

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

)
) DOCKET NO. 14-035-24
)
)
In the Matter of the Formal Complaint of)
Ellis-Hall Consultants against) ORDER APPROVING ELLIS-HALL
PacifiCorp/Rocky Mountain Power) CONSULTANTS, LLC'S MOTION FOR
) LEAVE TO FILE OVER-LENGTH REPLY
) COMMENTS AND DISMISSING
) COMPLAINT
)

ISSUED: April 25, 2014

SYNOPSIS

The Commission approves Ellis-Hall Consultants, LLC's ("EHC") motion for leave to file over-length reply comments and dismisses EHC's complaint.

BACKGROUND AND PROCEDURAL HISTORY

This matter is before the Public Service Commission of Utah ("Commission") on the March 3, 2014, formal complaint ("Complaint") of EHC against PacifiCorp, dba Rocky Mountain Power ("PacifiCorp"). EHC's Complaint requests the Commission enforce the provisions of its August 16, 2013, Order on Phase II Issues in Docket No. 12-035-100¹ ("Phase II Order") and require PacifiCorp to execute a power purchase agreement ("PPA") with EHC for its wind project based on indicative pricing provided to EHC by PacifiCorp on May 22, 2013. The indicative pricing provided by PacifiCorp on May 22, 2013, was based on the avoided cost method in effect at the time. This avoided cost method was discontinued pursuant to the August

¹ *In the Matter of the Application of Rocky Mountain Power for Approval of Changes to Renewable Avoided Cost Methodology for Qualifying Facilities Projects Larger than Three Megawatts*, Docket No. 12-035-100 (Order on Phase II Issues; August 16, 2013).

16, 2013, Phase II Order. To provide context for EHC's Complaint, the origin and current status of the Commission's avoided cost method for large wind qualifying facilities is provided below.

I. Avoided Cost Pricing for Large Wind Qualifying Facilities

A. 2005 Order

On October 31, 2005, the Commission issued its order ("2005 Order")² establishing a method for calculating avoided cost pricing for large wind qualifying facilities ("QFs") (*i.e.*, in excess of three megawatts of generating capacity) served through PacifiCorp's Electric Service Schedule No. 38, Qualifying Facility Procedures ("Schedule 38"). That method, referred to as the "market price proxy" or "Market Proxy" method, is based on the winning bid in PacifiCorp's most recently executed request for proposal ("RFP") for a wind resource.³ The 2005 Order directed PacifiCorp to apply the Market Proxy method to provide indicative avoided cost pricing to wind QFs up to the target level for wind resources in PacifiCorp's Integrated Resource Plan ("IRP").

B. Phase I Order

On October 9, 2012, PacifiCorp filed an application with the Commission for consideration of proposed changes to the Market Proxy method, among other things. PacifiCorp's application included a motion to stay that portion of the 2005 Order establishing the Market Proxy method for determining indicative pricing for large wind QFs ("Motion").

² See *In the Matter of the Application of PacifiCorp for Approval of an IRP-Based Avoided Cost Methodology for QF Projects Larger than One Megawatt*, Docket No. 03-035-14 (Report and Order; October 31, 2005).

³ The current Market Proxy price for wind resources was determined in the 2009R RFP in which PacifiCorp selected the Dunlap I wind facility located in Wyoming.

On November 8, 2012, the Commission held a scheduling conference and thereafter issued a scheduling order on November 13, 2012, bifurcating the proceeding into two phases. Phase I of the proceeding addressed PacifiCorp's Motion and allowed parties to file direct, rebuttal, and surrebuttal written testimony in advance of the December 12, 2012, evidentiary hearing. On December 20, 2012, the Commission issued an order denying PacifiCorp's Motion and reaffirming the Commission's intention to re-examine the avoided cost pricing method for large wind QFs in Phase II of the proceeding ("Phase I Order").⁴

C. Phase II Order

Based on the evidence presented in Phase II of the docket, the Commission issued its Phase II Order on August 16, 2013. In the findings and conclusions section of the Phase II Order regarding the Market Proxy method, the Commission made the following determination:

In the 2005 Order we determined the Market Proxy method is appropriate for providing indicative pricing for wind QF generation, assuming PacifiCorp is acquiring cost effective wind resources through RFPs to meet load requirements during the next 20 years, as identified in its IRP. The last competitively bid system-wide RFP for a renewable resource was conducted in 2009. Because PacifiCorp is not actively conducting any system-wide RFPs for wind resources, the last executed wind contract from an RFP (i.e., the 2009R RFP) upon which Market Proxy indicative pricing is currently based, runs the risk of becoming out of date. We therefore discontinue use of the Market Proxy method for determining indicative prices for Schedule 38 wind QFs going forward and expand the application of the Proxy/PDDRR method to include wind QFs seeking indicative pricing.⁵ This action will ensure our method for determining indicative

⁴ *In the Matter of the Application of Rocky Mountain Power for Approval of Changes to Renewable Avoided Cost Methodology for Qualifying Facilities Projects Larger than Three Megawatts*, Docket No. 12-035-100 (Order on Motion to Stay Agency Action; December 20, 2012)

⁵ The Partial Displacement Differential Revenue Requirement or "PDDRR" method for determining avoided energy cost along with the "Proxy" method for determining avoided capacity cost constitute the Commission's established method (referred to as the "Proxy/PDDRR method") for determining indicative avoided cost pricing for Schedule 38 QF resources.

prices will continue to reflect changing avoided costs in light of changing conditions present in PacifiCorp's ongoing IRPs.

We are persuaded PacifiCorp's proposed Proxy/PDDRR method, with certain adjustments discussed below is a reasonable method for determining wind resource indicative prices going forward. Therefore, future requests for indicative pricing for wind QFs under Schedule 38 will be calculated using the Proxy/PDDRR method as has been the case for other QFs previously. This approach will ensure future indicative prices, and therefore QF energy and capacity payments will reflect appropriately the costs reasonably expected to be avoided or deferred over the term of the contract.⁶

Ordering paragraph two of the Phase II Order reflects the directive above stating, “[f]uture requests for indicative pricing for wind QFs under Schedule 38 shall be calculated using the Proxy/PDDRR method.”⁷

On September 5, 2013, Energy of Utah, LLC (“EOU”) filed with the Commission a petition for review, rehearing and clarification of the Phase II Order (“EOU Petition”). The EOU Petition describes an August 27, 2013, letter⁸ from PacifiCorp to EOU’s project that in turn refers to a previous indicative pricing letter dated April 15, 2013. The earlier letter states that pursuant to Schedule 38, indicative prices are “merely indicative and are not final and binding. Prices and other terms and conditions are only final and binding to the extent contained in a power purchase agreement executed by both parties and approved by the Commission.” The August 27 letter also references the Phase II Order directing PacifiCorp to discontinue use of the Market Proxy method and to provide indicative avoided cost pricing based on the Proxy/PDDRR

⁶ Phase II Order at pp. 17-18 (emphasis added).

⁷ Phase II Order at p. 43.

⁸ The August 27, 2013, letter from PacifiCorp to EOU’s project is attached as Exhibit C to the EOU Petition.

method. Additionally, the August 27 letter cites the following language from pages 17-18 of the Phase I Order:

We acknowledge the possibility the outcome of the Phase Two hearings and the interests of ratepayers may require the application of new avoided cost calculations for all large wind QF projects not in possession of executed power purchase agreements when the Phase Two order is issued.

The August 27 letter concludes with PacifiCorp stating EOU's project "previously received indicative pricing but is not currently in possession of an executed power purchase agreement. Therefore, pursuant to the Commission orders in Docket No. 12-035-100, the previously provided indicative pricing is no longer valid. Should you desire to receive updated indicative pricing, please submit a request pursuant to Schedule 38."

In reference to the August 27 letter, the EOU Petition concludes:

[w]e believe that this decision does not belong to PacifiCorp, but rather the Utah Public Service Commission" and "[w]e have offered PacifiCorp our view, based on the completion of contract negotiations and also on our interpretation of the wording of the final Commission ruling: *'Future requests for indicative pricing for wind QFs under Schedule 38 shall be calculated using the Proxy/PDDRR method.'*

We respectfully ask the Commission to consider the completion of contracts negotiations and the committed funds in our effort to complete the development of South Mountain. We believe that our significant commitment and the satisfaction of our obligations in the PPA negotiation warrant consideration.

On September 23, 2013, the Commission issued an order denying EOU's Petition.

D. Schedule 38

Through a fully vetted and public process, the Commission approved PacifiCorp's Schedule 38 that sets forth procedures for negotiating PPAs between PacifiCorp and QFs of similar size to EHC seeking to make wholesale power sales to PacifiCorp. Under Schedule 38, once certain conditions are met by a QF, PacifiCorp is obligated to provide an indicative pricing proposal for capacity and energy to the QF.⁹ The proposal also may include other indicative terms and conditions, tailored to the individual characteristics of the proposed project. Such a proposal may be used by the QF to make determinations regarding project planning, financing and feasibility.¹⁰ "However, such prices are merely indicative and are not final and binding. Prices and other terms and conditions are only final and binding to the extent contained in a power purchase agreement executed by both parties and approved by the Commission."¹¹

If a QF desires to proceed forward with a project after receiving PacifiCorp's indicative pricing proposal, it may request PacifiCorp to prepare a draft PPA to serve as the basis for negotiations between the parties. In connection with such a request, the QF must provide PacifiCorp with any additional information that PacifiCorp reasonably determines to be necessary for the preparation of a draft PPA.¹² After receipt of the requested information, PacifiCorp is required to provide the QF with a draft PPA containing a comprehensive set of proposed terms and conditions, including a specific pricing proposal for purchases from the

⁹ See Schedule 38, Sheet 38.2-38.3.

¹⁰ See Schedule 38, Sheet 38.3.

¹¹ *Id.*

¹² *Id.*

project.¹³ This draft PPA serves as the basis for subsequent negotiations and, unless clearly indicated, shall not be construed as a binding proposal by PacifiCorp.¹⁴ In connection with such negotiations, PacifiCorp is required to “update its pricing proposals at appropriate intervals to accommodate any changes to [PacifiCorp’s] avoided-cost calculations. . .”¹⁵ When both parties are in full agreement as to all terms and conditions of the draft PPA, PacifiCorp will prepare and forward to the QF a final, executable version of the PPA. The prices and other terms and conditions of the PPA will not be binding and final until the PPA has been executed by both parties and approved by the Commission.¹⁶

In addition to provisions relating to pricing, Schedule 38 identifies the dispute resolution process by which the Commission may determine the reasonableness of PacifiCorp’s administration of its tariff. Schedule 38 incorporates its dispute resolution process by referencing the Commission’s website that describes the Commission’s complaint process.¹⁷ The website description makes clear that following the informal review of a complaint by the Division, complainants unsatisfied with PacifiCorp’s response may at their discretion file a formal complaint with the Commission.

II. EHC Complaint

The Division’s informal complaint report is attached to the Complaint. The informal complaint report indicates the Division first received an informal complaint from EHC

¹³ See Schedule 38, Sheet 38.4.

¹⁴ *Id.*

¹⁵ See Schedule 38, Sheet 38.5.

¹⁶ See Schedule 38, Sheet 38.5.

¹⁷ See Schedule 38, Sheet 38.7. The Commission’s website referenced by Schedule 38 can be viewed at: <http://psc.utah.gov/complaints/index.html>.

on November 7, 2013.¹⁸ In addition to allegations similar to those described in the Complaint, the informal complaint indicates that like EOU, EHC received a letter from PacifiCorp on August 27, 2013 (approximately two months prior to EHC's informal complaint).¹⁹ The August 27 letter to EHC states the indicative pricing provided to EHC on May 22, 2013, is no longer valid based on the same reasons provided in the letter to EOU.²⁰

The Division's report indicates that PacifiCorp provided a response to the informal complaint on November 12, 2013.²¹ More than two months later, on January 23, 2014, EHC emailed the Division and PacifiCorp stating:

Because we have not received any further response from the Division, we assume that there is no additional investigation being conducted into our informal complaint. If so, we are not satisfied with the resolution of our informal complaint and ask that the PSC provide us with a form to file a formal complaint.²²

More than one month later on March 3, 2014, EHC filed its Complaint containing the following language:

Ellis-Hall Consultants ("Ellis-Hall") has requested that PacifiCorp execute a power purchase agreement ("PPA") based on indicative pricing provided by PacifiCorp in a May 22, 2013 letter. The letter was provided pursuant to Utah Schedule 38. PacifiCorp initially refused to execute a PPA with Ellis-Hall claiming that under Schedule 38, a QF applicant was required to execute a Large Generation Interconnection Agreement ("LGIA") before obtaining a PPA. While PacifiCorp imposed the LGIA requirement on Ellis-Hall, it later waived this requirement for two of Ellis-Hall's competitors. This disparate treatment wrongfully delayed the execution of Ellis-Hall's

¹⁸ Informal Complaint Report at p.1.

¹⁹ Informal Complaint Report at p.1.

²⁰ In reviewing the August 27 letters from PacifiCorp to EHC and EOU, they appear to contain the exact same language with the exception of project names and representatives and dates of earlier indicative pricing.

²¹ Informal Complaint Report at p.2.

²² Informal Complaint Report at p.3. The Informal Complaint Report shows correspondence from the Division to EHC less than one hour after EHC's request, attaching paperwork on how to file a formal complaint with the Commission.

PPA and resulted in an action before the Public Service Commission of Utah (“Commission”) that is currently on appeal to the Utah Supreme Court.

On August 16, 2013, after Ellis-Hall had made its claim of disparate treatment, the Commission entered an order in Phase II of Docket No. 12-035-100. In its Order, the Commission directed PacifiCorp to discontinue use of the market proxy pricing method and to provide indicative avoided cost pricing to wind and solar qualifying facility projects based on the partial displacement differential revenue requirement pricing method.

Importantly, however, the Commission Order specifically applies only to future requests for indicative pricing for wind QFs under Schedule 38, stating in part: “future requests for indicative pricing for wind QFs under Schedule 38 will be calculated using the Proxy/PDDRR method.” The Order does not state that it has any application to projects that have already received indicative pricing such as Ellis-Hall’s project.

Notwithstanding the language of the Commission’s Order, PacifiCorp has refused to execute a PPA with Ellis-Hall based on the indicative pricing provided to Ellis-Hall on May 22, 2013. Ellis-Hall respectfully requests that the Commission enforce the plain language of its August 16, 2013 Order and require PacifiCorp to execute a PPA with Ellis-Hall based on the indicative pricing provided to Ellis-Hall on May 22, 2013.

On March 5, 2014, the Commission issued a notice of hearing to be held April 22, 2014. On March 7, 2014, EHC filed a motion for expedited hearing and requesting the Commission issue a decision in this docket prior to the week of April 28, 2014. According to EHC’s motion:

First, Ellis-Hall must know the pricing it will receive on its project by May 1, 2014 so that it can determine whether the project will be economically viable and to ensure that the project can be completed by the required completion date in December, 2015. If this hearing and decision are not expedited, and Ellis-Hall is unable to complete its analysis by May 1, 2014, Ellis-Hall will suffer a substantial hardship and irreparable harm.²³

²³ EHC Motion for Expedited Hearing at p. 2.

Based on EHC's motion, the Commission convened a scheduling conference on March 13, 2014, to discuss a hearing date for this docket. At the scheduling conference, EHC indicated that a factual hearing in this docket is unnecessary because the scope and nature of EHC's Complaint is limited to the legal question of whether the language from the Phase II Order requires PacifiCorp to execute a PPA with EHC based on the indicative pricing received on May 22, 2013. The parties at the scheduling conference further agreed that only three facts are relevant to this legal question: (1) the date EHC received PacifiCorp's letter providing indicative pricing based on the Commission's Market Proxy avoided cost method for large wind QFs established in the 2005 Order (May 22, 2013); (2) the date the Commission issued the Phase II Order (August 16, 2013); and (3) the date PacifiCorp sent a letter to EHC (August 27, 2013) invalidating the indicative pricing provided by PacifiCorp on May 22, 2013. EHC declined to expand the scope of this docket to address any issues of alleged disparate treatment by PacifiCorp with respect to Schedule 38 PPA negotiations between EHC and PacifiCorp.²⁴

Pursuant to the Commission's March 13, 2014, scheduling order, EHC, PacifiCorp, the Division and the Office filed comments on March 28, 2014. On April 11, 2014, the Division and Office filed reply comments and EHC filed a motion for leave to file over-length reply comments and reply comments. On April 14, 2014, EHC filed an errata to its previously filed motion for leave to file over-length reply comments. No party opposes EHC's motion. That motion is granted.

²⁴ March 13, 2014 Tr. 7: 24-25; 8: 1-12; 14: 9-25; 15: 1-5.

DISCUSSION, FINDINGS AND CONCLUSIONS

I. Parties' Positions

A. EHC

According to EHC, its Complaint “centers on a dispute between [EHC] and PacifiCorp regarding the meaning of the Commission’s [Phase II Order] which states: ‘[w]e therefore discontinue use of the Market Proxy method for determining indicative prices for Schedule 38 wind QFs going forward Therefore, future requests for indicative pricing for wind QFs under Schedule 38 will be calculated using the Proxy/PDDRR method[. . .]’”²⁵ EHC notes that although the Phase II Order discontinued the use of the Market Proxy method, the Commission “specifically limited its Order only to future requests for indicative pricing for wind QFs under Schedule 38”²⁶ In support of this argument, EHC cites to a series of Utah cases holding that language contained in orders, regulations and statutes is to be interpreted by their plain meaning and language.²⁷

EHC acknowledges the Commission has previously recognized indicative pricing is not a final guaranteed price, and that under Schedule 38 PacifiCorp may update its pricing proposals at appropriate intervals to accommodate any changes to its avoided cost calculations, among other reasons. EHC argues, however, that Schedule 38 does not permit PacifiCorp to unilaterally impose a different pricing methodology that is inconsistent with the limitations imposed by the Phase II Order.²⁸

²⁵ EHC Comments at p. i, *citing* Phase II Order at pp. 17-18.

²⁶ EHC Comments at p. ii.

²⁷ EHC Comments at pp. 1-2.

²⁸ EHC Comments at p. 8.

B. PacifiCorp

PacifiCorp argues that although EHC has styled its pleading in this docket as a formal complaint, “it appears to be, in fact, an untimely Petition for Review of the Commission’s Phase II Order.”²⁹ PacifiCorp cites to provisions of the Utah Administrative Procedures Act (“UAPA”) and the Commission’s rules that require the filing of a petition for judicial review of an order constituting final agency action within 30 days of issuance.³⁰ PacifiCorp notes there is no issue of fact or law in EHC’s Complaint that could not have been raised at the conclusion of Phase II of Docket No. 12-035-100; therefore, PacifiCorp argues EHC’s Complaint should be dismissed.³¹

PacifiCorp also disagrees with EHC’s interpretation of the Phase II Order—that the Proxy/PDDRR method should only be applied to future requests for indicative pricing for wind QFs under Schedule 38. In support of its position, PacifiCorp points to the Phase I Order, which signaled the Commission’s intention to issue a new order on large wind QF avoided cost methodology by mid-summer 2013.³² PacifiCorp notes that although the Commission did not stay the application of the market proxy method for indicative pricing purposes at the time of the Phase I Order, “the Commission took comfort in the flexibility allowed by the Company’s tariff to update its pricing, noting that ‘Schedule No. 38 is clear; RMP will update its pricing proposals at appropriate intervals to accommodate any changes to avoided cost calculations’”³³

²⁹ PacifiCorp Response at p. 2.

³⁰ PacifiCorp Response at p. 2.

³¹ PacifiCorp Response at pp.2-3.

³² PacifiCorp Response at p. 3, *citing* Phase I Order at p.17.

³³ PacifiCorp Response at pp.3-4, *citing* Phase I Order at p.14.

PacifiCorp further points to the following language from the Phase I Order where the Commission acknowledged the threshold for receiving the previous pricing was to have a signed PPA:

We acknowledge the possibility the outcome of the Phase II hearings and the interests of ratepayers may require the application of new avoided cost calculations for all large wind QF projects not in possession of executed power purchase agreements when the Phase Two order is issued.³⁴

PacifiCorp also relies on the Commission's denial of the EOU Petition as further support of PacifiCorp's interpretation of the Phase II Order. In essence, PacifiCorp reads the argument presented in the EOU Petition as identical to the argument presented in EHC's Complaint.³⁵

C. Division

The Division initially argues that because the Commission denied the EOU Petition and because EHC's legal arguments are the same as those made by EOU in its Petition, the Commission should deny EHC's Complaint on the basis of *stare decisis*.³⁶

In the alternative, the Division recognizes the Commission may wish to clarify its application of the Phase II Order. To that end, the Division notes that when read in complete isolation, the Phase II Order language at issue in this docket is difficult to apply to QF projects. When read in the context of the Phase I Order, however, the Division asserts the intent and application of the Phase II Order become clear. According to the Division, the Phase II Order intended to update all existing QF pricing not contained in an executed PPA.³⁷ In support of its

³⁴ PacifiCorp Response at p.4, *citing* Phase I Order at pp.17-18.

³⁵ PacifiCorp Response at p.5.

³⁶ Division Response at pp.4-5.

³⁷ Division Response at pp.5-6.

assertion, the Division (like PacifiCorp) relies on language from the Phase I Order (1) putting market participants on notice of potential changes to avoided cost calculations; and (2) requiring PacifiCorp to update its indicative pricing proposals at appropriate intervals to reflect changes to avoided cost calculations.³⁸ The Division argues that as an intervenor in Docket No. 12-035-100, EHC was on notice that its indicative pricing was subject to being updated to a new method as a result of the Phase II Order if it did not have an executed PPA by that time.³⁹

The Division further argues that strictly applying the Proxy/PDDRR method only to future indicative pricing requests would lead to confusion and uncertainty because indicative pricing is intended solely for planning purposes. As explained by the Division, following the QF's receipt of indicative pricing there are at least three additional pricing stages in the Schedule 38 process. After indicative pricing is received, if the QF desires to proceed, PacifiCorp is required to provide a draft PPA containing a "specific pricing proposal."⁴⁰ Although provided after the indicative pricing, the specific pricing proposal "shall not be construed as a binding proposal."⁴¹ The Division further notes that even after providing the specific pricing proposal in the draft PPA, Schedule 38 requires PacifiCorp to "update its pricing proposals at appropriate intervals to accommodate any changes to [PacifiCorp's] avoided-cost calculations."⁴²

To further illustrate the point that indicative pricing is not intended to be static, the Division cites to language from Schedule 38 (*e.g.*, "such prices are merely indicative and are

³⁸ Division Response at p.6.

³⁹ Division Response at pp.6-7.

⁴⁰ Division Response at p.7, *citing* Schedule 38(I)(B)(5).

⁴¹ *Id.*

⁴² Division Response at p.7, *citing* Schedule 38(I)(B)(6)(c).

not final and binding”).⁴³ The Division further notes that Schedule 38 states that pricing and terms are “only final and binding to the extent contained in a power purchase agreement executed by both parties and approved by the Commission” and that “[p]rices and other terms and conditions in the power purchase agreement will not be final and binding until the power purchase agreement has been executed by both parties and approved by the Commission.”⁴⁴

Based on this language, the Division explains:

It’s difficult to parse the language in Schedule 38 in any way that doesn’t require the new pricing method to be applied to QFs via updated pricing. Indeed, if the utility were not to update its pricing, the Division would likely challenge the utility’s recovery in rates of any amount paid to the QF above the updated pricing.⁴⁵

D. Office

The Office asserts that although EHC’s pleading is styled as a Complaint, EHC has repeatedly stated the relief requested in the Complaint is an interpretation or clarification of the Phase II Order (*e.g.*, “Our question is very, very simple. It is: What did the Commission mean when it said ‘future requests for indicative pricing?’”).⁴⁶ As such, the Office asserts that under UAPA and Utah case law, the Commission is without jurisdiction to grant the relief requested by EHC and must dismiss the Complaint as a “nearly six months tardy” petition for review or rehearing.⁴⁷

⁴³ Division Response at p.6, *citing* Schedule 38(I)(B)(5).

⁴⁴ Division Response at p.6, *citing* Schedule 38(I)(B)(3), (I)(B)(7).

⁴⁵ Division Response at pp.7-8.

⁴⁶ Office Response at pp.1-2, *citing* March 13, 2014, Tr. 17: 7-8.

⁴⁷ Office Response at pp.2-3.

In the alternative, the Office (like the Division) argues the Complaint should be dismissed under the doctrine of *stare decisis* because EHC is requesting the identical relief related to the Phase II Order as previously requested in the EOU Petition.⁴⁸ The Office notes “the relief requested by EOU was vague, but appeared to request an Order from the Commission requiring the Company to honor, through a power purchase agreement [], an indicative pricing estimate provided prior to the Phase II Order.”⁴⁹ The Office further notes that “EOU relied upon the very language quoted by Ellis-Hall in the current complaint: ‘future requests for indicative pricing for wind QFs under Schedule 38 shall be calculated using the Proxy/PDDRR method.’”⁵⁰

The Office also states that if the Commission determines to review the merits of EHC’s arguments, the Commission should dismiss the Complaint because the gravamen of the Complaint falls short under a plain language reading of Schedule 38.⁵¹ Specifically, the Office asserts:

Ellis-Hall’s Complaint contends that ‘the [Phase II] Order specifically applies only to future requests for indicative pricing for wind QFs under Schedule 38...The Order does not state that it has any application to projects that have already received indicative pricing such as Ellis-Hall’s project.’ Complaint, p. 1. In other words, Ellis-Hall contends that since it had a pricing estimate from the Company, provided nearly ten months ago, that, notwithstanding any intervening developments, the Company (and thus ratepayers) are bound to honor the May, 2013 indicative pricing estimate with a contract. This contention is at odds with the plain language of Schedule 38.⁵²

⁴⁸ Office Response at p.2.

⁴⁹ Office Response at p.3.

⁵⁰ Office Response at p.4.

⁵¹ Office Response at p.5.

⁵² Office Response at p.5.

The Office describes in detail the language contained in Schedule 38 and Commission orders indicating that indicative pricing is neither final nor binding and that PacifiCorp is mandated to update its pricing proposals at appropriate intervals to accommodate any changes to PacifiCorp's avoided cost calculations.⁵³ According to the Office, an order granting EHC's requested relief would result in unjust and unreasonable rates imposed on ratepayers and a violation of the public interest.⁵⁴ The Office further voices its concern that requiring PacifiCorp to execute the PPA with the pre-Phase II Order indicative pricing may prejudice or otherwise limit a full and comprehensive prudence review of the PPA in a future docket.⁵⁵

The Office also describes PacifiCorp's application in Docket No. 12-035-100 for consideration of proposed changes to the Market Proxy method culminating in the avoided cost methodology provided in the Phase II Order. The Office details the Phase I Order (1) putting market participants on notice of potential modifications to avoided cost calculations; and (2) requiring PacifiCorp to update its indicative pricing proposals at appropriate intervals to reflect modifications to avoided cost calculations.⁵⁶ The Office notes such modification became effective under the Phase II Order and that a comprehensive and appropriate reading of the Commission's findings and conclusions in Docket No. 12-035-100 prohibits the inclusion of the Market Proxy method in any contracts not executed prior to the Phase II Order.⁵⁷

⁵³ Office Response at p.6.

⁵⁴ Office Response at pp.6-7.

⁵⁵ Office Response at fn.6.

⁵⁶ See Office Response at pp.7-8.

⁵⁷ See Office Response at p.8.

II. Findings and Conclusions

As an initial matter, we reiterate that based on EHC's specific request and the agreement by the other parties to this docket at the March 13, 2014, scheduling conference, the scope and nature of our consideration of EHC's Complaint is limited to this legal question: Given the stipulated events on the three stipulated dates, does the Phase II Order require PacifiCorp to execute a PPA with EHC based on the indicative pricing EHC received on May 22, 2013? We also note that EHC explicitly declined to expand the scope of this docket to address any issues of alleged disparate treatment by PacifiCorp with respect to Schedule 38 PPA negotiations between EHC and PacifiCorp.⁵⁸ As such, any claims or facts presented in this docket beyond EHC's requested scope of our consideration of the Complaint, as discussed above, are not considered here. As noted repeatedly in other dockets addressing EHC's allegations of disparate treatment,⁵⁹ however, we remain ready to examine EHC's allegations of disparate treatment should it choose to present them in a formal complaint.⁶⁰

A. Phase II Order

We first address the language from the Phase II Order that, according to EHC, is at the center of its Complaint:⁶¹

⁵⁸ March 13, 2014 Tr. 7: 24-25; 8: 1-12; 14: 9-25; 15: 1-5.

⁵⁹ March 13, 2014 Tr. 15: 1-4; 18: 15-19; 20: 6-12. *See e.g.*, Docket Nos. 13-035-115 and 13-035-116.

⁶⁰ We acknowledge that EHC asserts disparate treatment in its Comments in this docket while explicitly requesting the Commission to disregard those assertions in acting on this Complaint because it believes its disparate treatment allegations have already been presented properly in the PPA dockets that are before the Utah Supreme Court. Thus, we do not consider these allegations in this docket both because EHC asks us not to and because the other parties have not been afforded an opportunity to present their relevant evidence on the allegations. We recognize EHC is a sophisticated participant in a potential commercial relationship with PacifiCorp. Accordingly, we will not second guess EHC's reasons for presenting the matter raised in this Complaint within the narrow confines EHC outlined at the scheduling conference.

⁶¹ EHC focuses on the underlined language, however, we provide that language in full context.

In the 2005 Order we determined the Market Proxy method is appropriate for providing indicative pricing for wind QF generation, assuming PacifiCorp is acquiring cost effective wind resources through RFPs to meet load requirements during the next 20 years, as identified in its IRP. The last competitively bid system-wide RFP for a renewable resource was conducted in 2009. Because PacifiCorp is not actively conducting any system-wide RFPs for wind resources, the last executed wind contract from an RFP (i.e., the 2009R RFP) upon which Market Proxy indicative pricing is currently based, runs the risk of becoming out of date. We therefore discontinue use of the Market Proxy method for determining indicative prices for Schedule 38 wind QFs going forward and expand the application of the Proxy/PDDRR method to include wind QFs seeking indicative pricing. This action will ensure our method for determining indicative prices will continue to reflect changing avoided costs in light of changing conditions present in PacifiCorp's ongoing IRPs.

We are persuaded PacifiCorp's proposed Proxy/PDDRR method, with certain adjustments discussed below is a reasonable method for determining wind resource indicative prices going forward. Therefore, future requests for indicative pricing for wind QFs under Schedule 38 will be calculated using the Proxy/PDDRR method as has been the case for other QFs previously. This approach will ensure future indicative prices, and therefore QF energy and capacity payments will reflect appropriately the costs reasonably expected to be avoided or deferred over the term of the contract.⁶²

Although EHC acknowledges the Phase II Order discontinued the use of the Market Proxy method, EHC asserts the Commission "specifically limited its Order only to future requests for indicative pricing for wind QFs under Schedule 38"⁶³ EHC argues the words in the Phase II Order should be interpreted by their plain meaning. We agree.

As noted above, the Phase II Order plainly reads: "future requests for indicative pricing for wind QFs under Schedule 38 will be calculated using the Proxy/PDDRR method. .

⁶² Phase II Order at pp.17-18 (emphasis added).

⁶³ EHC Comments at p.ii.

.⁶⁴ In other words, the Phase II Order requires PacifiCorp to utilize the Proxy/PDDRR method to calculate future requests for indicative pricing for wind QFs under Schedule 38. Importantly, this sentence in no way alters the requirement of Schedule 38 for PacifiCorp to update pricing to reflect changes to avoided cost calculations.

As discussed in detail by PacifiCorp, the Division and the Office, indicative pricing provided to prospective QFs under Schedule 38 is intended to be used for planning and is neither final nor binding. Rather, under Schedule 38 PacifiCorp is required to “update its pricing proposals at appropriate intervals to accommodate any changes to [PacifiCorp’s] avoided-cost calculations. . .”⁶⁵ Further, Schedule 38 provides that “[p]rices and other terms and conditions in the power purchase agreement will not be final and binding until the power purchase agreement has been executed by both parties and approved by the Commission.”⁶⁶ The Commission’s directive regarding potential changes to existing and future indicative pricing was broadcast plainly in the Phase I Order and is consistent with Schedule 38:

Under the current schedule in this docket, we will issue a new order on large wind QF project avoided cost methodology by mid-summer, 2013. If the evidence shows changes in methodology are warranted, we will have the opportunity to implement them for use in the calculation of indicative pricing at that time. As noted above, the indicative pricing proposals RMP has provided, and will continue to provide during the pendency of this docket, are not binding. Moreover, Schedule No. 38 is clear; RMP will update its pricing proposals at appropriate intervals to accommodate any changes to its avoided cost calculations, among other reasons. We acknowledge the possibility the outcome of the Phase Two hearings and the interests of ratepayers may require the application of new avoided cost

⁶⁴ Phase II Order at p.43. We note that ordering paragraph two of the Phase II Order reflects the directive contained in the findings and conclusions section of the Phase II Order stating, “[f]uture requests for indicative pricing for wind QFs under Schedule 38 shall be calculated using the Proxy/PDDRR method.” (emphasis added)

⁶⁵ See Schedule 38, Sheet 38.5.

⁶⁶ Schedule 38(I)(B)(3), (I)(B)(7).

calculations for all large wind QF projects not in possession of executed power purchase agreements when the Phase Two order is issued. This approach reasonably and adequately protects ratepayers from the effects of an avoided cost methodology that may require changes due to current circumstances, while reserving judgment on the issues RMP raises in its Application until parties have a full opportunity to litigate them.⁶⁷

The underlying requirement for non-binding indicative pricing that changes in-step with modifications to the Commission's avoided cost method is driven by the federal and Utah state laws requiring utilities such as PacifiCorp to purchase QF power at prices that cannot exceed PacifiCorp's avoided cost of acquiring or producing the same power through other means.⁶⁸ As noted in the passage from the Phase I Order above, the Commission fully anticipated the possibility that a change in its avoided cost method would result in the application of new avoided cost calculations for all large wind QF projects not in possession of executed power purchase agreements when the Phase II order was issued.

In essence, EHC argues the Phase II Order was intended to vest a prospective QF with the indicative pricing received from PacifiCorp prior to the Phase II Order, irrespective of the provisions contained within Schedule 38. That reading ignores the underlying mandates of federal and Utah state law regarding QF power pricing, and the very plain language of Schedule 38, the Phase I Order⁶⁹ and the Phase II Order.

We stand by the plain reading of the language contained in the Phase II Order. That language requires PacifiCorp to utilize the Proxy/PDDRR method to calculate future requests for indicative pricing for wind QFs under Schedule 38. Contrary to EHC's claims, the

⁶⁷ Phase I Order at pp. 17-18 (emphasis added).

⁶⁸ See 18 C.F.R. § 292.101(b)(6); Utah Code Ann. § 54-12-2(2).

⁶⁹ In fact, the Phase I Order did not grandfather in the Market Proxy method for all QFs requesting indicative pricing during the pendency of the Phase II Order.

Phase II Order does not vest QFs with indicative pricing calculated using an outdated method and received under Schedule 38 prior to the Phase II Order. Rather, consistent with Schedule 38, our previous orders, and federal and state law applicable to QF power purchases, indicative prices are required to be updated to reflect new avoided costs calculations until a power purchase agreement is executed by both parties.⁷⁰

B. Phase II Order as Applied to EHC's Complaint

No parties in this docket dispute that: (1) EHC received indicative pricing from PacifiCorp on May 22, 2013, that was based on the Commission's then-applicable Market Proxy avoided cost method for large wind QFs established in the 2005 Order; (2) the Commission issued the Phase II Order on August 16, 2013, discontinuing the use of the Market Proxy Method and ordering that future requests for indicative pricing for wind QFs under Schedule 38 shall be calculated using the Proxy/PDDRR method; and (3) PacifiCorp sent a letter to EHC on August 27, 2013, invalidating the indicative pricing received by EHC on May 22, 2013, and offering to provide new indicative pricing based on the newly-approved method following a request by EHC to do so.

As noted in Section II A above, the plain meaning of the language contained in the Phase II Order requires PacifiCorp to utilize the Proxy/PDDRR method to calculate future requests for indicative pricing for wind QFs under Schedule 38. It does not vest a QF with indicative pricing provided prior to the Phase II Order. Moreover, neither the Phase II order nor

⁷⁰ Alternatively, the interactions between a QF and a utility can give rise to a legally enforceable obligation that exists prior to the execution of a power purchase agreement. *See* 18 C.F.R. § 292.304(d). EHC has not made that claim in this complaint. *See* March 13, 2014 Tr. 7: 24-25; 8: 1-12; 14: 9-25; 15: 1-5.

the specific language at issue alters the requirement of Schedule 38 for PacifiCorp to update pricing for changes to avoided costs. The Phase I Order anticipated and acknowledged that this aspect of Schedule 38 probably would remain unchanged by the Phase II Order.⁷¹ Thus, pursuant to Schedule 38, “[p]rices and other terms and conditions in the power purchase agreement will not be final and binding until the power purchase agreement has been executed by both parties and approved by the Commission.”⁷² As such, based on the facts presented in this docket, we find PacifiCorp’s actions in sending a letter to EHC on August 27, 2013, stating the indicative pricing provided to EHC prior to the Phase II Order was no longer valid, to be consistent with Schedule 38, Commission orders, and federal and Utah state law applicable to QF power purchases. Therefore, the EHC Complaint is dismissed.

C. Untimely Petition for Review or Rehearing

We next address the arguments of PacifiCorp and the Division that the Commission should dismiss the Complaint because, although EHC’s pleading is styled as a complaint, it is actually a time-barred request for reconsideration or rehearing of the Phase II Order. We agree that in certain respects, the Complaint reads very much like a request for rehearing or review of the Phase II Order. We also agree the time for seeking review or rehearing of the Phase II Order has long since passed.

The Complaint, however, “requests that the Commission enforce the plain language of its August 16, 2013 Order and require PacifiCorp to execute a PPA with Ellis-Hall

⁷¹ Phase I Order at-.17-18. “We acknowledge the possibility the outcome of the Phase Two hearings and the interests of ratepayers may require the application of new avoided cost calculations for all large wind QF projects not in possession of executed power purchase agreements when the Phase Two order is issued.”

⁷² Division Response at p. 6, *citing* Schedule 38(I)(B)(3),(I)(B)(7).

based on the indicative pricing provided to Ellis-Hall on May 22, 2013.” Putting aside EHC’s arguments regarding the interpretation of the Phase II Order, EHC has complained based on PacifiCorp’s action or application of the Phase II Order. As such, we decline to dismiss the Complaint based on the assertion that it was an untimely petition for review or rehearing.

D. EOU Petition/*Stare Decisis*

The Division and Office argue that EHC’s Complaint must be dismissed under the doctrine of *stare decisis* because EHC’s legal arguments are the same as those made by EOU in its Petition that was denied by the Commission. Because we have dismissed the EHC Complaint for the reasons described above, we find it unnecessary to decide whether the doctrine of *stare decisis* is applicable.

ORDER

Pursuant to the foregoing discussion, findings and conclusions, EHC’s Complaint is dismissed.

DATED at Salt Lake City, Utah, this 25th day of April, 2014.

/s/ Ron Allen, Chairman

/s/ David R. Clark, Commissioner

/s/ Thad LeVar, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#253750

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on the 25th day of April, 2014, a true and correct copy of the foregoing was served upon the following as indicated below:

By U.S. Mail:

Ellis-Hall Consultants
4733 Hiddenwoods Lane
P.O. Box 572098
Murray, Utah 84107

By Electronic-Mail:

Data Request Response Center (datarequest@pacificorp.com)
Customer Advocacy Team (customeradvocacyteam@pacificorp.com)

Dave Taylor (dave.taylor@pacificorp.com)
Daniel E. Solander (daniel.solander@pacificorp.com)
Eric Holje (eric.holje@pacificorp.com)
Rocky Mountain Power

Mary Anne Q. Wood (mawood@woodbalmforth.com)
Stephen Q. Wood (swood@woodbalmforth.com)
Wood Balmforth, LLC

By Hand-Delivery:

Division of Public Utilities
160 East 300 South, 4th Floor
Salt Lake City, Utah 84111

Office of Consumer Services
160 East 300 South, 2nd Floor
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Administrative Assistant