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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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IN THE MATTER OF THE PETITION OF WASATCH WIND, LLC FOR APPROVAL OF A CONTRACT FOR THE SALE OF CAPACITY AND ENERGY FROM THEIR PROPOSED QF FACILITIES	Docket No. 06-035-42
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**PREFILED TESTIMONY OF TRACY LIVINGSTON**

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Wasatch Wind hereby submits the Prefiled Testimony of Tracy Livingston in this docket.

DATED this 15<sup>th</sup> day of May, 2006.

Tracy Livingston

/s/ \_\_\_\_\_  
Tracy Livingston  
Wasatch Wind, LLC

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by United States mail, postage prepaid, or by email this 15<sup>th</sup>, May 2006 to the following:

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**PREFILED TESTIMONY**

**Of**

**Tracy Livingston  
Wasatch Wind, LLC**

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IN THE MATTER OF THE PETITION OF WASATCH WIND, LLC FOR APPROVAL OF A  
CONTRACT FOR THE SALE OF CAPACITY AND ENERGY FROM THEIR PROPOSED  
QF FACILITIES

Docket No. 06-035-42

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May 15, 2006

1 **BACKGROUND**

2 **Q. Please state your name and occupation.**

3 A. My name is Tracy Livingston. I am the Manager of Wasatch Wind, LLC, a wind  
4 project development company, manager of Spanish Fork Wind Park 2, LLC a  
5 special purpose entity, and CEO of Wind Tower Composites, LLC a technology  
6 engineering firm funded by the US Department of Energy and the California  
7 Energy Commission to develop next generation, lower cost, multi megawatt class  
8 wind turbine towers. All companies are located in Heber City, UT

9 **Q. On whose behalf are you filing testimony in this Docket?**

10 A. Wasatch Wind, LLC

11 **Q. Have you submitted testimony to this Commission before?**

12 A. Yes in Docket 03-35-14.

13 **Q. What is the status of your Spanish Fork wind project?**

14 A. WW has been monitoring wind resources at the mouth of Spanish Fork Canyon in  
15 the industrial zone of Spanish Fork City for the past 1.5 years for the purpose of  
16 building, owning, and operating a wind farm of 18.9 MW as a special purpose  
17 entity called Spanish Fork Wind Park 2, LLC. In addition to the recent data, 3  
18 years of historical wind data from one of our partner companies with a permanent  
19 facility and two towers at the site have been evaluated to establish long term  
20 energy predictability. Analysis shows that wind predictability and capacity factor  
21 due to the strong diurnal nature at the site is superior to the more typical non-  
22 diurnal wind farms being governed by macro weather events. The project was  
23 recently relocated closer to the mouth of Spanish Fork Canyon due to objections

1 by some residents of Spanish Fork City that the wind farm will be too close to the  
2 residents. With the move, the support from the community has been  
3 overwhelming positive. The city mayor and the city council have been fully  
4 supportive and cooperative and have also provided land for several of the  
5 turbines. Wasatch Wind i.e. Spanish Fork Wind Park 2, LLC has filed an  
6 interconnect agreement with the Company per “FERC Docket No. RM02-12-000;  
7 Order No. 2006” regarding interconnect procedures for small generators of less  
8 than 20 MW. The Company has also provided a method for indicative pricing  
9 that Wasatch Wind finds acceptable pending the outcome of a recent Docket  
10 initiated by Pioneer Wind.

11 **Q: Are there any other barriers to project completion.**

12 **A:** Yes. The Company offered Wasatch Wind a PPA nearly identical to the 64.5 MW  
13 proxy wind farm PPA. Wasatch Wind and the Spanish Fork project as a small  
14 (less than 20 MW) wind farm cannot proceed with a firm energy contract that is  
15 more suitable for a large wind farm. Our financial and turbine availability  
16 metrics are different thus requiring a different contract. The Company has stated  
17 it is unable to agree to a contract with substantive differences to the proxy.

18 **Q: What is your summary recommendation to the Commission that will allow  
19 Wasatch Wind to proceed with an 18.9 MW wind farm at Spanish Fork?**

20 **A:** It’s really quite simple. The commission should rule that small wind projects of  
21 20 MW or less as an intermittent resource should be approved to use non-firm  
22 contracts typically used by the Company for some other non-firm QF’s and should  
23 further clarify that the proxy method as previously defined by the commission

1 should be used only as a determiner of price and is not to be construed as a  
2 determiner of contract provisions.

3 **Q: What are your specific recommendations?**

4 **A:** The commission should order the company to negotiate a good faith non-firm  
5 energy contract similar to the Tesoro and Kennecott QF contracts for 20 MW and  
6 smaller projects using the proxy pricing and recommended adjusters from the  
7 previous related dockets.

8 **Q: Do you have an alternative recommendation to the Commission?**

9 **A:** Yes I do. The commission could rule that wind power is a non-firm resource and  
10 as such require that the liquidated damages, and associated contract provisions be  
11 removed from the present contract for 20 MW and smaller wind projects, be  
12 allowed to receive the proxy pricing, and then make a further decision regarding  
13 the necessity of the amount of security provisions.

14 **Q: What provisions of the Company provided PPA are barriers for Wasatch  
15 Wind?**

16 **A:** There are several. Liquidated damages are the most egregious with several other  
17 contract provisions directly tied to this requirement. These “associated  
18 provisions” include: turbine mechanical availability, delay damages, guaranteed  
19 commercial operation date, and cost to cover. These related provisions are found  
20 in the Companies firm power PPA’s but are not necessary and have not been  
21 required in non firm Company contracts.

22 **Q: Are there any other alternatives to reaching an agreement with the  
23 Company?**

1    **A:**    Not in my opinion. Company negotiators have stated that alternative contract  
2            clauses that make adjustments to liquidated damages or “associated provisions”  
3            would be considered if Wasatch Wind would be willing to agree to a downward  
4            price adjustment. This appears to be an egregious interpretation by the Company  
5            of the Order in Docket 03-35-14. The Company has stated in negotiations that  
6            Wasatch Wind must accept nearly all the major provisions of the firm power  
7            proxy contract including liquidated damages and associated provisions in order to  
8            receive the proxy price (adjusted for on peak/off peak delivery). The Company has  
9            stated they are unable to move beyond this point.

10   **Q:**    **What are the specific alternatives suggested by the Company?**

11   **A:**    The Company stated in a recent Settlement Conference that because there is an  
12            implied capacity value in the proxy resource, the new QF should also be expected  
13            to use a similar (and almost identical) firm resource contract in order to capture  
14            that implied value for a wind project. The next jump in logic is that since capacity  
15            has value that a non-firm contract must be adjusted using this value. This logic is  
16            tenuous as no clearly defined price for capacity (or even if there is one) has been  
17            reached in previous proceedings. The Company’s argument for price adjustments  
18            to justify the use of a non-firm wind QF contract is the wrong approach for small  
19            wind projects as no clear evidence to the validity, the amount, or a simple method  
20            on how to make the capacity adjustment has been forthcoming in negotiations or  
21            agreed to in the previous Docket 03-35-14. In this Docket, some parties said that  
22            capacity value should be studied further; others stated that a 20 percent value was  
23            appropriate, while others said it should equal the capacity factor of the plant, and

1 some said it should not be considered at all. For example, Bruce Griswold in  
2 testimony under Docket No. 03-35-14 stated, “Under the Company’s proposal, the  
3 Company will pay twenty (20) percent of the avoided capacity costs as determined  
4 using the Commission approved avoided cost methodology for QF projects over 3  
5 MW.” He further states, “The Company proposes that a wind QF resource receive  
6 a volumetric price structured as on-peak and off-peak prices where the 20%  
7 capacity payment would be included only within on-peak hours. In order for the  
8 wind QF to receive the full 20% capacity payment in the on-peak energy price, it  
9 would need to maintain a 35% wind capacity factor.” This method was disputed  
10 vigorously with little agreement. Of note, the proxy resource’s capacity factor is  
11 lower than Mr. Griswold’s threshold and since it is suggested by him that the  
12 value is only for on peak hours, even the company places little value on this  
13 Capacity.

14 We understood that the final Order in 03-35-14 for using the proxy pricing  
15 was based on creating a simple pricing method for wind QF’s. The Order has  
16 achieved this goal. If the Company was allowed to make adjusters to the contract  
17 price, then the development of a methodology for determining this adjustment  
18 whether it be based on risk allocation or a capacity difference, would clearly  
19 devolve into another endless debate. We would be in proceedings yet again. We  
20 are already near the limit of what can be absorbed from a resource and financial  
21 prospective. Yet the debate of this controversial issue would continue the delay.  
22 Not to mention the action of which could unduly delay integration of small wind  
23 projects at competitive prices into the system.



1 **Q: Are the capacity values of the Spanish Fork and the Proxy projects similar?**

2 **A:** No one seems to know and that is my point. No agreed analysis can be completed  
3 by the Company to put a relative value on this capacity portion. Considering the  
4 contract is structured to imply a price for energy and a price for capacity with an  
5 unknown explicit value for that capacity and an inability to separate the capacity  
6 value with no method by the company to adjust the value of that capacity as a  
7 function of energy predictability, then improper pricing signals are the result and  
8 the method leaves confusion on how to make an adjustment.

9 **Q: Does the Commission need only to clarify the Order in Docket 03-35-14**  
10 **stating that the proxy plant comparisons are for pricing only to enable the**  
11 **contract negotiations to proceed?**

12 **A:** I do not believe it will be enough. In our early negotiations with the Company, I  
13 believed this simple clarification would be sufficient. Statements were made by  
14 Company personnel saying our contract must be nearly identical to the proxy  
15 contract and that contract terms and pricing were inextricably combined and  
16 therefore less this clarification they could not proceed with significant contract  
17 changes. Therefore, I believed a pricing clarification from the Commission would  
18 then give the Company the ability to disconnect pricing from contract terms and  
19 thereby negotiate different terms suitable for small wind. However, in the  
20 Settlement Conference we were told that even with that clarification, the contract  
21 needs to have “good commercial terms” and we were told that firm power  
22 provisions would not be changed in a meaningful way by the Company thus  
23 leading us to the conclusion that further Commission direction to specifically

1 require the Company to make adjustment to contract provisions or allow the use  
2 of a non-firm PPA would be necessary.

3 **Q: Why would small wind farm development be hampered if the contract was**  
4 **not changed to a standard non-firm type?**

5 In general, project development costs (those prior to construction) are nearly the  
6 same for a small project versus a large one. As such, these costs are a larger  
7 percentage of the projects total costs for a small wind farm. Therefore, in order  
8 for a small wind farm to be viable, other costs such as contract provisions and  
9 even the very act of PPA negotiation and regulatory issues must be streamlined  
10 for the small project to be on equal financial terms with the large ones. This  
11 process for Wasatch Wind has been expensive, long, and difficult and now we are  
12 being asked to absorb liquidated damage provisions that are also more difficult for  
13 a small wind farm. The combination is more than a small project can absorb.  
14 One of our investors is providing testimony in this docket of the problems that a  
15 firm power contract creates for a small wind project. Based on our discussions  
16 with other investors as well, small projects have difficulty absorbing the  
17 undefined costs associated with the risks of liquidated damages especially in states  
18 with regulatory and PPA difficulties.

19 **Q: Do you personally have knowledge of particular small wind projects that**  
20 **would be hampered in addition to the Spanish Fork project?**

21 **A:** Yes. The Spanish Fork site appears to have similar winds to at least three  
22 other canyon sites in Utah with diurnal wind patterns. At this time, the likelihood  
23 that these sites are viable from a wind resource and land logistics issue is high.

1 Each site is also constrained in size due to site logistics thus all three would be  
2 smaller than 20 MW's each. Since the winds and thus the financial metrics are  
3 similar to the Spanish Fork site, the contract issues will be the same.

4 **Q: Would no action in this Docket be considered rate payer neutral?**

5 **A:** No. Doing nothing will mean that small wind projects will be delayed or  
6 canceled in Utah because of insurmountable contract terms thus hampering the  
7 Company's efforts in reaching its IRP goals for wind projects. This delay will  
8 thus subject the ratepayers to greater portfolio risk as the IPR has already deemed  
9 that 1400 MW's of wind are the appropriate balance. This also means losing  
10 valuable economic development benefits Governor Huntsman has stressed are so  
11 important in rural Utah via construction, operation, and tax base increases from  
12 wind farm development.

13 **Q: Why do you believe the use of a non-firm contract is a fair proposal?**

14 **A:** Non-firm contract provisions should apply to small wind projects because of the  
15 importance of keeping contracts simple yet reasonably fair and accurate to achieve  
16 minimal administrative and overhead burden for the Company, the Commission,  
17 the Division and the Committee all while providing equal and fair opportunity for  
18 small wind farm developers while maintaining rate neutrality. I believe Wasatch  
19 Wind's proposal accomplishes all that and yet keeps in place the motivations for  
20 the wind farm owner to produce power.

21 **Q: Can you provide some background for specific examples of the Companies**  
22 **use of firm power PPA's?**

23 **A:** A sample PPA can be obtained from PacifiCorp at

1 <http://www.pacificorp.com/File/File25896.pdf>. We understand that this  
2 Company provided contract was approved by the Commission as a framework for  
3 negotiations for QF's by an Order issued in DOCKET NO. 03-35-15 on August  
4 26, 2003. The Order stated in part,

5 "The Commission finds that the proposed generic PPA provides a  
6 reasonable basis for negotiations with Large QFs, and that it would be in the  
7 public interest for the Commission to approve the proposed generic PPA."

8 We believe the intent of the Generic PPA was to allow large QF's  
9 delivering firm power to have a baseline for negotiations. These contracts include  
10 liquidated damages and related provisions which make sense for firm power  
11 deliveries as witnessed by several larger QF contracts entered into by the  
12 Company including Desert Power and Sunnyside Cogen. Both these contracts  
13 appear to be patterned after the Generic PPA as they include many of the  
14 liquidated damages, performance, security, and default provisions previously  
15 mentioned and include firm power obligations by the QF.

16 **Q: Has the company used different QF contracts for non-firm power?**

17 **A:** Yes in at least two cases in the past year entirely different contracts were used for  
18 these non-firm power QF's. The contracts were with Tesoro signed by the  
19 Company on January 9, 2006 for a 25 MW gas fired co-generation facility located  
20 in Salt Lake City, Utah and another contract with Kennecott signed on December  
21 20, 2005 for up to 31.8 MW from a waste heat fired co-generation facility located  
22 in Magna, Utah. Neither of these contracts have provisions for liquidated  
23 damages, availability requirements, delay damages, commercial operation start

1 date penalties, Cost to Cover provisions, etc. Although I have not reviewed the  
2 US Magnesium contract, I have been told that it also is a non-firm PPA without  
3 these provisions as well. The consistent message here is that non-firm power  
4 requires a different type of contract.

5 **Q: Have other parties testified previously that wind is a “non-firm resource”.**

6 **A:** Yes. Among others, Phil Hayet in docket no. 03-035-14, testimony dated 12 April  
7 2004 states, “The Company is correct that wind generation is intermittent (non-  
8 firm) and should not be afforded the same treatment as firm QF resources.” I concur  
9 with this statement.

10 **Q: Would the Company be at significant risk of energy non delivery from the**  
11 **wind farm without the penalties of liquidated damages and associated**  
12 **provisions in the contract?**

13 **A:** No. Provisions to cover liquidated damages have historically been used to ensure  
14 that fossil fuel generators continue to deliver power under firm energy contracts.  
15 For example, a fuel generator without a tolling arrangement that under predicts  
16 future fuel costs has a strong incentive to stop producing as the costs of the fuel  
17 place them in a negative financial situation. In this case, the liquidated damages  
18 provisions are crucial. In fact damage provisions tend to be significant to avoid  
19 non-delivery at times when the Company must depend on the QF for delivery.  
20 These provisions also help ensure that generators strongly consider the  
21 implications of fixed price contracts before entering into a PPA. The issue with a  
22 wind plant is vastly different. More than 70% typically of the cost of power from  
23 a wind plant consists of sunk capital costs with the remainder consisting of

1 variable costs associated with maintenance, administration, and land owner  
2 royalties, none of which is dependent on fuel. This is contrasted to fossil plants  
3 where most of the energy costs are for fuel. Thus wind plant owners are entirely  
4 driven by a necessity to keep turbines operational to cover the capital costs and  
5 achieve the expected return on investment i.e. the greater diligence to keep wind  
6 turbines mechanically ready, the more energy will be produced, and therefore the  
7 higher the return. This is always true.

8 **Q: Are there any other remaining provisions that are difficult?**

9 **A:** Yes there are. The provided PPA requires that the Project Development Security  
10 be in place within 10 days after the Effective Date i.e. after Parties and

11 Commission approval. This is to cover the costs associated with the project not  
12 being able to achieve operation by the Expected Commercial Operation Date.

13 This short time frame is egregious, and doesn't capture the reasonable purpose of

14 this clause even in a firm wind energy contract. For example, if two identical

15 projects entered into a contract on the same day and one project had a three year

16 time frame to Operation and the other a one year time frame, do both have the

17 same risk of non-performance at the date of contract signing? While the answer is

18 clearly no, the risk is similar at the time that both projects are within one year of

19 operation. For a small project using a non-firm contract, security provisions are

20 not necessary as the intent is that capacity is available on the system whether the

21 wind farm is in place or not. If the Commission MUST require this security and

22 believes there is some increasing risk to the Company and/or ratepayers as the

23 Expected Commercial Operation Date comes closer then we suggest a method

1 similar to some other wind contracts. We propose that within one year of  
2 Expected Commercial Operation Date that the security funding begins as a linear  
3 escalator starting at zero at one year from operation date to full security funding at  
4 time of Expected Commercial Operation Date as updated on quarterly basis.

5 **Q: Why does the Project Development Security provision presently hinder your**  
6 **project?**

7 **A:** Small wind projects are typically developed by firms that ultimately do not  
8 provide the final project construction or final capital takeouts as they either do not  
9 have the resources or the capability of effectively using the federal production tax  
10 credit. Therefore, only after the site development work is nearly completed and  
11 the PPA has been signed are these investors willing to negotiate an interest in a  
12 wind project. The good news is that these investors are readily available and  
13 willing to negotiate but in general they are unwilling to negotiate prior to the local  
14 developer on a small project signing a PPA. There are just too many projects in  
15 states where contracts have been able to be signed by local developers and utilities  
16 because the contracts do not have an imminent security provision.

17 **Q: Did you bid into the most recent RFP?**

18 **A:** Yes we did because of encouragement from PacifiCorp from two sources. The  
19 first encouragement was based on Bruce Griswolds surebuttal testimony in  
20 Docket No. 03-35-14 where he states, "PacifiCorp's alternative proposal is that  
21 the Commission could require that all renewable QF's (over the Schedule 37  
22 threshold) participate in renewable RFP's." and second that we were encouraged  
23 to participate by PacifiCorp personnel during the negotiation process.

1 **Q: Were you accepted as a qualified bidder?**

2 **A:** No. We did not meet the minimum annual energy delivery requirements of  
3 70,000 MWh which is equivalent to an approximately 20 MW capacity wind  
4 farm.

5 **Q: Where does that leave the 18.9 MW Spanish Fork Project?**

6 **A:** We are left in contract limbo. We are too small to participate in the RFP process  
7 and yet because we are small we need different contract provisions for success in  
8 the QF proxy process.

9 **Q: If 20 MW or smaller projects receive non-firm contracts doesn't that create a**  
10 **bias against larger wind QF's subject to firm contract provisions?**

11 **A: No.** Larger QF's have the opportunity to bid into the RFP. As part of this RFP  
12 process the bidder also has the opportunity to adjust contract terms. While the  
13 company may chose bidders that are willing to accept firm power contract  
14 provisions, they are also under obligation to consider all viable bidder offers in a  
15 competitive process gauged against the requirements of the IRP. Less than 20  
16 MW wind projects are unable to participate in this process.

17 **Q: Does this conclude your testimony**

18 **A:** Yes it does.