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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 )  
Power Purchase Agreement Between )  
PacifiCorp and Latigo Wind Park, LLC )

**Docket No. 13-035-116**

REPLY COMMENTS OF  
LATIGO WIND PARK, LLC

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Pursuant to the procedural schedule issued by the Commission on August 6, 2013, Latigo Wind Park, LLC (“Latigo”) submits its Reply Comments in this proceeding seeking timely Commission approval of a purchase power agreement between Rocky Mountain Power and Latigo for a wind project in San Juan County (the “Latigo PPA”).

Four parties in addition to Latigo have filed initial comments on Rocky Mountain Power’s application to the Commission to approve the Latigo PPA: the Division of Public Utilities (“Division”), the Office of Consumer Services (“Office”), Utah Clean Energy and Ellis-Hall Consultants, LLC (“Ellis-Hall”).

*Division.* The Division has recommended approval of the Latigo PPA. Although the Division takes the opportunity through its Report to state that it would prefer a dif-

ferent pricing methodology to be applied to agreements of this type, it confirms that Rocky Mountain Power has properly processed and agreed to terms, including pricing, that fully comport with the provisions of applicable Commission orders and Rocky Mountain Power's tariff—Electric Service Schedule No. 38—in effect and applicable to Latigo's project at the time that the Latigo PPA was negotiated and executed.

Latigo understands the Division's desire to reiterate its position that the Commission should "change its directives (e.g., its approved methodologies) as circumstances change,"<sup>1</sup> but the important element of the Division's recommendation on the issue directly before the Commission is that "[t]he PPA appears to comply with Commission orders," and that "[t]he parties appear to have negotiated in good faith relying on the prior Commission orders."<sup>2</sup>

Indeed, the parties *have* complied with Commission orders and tariff provisions applicable to Latigo's project. That should be the only test for Commission approval. The Division, in its role as independent analyst for the general public interest,<sup>3</sup> has found that the Latigo project warrants approval, noting that "deviation from the relevant past orders in this case would undermine the stability, predictability and reliability of Commission orders."<sup>4</sup> Indeed, energy projects that require certain Commission approval are entitled to regulatory stability and the predictability of the application of Commission orders. For otherwise, the development of projects that have been found to be in

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<sup>1</sup>Division Report, at 7.

<sup>2</sup>*Id.* at 6.

<sup>3</sup>The Division is to "represent the public interest in matters and proceedings involving regulation of a public utility pending before any . . . commission." Utah Code Ann. § 54-4a-1(1)(b) (2012). It is, in effect, the statutory "watchdog" for the general public interest.

<sup>4</sup>*Id.* at 7.

the general public interest would be repressed; entrepreneurs who could contribute to these developments would be discouraged for moving forward; and the Utah energy picture would be the poorer for it.

*Office.* The Office, as does the Division, expresses its disagreement with the Latigo PPA pricing as a general matter. Nevertheless, it concedes that the Latigo PPA complies with the regulatory and legal requirements applicable during the time from Latigo's initial contacts with Rocky Mountain Power to the final execution of the PPA: "With respect to the pricing given to Latigo in this PPA, the Office recognizes that the Company has met the requirements ordered by the Commission."<sup>5</sup> The Office concedes the point a second time when it states that it "does not dispute that the Company has followed the Commission ordered method in establishing pricing for Latigo."<sup>6</sup>

What more would the Office ask of the Latigo and Rocky Mountain Power in this proceeding? The two parties have complied with the applicable regulations, tariffs and Commission orders in effect at the time of their PPA negotiations and final execution. In effect, the Office's failure to recommend or agree to approval of the Latigo PPA is an attempt to use Latigo's straightforward PPA approval docket as a forum to re-litigate the general issue of the timing of the Commission's newly adopted pricing methodology.<sup>7</sup> However, the Commission has already spoken on the issue of when the modified pricing regimen will be effective. "Future requests for indicative pricing for wind QFs under

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<sup>5</sup>Office Cmts., at 3.

<sup>6</sup>*Id.* at 4.

<sup>7</sup> The Office has the option to seek rehearing of the Commission's August 16, 2013, order in Docket NO. 12-035-100.

Schedule 38 shall be calculated using the Proxy/PDDRR method.”<sup>8</sup> Accordingly, this docket is neither the time nor the place for the Office to raise and rehash the timing of future QF pricing issues. As the Office concedes, Rocky Mountain Power has followed the Commission-ordered method in establishing pricing for the Latigo PPA. That should end it. Disapproval at this time would not only be grossly unfair to Latigo, who has spent almost seven years developing its project, but unlawful as well.<sup>9</sup>

*Utah Clean Energy.* Utah Clean Energy has filed comments that carefully describe the regulatory background for a wind Qualifying Facility (“QF”) such as Latigo’s project and outlining the public-policy reasons that make it appropriate for the Commission to approve the Latigo PPA.

Perhaps the most salient point made in Utah Clean Energy’s comments is the importance of providing energy project owners with a “window of regulatory certainty.” This should be foundational for projects that require long lead times and substantial investments to come to fruition and benefit electricity consumers and the general population. Closing the “window” after a substantial period of major project investment and development—for Latigo, six to seven years—but before approval would almost surely discourage, even stop, others who might otherwise pursue major, beneficial projects. This can’t be what was envisioned by Governor Gary R. Herbert’s office when it emphasized that the State of Utah should provide a stable and friendly business-friendly envi-

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<sup>8</sup>*In re: Renewable Avoided Cost Methodology*, Dkt. No. 12-035-100, Order on Phase II Issues, at 43 (P.S.C.U. Aug. 16, 2013).

<sup>9</sup>The Office’s position that the Commission should not approve the Latigo PPA has the characteristics of the Lucy van Pelt football maneuver: Set up the ground rules and, just as Charlie Brown (Latigo) is about to make the play, withdraw the inducement. Aaugh!

ronment.<sup>10</sup>

The related points in that regard are the positive economic aspects of moving the Latigo project along to construction and completion: the creation of jobs, investment in Utah, an increased tax base and cleaner energy production. This is in addition to the fundamental reason to approve the Latigo PPA: obtaining additional supplies of renewable energy at stable prices for the next 20 years.

*Ellis-Hall.* Ellis-Hall's opposition to the Latigo project is a clear attempt by a wind-project competitor of Latigo to place roadblocks in the path of a project that is much further along to producing electricity to add to the grid than its own. To pose as a monitor over Rocky Mountain Power's administration and compliance with applicable law, Commission orders and its own tariff provisions is, at best, disingenuous.

Ellis-Hall claims that Rocky Mountain Power has engaged in preferential treatment of the Latigo project, yet the only aspect of the Company's treatment of Latigo that is "preferential" is that Latigo is well ahead of Ellis-Hall in the development of a viable wind-energy project. Giving preference to a project that has satisfied the criteria set forth by the Commission's orders and Rocky Mountain Power's tariff provisions over one that hasn't yet done so is hardly an unlawful preference. Rocky Mountain Power has simply done what is required of it in the specified PPA procedures.

The incentive for Ellis-Hall to delay a wind project in southeast Utah is not hard to divine: Rocky Mountain Power has finite capacity to interconnect the output of a project in this area without the capital outlay for additional facilities. Ellis-Hall's later-developing project may find itself saddled with those additional costs unless it can delay

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<sup>10</sup>UTAH'S ECONOMIC DEVELOPMENT PLAN," at 3 (Fall 2010), <http://business.utah.gov/-start/econ-plan>.

or stop other San Juan County wind projects. It is, thus, not surprising that Ellis-Hall would fight tooth and toe nail to place obstacles in the path of Latigo in the hopes that it will ultimately avoid interconnection costs. But, such tactics should be identified for what they are and are not: They *are* designed to derail or delay a project that currently has, by the hard efforts of Latigo, developed a competitive advantage over Ellis-Hall. They *are* designed solely to improve the potential financial gain of Ellis-Hall, potentially at the expense of Latigo. They *are not* altruistic exercises designed with the overall public interest as the touchstone—that, after all, is the statutory role of the Division.<sup>11</sup> They *are not* the actions of a public-spirited regulatory “watchdog” who is genuinely concerned about the public weal, and the Commission should evaluate Ellis-Halls’s sniping at Rocky Mountain Power’s proper implementation of the applicable regulatory procedures negotiating and executing the Latigo PPA.

In its extensive comments, Ellis-Hall claims in a variety of ways that Rocky Mountain Power has treated Latigo preferentially or otherwise discriminated against Ellis-Hall.<sup>12</sup> But, is it preferential or discriminatory for Rocky Mountain Power to process an application for a PPA where the applicant has dotted all the i’s and crossed all the t’s, vis-à-vis that of a project that is demonstrably behind in various aspects the development a viable project of its own?

Latigo submits that it is not. Behavior cannot be preferential unless there is something or someone who is substantially similarly situated to make a comparison. Ellis-Hall is not such an entity. Not only is in not similarly situated in the apples-and-

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<sup>11</sup>See note 3, *supra*.

<sup>12</sup>Ellis-Hall Obj., at 1-7.

oranges sense, it is more like the egg and hatchling—far different in the relative development from the initial phases of growth into an adult project. An indicative example of the difference in maturity of the two projects is in the installation of MAP towers to gather at least a years' worth of meteorological data: Latigo has five such towers, Ellis-Hall none.

Ellis-Hall goes to great length to establish that the Latigo PPA is legally unenforceable.<sup>13</sup> This seems an odd position for a non-party to the PPA to take—an entity that could not even qualify as a third-party beneficiary. As a non-party to the Latigo PPA, Ellis-Hall has no actual standing or legitimate reason to declare that it is unenforceable. Ellis-Hall's only reason to raise the point is to cloud an otherwise clear issue: Have the parties properly administered and applied the legal and regulatory provision of the Commission's orders and the Rocky Mountain Power tariff? Yes, they have.

Is the Latigo PPA unenforceable? On its face, the agreement addresses all the essential terms that are required of an enforceable contract. That there are terms in the agreement that recognize a complex power purchase agreement for a 20-year period cannot foresee every turn in the road ahead does not make the contract unenforceable.<sup>14</sup> If commercial parties dealing in complex matters were required to spell out every jot and tittle in a complex agreement, commercial activity would grind to a halt. The key legal requirement is that the "essential" terms of the agreement have been incorporated.

Equally important, the issue of whether or not the 166-page agreement that took

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<sup>13</sup> Ellis-Hall Obj., at 7-20.

<sup>14</sup>*Brown's Shoe Fit Co. v. Olch*, 955 P.2d 357, 364 (Utah Ct. App. 1998) (quoting *C & Y Corp. v. General Biometrics, Inc.*, 896 P.2d 47, 52 (Utah Ct. App. 1995)) ("It is not necessary that the contract itself contain all of the particulars of the agreement. The crucial question is whether the parties agreed on the essential terms of the contract."); see also *Nielsen v. Gold's Gym*, 2003 UT 37, 78 P.3d 600, 602.

six months to negotiate is legally enforceable at this stage involves rank speculation on the part of Ellis-Hall. Unenforceability is, in the first instance, the province of one of the parties to an agreement or a beneficiary of the agreement. Here, Ellis-Hall is neither. Further, asking the Commission to find that the PPA is legally unenforceable is tantamount to seeking a declaratory ruling under Commission Rule R746-100. The Commission is in no position to make such a legal determination at this point. Further, one of the key prerequisites for seeking such a ruling is to establish that “no public utility under the Commission’s jurisdiction will be adversely affected by a ruling favorable to the petitioner.”<sup>15</sup> Ellis-Hall cannot satisfy this condition: Were it to extract such a ruling from the Commission, it would indeed have an adverse effect on Rocky Mountain Power, as well as on the general public interest.

As would be normal for two entities negotiating a complex, long-term agreement with major financial ramifications—particularly to the seller, Latigo and Rocky Mountain Power conducted a series of negotiations, many of them by e-mail, to work out the terms. As one would expect for a complex QF project, there were a number of terms of the PPA that needed the usual back and forth of two parties negotiating a complex contract. Ellis-Hall attempts to cast the normal give and take of such discussions and negotiations as a nefarious exercise designed to thwart the public interest.<sup>16</sup> But, there is nothing insidious about the utility’s and the QF owner’s engaging in normal negotiations that would accommodate the parties’ interest in seeing a project move forward with due pace.

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<sup>15</sup>Utah Administrative Code § R746-101-2.D (2013).

<sup>16</sup>Ellis-Hall Obj., at 4-6.





**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of REPLY COMMENTS OF LATIGO WIND PARK, LLC, in PSCU Docket No. 13-035-116 was served by e-mail this 9<sup>th</sup> day of September, 2013 on the following:

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