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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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
RESPONSE OF LATIGO WIND PARK,
LLC, TO PETITION FOR REVIEW OR
REHEARING OF ELLIS-HALL
CONSULTANTS, LLC

Pursuant to Utah Administrative Code § R746-100-11.F, Latigo Wind Park, LLC (“Latigo”) submits its Response to the Petition for Review or Rehearing of Ellis-Hall Consultants, LLC (“Ellis-Hall”), filed on November 4, 2013 (“Petition”). The Petition raises no new issues or arguments and identifies no new evidence that would warrant Commission review or rehearing. Accordingly, Latigo urges the Commission to deny Ellis-Hall’s request for review and rehearing.

SUMMARY

Notwithstanding the overwhelming volume of materials thrust upon the Com-

mission and the parties to this case,¹ Ellis-Hall's petition has raised no issue, no argument and no evidence that has not been previously fully presented and considered by the Commission.

To the extent that the rehearing process is designed to provide a party with the opportunity to bring to the Commission's attention evidence that has newly come to light or to point out certain *material* matters that the Commission may have overlooked or inadequately considered, Ellis-Hall has not done anything remotely in the neighborhood of such an exercise.² The entire 2½" collection of documents that Ellis-Hall has filed is nothing but a rehash of the arguments that were fully presented to and considered by Presiding Officer White during the course of the proceedings and by the Commission in its final order approving the power purchase agreement ("PPA") between Rocky Mountain Power and Latigo.

Even if Ellis-Hall were to claim that it has new evidence (there does not appear to be any such claim), it would not alter the argument there is nothing that it has highlighted that would justify an order granting rehearing. Ellis-Hall had ample opportunity to, and did in fact, conduct extensive discovery and research to develop arguments and evidence to support its claims.

¹As served on Latigo's counsel on November 5, 2013, the Ellis-Hall petition, including its 51 exhibits and exhibit subparts, measures a full 2½" in depth—a boon to the paper manufacturers of the world, but a burden to the planet and its inhabitants in many other regards. Notably, no part of Ellis-Hall's filing was served on Latigo in compliance with the Commission's August 6, 2013, Scheduling Order and Notice of Hearing, which required service on or before the rehearing filing deadline of November 4, 2013.

²To the extent that Rule 60(b) of the Utah Rules of Professional Conduct provides a guideline for re-opening a proceeding on the basis of newly uncovered evidence, any such claim cannot be based on evidence that could have, with due diligence, been uncovered prior to the tribunal's decision. *Cope v. Utah Valley State College*, 2012 UT App. 319, ¶ 8, 290 P.3d 314, 317-18. Ellis-Hall has made no claim of new evidence that it could not have obtained before the hearings were held.

There is no new evidence advanced in Ellis-Hall's petition; there are no arguments or statements of issues that Ellis-Hall has not made to a fare-thee-well before the Commission. There is no reason for the Commission to extend the regulatory process further to the potential detriment of a significant electric energy project—Latigo's. The Commission should, therefore, deny Ellis-Hall's petition forthwith or allow the 20 days for taking action under Utah Code Ann. § 54-7-15(2)(c) quietly to expire.

DISCUSSION

For the reasons summarized above, it would not be productive for Latigo to dissect the component parts of Ellis-Hall's petition in detail. The Commission has already heard the evidence and arguments of the parties, digested them and issued a reasoned order based on the evidence and the applicable law governing the facts.

At the risk of duplicating the points already made in previous pleadings by Latigo, Rocky Mountain Power, the Division of Public Utilities, the Office of Consumer Services and Utah Clean Energy, Latigo submits these limited comments on some of the primary arguments and claims in Ellis-Hall's petition.³

Ellis-Hall's Claim That PacifiCorp Failed Consistently to Apply Schedule 38's Requirements Is Irrelevant and, in All Events, Unsubstantiated.

Ellis-Hall's request in this regard is completely out of bounds on at least two grounds. First, the Commission's responsibility in this case is solely centered on the Rocky Mountain Power's application for approval of the Rocky Mountain Power-Latigo

³Latigo declines to follow the Ellis-Hall practice of loading its pleadings with copies of documents that have been previously filed with or issued by the Commission. On a related point, the form of the unnecessarily burdensome stack of documents served on Latigo was not consistent with the double-sided and 3-hole-punched provisions of Utah Administrative Code § R746-100.3.C. Nor did Ellis-Hall make any attempt to comply with the requirements for proper treatment of confidential information under Utah Administrative Code § R746-100-16. The entire filing was printed on yellow paper with no differentiation of which materials were actually confidential. Very little of its filing (if any) was confidential.

PPA. The approval decision is driven only by whether the terms of the PPA comport with applicable law. In that regard, the overarching concerns of the Commission are whether the rates are just and reasonable and whether the Latigo PPA comports with applicable tariff provisions.

The rate established and applicable to the Latigo PPA was formulated generically in a previous Commission proceeding⁴ and was determined to be just and reasonable and in compliance with the provisions Public Utilities Regulatory Policy Act of 1978 and the public-policy goals set by the Utah Legislature.⁵ Further, the evidence was convincing that the provisions of Rocky Mountain Power Electric Service Schedule 38 (“Schedule 38”) were fully complied with. That completes the Commission’s oversight responsibilities with respect to the Latigo PPA.

Second, whether another qualifying-facility developer has a project underway that might be the subject of a PPA negotiation with Rocky Mountain Power is irrelevant to this proceeding. Claims that Rocky Mountain Power has treated a separate project in a way different from its treatment of Latigo are not germane to the basic contract-approval issue for the Latigo PPA. As the Commission has pointed out repeatedly through the statements of the Presiding Officer at the hearings and in the Commission’s November 4, 2013, Order, any grievance that Ellis-Hall might have concerning its rela-

⁴Docket No. 112-035-100 (Order on Phase II Issues, Aug. 16, 2013).

⁵It is the policy of this state to encourage the development of independent and qualifying power production and cogeneration facilities, to promote a diverse array of economical and permanently sustainable energy resources in an environmentally acceptable manner, and to conserve our finite and expensive energy resources and provide for their most efficient and economic utilization.

Utah Code Ann. § 54-7-12(1).

tionship with Rocky Mountain Power as it attempts to develop its own project is of no moment in this case and should be taken up in other proceedings.⁶

The Latigo PPA Does Not Establish Discriminatory or Disparate Conduct by PacifiCorp.

In the first instance, the issue of any discriminatory conduct plays no role in determining whether the Latigo PPA should be approved. Rocky Mountain Power's application for approval is a stand-alone exercise involving a singular two-party contract to which Ellis-Hall is not a party. The treatment of Ellis-Hall by Rocky Mountain Power—whether better than, worse than or the same as that of Latigo—is simply not relevant in this case.

Relatedly, Ellis-Hall's claim of discriminatory conduct fails as a matter of simple logic. The concepts of discrimination and disparate treatment involve comparisons of treatment of two or more entities similarly situated. Even if considerations of discrimination were properly before the Commission in this proceeding (they are not), it would have been necessary for Ellis-Hall to establish that its position and the development of its project are similarly situated and that Rocky Mountain Power favored one similarly situated entity over the other. No such evidence appears on the record.

The Enforceability of the Latigo-Rocky Mountain Power PPA Is Not at Issue in this Case.

Ellis-Hall goes to extraordinary lengths in an attempt to establish that the Latigo-Rocky Mountain Power PPA is “unenforceable.” As a legal matter, Ellis-Hall is dead

⁶Although Latigo would not concede the point, Ellis-Hall might be in a somewhat more credible position to make this argument if both it and Latigo had been standing at Rocky Mountain Power's doorstep at an identical point in their project development with the same material factors in play and Rocky Mountain Power were to have materially favored Latigo over Ellis-Hall. That's not the state of affairs here, and Ellis-Hall put on no evidence in an attempt to establish that it was.

wrong on the facts. But, more importantly, contract enforceability is simply not an issue before the Commission in this case. Further, as a non-party to the PPA, Ellis-Hall has no legal interest in whether or not the PPA is legally enforceable.

As a procedural matter beyond the legal issue of what constitutes an enforceable contract, any enforceability issue of a detailed, ____-page contract that was the subject of several months of negotiation between sophisticated parties (of which Ellis-Hall is *not* one) is simply outside the scope of the current proceeding before the Commission. Whether a contract is enforceable is a matter between the contracting parties⁷—it is not a matter for a legally disinterested bystander such as Ellis-Hall.

The only contractual issue before the Commission is whether the PPA complies with applicable statutes and regulatory requirements (primarily pricing and compliance with Schedule 38). Whether the PPA is enforceable in the Corbin-on-Contracts sense would be between the parties and is not before the Commission. Under the circumstances of a vigorous, sophisticated two-party contract negotiation under the aegis of a detailed regulatory framework, it is inconceivable that either of the two parties to the contract would have an actionable claim of unenforceability.

The foregoing observations cover a range of issues that Ellis-Hall attempts to dress up its claim of “unenforceability” of the Latigo PPA: turbine selection, site control, interconnection route, interconnection agreement, and permits.

None of these issues raised by Ellis-Hall would be deal-breakers in the contract-theoretic sense, and none of them go to the heart of the elements to be considered in approving the PPA. It is well established, as Latigo set forth in its previous Reply Com-

⁷There may be times when third-party beneficiaries would have standing to make such a claim. That situation does not exist here.

ments,⁸ that a contract is enforceable if all material aspects of the transaction have been agreed to. The PPA satisfies this condition—not that every last detail has been spelled out, as Ellis-Hall would have the Commission believe. That there are elements subject to change or renegotiation or details to be added at a later time does not render an agreement unenforceable. As to Ellis-Hall’s laundry list:

➤ Changing the turbine with the agreement of both contracting parties is perfectly reasonable in the face of changing technology and energy marketplaces. The only question is whether Latigo can provide the energy it has committed to deliver under the PPA—not whether it finally selected a particular turbine under fluid industry conditions.

➤ Site control is the responsibility of Latigo and goes to whether it will be able to deliver energy under the PPA. If it can’t, it will be in breach, and Rocky Mountain Power will have available to it the usual remedies at law and equity. Ellis-Hall would have no role to play in such development. It would also is not a matter that plays a role in the Commission’s approval process here. On the merits of the issue, the record evidence is that Latigo has provided the assurances to Rocky Mountain Power that are necessary to support the execution of and the performance under the PPA pursuant to the terms of Schedule 38.

➤ Latigo’s interconnection route and its agreement with PacifiCorp’s Transmission Services are even further removed from the relevant issues before the Commission. These matters directly implicate only PacifiCorp’s interstate transmission function, which is strictly within the purview of the Federal Energy Regulatory

⁸Reply Comments of Latigo Wind Farms, LLC, at 7 & n.14 (Sept. 9, 2013).

Commission and not the Utah Public Service Commission. Further, Schedule 38 gives broad discretion to Rocky Mountain Power: “The Company *reserves the right to condition* execution of the power purchase agreement upon simultaneous execution of an interconnection agreement between the owner and the Company's power delivery function.”⁹ It does not mandate the imposition of a particular sequence of events, as Ellis-Hall claims.

The Commission's Denial of Ellis-Hall's Motion to Compel Latigo and Rocky Mountain to Provide Further Responses to Discovery Requests Was Reasonable.

The Commission quite reasonably limited Ellis-Hall's “shotgun” requests for every conceivable document generated by Latigo and Rocky Mountain Power in connection with the negotiation and execution of the PPA. Extensive materials were provided by Latigo and Rocky Mountain Power, and Ellis-Hall has not established that its ability to present and argue its positions fully was materially hindered by the Commission's limitations on discovery. Indeed, the Commission's restrictions were primarily oriented around interstate transmission documents and communications that went beyond the relevant issues before the Commission in determining whether to approve the Latigo PPA. Further, the Commission was well within its authority to control the pace and extent of the proceedings to provide parties with adequate opportunity to explore the issues while being mindful of the use of resources of the parties and the concerns of moving the proceedings along in a timely fashion.

The discovery relevant to the issues in the case was exhaustive. Further, the position of Ellis-Hall as a wind-farm project competitor of Latigo provided additional foun-

⁹Rocky Mountain Power Electric Service Schedule 38, § I.B.7 (emphasis added).

dation for the Commission's reluctance to allow it additional access to Latigo's information that would potentially provide a competitive advantage to Ellis-Hall.

The Commission's Denial of Ellis-Hall's Request that Tom Fishback Be Required to Appear and Testify Was Proper.

Tom Fishback was identified as an official with PacifiCorp's Transmission Services and an individual who might testify directly about communications between Latigo and PacifiCorp in connection with Latigo's arrangement for interconnection on PacifiCorp's interstate transmission facilities. As those facilities and the operations that take place on them are interstate in character, they are beyond the scope of inquiry that the Commission here is responsible for: a power purchase agreement between Latigo and a Utah public utility operation that is governed by state law, state regulation and a controlling tariff provision approved by the Utah Public Service Commission.

In addition, to the extent that it was useful for the Commission to hear the background about the interface between the state and interstate operations of PacifiCorp, the testimony of Rocky Mountain Power's Paul Clements on the relevant subject matter was made part of the record.

No further useful purpose would have been served by the testimony of a PacifiCorp transmission function witness concerning the interstate transmission aspects of the Latigo wind-farm project.

CONCLUSION

As indicated by the Division of Public Utilities and the Office of Consumer Services and supported by Utah Clean Energy, the Latigo PPA comports with all the conditions set forth by the Commission in its orders applicable to QF projects such as Latigo's for which PPAs have been signed and executed prior to Aug. 16 2013. Ellis-Hall has not

presented any convincing reason that the Commission should grant rehearing in this matter and further delay a proceeding that has been the subject of intense discovery, evidence and analysis. Further delay may jeopardize an energy project that is in the public interest.

WHEREFORE, Latigo Wind Park, LLC, respectfully urges the Commission to deny Ellis-Hall's petition for rehearing and confirm its order approving the Latigo-Rocky Mountain Power PPA. This will permit Latigo to move forward with a project that is in the public interest and to do so on a timely basis that allows Latigo the opportunity to obtain the benefits of IRC § 45 tax credits due to expire on December 31, 2013.

JONES WALDO HOLBROOK & MCDONOUGH, P.C.

/s/ Gary G. Sackett

Gary G. Sackett
Attorneys for Latigo Wind Park, LLC

Dated: November 19, 2013

CERTIFICATE OF SERVICE

I certify that a true and correct copy of RESPONSE OF LATIGO WIND PARK, LLC, TO PETITION FOR REVIEW OR REHEARING OF ELLIS-HALL CONSULTANTS, LLC, in PSCU Docket No. 13-035-116 was served by e-mail this 19th day of November 2013 on the following:

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