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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  
**DIVISION RESPONSE TO INITIAL BRIEF OF THAYN HYDRO, L.L.C.**

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Pursuant to Utah Code Ann. § 54-4a-1 and Utah Admin. Code r746-100 the Utah Division of Public Utilities (“Division”), hereby submits this Response to Initial Brief of Thayn Hydro L.L.C. The Division recommends approval of the PPA with the prior Schedule 37 pricing. The Division further recommends that approval be fact specific to the unique circumstances of this existing hydro facility.

**INTRODUCTION**

On February 4, 2016 Rocky Mountain Power filed an Application for approval of a Power Purchase Agreement (“PPA”) to purchase power from Thayn Hydro LLC (“Thayn Hydro”). The pricing and contract length of the PPA were left open to be determined by the

Commission. A scheduling conference was held and a schedule set. Parties filed comments on March 2, 2016.

On March 4, 2016 the Commission issued a Provisional Conclusion of Law stating in relevant part that “to date, no party has asserted a [legally enforceable obligation (“LEO”)] was established prior to the Commission’s issuance of its Pricing Order or its Contract Duration Order.”<sup>1</sup> The Commission further notified the parties that “In the absence of a showing that a LEO existed that entitles Thayn to otherwise outdated terms or prices, the Commission will not order RMP to enter into a PPA using pricing or terms contrary to the applicable tariff.”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>2</sup>

Following the Provisional Conclusion of Law the schedule was suspended upon a Motion filed by Rocky Mountain Power. A scheduling conference was held on March 15, 2016. The Commission issued its First Amended Scheduling Order and Notice of Hearing on March 16, 2016 reflecting the agreed upon schedule.

Thayn Hydro filed its Initial Brief on April 15, 2016. Thayn Hydro asserts multiple arguments in favor of approval of the Schedule 37 pricing prior to the Pricing Order. First, Thayn Hydro asserts that extenuating circumstances exist that support approval of the earlier pricing. Thayn Hydro relies on the Commission’s precedent 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*. Thayn Hydro also argues in the alternative that an LEO did exist at or prior to the Pricing Order. Thayn Hydro supports its position with the somewhat unique facts relating to Thayn Hydro as an existing facility reaching the end of its prior contract term wishing to sign a new long term agreement.

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<sup>1</sup> March 4, 2016 Provisional Conclusion of Law p.3-4.

<sup>2</sup> *Id.* at 4.

## DISCUSSION

The Division remains consistent with its March 2, 2016 Comments and continues to recommend that the Commission approve the PPA with respect to the Schedule 37 pricing effective prior to September 18, 2014. While states have some latitude in determining when an LEO has formed, the basic principle set by FERC is that if a QF obligates itself to sell to a utility it also obligates the utility to purchase. Because of Schedule 37's fixed pricing this issue is simplified in this case as there is not a need to retroactively calculate a project specific price, but instead merely apply the appropriate price based on the prior date if the Commission finds that an LEO had been formed. The Division believes that, based on the evidence presented, an LEO likely existed prior to the Pricing Order.

LEOs are a creature of Federal Regulation. 18 C.F.R. § 292.304 states in relevant part:

- (d) Purchases "as available" or pursuant to a legally enforceable obligation. Each qualifying facility shall have the option either:
  - ...(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
    - (i) The avoided costs calculated at the time of delivery; or
    - (ii) The avoided costs calculated at the time the obligation is incurred.

It is clear from the language that a QF may create an obligation for the utility to purchase separate from a contract. In review of a recent set of PPAs in Idaho FERC has opined on LEO formation stating that:

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

applicable.<sup>3</sup>... [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>4</sup>

Both Thayn Hydro and Rocky Mountain Power were fully aware that Schedule 37 pricing was likely to be changing in the near future. As the Division has explained in its March 2, 2016 Comments, in this Docket the evidence supports a conclusion that while there may not be direct documentation of all of the communications between Thayn Hydro and Rocky Mountain Power the weight of the evidence supports the claim by Thayn Hydro that it was informed by Rocky Mountain Power it could lock in the prior pricing by committing to that pricing. And Thayn Hydro sent an email on July 22, 2015 that it would “like to commit to a 20 year non-levelized contract based on the Schedule 37 (Effective: February 20, 2015) rates.”<sup>5</sup>

In the instant case the facts support a finding that Thayn Hydro did obligate itself to sell its energy to Rocky Mountain Power and by doing so created an LEO under the earlier pricing. As the Division noted in its March 2, 2016 Comments, the level of commitment is a critical component to the formation of an LEO and there may be other circumstances where a green field project would not have the same ability as an existing facility seeking renewal to actually offer a firm commitment. However in the instant case Thayn Hydro is an existing facility. It has been operating and delivering power and is seeking a renewal contract to continue to sell power.

These facts support Thayn Hydro’s ability to actually make a commitment to deliver power unlike many QFs over the last few years that have signed PPAs and still failed to complete development and deliver power. In some other situations an email commitment without more would not be sufficient to actually bind a developer of a new project to a pricing or contract

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<sup>3</sup> *Grouse Creek Wind Park, LLC Grouse Creek Wind Park II, LLC*, 142 FERC P 61187, 61892.

<sup>4</sup> *Id.* at 61893-94.

<sup>5</sup> Attachment A to Initial Brief of Thayn Hydro.

term. Rather it would be reasonable and prudent to require a substantially higher level of demonstrated actual commitment and obligation to deliver before an LEO would form in such instances. With respect to the surrounding facts in this specific instance it is likely that the commitment provided by Thayn Hydro was sufficient to obligate itself to sell and Rocky Mountain Power to buy. The Commission should grant Thayn Hydro the prior pricing.

The Division declined to opine on the contract length in its March 2, 2016 Comments. The Division is generally opposed to the longer term and has supported significantly shorter QF contract terms to protect customers. While Thayn Hydro did not commit itself specifically to sell for a term of 20 years, the LEO formed by its commitment to sell should also include a contract length term.

Although Thayn Hydro did not choose the levelized pricing, it was an option. Had Thayn Hydro chosen levelized pricing it would be difficult to unwind the pricing calculation to reset for 15 years and would certainly change the nature of what the QF had committed to. It would be inconsistent to reevaluate the obligation's term because of the choice of non levelized price where Thayn Hydro likely would have retained the 20 year term if it had chosen the levelized pricing. Additionally Thayn Hydro's commitment specifically included a commitment to sell for 20 years available under Schedule 37 at the time the commitment was made. For this reason the LEO should also include the 20 year term.

## CONCLUSION

Based on the unique circumstances in this instance, the facts support a determination that Thayn Hydro did commit itself to sell prior to the Pricing Order. The Commission should find that an LEO existed and Thayn Hydro is entitled to the earlier pricing. The Commission should grant Thayn Hydro the previous Schedule 37 pricing and 20 year contract term.

Respectfully Submitted this 6<sup>TH</sup> day of May, 2016

/s/Justin Jetter

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