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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 the Power Purchase Agreement between PacifiCorp and Thayn Hydro, LLC	Docket No. 16-035-04  <b>REPLY BRIEF OF THAYN HYDRO, L.L.C.</b>
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**1. INTRODUCTION**

Pursuant to Utah Code Ann. § 54-4a-1 and Utah Admin. Code R746-100, and the First Amended Scheduling Order And Notice Of Hearing issued by the Commission on March 16, 2016, Thayn Hydro, L.L.C. (“**Thayn Hydro**”) hereby submits its Reply Brief in the above-captioned docket.

The other parties to this docket, the Division of Public Utilities (the “**Division**”), Ellis-Hall Consultants (“**Ellis-Hall**”), the Office of Consumer Services (the “**OCS**”), and PacifiCorp, d/b/a Rocky Mountain Power (“**PacifiCorp**” or the “**Company**”) all submitted response briefs or comments at the May 6, 2016 deadline for the second round of filings in this docket.

The Division recommends that the Commission approve the Thayn Hydro Power Purchase Agreement (the “**PPA**”) with the pricing in effect prior to the Commission’s September 18, 2015 order approving new Schedule 37 pricing (the “**SCH 37 Order**”) based on the existence of a legally enforceable obligation (or “**LEO**”) prior to the SCH 37 Order. The Division argues that

the weight of the evidence in this docket supports the existence of a LEO prior to the SCH 37 Order and that the Commission should approve the old pricing and a 20-year term for the PPA.

Ellis-Hall points out that the Commission can only take action under the Public Utility Regulatory Policy Act (“**PURPA**”) to the extent that action is in accordance with the rules set by the Federal Energy Regulatory Commission (“**FERC**”), argues that both term and pricing are set at the time a LEO is incurred rather than at the date of contract execution, and that Thayn Hydro is entitled to the pricing and term existing prior to the SCH 37 Order.

The OCS correctly observes that this issue regarding the existence of a LEO is an issue of first impression for the Commission. The OCS presents a helpful summary of the facts leading up to this point, relevant FERC precedent, and an extensive survey of other states’ approaches to the question of determining when a LEO arises. The OCS suggests that the proper approach in Utah for determining the existence of a LEO is to require a Qualifying Facility (“**QF**”) to “unconditionally commit to sell its energy and/or capacity and to do everything in its power to establish a contract.”<sup>1</sup> The OCS also suggests that the current Schedule 37 language is contrary to FERC precedent and that the Commission should open a new docket to address the LEO issues more broadly and to possibly make corresponding tariff amendments.<sup>2</sup>

PacifiCorp again suggests that the Commission could exercise its broad discretion to approve the PPA with the old pricing and a 20-year term without addressing the LEO issue.<sup>3</sup> PacifiCorp argues that the proper test for the existence of a LEO requires “a showing that there would have been a contract but for the actions of the utility.”<sup>4</sup> PacifiCorp also argues that the facts of the present situation do not support the finding of a LEO on behalf of Thayn Hydro.

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<sup>1</sup> OCS Response Brief at 13.

<sup>2</sup> *Id.* at 16-17.

<sup>3</sup> PacifiCorp Response Brief at 3, 11.

<sup>4</sup> *Id.* at 7-8.

## 2. ARGUMENT

Thayn Hydro agrees with PacifiCorp that the Commission has the ability to approve the PPA with the old, pre-SCH 37 Order pricing and term without setting significant precedent on the LEO issue. As OCS points out, the Commission is indeed authorized to implement the LEO doctrine for Utah.<sup>5</sup> However, the Commission's power is constrained by FERC precedent that requiring actual execution of a PPA is too stringent a requirement, because a LEO can be created earlier in the PPA negotiation process.<sup>6</sup> This precedent sets the absolute outside bound—that requiring an executed agreement is a step too far—for the point in the negotiation process at which a LEO is created. The Commission can and should rely on this clear statement from FERC as to the creation of a LEO to decide this matter without setting new LEO precedent applicable to all QFs in Utah.

### 2.1. Thayn Hydro Unconditionally Committed To Sell Its Output To PacifiCorp

As Thayn Hydro noted in its initial brief, Thayn Hydro committed to sell its output to PacifiCorp on July 22, 2015, when Thayn Hydro sent an email to PacifiCorp specifically stating that it was committing itself to sell power at the then-effective Schedule 37 rates, as requested by John Younie (Thayn Hydro's contact at PacifiCorp for the PPA renewal).<sup>7</sup> For Thayn Hydro, that commitment was absolute and relieved it of any concern about a future change in the applicable Schedule 37 rates. Indeed, for Thayn Hydro, the PPA renewal process was expected to be a

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<sup>5</sup> OCS Response Brief at 9 (citing *West Penn Power Co.*, 71 FERC ¶ 61,153 at P 61,495 (1995)).

<sup>6</sup> *Id.* (“the deference given to the states in determining the date of a LEO ‘is subject to the terms of the [FERC’s] regulations. *West Penn* does not . . . give states the unlimited discretion to limit the ways a legally enforceable obligation is incurred.”) (citing *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P. 35 (2011)); *see also Cedar Creek*, 137 FERC at P. 41 (“In conclusion, we find that the Idaho PUC’s June 8 Order, limiting the methods by which a legally enforceable obligation may be incurred to only a fully-executed contract, is inconsistent with our regulations implementing PURPA.”).

<sup>7</sup> Thayn Hydro Initial Brief at 10.

perfunctory step in the continued operation of the Thayn Hydro hydroelectric facility (the “**Facility**”) and upon the commitment to sell to PacifiCorp made in writing, via email to its contact at PacifiCorp, Thayn Hydro considered the matter resolved subject to the formality of signing the paper PPA. The actions of Thayn Hydro throughout the PPA renewal process are consistent with this attitude.

The actions of Thayn Hydro, including the emailed commitment show an unconditional commitment to sell the Facility’s output to PacifiCorp. Further supporting this interpretation is the fact that the Facility is an existing QF. An existing QF is not subject to any of the concerns inherent in a yet-to-be-developed QF. The Facility has been producing power and selling that power to PacifiCorp for decades and any technical or interconnection issues relating to integration with the PacifiCorp grid have long been resolved. The only hurdle faced by Thayn Hydro in continuing to sell output to PacifiCorp was the execution of a renewal PPA at prices already set by the Commission via Schedule 37.

## **2.2. A Legally Enforceable Obligation Existed Prior To The Pricing Change**

The situation presented to the Commission is extremely simple and leads only to the conclusion that a LEO existed prior to the SCH 37 Order: Thayn Hydro unconditionally committed to sell its output to PacifiCorp and the only remaining step in the process was to execute the PPA. On August 4, 2015 the negotiated PPA between Thayn Hydro and PacifiCorp was submitted for PacifiCorp internal review and approval with the expectation that “we should be ready to sign the PPA in about a month.”<sup>8</sup> As FERC has ruled that requiring actual execution of a PPA to find the existence of a LEO is too stringent a standard, at the very minimum a LEO must exist at this point.

During the “internal review and approval process,” all progress toward the goal of signing

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<sup>8</sup> PacifiCorp Response Brief at 5.

the PPA was wholly in control of PacifiCorp. Thayn Hydro, having not participated in the PPA execution process in decades, relied on the word of PacifiCorp and expected an execution copy of the PPA in “about a month.” Unfortunately, that internal review process was derailed by the departure of John Younie from PacifiCorp, and the ensuing confusion, and the PPA was not signed prior to the SCH 37 Order.<sup>9</sup>

### **2.3. The LEO Standards Proposed By PacifiCorp And The OCS Need Not Be Addressed In This Docket**

The Commission should reach a decision in this docket based on applicable FERC precedent and need not set additional LEO precedent for Utah. Both PacifiCorp and the OCS have proposed standards for determining the existence of LEOs in Utah.<sup>10</sup> As Thayn Hydro explained in its initial brief, the issue currently before the Commission can be decided by looking only to the FERC precedent setting the outer bound of when a LEO can be created. FERC has also ruled that requiring actual execution of a PPA is too stringent a requirement and that a LEO is created, at a minimum, at the point when both parties have come to agreement but not actually executed a written contract.<sup>11</sup> The Commission must respect this FERC precedent and, by doing so, can decide this matter without setting new precedent in Utah. In this instant situation, the terms of the PPA had been negotiated and the single remaining step was the execution of the PPA after completion of PacifiCorp internal review process; thus, a LEO must have existed, at a minimum, at this point in the process when the parties had negotiated the agreement but not yet memorialized

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 7-8 (“the Company submits that a LEO requires a showing that there would have been a contract but for the actions of the utility.”); OCS Response Brief at 13 (“the approach most consistent with the FERC’s regulations and general Utah law is the approach requiring a QF to unconditionally commit to sell its energy and/or capacity and to do everything in its power to establish a contract.”).

<sup>11</sup> See *Cedar Creek*, 137 FERC at P. 41 (“In conclusion, we find that the Idaho PUC’s June 8 Order, limiting the methods by which a legally enforceable obligation may be incurred to only a fully-executed contract, is inconsistent with our regulations implementing PURPA.”).

it in writing.

Although the Commission need not consider PacifiCorp's proposed standard for determining the existence of a LEO, an analysis of the current situation under PacifiCorp's proposed "there would have been a contract but for the actions of the utility" standard nonetheless leads to the conclusion that a LEO existed prior to the SCH 37 Order. In the case of Thayn Hydro, PacifiCorp controlled the drafting process, the production of draft agreements, and the eventual generation of an execution copy of the PPA—PacifiCorp at all times took responsibility for the PPA document. The last point prior to the SCH 37 Order that Thayn Hydro had influence as to the content of the final draft PPA that was submitted to the PacifiCorp internal approval process was prior to August 4, 2015.<sup>12</sup> At that point, the process was entirely in control of PacifiCorp. Had PacifiCorp produced the execution copy of the PPA in the month timeframe as promised, or within the 21 day timeframe applicable to Utah Schedule 38 PPAs, or within the 15 business day timeframe that PacifiCorp operates under in Oregon, this docket would likely not exist.<sup>13</sup> It is entirely reasonable to expect that both Thayn Hydro and PacifiCorp would have signed the final, execution copy of the PPA within in matter of days, let alone within the period before the SCH 37 Order. The evidence here suggests that there would have been a contract but for the actions of PacifiCorp.

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<sup>12</sup> PacifiCorp Response Brief at 5 ("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. 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>13</sup> Rocky Mountain Power Utah Electric Service Schedule No. 38 at 5(k) ("Company must Complete all internal reviews and approvals within twenty-one (21) days after agreement is reached on a proposed final version of a power purchase agreement."); Pacific Power Oregon Schedule 37 at B(6) ("When both parties are in full agreement as to all terms and conditions of the draft power purchase agreement, the Company will prepare and forward to the owner within 15 business days, a final executable version of the agreement.").

#### 2.4. Thayn Hydro Did Not Delay The Execution Of The PPA

Thayn Hydro did not delay the execution of the PPA and should not be punished for the slowness of PacifiCorp's internal process. PacifiCorp attempts to disclaim any responsibility for delays in the execution of the PPA.<sup>14</sup> The Commission does not need to ascribe any blame in order to find that Thayn Hydro is entitled to pre-SCH 37 Order rates; however, under no circumstances should a small QF unfamiliar with the contract negotiation process be held responsible for reasonably relying upon PacifiCorp's communications and promises.

PacifiCorp asserts that "neither [PacifiCorp] nor Thayn Hydro reached out to each other between August 4, 2015 and August 29, 2015."<sup>15</sup> During this time, as communicated to Thayn Hydro, the PPA was in the internal "review and approval" process at PacifiCorp.<sup>16</sup> As such, Thayn Hydro had no reason to reach out to PacifiCorp.

PacifiCorp further claims that 15 days is "not an unreasonable period for a company like Rocky Mountain Power to replace the main contact for PPA renewal negotiations".<sup>17</sup> Contrary to PacifiCorp's claim, 15 days is indeed an unreasonable period to delay covering the responsibilities of an employee whose departure was initiated by PacifiCorp. PacifiCorp is an enormous company with 5,700 employees and serving 1.8 million retail customers.<sup>18</sup> Thayn Hydro submits that one of the other PacifiCorp employees in either Portland or Salt Lake tasked with negotiating QF contracts could and should have taken over John Younie's responsibilities immediately. More relevant is not the 15 days to replace Thayn Hydro's lead contact, but the 45 days between the last

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<sup>14</sup> *Id.* at 8-9.

<sup>15</sup> *Id.* at 8.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *PacifiCorp facts*, PACIFICORP (2016)

[http://www.pacificorp.com/content/dam/pacificorp/doc/About\\_Us/Company\\_Overview/PC-FactSheet-Final\\_Web.pdf](http://www.pacificorp.com/content/dam/pacificorp/doc/About_Us/Company_Overview/PC-FactSheet-Final_Web.pdf).

substantive communication from PacifiCorp (August 4, 2015) and the date of the SCH 37 Order (September 18, 2015). But for the actions of PacifiCorp, the contract would have been finalized much earlier.

PacifiCorp also attempts to fault Thayn Hydro waiting “until the seventh month of the 19<sup>th</sup> year of a 20-year contract” to initiate the renewal process.<sup>19</sup> In Thayn Hydro’s opinion, a period of five months is more than sufficient to execute what is effectively a contract of adhesion drafted by PacifiCorp at prices already set by the Commission. In fact, under PacifiCorp’s Oregon Schedule 37, the timelines for a new QF allow a power purchase agreement to be finalized in a less than three months after the QF provides all required information.<sup>20</sup> Indeed, although the PPA was not signed prior to the SCH 37 Order, both PacifiCorp and Thayn Hydro agree that the PPA could have been executed before the SCH 37 Order had either party been aware of the date of the SCH 37 Order.<sup>21</sup>

## **2.5. Disclaimer Language On The PPA Does Not Preclude A LEO**

The disclaimer language drafted by PacifiCorp on the first page of the draft PPA does not preclude the creation of a LEO prior to execution. PacifiCorp emphasizes its disclaimer language written prominently on the first page of the form power purchase agreement.<sup>22</sup> While this disclaimer language is presumably intended to prevent the enforcement of any of the terms of the PPA prior to actual execution by all parties, such a disclaimer on an unexecuted contract can obviously have no effect on a separate agreement—even one addressing the same subject matter.

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<sup>19</sup> PacifiCorp Response Brief at 9.

<sup>20</sup> Pacific Power Oregon Schedule 37 at B(3)-(6) (PacifiCorp has 15 business days to provide a draft power purchase agreement after receiving all required information, 15 business days to provide a final draft contract, and 15 days to provide a final executable contract after all terms have been agreed upon).

<sup>21</sup> PacifiCorp Application at 4.

<sup>22</sup> PacifiCorp Response Brief at 4, 9.



An agreement to sell and buy output pursuant to a LEO is just such a separate agreement, even if unwritten.<sup>23</sup> Further, the inclusion of that disclaimer language is in direct violation of FERC rules and regulations that the signing of a contract is not required to establish a LEO, and this argument should be addressed by the Commission at a future date.

PacifiCorp's claim that there needs to be a "meeting of the minds" is directly contrary to its previous statements and FERC precedent. While admitting that it has argued in Oregon that a LEO can be formed before a final contract is signed by the parties, PacifiCorp distinguishes this fact on the grounds that its Oregon Schedule 37 is different and has specific time tables.<sup>24</sup> In Oregon, PacifiCorp's recognized that FERC has concluded that a state "may not require a QF to obtain a fully executed agreement as a precondition to the QF's locking in a particular avoided cost rate. FERC ruled that if a QF 'unequivocally commits' itself to sell to an electric utility, it may obtain a non-contractual, but binding, LEO that entitles the QF to the prevailing avoided cost price."<sup>25</sup> At least in Oregon, PacifiCorp has recognized that many QFs can (and Thayn Hydro did) unequivocally commit and form a LEO well before PacifiCorp signs or agrees to a contract.

### 3. CONCLUSION

Thayn Hydro committed itself, at the very latest, to sell its output to PacifiCorp on or before August 4, 2015. The Commission should rely on existing FERC precedent to determine that a LEO was created as of that date, without setting new Utah-specific precedent on the LAO issue. Thayn Hydro respectfully requests that the Commission (1) find that a LEO had been created prior

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<sup>23</sup> See *Cedar Creek*, 137 FERC at P. 32 ("a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.").

<sup>24</sup> PacifiCorp Response Brief at 10.

<sup>25</sup> *In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Staff Investigation Into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Opening Testimony of Bruce W. Griswold at 13 (PAC/1000, Griswold/13) (May 22, 2015).

to the SCH 37 Order and (2) order that the renewal PPA that is the subject of the Application use a 20-year term and the Schedule 37 rates in effect immediately prior to the SCH 37 Order.

DATED this 27<sup>th</sup> day of May, 2016.

Respectfully Submitted,  
**SMITH HARTVIGSEN, PLLC**

/s/ Adam S. Long  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served on this 27<sup>th</sup> day of May, 2016 upon the following as indicated below:

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