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September 4, 2012

Gary Widerburg
Commission Secretary
Public Service Commission of Utah
Heber M. Wells Building, 4th Floor
160 East 300 South
Salt Lake City, Utah 84114

Re: **Docket No. 12-035-90**, Rocky Mountain Power's Response to Cottonwood Hydro, LLC's Request for Agency Action regarding its power purchase agreement with PacifiCorp.

Dear Mr. Widerburg:

The purpose of this letter is to provide the Public Service Commission of Utah (the "Commission") with a response to the request for agency action filed by Cottonwood Hydro, LLC ("Cottonwood Hydro") on August 1, 2012. This letter provides Rocky Mountain Power's response and recommendation relative to this matter.

PacifiCorp has two power purchase agreements with Cottonwood Hydro. These power purchase agreements are for two separate small hydro-electric generation facilities located in Little Cottonwood Canyon. The facilities are commonly referred to as the upper facility and the lower facility. Both power purchase agreements had effective dates of December 14, 2011. Each of the respective power purchase agreements included a provision that required Cottonwood Hydro to provide to PacifiCorp, within six months of the effective date of the power purchase agreement, a "Federal Power Act hydroelectric license or exemption issued by the Federal Energy Regulatory Commission (FERC) for the Facility or a written statement from FERC explaining why the Facility does not require such a license or exemption." This provision further provided for a six month extension "so long as Seller has applied for and is diligently pursuing a FERC hydroelectric license or exemption." The power purchase agreement went on to state that "Seller's failure to obtain a FERC hydroelectric license or exemption shall constitute a failure to perform a material obligation by Seller under Section A6.1.9."¹ Given the effective date of December 14, 2011, the FERC exemption or license was due to PacifiCorp on June 14, 2012. Neither the FERC exemption nor license has been provided.

On June 21, 2012, following communications with Cottonwood Hydro on the status of the FERC exemption or license, PacifiCorp sent a letter to Cottonwood Hydro agreeing to extend the deadline for providing the FERC exemption or license to December 14, 2012, as provided in the respective power purchase agreements. On July 20, 2012, Cottonwood Hydro sent a letter to PacifiCorp requesting that the deadline be further extended to December of 2013. PacifiCorp responded on July 30, 2012 indicating the power purchase agreements did not provide for this

¹ The language quoted in this paragraph is found in Section 1.4 of the power purchase agreement for the Lower Facility and Section 1.2.4 of the power purchase agreement for the Upper Facility.

additional extension. This being said, PacifiCorp explained that Cottonwood Hydro would not be placed in default until at the earliest December 17, 2012, and pursuant to the terms of the respective power purchase agreements, Cottonwood Hydro would have up to an additional 120 days to cure the default (in other words provide the FERC exemption or license) assuming it continued to diligently pursue the exemption or license. Thus, no termination of the power purchase agreements would occur until at least April 17, 2013. Following the July 30, 2012 correspondence, Cottonwood Hydro filed the current request for agency action asking that the Commission unilaterally amend the power purchase agreements to provide a three year extension to obtain the FERC exemption or license. Given the facts stated above, Rocky Mountain Power has three primary responses to the claims raised by Cottonwood Hydro.

First, as explained above, Cottonwood Hydro is currently not in default under the terms of the power purchase agreements and PacifiCorp cannot, pursuant to the terms of the power purchase agreements, imminently terminate the power purchase agreements. In fact, PacifiCorp will not have the right to terminate the power purchase agreement until April 17, 2013 (assuming Cottonwood Hydro continues to diligently pursue the FERC exemption or license to cure its default). Thus, there is no immediate risk to Cottonwood Hydro. Cottonwood Hydro may, if they diligently continue to pursue the FERC exemption or license, be able to resolve this matter on or before April 16, 2013. Thus, this matter is not ripe for Commission action.

Second, Cottonwood Hydro engaged in lengthy negotiations between August and December of 2011, with PacifiCorp on the power purchase agreements. Recognizing the uncertainty in regulatory proceedings, PacifiCorp and Cottonwood Hydro negotiated a six month extension to obtain the necessary FERC exemption or license. Both parties then signed the power purchase agreements (including the FERC exemption or license requirement) and those agreements became effective and binding on the parties. Cottonwood Hydro had the responsibility at the time it negotiated the power purchase agreements to know the timeline for obtaining necessary regulatory approvals. The fact that Cottonwood Hydro failed to properly account for that time in the power purchase agreements is not a basis for the Commission to unilaterally amend those power purchase agreements. When two parties negotiate a contract in good faith that contract should be recognized and upheld and should not be unilaterally amended by a regulatory or judicial body because one party to the agreement, after the fact, decides it no longer likes, or is unable to comply with, the terms to which it previously agreed.

Third, PacifiCorp entered the power purchase agreement with Cottonwood Hydro on the basis Cottonwood Hydro was a qualifying facility pursuant to the Public Utility Regulatory Policies Act and the implementing regulations found in 18 CFR 292. Entering a power purchase agreement as a qualifying facility allows the qualifying facility the benefit of avoid cost rates. In order for a small hydroelectric project to qualify as a qualifying facility it must, among other requirements, obtain a FERC exemption or license.² PacifiCorp included the requirement that Cottonwood Hydro obtain the FERC exemption or license within a fairly short period of time in order to allow PacifiCorp to confirm that it was in fact contracting with a qualifying facility. Until such time as Cottonwood Hydro obtains the required FERC exemption or license it is not a qualifying facility and therefore does not qualify to receive avoided cost rates. Based on prior experience and representations from Cottonwood Hydro, PacifiCorp believed Cottonwood Hydro was likely to obtain the FERC exemption or license within the period provided in the power

² See 18 CFR 292.203(c) and 292.208.

purchase agreements. This may yet occur and PacifiCorp will honor its contractual obligations in such circumstances. If Cottonwood Hydro does not obtain the FERC exemption or license within the timeline contained in the current power purchase agreements it is appropriate to allow the power purchase agreements to be terminated according to its terms (terms which were expressly agreed to by Cottonwood Hydro). Termination is appropriate given the fact Cottonwood Hydro entered into a qualifying facility power purchase agreement, but has failed to take those steps necessary to be a qualifying facility. It is not appropriate to require the customers of Rocky Mountain Power to pay the expenses associated with the avoided cost rates for power from a facility that is not a qualifying facility. Instead, given the questions now raised by FERC, it is appropriate to allow the power purchase agreement to be terminated (should Cottonwood Hydro not obtain the required license or exemption by the required date), require Cottonwood Hydro to obtain those approvals required under federal law to be a qualifying facility and then allow Cottonwood Hydro to enter into new power purchase agreements that contain the then current avoided costs rates. This process ensures compliance with federal law and that the customers of Rocky Mountain Power in fact remain neutral with respect to the avoided cost rates paid to qualifying facilities.

Unilaterally amending the power purchase agreements to provide Cottonwood Hydro with three additional years to obtain a FERC exemption or license not only offends fundamental principles of contract law, but also puts PacifiCorp in the position of paying avoided cost rates to a generation facility that is not a qualifying facility. Such a circumstance would be contrary to federal law and would create a perception in Utah that a qualifying facility can selectively lock in avoided cost rates well in advance of actually qualifying for such rates (a circumstance that is detrimental to the customers of Rocky Mountain Power).

Rocky Mountain Power recommends that the Commission decline this request for agency action on the basis Cottonwood Hydro still has a current and valid contract. If Cottonwood Hydro is unable to obtain the necessary FERC exemption or license and the power purchase agreements are terminated for that breach of contract, Cottonwood Hydro would have the legal recourse it has pursuant to the terms of the power purchase agreements. If the Commission elects at this time to take action with respect to this request, Rocky Mountain Power agrees with the Division of Public Utilities that a scheduling conference should be set in this matter to establish a formal process for considering these matters.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Mark C. Moench
Senior Vice President and General Counsel
Rocky Mountain Power

cc: DPU
OCS
Cottonwood Hydro, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2012, a true copy of the foregoing document was sent via email to the following:

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