



By mail: Data Request Response Center  
Rocky Mountain Power  
825 NE Multnomah St., Suite 2000  
Portland, OR 97232

Bob Lively  
Rocky Mountain Power  
1407 W North Temple, Suite 330  
Salt Lake City, UT 84116  
Telephone: (801) 220-4052  
Facsimile: (801) 220-4615

Yvonne R. Hogle  
1407 W. North Temple, Suite 320  
Salt Lake City, UT 84116  
Telephone: (801) 220-4050  
Facsimile: (801) 220-3299

Informal inquiries may be directed to Bob Lively, Utah Regulatory Affairs Manager, at (801) 220-4052.

## **HISTORY**

Rocky Mountain Power filed an application seeking (1) approval of a power purchase agreement (“PPA”) between the Company and Thayn Hydro and (2) guidance on the price and term to be used in the PPA on February 4, 2016. The Company noted the Commission issued two orders altering Schedule 37 prices and the allowable contract term for qualifying facilities (“QF”) PPAs during the process of the negotiations of the PPA.

After having established an expedited schedule for approval of the PPA, the Commission issued its Provisional Conclusion of Law on March 4, 2016, and directed the parties in the case to be prepared to either brief or argue, at the then-scheduled hearing, the issue of a “legally enforceable obligation” or “LEO” noting that no party had asserted a LEO in the docket and that it would entertain requests for additional time to prepare evidence and arguments in the docket.

The parties agreed to suspend the remaining dates in the original schedule and, pursuant to a motion to suspend the schedule and request for expedited treatment, recommended that the Commission hold another scheduling conference to set an alternative schedule in the docket.

On March 16, 2016, the Commission issued its First Amended Scheduling Order and Notice of Hearing setting forth the amended schedule in the docket. The Commission allowed interested parties to file initial comments/briefs by April 15, 2016, reply comments/briefs by May 6, 2016 and final comments/briefs by May 27, 2016.

Thayn Hydro filed its Initial Brief on April 15, 2016. Thayn Hydro presents information that it believes supports a LEO in this case and lays out federal and state law concluding that a LEO can be reached and is binding on the utility prior to the execution of a PPA. Thayn Hydro also suggests the Commission could decide the matter under extenuating circumstances without addressing the LEO issue, like the Commission did in the *Three Peaks Power* case.<sup>1</sup> While the Company believes that additional details and dates pertaining to the negotiations process between the parties demonstrate there was no LEO in this case, the Company agrees with Thayn Hydro's suggestion that the Commission could decide the matter under extenuating circumstances without addressing the LEO issue because the facts here are analogous to the facts reviewed by the Commission in the *Three Peaks Power* case.<sup>2</sup> In that Order, the Commission found that extenuating circumstances justified approving a PPA under the terms of the then-superseded Schedule 38 and the Commission explicitly made no finding relating to the existence of a LEO.<sup>3</sup>

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<sup>1</sup> See *In the Matter of the Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Three Peaks Power, LLC*, Docket No. 15-035-70.

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

<sup>3</sup> *Id.*, Order (December 2, 2015).

As Rocky Mountain Power stated in its Application, and as the Commission correctly noted in its Provisional Conclusion of Law, “RMP is obliged to follow its tariff. Schedule 37 provides ‘[t]he prices applicable to a Utah Qualifying Facility shall be those in effect at the time a written contract is executed by the parties.’”

Rocky Mountain Power sets forth additional dates and details below regarding the negotiations between Thayn Hydro and the Company that will provide broader context of the facts from which the Commission can make its decision.

Thayn Hydro approached the Company on July 7, 2015 with a request to begin negotiation of the renewal of a PPA. Thayn Hydro had previously entered into a 20 year PPA that was set to expire December 31, 2015. On July 14, 2015, John Younie provided to Thayn Hydro a draft PPA which states the following in bold in the first page:

**THIS WORKING DRAFT DOES NOT CONSTITUTE A BINDING OFFER, SHALL NOT FORM THE BASIS FOR AN AGREEMENT BY ESTOPPEL OR OTHERWISE, AND IS CONDITIONED UPON SATISFACTION OF ALL REQUIREMENTS OF SCHEDULE 37 (INCLUDING BUT NOT LIMITED TO EACH PARTY'S RECEIPT OF ALL REQUIRED MANAGEMENT APPROVALS (INCLUDING FINAL CREDIT AND LEGAL APPROVAL)) AND ALL OTHER NECESSARY REGULATORY APPROVALS. ANY ACTIONS TAKEN BY A PARTY IN RELIANCE ON THE TERMS (INCLUDING BUT NOT LIMITED TO PRICING) SET FORTH IN THIS WORKING DRAFT OR ON STATEMENTS MADE DURING NEGOTIATIONS PURSUANT TO THIS WORKING DRAFT SHALL BE AT THAT PARTY'S OWN RISK.**

On July 22, 2015, John Younie received an email from Rick Kaster of Thayn Hydro indicating “as per our phone conversation today, Thayn Hydro ... would like to commit to a 20 year non-levelized contract based on the Schedule 37 (EFFECTIVE: February 20, 2015) rates.”<sup>4</sup>

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<sup>4</sup> Thayn Hydro Initial Brief, Exhibit A.

On August 4, 2015, John Younie provided a redlined draft of the PPA to Rick Kaster asking him whether he had any additional edits to the PPA.<sup>5</sup> In the same email communication, John Younie indicated the PPA had been submitted for review and approval on the same date and that “we should be ready to sign the PPA in about a month.”<sup>6</sup>

In response to John Younie’s email, on August 4, 2015, Rick Kaster indicated that he would be out of town the week of August 4, 2015, that he had made a quick review of the draft PPA but would review it more carefully when he returned home the following week.<sup>7</sup> Rick Kaster then identified a requirement in the draft PPA for a \$5 million umbrella to the insurance requirements that “cause[s] me concern” and indicated that he would appreciate John Younie checking into the necessity of adding the requirement.<sup>8</sup>

John Younie informed Rick Kaster on August 29, 2015 that his last day as a Rocky Mountain Power employee would be September 1, 2015.<sup>9</sup> On September 1, 2015, Rick Kaster contacted Bruce Griswold requesting another contact to complete the PPA renewal negotiations.<sup>10</sup> On September 16, 2015, Kyle Moore contacted Rick Kaster to continue the PPA renewal negotiation, leaving a voicemail.<sup>11</sup>

On September 17, 2015, Rick Kaster forwarded to Kyle Moore the then-most recent red-lined version of the PPA and noted the prior email communications he had with John Younie regarding the insurance proposals in the draft PPA.<sup>12</sup>

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<sup>5</sup> Email from John Younie to Rick Kaster, attached as Attachment 1-A.

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

<sup>7</sup> Email from Rick Kaster to John Younie, attached as Attachment 1-B.

<sup>8</sup> *Id.*

<sup>9</sup> Thayn Hydro Initial Brief, at 4.

<sup>10</sup> *Id.*

<sup>11</sup> Thayn Hydro Initial Brief, at 4.

<sup>12</sup> Email from Rick Kaster to Kyle Moore, attached as Attachment 1-C.

Kyle Moore forwarded to Bruce Griswold and Paul Clements on September 18, 2015, Rick Kaster’s email requesting a review of the \$5 million requirement given that Thayn Hydro “currently already [has] a one million dollar single event and 2 million dollar aggregate limit per year. And that [a]dding the 5 million dollar umbrella would increase our premiums by 300%.” Kyle Moore asked “is this something we can allow (going with the \$2mm in insurance rather than \$5mm).”<sup>13</sup> Bruce Griswold responded on September 18, 2015 “I am ok relaxing the standard a bit because they are operating and have a long track record but we need to check the box with insurance.”<sup>14</sup> On the same date, the Commission issued its new Schedule 37 Order changing the pricing for Schedule 37 projects.

## **ARGUMENT**

At the outset, the Company submits that while the facts in this case do not support a finding that a LEO was created prior to September 18, 2015, it is arguable that there were extenuating circumstances that could form the basis upon which the Commission could approve prices based on pre-Schedule 37 Order prices.

State agencies that regulate electric utilities have discretion in determining the manner in which the rules of the Federal Energy Regulatory Commission (“FERC”) will be implemented, and they may comply by issuing regulations, by resolving disputes on a case-by-case basis, or by other action reasonably designed to give effect to FERC’s rules.<sup>15</sup> “[S]tates must provide for legally enforceable obligations as distinct from contractual obligations, but ‘[i]t is up to the States, not [FERC], to determine the specific parameters

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<sup>13</sup> Email from Kyle Moore to Paul Clements and Bruce Griswold, attached as Attachment 1-D.

<sup>14</sup> Email from Bruce Griswold to Kyle Moore, attached as Attachment 1-E.

<sup>15</sup> *F.E.R.C. v. Mississippi*, 456 U.S. 742, at 751.

of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law.”<sup>16</sup> The concept of a LEO does not appear in PURPA. It arises from the implementing regulations promulgated by the FERC. FERC’s explanation for adopting that concept in its regulations is that the “[u]se of the term ‘legally enforceable obligation’ is intended to *prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility.*”<sup>17</sup> (Emphasis added)

“FERC has given each state the authority to decide when a LEO [legally enforceable obligation] arises in that state.”<sup>18</sup> In that case, the court upheld an order from the state public utilities commission that “a legally enforceable obligation arises only when a qualified facility can deliver power within 90 days.” *Id.* at 237. The court added, “If FERC had determined it necessary to set more specific guidelines concerning LEOs, it could have done so.” *Id.* at 239. Considering FERC’s declared purpose for adopting the concept of a LEO and the broad discretion commissions have in implementing FERC’s rules and in determining the requirements for a LEO, the Company submits that a LEO requires a showing that there would have been a contract but for the actions of the utility.<sup>19</sup>

It is undisputed that Rocky Mountain Power has never refused to enter into a PPA with Thayn Hydro. Rick Kaster accepted the reduction to the insurance requirements from \$5 million to \$3 million October 1, 2015.<sup>20</sup> The only open issue at the time was the pricing.

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<sup>16</sup> *Power Resource Group, Inc. v. Public Utility Comm’n of Texas*, 422 F.3d 231, 238 (5th Cir. 2005); accord *Rosebud Enterprises, Inc. v. Idaho Public Utilities Comm’n*, 128 Idaho 609, 623-24, 917 P.2d 766, 780-81 (1996) (*Rosebud Enterprises I*).

<sup>17</sup> 45 Fed. Reg. 12214, 12224 (February 25, 1980).

<sup>18</sup> *Power Resource Group*, 422 F.3d at 239.

<sup>19</sup> See *Idaho Power Company v. Idaho Public Utilities Commission and Grouse Creek Wind Park, LLC, and Grouse Creek Wind Park II, LLC*, 155 Idaho 780 (Idaho 2013).

<sup>20</sup> Email from Rick Kaster to Kyle Moore, attached as Attachment 1-F.

It is important to highlight the negotiation period in this case. It took approximately 2.6 months from the date the Company provided the initial draft PPA to Thayn Hydro, July 21, 2015, to the date agreement on all the terms and conditions (with the exception of the price) of the PPA (October 1, 2015) was reached, even with a change in the personnel who were dealing directly with Thayn Hydro. While the Company has not historically tracked the negotiation period for Utah Schedule 37 PPAs due to the small number of such PPAs the Company executes in Utah, the Company has tracked the negotiation period for “standard” or small QF PPAs in Oregon. The Company average negotiation period for those PPA renewal negotiations is 2.7 months, as shown in the attached Exhibit A.

Rocky Mountain Power was also not at fault for the failure to have a written contract before September 18, 2015, contrary to Thayn Hydro’s contentions. Thayn Hydro erroneously contends that PacifiCorp essentially ignored Thayn Hydro between August 4, 2015 and September 16, 2015. The facts are that neither the Company nor Thayn Hydro reached out to each other between August 4, 2015 and August 29, 2015. John Younie indicated to Rick Kaster on August 4, 2015 that he would be out and would not return until August 17, 2015.<sup>21</sup> And Rick Kaster responded that he was out of town working during the week of August 4, 2015 and that he would review the PPA more carefully “when I get home next week.”<sup>22</sup> On August 29, John Younie informed Rick Kaster that he would no longer be a Company employee effective September 1, 2015. Rick Kaster reached out to the Company September 1, 2015 inquiring about the status of the draft PPA.

While approximately 15 days passed between the time John Younie left the Company and the date Kyle Moore replaced him as the main contact and reached out to

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<sup>21</sup> See Attachment 1-A.

<sup>22</sup> See Attachment 1-B.



Rick Kaster to continue the negotiations, it is not an unreasonable period for a company like Rocky Mountain Power to replace the main contact for PPA renewal negotiations. An important fact to consider is that Thayn Hydro waited until the seventh month of the 19<sup>th</sup> year of a 20-year contract to reach out to the Company to renegotiate another 20-year contract.

Thayn Hydro argues that a LEO was created on the date that it committed to sell power to PacifiCorp, or July 22, 2015. This is just 15 days from the date Thayn Hydro initiated discussions with Rocky Mountain Power. While the Company does not dispute its obligation to purchase the output from Thayn Hydro, it disagrees that this is all it takes to have a LEO. At the time Thayn Hydro committed to sell its energy, redlined versions of the PPA were subsequently exchanged for proposed changes to “default” and “insurance requirements” provisions.<sup>23</sup> In addition, all of the draft PPAs that were exchanged include language in bold in the first page that clearly indicate approvals must be received before a binding agreement is reached. The draft PPA had not even been submitted for approvals on or before July 22, 2015. John Younie informed Rick Kaster for the first time that he had submitted the draft PPA for internal review and approval on August 4, 2015.

Thayn Hydro also uses a filing made by Pacific Power in Oregon in Docket UM 1610 as support that a LEO existed prior to September 18, 2015 in this case. Pacific Power recommended that the Oregon commission determine the existence of a LEO “when a QF approves a final draft PPA under section B(5) on page 10 of the Company’s [Oregon] Schedule 37.”<sup>24</sup> The Company notes that Oregon’s Schedule 37 is materially different than Utah’s Schedule 37. Oregon’s tariff specifically includes detailed steps of the negotiation

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<sup>23</sup> See Attachment 1-A.

<sup>24</sup> Thayn Hydro Initial Brief, at 11.

process, very similar to Utah’s Schedule 38 process. No such detailed negotiation process exists in Utah’s tariff Schedule 37. Thus, the Commission should reject Thayn Hydro’s recommendation. It should base its decision on approved Utah Schedule 37 and its deadlines, not Oregon’s Schedule 37 and its deadlines. Even assuming the Commission finds the comparison persuasive, the facts here still fail to support the contention that a LEO existed prior to September 18, 2015 under Thayn Hydro’s test. The evidence shows that Rick Kaster had not approved a final draft PPA by September 18, 2015. As stated before, the red-lined drafts of the PPA were being exchanged and Rick Kaster specifically requested that the Company review the insurance requirements in the draft PPA.

A finding that a LEO was established depends on the facts of each case. The facts in this case, in total, do not support a finding that a LEO was established prior the date Scheduling 37 pricing changed. The facts also do not support a finding that but for the actions of Rocky Mountain Power, the parties would have signed the PPA by September 18, 2015.

This notwithstanding, it is arguable that there may have been a meeting of the minds between the parties on September 18, 2015 based on Bruce Griswold’s email indicating that he could relax the insurance requirement but that he had to check the insurance box.<sup>25</sup> Some jurisdictions have indicated that evidence regarding whether there was a meeting of the minds could conceivably be a factor in a LEO analysis.<sup>26</sup> Also, as the Company indicated in its Application, all of the other terms and conditions had been agreed to between the parties prior to that date. Finally, the insurance department concurred with Bruce Griswold’s email communication that the insurance requirements could be relaxed by October 1, 2015.<sup>27</sup> The

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<sup>25</sup> See Attachment 1-E.

<sup>26</sup> See *supra* n.18, p. 21 (indicating the Idaho Supreme Court potentially would have considered evidence in the form of “documentation” showing “that there was a meeting of the minds”).

<sup>27</sup> See Attachment 1-F and draft PPA submitted with the Application.

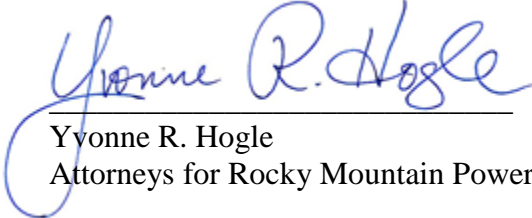
insurance requirement was relaxed to \$3 million rather than \$5 million in the draft PPA.

In conclusion, the Company submits that the facts in this case do not support a finding that a LEO was created prior to September 18, 2015. This notwithstanding, the Commission has broad discretion to determine that extenuating circumstances existed in the case that support approving Schedule 37 prices effective prior to the date the Schedule 37 Order was issued.

WHEREFORE, based on the foregoing, Rocky Mountain Power respectfully requests that the Commission (1) reject the argument that there was a LEO prior to September 18, 2015, (2) approve the PPA between Thayn Hydro and Rocky Mountain Power using the pricing and contract term it deems appropriate and (3) find that the terms and conditions of the PPA to be just and reasonable and in the public interest.

DATED this 6<sup>th</sup> day of May 6, 2016.

Respectfully submitted,



Yvonne R. Hogle  
Attorneys for Rocky Mountain Power

## CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2016, I caused to be served via electronic mail, a true and correct copy of the foregoing Response Brief of Rocky Mountain Power to the following:

Patricia Schmidt  
Assistant Attorney General  
Division of Public Utilities  
500 Heber M. Wells Building  
160 East 300 South  
Salt Lake City, UT 84111  
[pschmid@utah.gov](mailto:pschmid@utah.gov)

Rex Olsen  
Assistant Attorney General  
Office of Consumer Services  
500 Heber M. Wells Building  
160 East 300 South  
Salt Lake City, UT 84111  
[rolsen@utah.gov](mailto:rolsen@utah.gov)

Irion Sanger  
Sanger Law PC  
1117 SE 53rd Ave  
Portland OR 97215  
[irion@sanger-law.com](mailto:irion@sanger-law.com)

Adam S. Long  
SMITH HARTVIGSEN PLLC  
175 S. Main Street, Suite 300  
Salt Lake City, Utah 84111

Ellis-Hall Consultants, LLC  
835 E 4800 South, Ste 210  
Murray, Utah 84107-5553  
[mail@ehc-usa.com](mailto:mail@ehc-usa.com)

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Kaley McNay  
Coordinator, Regulatory Operations