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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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 Ellis-Hall Consultants, LLC's Comments in Support of Thayn Hydro, LLC

Intervenor Ellis-Hall Consultants, LLC ("Ellis-Hall") files these comments in the above-captioned matter in support of Thayn Hydro, LLC ("Thayn").

ARGUMENT

On April 15, 2016, Thayn argued that it is entitled to a 20-year term with pricing existing prior to the Commission's September 18, 2015 order on the basis that it already incurred a legally enforceable obligation ("LEO"). Thyan Initial Brief. Thayn correctly argues that "the 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." *Cedar Creek*, 137 FERC ¶ 61,006 at ¶ 36 (2011). Thayn convincingly argues that PacifiCorp delayed execution of its PPA thereby triggering application of its LEO.

Ellis-Hall will make three additional comments in support of Thayn. Ellis-Hall will address the first two by responding to comments made by the Office of Consumer Services and the Department of Public Utilities.

First, the Office of Consumer Services (the "OCS") argues that "prices applicable to a Utah Qualifying Facility shall be those in effect at the time a written contract is executed by the parties." OCS Comments 2. The OCS then reasons against Thayn, recommending that Thayn's "PPA must include those prices in effect at the time a written contract is executed." *Id.* at 3. Ellis-Hall respectfully disagrees.

"[A] state may take action under PURPA ***only*** to the extent that that action is in accordance with [FERC's] rules." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at ¶ 27 (October 4, 2011) (emphasis added). Under the law, Qualifying Facilities ("QFs") shall have the option "[t]o provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term . . . based on . . . [t]he avoided costs calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d). Thus, a state violates PURPA if it limits the "circumstances under which a legally enforceable obligation [arises]," such as making a "fully-executed contract a condition precedent to a legally enforceable obligation." *Grouse Creek*, 142 FERC ¶ 61,187, at ¶¶ 36, 38; *see also*, *Murphy Flat*, 141 FERC ¶ 61,145, at ¶¶ 23-24; *see also*, *In re: Virginia Electric and Power Co.*, 151 FERC ¶ 61,038, at ¶ 28 (April 16, 2015) ("As the Commission has made clear, section 292.304(d) . . . does not vest a utility with the authority to delay creation of that legally enforceable obligation by insisting that a QF enter into a contract").

Thayn, therefore, is entitled to "[t]he avoided costs calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d). Rates are not set, as the OCS contends, at the time the

parties execute a contract. Indeed, to relegate a QF's pricing to the day of its executed agreement would effectively disallow a QF from incurring its LEO until the date of the executed agreement. This is expressly prohibited.

Second, the Department of Public Utilities (the "DPU") "does not make a recommendation on the term." DPU Comments 6. Nevertheless, the DPU reasons that "there is not a necessary connection between the term of a QF contract and the pricing." *Id.* Ellis-Hall respectfully disagrees. The connection is the LEO. Section 292.304 sets both the pricing ***and*** the term at the time that the LEO is incurred. *See* 18 C.F.R. § 292.304(d). Indeed, a QF could not "provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy over a specified term" if that specified term did not exist at the time of the LEO. *Id.*

The Commission's Duration Order supports this conclusion. There, the Commission excepted from its order instances where a party possessed a LEO prior to the date of that order. *See* Order dated January 7, 2016, *In the Matter of the Application of Rocky Mountain Power for Modification of Contract Term of PURPA Power Purchase Agreements with Qualifying Facilities*, Docket No. 15-035-53 ("In the event a PPA has not been executed as of the date of this Order by a party nevertheless believes it possess a legally enforceable obligation as of the date this Order that entitles the party to a 20-year contract term, the party may submit the circumstances for commission review.").

This must be so as a practical matter. LEOs are not incurred in a vacuum. A QF, for example, committed to sell under a 20 year specified term with a certain pricing may be unwilling to commit to a 1, 5, 10, or 15-year term due to financing, risk, and/or other costs. It would be draconian to expect a QF to sell for a term that it did not agree to in incurring its LEO.

Accordingly, a QF's LEO not only sets the pricing but also the term. Anything to the contrary would undermine FERC's regulations protecting QFs from utility delays and abuse.

Third, and as discussed at length in *Cedar Creek* and other noted cases, FERC has rejected "bright line" condition precedents that require QFs to execute a PPA by a particular date to avoid becoming subject to new regulations. *See e.g. Grouse Creek*, 142 FERC ¶ 61,187, at ¶¶ 35, 36 (holding, "state restrictions mandating that a legally enforceable obligation may be created only by a fully-executed contract are inconsistent with PURPA"). Thus, Commission orders can only work prospective to an already incurred LEO. *See e.g. In re: Virginia Electric and Power Co.*, 151 FERC ¶ 61,038, at ¶ 29 (April 16, 2015) ("[P]ursuant to section 210(m) of PURPA, the Commission's regulations, and Order No. 688 . . . termination does not apply to grandfathered legally enforceable obligations or contracts.").

Thayn's pricing and term were set on the day that Thayn incurred its LEO and could not, thereafter, change by virtue of a subsequent Commission order. Indeed, prejudicing Thayn for not entering into an executed contract prior to a Commission order would create an impermissible bright line condition precedent that a QF must enter into an executed prior to the date of the order.

CONCLUSION

Thayn is entitled to pricing and a term as of the date it incurred its LEO. In addition, no party has recommended any changes to Utah's LEO regime. No such changes are needed. And if they were, they should not be litigated in this narrow, expedited docket without proper notice.[1]

DATED this 6th day of May 2016.

Respectfully submitted,

/s/ Tony Hall

Tony Hall
Ellis-Hall Consultants, LLC – Member

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[1] On March 4, 2016, the Commission issued a Provisional Conclusion of Law in this matter, noting that RMP does not assert a LEO in its application and that Thayn did not assert that it incurred an LEO prior to the Commission issuing either its Pricing Order or its Duration Order. March 4, 2016 Order 2. Consequently, the scope of LEOs have not been considered in this docket.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May, 2016, an original and ten (10) true and correct copy of the foregoing **Ellis-Hall Consultants, LLC's Comments in Support of Thayn Hydro, LLC** were hand-delivered to:

Public Service Commission of Utah
Heber M. Wells Building, Fourth Floor
160 East 300 South
Salt Lake City, UT 84111

and true and correct copies were electronically mailed to the addresses below:

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