally, both parties are victims of circumstance in that the renewal PPA for Thayn Hydro had not been executed prior to the SCH 37 Order. Both PacifiCorp and Thayn Hydro have stated in previous filings in this docket that the renewal PPA could have been finalized prior to the SCH 37 Order had the parties been aware that it was to be issued on September 18.

Thayn Hydro does not believe the Commission needs to determine or analyze whether PacifiCorp's delays were intentional or inadvertent. In addition, the Commission does not need to penalize or otherwise harm PacifiCorp for any actions or inactions it has taken. The key facts are that there were delays and that Thayn Hydro should not be paid lower rates than it is entitled because of circumstances outside of its control.

#### **4. CONCLUSION**

Thayn Hydro committed itself, at the very latest, to sell its output to PacifiCorp on or before August 4, 2015. Indeed, Thayn Hydro likely made the commitment necessary to create a LEO some time before August 4, but the Commission need not make such a determination in this case; applying the minimum standard set by FERC for finding the existence of a LEO is sufficient to allow the Commission to decide this matter. Since Thayn Hydro committed itself to sell power to PacifiCorp on or before August 4, 2015, a LEO was created as of that date. Therefore, the PPA between Thayn Hydro and PacifiCorp should include the Schedule 37 pricing, and maximum contract term, in effect on the date the LEO was created. Thayn Hydro respectfully requests that the Commission (1) find that a LEO had been created prior to the SCH 37 Order and (2) order that

renewal PPA that is the subject of the Application use a 20-year term and the Schedule 37 rates in effect immediately prior to the SCH 37 Order.

DATED this 15<sup>th</sup> day of April, 2016.

Respectfully Submitted,  
**SMITH HARTVIGSEN, PLLC**

                  /s/ Adam S. Long                    
Adam S. Long  
*Attorney for Thayn Hydro, L.L.C.*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served on this 15th day of April, 2016 upon the following as indicated below:

Via hand delivery and email to:

UTAH PUBLIC SERVICE COMMISSION  
c/o Gary Widerburg, Commission Secretary  
160 East 300 South, Fourth Floor  
Salt Lake City, Utah 84111  
psc@utah.gov

Via e-mail to:

Data Request Response Center (datarequest@pacificorp.com)  
PacifiCorp

Robert C. Lively (bob.lively@pacificorp.com)  
Yvonne R. Hogle (yvonne.hogle@pacificorp.com)  
Rocky Mountain Power

Patricia Schmid (pschmid@utah.gov)  
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Utah Assistant Attorneys General

Rex Olsen (rolsen@utah.gov)  
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Office of Consumer Services

/s/ Adam S. Long



# **EXHIBIT A**



rick kaster <rickkaster@gmail.com>

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## Thayn Hydro LLC (Green River, Utah) Contract Renewal

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rick kaster <rickkaster@gmail.com>  
To: "Younie, John" <John.Younie@pacificcorp.com>

Wed, Jul 22, 2015 at 3:41 PM

John,

As per our phone conversation today, Thayn Hydro LLC would like to commit to a 20 year non-levelized contract based on the Schedule 37 (EFFECTIVE: February 20, 2015) rates.

We would like to learn more about how to utilize the REC's that we will generate and would appreciate receiving the contact information for the PacifiCorp personnel that deal with those.

Thank you,  
Rick Kaster



## **EXHIBIT B**



rick kaster <rickkaster@gmail.com>

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**Thayn Hydro Draft PPA 08042015**

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**Younie, John** <John.Younie@pacificorp.com>  
To: Rick Kaster <rickkaster@gmail.com>

Tue, Aug 4, 2015 at 3:37 PM

Rick,

Here is the latest redline draft PPA. Bruce didn't want to change the Seller's default on the minimum delivery. Let me know if you have any more changes or edits. I submitted the deal internally for review and approval today. We should be ready to sign the PPA in about a month. I am starting a raft trip next Tuesday returning to work on Monday, Aug 17.

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 **Thayn Hydro Draft PPA 08042015.docx**  
177K