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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 Response Brief of the Office of Consumer Services

Pursuant to the Public Service Commission's ("Commission") March 4, 2016, Provisional Conclusions of Law and the March 16, 2016, First Amended Scheduling Order and Notice of Hearing, the Utah Office of Consumer Services ("Office") submits this Response Brief replying to the Initial Brief of Thayn Hydro, L.L.C. ("Thayn.") This Docket arose out of a February 4, 2016, Application and Request for Expedited Approval filed by PacifiCorp dba Rocky Mountain Power ("RMP") requesting that this Commission issue an Order determining the pricing and length of contract's term for a proposed Power Purchase Agreement ("PPA") between Thayn and RMP.

During the course of negotiations over the proposed PPA, this Commission issued a September 18, 2015 Order reducing Schedule 37 pricing ("Pricing Order") and a January 7, 2016 Order decreasing the maximum length of the terms of Qualifying Facility's (QF) PPAs ("Term Order.")[1]

The proposed PPA has not been signed and Schedule 37 tariff provides that the "prices applicable to a Utah Qualifying Facility shall be those in effect at the [2]time a written contract is executed by the parties."[3] Nevertheless, Thayn, RMP and the Division of Public Utilities ("Division") all argue that given the nature of the negotiations it is "just and reasonable" or "in the public interest" for this Commission to approve a PPA with price terms in effect prior to the Pricing Order and with a contract term in effect prior to the Term Order. On March 4th 2016, this Commission issued a Provisional Conclusion of Law rejecting these arguments and noting that the Federal Energy Regulatory Commission's ("FERC") regulations and rulings provide that under certain conditions a legally enforceable obligation ("LEO") may arise entitling a QF to terms that would otherwise be outdated.

The Provisional Conclusions of Law go on the provide that in "the absence of a showing that a LEO existed that entitles Thayn to otherwise outdated terms or prices, the Commission will not order RMP to enter into a PPA using pricing or terms contrary to the applicable tariff." (Provisional Conclusions of Law at pg. 4.) The current round of briefing addresses a matter of first impression, under the facts in this Docket did a LEO

[1] Docket No. 15-035-T06, *in the Matter of Rocky Mountain Power's Proposed Revisions to Electric Service Schedule No 37, Avoided Cost Purchases form Qualifying Facilities*, (Sep. 18, 2015); Docket No. 15-035-53, *In the Matter of the Application of Rocky Mountain Power for Modification of Contract Term of PURPA Power Purchase Agreements with Qualifying Facilities.* (Jan. 7, 2016).

[2] The Office asserted that Thayn's PPA's pricing and terms should be governed by the Schedule 37 tariff. However, as noted in the Provisional Conclusions of Law, no party addressed the issue of the application of the LEO doctrine.

[3] RMP Electronic Service Schedule No. 37, Third Revision of Sheet 37.3.

arise prior to either of the two Orders changing Schedule 37 pricing and the maximum length of QF PPAs.

FACTS

Thayn is a Schedule 37 QF operating a small 575 KW hydroelectric power facility outside of Green River, Utah, that in 1995 entered into a 20-year PPA with RMP for the sale of energy beginning in 1996. As the PPA neared its expiration date at the end of December 2015, Thayn contacted RMP in an attempt to negotiate a PPA renewal. (Thayn Initial Brief at pg. 3) As Thayn points out in its brief, the negotiations of its renewal PPA is considerably simpler than a negotiation for a newly proposed QF, in part, because an interconnection agreement is already in place, there is no issue of obtaining financing or establishing a timeline for development and technical problems concerning the project have been resolved. (*Id.* at pg. 10.) The negotiations proceeded as follows.

July 7, 2015 – Rick Kaster of Thayn initiates negotiations with John Younie of RMP to renew the PPA. (*Id* at pg. 3; Thayn's Informal Complaint Report at pg. 1.)

July 14, 2015 – RMP delivers a draft PPA template to Thayn, which had a prominent provision providing "**THIS WORKING DRAFT DOES NOT CONSTITUTE A BINDING OFFER, SHALL NOT FORM THE BASIS FOR ANY AGREEMENT BY ESTOPPEL OR OTHRWISE, AND IS CONDITIONED UPON SATISFACTION OF ALL REQUIREMENTS OF SCHEDULE 37.**" In an email on this same date, RMP estimated that the prices on Schedule 37 will change some time in August. Thayn responded by asking to expedite the negotiation process to lock in the February 20, 2015 Schedule 37 prices in effect at that time. (Thayn Informal Complaint Report at pg. 1; Division Action Request Response at pg. 2.)

July 17, 2015 – Thayn sends redline version of PPA to Bruce Griswold of RMP and expressed the need for expedited treatment. (Division's Action Requests at pg. 2-3.)

July 22, 2015 – Thayn asserts that in a phone conversation between Mr. Kaster of Thayn and Mr. Younie of RMP, Mr. Younie told Thayn that that if it committed in writing to sell its energy to RMP at the February 20, 2015 rates, both parties will be bound by the existing rates. On this same date, Thayn sent an email to RMP providing:

> 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.

(Thayn' Initial Brief at pg. 3-4 & Exhibit "A.")

July 31, 2015 – Thayn provides RMP with all information RMP requested as needed to finalize the draft PPA. (Thayn Informal Complaint Report at pg. 2.)

August 4, 2015 – Mr. Younie of RMP sent an email to Mr. Kaster of RMP providing:

> 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.

Mr. Kaster responded:

> One item that causes me concern is the request that we add a 5 million dollar umbrella to the insurance requirements. I obtained a preliminary budget quote and the cost would be very expensive for a project of this size. Especially so given the power rates that we are to be paid.

> We currently already have a one million dollar single event and 2 million dollar aggregate limit per year. Adding the 5 million dollar umbrella would increase our premiums by 300%.
> I would appreciate you checking into the necessity of adding this requirement.

RMP's contends that its internal contract review was delayed because of the request "to continue negotiating the contract concerning the insurance requirements." (Exhibit "A" to the instant Response Brief; Divisions Action Request Response pg. 3.)

August 29, 2015 – Mr. Younie, upon returning from his vacation, sent an email to Thayn stating that he had been laid off and that the last day of his employment with RMP would be September 1, 2015. The email stated that Thayn should contact Bruce Griswold to determine the appropriate person at RMP concerning the contract renewal. (Thayn's Initial Brief at pg. 4; Thayn Informal Complaint Report at pg. 2.)

September 1, 2015 -- Thayn contacted Bruce Griswold to determine whom in RMP to contact regarding the PPA renewal. (Thayn Informal Complaint Report at pg. 2; Thayn Initial Brief at pg. 2.)

September 16, 2015 – Thayn received a voice mail from Kyle Moore stating that he would be replacing Mr. Younie as Thayn's contact at RMP. (Thayn's Informal Complaint Report at pg. 2; Thayn's Initial Brief at pg. 13.)

September 17, 2015 -- Thayn again contacts RMP concerning the 5 million umbrella insurance requirement. (Thayn's Initial Brief at pg. 4.)

<u>SEPTEMBER 18, 2015</u> -- This Commission issues its Pricing Order reducing the price for energy and capacity under Schedule 37. Both Thayn and RMP argue that had they known the timing of the Pricing Order the PPA would have been executed prior to September 18, 2015. (*Supra* note 1; RMP's Application and Request for Expedited

Approval at pg. 4; Thayn's Initial Brief at pg. 13.) **September 25, 2015 –** RMP sent Thayn an email providing:

> Thanks for your patience as I corresponded with our insurance folks up the line. After speaking with them about the situation they felt like they could come down to a $3 million umbrella policy and also gave me new language to put in the contract regarding the insurance. Could you please look over Exhibit 1, Required Insurance, and get back to me about your thoughts on the new language and if the lower insurance levels will work for your project?

(Exhibit "B" to the instant Response Brief.)

October 1, 2015 – Thayn sent RMP a reply email stating:

> I verified today that we will be able to provide the insurance coverages listed in your last red line PPA that you sent me.
> I don't see any other issues to address other than having you fill in the Schedule 37 (Effective: February 20, 2015) rates that John Younie and I agreed to on the Exhibit F page.

(Exhibit "C" to the instant Response Brief.)

October 13, 2015 – Thayn contacted RMP requesting the final draft of the PPA and was informed that RMP could no longer offer the February 20, 2015 price because of the intervening September 18th Pricing Order. RMP also sent a revised PPA containing the new pricing. (Exhibit "D" to the instant Response Brief.)

November 2, 2015 – Although both Thayn and RMP argue that, at the latest, all material terms of the PPA were agreed to by October 1th, the parties continued to communicate concerning the pricing in the PPA, and Thayn sent RMP an email that suggests that negotiations may be ongoing. Specifically, the email provides:

> Following are some of the questions we have.

. . . .

> Our current contract considers a failure to deliver the Minimum Annual Delivery for any two consecutive years a default. . . . The current proposal is that if we fail to meet the minimum for even one year then we would be in default. While we don't believe that we will ever fail to meet the minimum output it seems a little extreme that one bad year could doom the entire project. We think that failing to meet the minimum output for any two contract years, consecutive or non consecutive, considered a default would be more reasonable.
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> Termination of Duty to Buy – We are very uneasy about this provision. This is basically says that if we default for any reason then we forfeit all our rights under PURPA. Something as simple as a temporary lapse in insurance could trigger this provision.

(Exhibit "E" to the instant Response Brief; Thayn Initial Brief at pg. 11; RMP Application and Request for Expedited Approval at pg. 5.)

November 27, 2015 – Thayn filed its Informal Complaint Report asserting its right to the Pre-Pricing Order rates. (Thayn Informal Complaint Report.)

<u>**JANUARY 7, 2016**</u> -- This Commission issues its Term Order reducing the maximum term of QF's PPA from 20 years to 15 years. (*Supra* note 1.)

February 4, 2016 – RMP files its Application and Request for Approval requesting that this Commission set the price and term of Thayn's PPA and arguing that Pre-Pricing Order rates and Pre-Term Order contract duration should be applied. (RMP Application and Request for Approval.)

ARGUMENT

As noted above, the issue of whether under Utah law and the facts of this Docket a LEO was created prior to the Pricing Order and/or the Term Order presents an issue of first impression with this Commission. While the FERC's regulations and decisions set out the general parameters for the establishment of a LEO, the precise circumstances giving rise to a LEO is left to state law. Moreover, though the other states decisions and general contract principles may be instructive, they are not binding on this Commission. The ultimate determination of this issue is left to this Commission's discretion.

While the Office does not attempt to delineate a test to determine the existence of a LEO in all cases, the Office proposes that if Thyne can demonstrate that it is a viable QF that unconditionally committed to the sale of its energy and/or capacity leaving nothing left for Thayne to do to complete its application, a LEO arose at that time. Here, although the record may be ambiguous, it is possible that a LEO was created as of August 4, 2015 when Thayn and RMP arguably agreed to all material terms of the PPA and formal execution of the agreement depended wholly on RMP's actions.[4] This conclusion is contingent on the contention that Thayn's inquiry regarding the 5 million dollar insurance requirement was simply a question or request and not a condition to the acceptance of the PPA.

A. FERC's Decisions and Regulations.

18 C.F.R. § 292.304(d) of the FERC's regulations provide that QFs have the option to sell their energy and capacity either on an "as available" basis or "pursuant to a legally enforceable obligation." If a QF elects to sell pursuant to a legally enforceable obligation, it has the option of rates being based on the "avoided costs calculated at the time the obligation is incurred."[5] The term "legally enforceable obligation" is broader

[4] The Office notes that absent the assertion of a LEO, its position would remain the same as presented in its Comments dated March 3, 2016, namely that the terms of Schedule 37 should be followed and the price must be that in effect at the time the contract is executed.
[5] 18 C.F.R. § 292.304(d) provides in full:

> (d) *Purchases "as available" or pursuant to a legally enforceable obligation*. Each qualifying facility shall have the option either:

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." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P. 36 (2011); *see also,* Order No. 69, FERC Stats. & Regs. ¶ 30,128, at P. 30,880.

In addition to preventing a utility from circumventing its obligations under PURPA, the LEO doctrine is also based on the unilateral nature of QF PPAs stemming from PURPA's mandatory purchase requirement. *See* 18 C.F.R. § 292.303(a) (2013). That is, "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." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P. 32 (2011); *see also*, *JD Wind 1*, 129 FERC ¶ 61,148, at P. 25 (2009.) The FERC has repeatedly held that a QF through the negotiation process may commit itself to sell to a utility creating a LEO prior to the formal execution of a PPA. *See, e.g., Murphy Flat Power, LLC,* 141 FERC ¶ 61145 at P. 24 (2012); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P. 36 (2011).

While the FERC's regulations and decisions set out the general parameters of the LEO doctrine, the determination of the precise date that a LEO arises is left to state law and the discretion of state authorities. *West Penn,* 71 FERC ¶ 61,153 at P. 61495 (1995). However, the deference given to the states in determining the date of a LEO "is

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(1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided cost calculated at the time of delivery; or

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specific 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 time of delivery; or

(ii) The avoided costs calculated at the time the obligation is incurred.

subject to the terms of the [FERC's] regulations. *West Penn* does not . . . give states the unlimited discretion to limit the ways a legally enforceable obligation is incurred." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P. 35 (2011).

In several dockets the FERC has issued Declaratory Orders ruling that the state commissions' decisions limiting a QF's ability to establish a LEO are contrary to its regulations. First, in a litany of cases out of Idaho, the FERC has repeatedly held that the state's commission rule violates the FERC's regulations by limiting the time a LEO can be formed to (1) the time at which both parties sign the agreement, or (2) the time the QF files a "meritorious complaint" with the Commission asserting the utility is not negotiating in good faith. *Grouse Creek Wind Park, LLC,* 142 FERC ¶ 61187, at P. 40 (2013); *Murphy Flat Power, LLC,* 141 FERC ¶ 61145, at P. 25 (2012); *Rainbow Ranch Wind, LLC,* 139 FERC¶ 61077, at P. 24 (2012); *Cedar Creek Wind, LLC,* 137 FERC ¶ 61006, at P. 30 (2011).

In these cases the FERC held that requiring a fully executed contract as a prerequisite to the establishment of a LEO is contrary to the FERC's pronouncements that a LEO "can pre-date the signing of a contract." *Grouse Creek Wind Park, LLC,* 142 FERC ¶ 61187, at P. 40 (2013). In addition, the "Idaho Commission's requirement that a QF formally complain "meritoriously" to the Idaho Commission before obtaining a legally enforceable obligation would both unreasonably interfere with QF's right to a legally enforceable obligation and also create practical disincentives to amicable contract formation." *Id.*

In *Hydrodynamics Inc.*, 146 FERC ¶ 61193, P. 33 (2014) the FERC held the Montana Commission violated FERC regulations by requiring that as a precondition to forming a LEO locking in long term avoid cost rates, the QF must participate in rarely held competitive solicitation process. Similarly, in *JD Wind 1*, 129 FERC ¶ 61148, at P. 23 (2009) the FERC held the Texas Commission violated FERC regulations by requiring that as a precondition to forming a LEO the QF must provide "firm" non-intermediate power. In both cases, the FERC rejected attempts to place preconditions on the formation of a LEO that do not appear in 18 C.F.R. § 292.304(d). These preconditions "`both unreasonably interfere with a QF right to a legally enforceable obligation and also create practical disincentives to amicable contract formation'" by limiting the types of QFs that entitled to form a LEO. *Hydrodynamics Inc.*, 146 FERC ¶ 61193, P. 33 (2014), *quoting Grouse Creek Wind Park, LLC,* 147 FERC ¶ 61187, at P. 40 (2013).

These FERC cases are best understood as prohibiting additional requirements to obtaining a LEO other than those stemming from 18 C.F.R. § 292.304(d) and Order No. 69, FERC Stats. & Regs. ¶ 30,128, i.e., the ability of a QF to obtain a LEO in situations where the utility refuses to negotiate or when through the negotiation process the QF commits itself to the sale of its energy prior to the formal execution of the PPA.

B. *Other State Decisions*

Several decisions fix the point in time when a LEO arises under a particular state's law. Generally, these cases fix the time a LEO arises on different points on the continuum of the PPA negotiation process.

On one point on the continuum, there is apparent consensus that for a LEO to arise the QF project must be sufficiently developed to be able to demonstrate its viability. *See e.g., Whitehall Wind LLC v. Montana Public Service Com'n*, 347 P.3d 1273, 1276-77 (Mont. 2015)(QF "was merely seeking information from which it could make a decision whether or not to proceed."); *South River Power Partners v. Penn. Public Utility Com'n,* 696 A.2d 926, 930 (Penn. 1997)(nonviable QF could not establish a LEO.)

Appeal of Public Service Com'n v. New Hampshire, 539 A.2d 275 (N.H. 1988), represents a middle ground and holds that a LEO will be created when (1) the QF files a timely rate petition (2) accompanied by the interconnection agreement signed by the QF. *Id.* at 280. For a rate petition to be timely, there must be "a demonstration that most of the developmental project had been resolved giving rise to a reasonable expectation that the project will be on-line on the date specified in the filling." *Id.* at 281. The QF must also "demonstrate that it is economically viable over the life of the project." *Id.*

Finally, several courts have held that a LEO arises when the QF makes unconditional commitment to deliver energy and/or capacity at a future date and the QF has done everything in its power to complete its application. *Whitehall Wind LLC v. Montana Public Service Com'n*, 347 P.3d 1273, 1275-76 (Mont. 2015)("[T]he touchstone of a legally enforceable obligation . . . is an absolute commitment to deliver energy or energy and capacity at a future date. Any commitment that is conditional fails to establish a [LEO.]" *Armco Advance Materials Corp. v. Pa. Pub. Util. Com'n,* 579 A.2d 1337, 1347 (Pa. 1990)(the QF "has done everything within it power to create such an obligation . . . only the act of acceptance by the utility or an act of approval by the [commission] remains to establish the existence of a contract.")[6]

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[6] In two cases out of Texas the Fifth Circuit of the Federal Court of Appeals has taken a more restrictive approach holding that a LEO will not occur unless the QF can deliver "firm" non-intermediate power within 60 days of the formation of the obligation. *Exelon Wind v. Nelson,* 766 F.3d 380, 400 (5th Cir. 2014); *Power Resource Group v. Public Utility Com'n of Texas*, 422 F.3d 231, 239 (5th Cir. 2005). This Commission should disregard these decisions. First, because Thayn is a preexisting QF that provides firm power, these decisions do not impact the present case. Second, they are in clear conflict with 18 C.F.R. § 292.304(d) and Order No. 69, FERC Stats. & Regs. ¶ 30128.

That these decisions are in conflict with the FERC is not simply the opinion of the Office it is an unquestionable fact. In *Exelon Wind*, the Fifth Circuit ignored the FERC's opinion in *JD Wind 1,* 129

C. Office's Proposal

The Office proposes that, under the facts of this case, the approach most consistent with the FERC's regulations and general Utah law is the approach requiring a QF to unconditionally commit to sell its energy and/or capacity and to do everything in its power to establish a contract. In these cases, a contract would be formed but for the reluctance of the utility. First, as mentioned above, the FERC has based its LEO doctrine, in part, on the notion that a QF, "by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P. 32 (2011).[7] Accordingly, for a LEO to arise, the QF's commitment must be sufficiently mature and definite to impose contractual liabilities on both the QF and the utility. This contention is generally consistent with Utah common law. Under Utah law a contract is sufficiently definite to be enforceable if the terms are definite enough to "provide the existence of a breach and to give an appropriate remedy." *Homestead Golf Club, Inc. v. Pride Stables*, 224 F.3d 1195, 1201 (10th Cir. 2000)(Utah law); *see also,* RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1979).

FERC 61148 (Nov. 19, 2009), which held that requirement that a QF must provide firm power violates the FERC's regulations and upheld the firm power precondition. *Id.* at 400. However, this decision is contrary to controlling case law form the U. S. Supreme Court., *Auer v. Robbins, 519 U.S. 452, 461 (1997); Decker v. Nw. Envtl. Def Ctr.*,133 S.Ct. 1326, 1336-37 (2013), other circuits hold that the FERC orders are entitled to significant deference, *Southern California Edison Co. v. FERC,* 195 F.3d 17, 28 (D.C. Cir. 1999), and the decision of the Fifth Circuit are not binding on this Commission.

[7] The above state cases focus on the FERC's pronouncement that a LEO can arise when a QF commits to sell in energy and/or capacity prior to the formal execution of a contract. They do not generally center on the need to prevent utilities' bad faith actions of refusing to timely sign a contract. This is in accord with the facts of the instant case. Although the delay in signing the contract prior to the price change was due to RMP's inaction in addressing the insurance issue, the record indicates that this was caused by a change in personal not by a bad faith attempt to delay signing the contract. In fact, RMP argues that Thayn should be granted the old prices.

A fact situation evidencing bad faith may be needed for this Commission to delineate the parameters of the LEO doctrine when confronted with an allegation of intentionally refusing to sign or negotiate. However, at least one court has held that an allegation of a bad faith refusal to negotiate is insufficient to create a LEO, at least in situations where the negotiations were at a preliminary state and the QF could not demonstrate viability. *Whitehall Wind LLC*, 347 P. 3d at 1277.

As discussed below, a significant issue in this case is that the commitment to sell energy and/or capacity must be unconditional. Thayn's Brief relies heavily on RESTATEMENT (SECOND) OF CONTRACTS § 61. (Thayn's Initial Brief at pg. 5 and footnote 5.) *see Sackler v. Savin*, 897 P.2d 1217, 1221 (Utah 1995)(Utah generally follows RESTATEMENT (SECOND) OF CONTRACTS.) Section 61 concerns acceptance of offers and provides an "acceptance which request a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an on assent to the change of added terms." *See Hutton Contracting v. City of Coffeyville,* 487 F.3d 772, 787 (10th Cir 2007)(Section 61 inapplicable when there is no freestanding acceptance "as would be if the [party] has expressed a hope or a request instead of a proviso.") Therefore, the requirement that a QF's commitment to sell must be unconditional is consistent with the FERC's regulation and orders and Utah common law.

The reference to Utah contract common law may by instructive but, like references to other state's LEO decisions, they are not binding on this Commission. This is because the LEO doctrine is a regulatory principle not a common law principle, the FERC has held that a LEO is broader then contract law, and LEO can arise absent both parties consent. *Cedar Creek Wind, LLC.*, 137 FERC ¶ 61,006 at P. 36 (2011); *see also,* Order No. 69, FERC Stats. & Regs. ¶ 30128, at P. 30880. However, because a LEO doctrine is broader than common law contract law, in fixing a point in time when a LEO arises, it important not to impose requirements on a LEO formation that exceed those under Utah contract common law.

D. LEO Doctrine Under the Facts of This Case.

Given these above principles, in this case a LEO was arguably formed on August 4th when Mr. Younie of RMP offered to submit the proposed PPA for internal review, if it is determined that Thayn agreed with this course of action, Thayn would have done everything in its power to commit to the sale of its energy and/or capacity. The fact that the contract was not timely signed was due the RMP inaction caused by changes in RMP personnel. However, the record as it now to stands is somewhat ambiguous on this point. Rather than simply agreeing to this course of action, Thayn responded by raising the issue of the 5 million dollar insurance requirement. However, the language used indicates that Thayn was asking a question or making a request rather than imposing a condition, particularly the sentence stating: "I would appreciate you checking into the necessity of adding this requirement."

Nevertheless, communications after August 4th suggest that Thayn continued to negotiate suggesting that Thayn was continuing to raise conditional proposals. While the record is ambiguous, the evidence suggests that the subsequent communications were just requests rather than conditions allowing the formation of a LEO prior to both the Pricing Order and the Term Order. If this Commission determines that the outstanding insurance issue prevent the formation of a LEO on August 4th, then it is possible that a LEO was formed on October 1st, when the insurance issue was resolved. While this date is subsequent to the Pricing Order, it is before the Term Order. However, this result is dependent on the determination that issues raised on November 2nd, regarding contract provisions other than the insurance, were requests and/or questions rather than conditions.

E. Remaining Issues.

Two remaining issues should be addressed: (1) Thayn's argument that the LEO doctrine need not be addressed and that this case be resolved pursuant to the reasoning in *In the Matter of the Application of Rocky Mountain for Approval of the Power Purchase Agreement between PacifiCorp and Three Peaks Power LLC, ("Three Peaks')* entitling Thayn to the old pricing on the grounds of "extenuating circumstances," and (2) the effect of this Commission's LEO decision on the present incarnation of Schedule 37.

First, Thayn's argument regarding *Three Peaks* must be rejected. *Three Peaks* involved Schedule 38 that includes specific language allowing old pricing under "extenuating circumstances." No such language exists in the Schedule 37 tariff. Moreover, in the March 16, 2016, Provisional Conclusion of Law this Commission ruled that in "absence of a showing that a LEO existed . . . the Commission will not order RMP to enter into a PPA using pricing or terms contrary to the applicable tariff." (Provisional Conclusions of Law at pg. 4.)

Second, it is clear that the present language of Schedule 37 is contrary to the FERC's regulations and orders. Specifically, Schedule 37 provides, "prices applicable to a Utah Qualifying Facility shall be those in effect at the time a written contract is executed by the parties." The FERC has rejected similar language in the Idaho cases because it does not take into account that a LEO may arise prior to the formal execution of a contract and would allow a utility to avoid its statutory responsibilities under

PURPA simply by refusing to sign a PPA. *Cedar Creek Wind, LLC,* 137 FERC ¶ 61,006 at P. 36 (2011); *see also*, Order No. 69, FERC Stats. & Regs. ¶ 30128, at P. 30880.

The Office proposes that this Commission open a Docket for the purpose of establishing a global approach to the LEO doctrine and amending the Schedule 37 tariff (and possibly Schedule 38) to incorporate this Commission's determination of when a LEO arises. This will allow other interested parties to provide input and allow this Commission to view the matter in general terms rather than only through the lens of the facts of the instant case.

CONCLUSION

This Commission has considerable discretion in fixing the date a LEO occurs under Utah law, as long as the decision is consistent with the FERC's regulations and orders. The Office believes that principle underlying the FERC's decisions, the decisions from other states and Utah common law support the contention that a LEO is formed when a viable QF unconditionally commits to the sale of its energy and/or capacity and the QF has done everything in its power to complete its application. While the record is ambiguous, it is arguable that a LEO was formed on August 4th entitling Thayn to old prices and a 20 year contact term.

Furthermore, the Office proposes that this Commission open a Docket for the purpose of establishing the contours of LEO doctrine, applicable to all cases, under Utah law.

DATED: May 6, 2016

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