

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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In the Matter of the Formal Complaint of Blue Mountain Power Partners, LLC against PacifiCorp d/b/a Rocky Mountain Power	<u>DOCKET NO. 16-035-47</u>  <u>ORDER OF DISMISSAL</u>
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ISSUED: March 28, 2017

**I. Procedural History.**

Pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA) and Utah Code Ann. § 54-12-2 (Utah PURPA), PacifiCorp d/b/a Rocky Mountain Power (PacifiCorp) is required to purchase energy and capacity from qualifying facilities<sup>1</sup> such as Blue Mountain Power Partners, LLC (Blue Mountain). To that end, PacifiCorp and Blue Mountain executed a power purchase agreement (PPA) on July 3, 2013, for the purchase by PacifiCorp of energy and capacity from a wind facility to be constructed by Blue Mountain in San Juan County, Utah.

On October 3, 2013, in Docket No. 13-035-115, the Public Service Commission of Utah (PSC) approved the PPA. A variety of factors delayed Blue Mountain's completion of certain deadlines required under the PPA, and PacifiCorp therefore terminated the PPA. On November 23, 2016, Blue Mountain filed a formal complaint against PacifiCorp to compel its performance. Specifically, the complaint requested that the PSC adjudicate whether deadlines set forth in the parties' PPA were required to be extended under the PPA's force majeure language.

On December 23, 2016, PacifiCorp filed a motion to dismiss the complaint and a motion to strike five paragraphs within the complaint, which paragraphs PacifiCorp considered to contain confidential settlement and mediation information.

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<sup>1</sup> A qualifying facility, or QF, is one that meets certain requirements set forth in PURPA, thus qualifying it to sell electric power on the wholesale market to an electric utility at the utility's avoided cost.

The parties fully briefed PacifiCorp's motions to dismiss and to strike. On January 30, 2017, the PSC issued orders denying the motion to dismiss and partially denying the motion to strike.

On March 1, 2017, PacifiCorp filed its response to Blue Mountain's complaint. In its response, PacifiCorp responded to each paragraph of the complaint, stating whether the utility admitted or denied the allegations set forth. In addition, PacifiCorp set forth the following affirmative defenses:

1. The complaint fails to state a claim upon which relief may be granted.
2. The complaint is barred or unenforceable under the doctrines of waiver, statute of limitations, estoppel, laches, and unclean hands.
3. The complaint is barred for failure to satisfy conditions precedent required under the contract at issue.
4. The complaint is barred because: (a) PacifiCorp's conduct was not the proximate cause of Blue Mountain's alleged damages; (b) Blue Mountain failed to mitigate its damages; (c) any damage was caused by intervening or superseding factors; (d) Blue Mountain's alleged damages were caused, if at all, by the acts and/or omissions of Blue Mountain and/or third parties; (e) Blue Mountain's alleged damages are speculative and inherently uncertain; and (f) Blue Mountain has suffered no detriment or damages as a result of the allegations described in the complaint.

5. The complaint is barred because at all relevant times PacifiCorp was acting in accordance with the requirements set forth by Utah statutes and regulations, and the direction of the PSC.
6. The complaint is barred to the extent it seeks relief beyond the scope of authority granted to the PSC.
7. The complaint is barred or dismissible as a result of prior inconsistent statements made by Blue Mountain to judicial bodies, by judicial estoppel, and by judicial admissions.
8. The complaint is barred by Blue Mountain's own material breach of contract.
9. The complaint is barred by the terms of the contract.
10. The complaint is barred by Utah Code § 25-5-4(1)(a), which states:
  - (1) The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:
    - (a) every agreement that by its terms is not to be performed within one year from the making of the agreement[.]

On March 14, 2017, Blue Mountain filed a final reply in support of its complaint. In its final reply, Blue Mountain stated generally that it disputes the contentions and claims set forth in PacifiCorp's response. In addition, Blue Mountain requested a scheduling conference for the purpose of setting deadlines for fact discovery, expert discovery, and hearing.

## **II. Findings and Conclusions**

PacifiCorp suggested in its sixth affirmative defense that the PSC's jurisdiction over this complaint might be limited. Although neither party has directly raised the issue of subject matter

jurisdiction, it must not be ignored. Therefore, the PSC considers the issue on its own initiative and in the interests of judicial economy.

**A. The PSC has limited jurisdiction over contract disputes and PPA contracts.**

Utah law is clear that the PSC does not have jurisdiction over every contract dispute that involves a public utility. In *Garkane Power Ass'n v. Public Serv. Comm'n*, 681 P.2d 1196, 1207 (Utah 1984), the Utah Supreme Court stated:

[Not] every contract entered into by a public utility is subject to the jurisdiction of the Public Service Commission. Many contracts for the purchase of supplies and equipment, and other contracts dealing with the ordinary conduct of a business, are contracts that could be litigated only in a district court and not before the Commission.

Similarly, in *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 901 P.2d 1017, 1023 (Utah 1995), the Utah Supreme Court stated:

Although the PSC has power to construe contracts affecting matters within its jurisdiction such as rate-making, ordinary contracts unrelated to such matters are outside of the purview of [the PSC's] jurisdiction.

Additionally, under ordinary circumstances, the PSC has no jurisdiction over the relationship between PacifiCorp and wholesale energy suppliers. Rather, the Federal Energy Regulatory Commission (FERC) has primary jurisdiction over wholesale electricity transmission and sales. 16 U.S.C. § 824(a)-(b).

PURPA and Utah PURPA create a narrow exception to FERC's jurisdiction in tasking the PSC with administering the set of laws that requires PacifiCorp to purchase wholesale power from a class of qualifying wholesale generators (QFs). *See* Utah Code Ann. § 54-12-2; 16 U.S.C.

§ 824a-3(f); *accord, FERC v. Mississippi*, 456 U.S. 742, 751 (1982). Blue Mountain is a QF. By law, the price paid for QF power cannot exceed PacifiCorp's avoided cost of acquiring or producing the same power through other means (e.g., coal or natural gas). *See* 18 C.F.R. § 292.101(b)(6); Utah Code Ann. § 54-12-2(2). As directed by PURPA and Utah PURPA, the Commission has approved, through a series of fully-litigated dockets, an avoided cost methodology that is utilized to set the price paid by PacifiCorp for the power of QFs like Blue Mountain.<sup>2</sup>

In reviewing QF PPAs for potential approval, the PSC is focused primarily on whether the pricing contained in a QF PPA is consistent with the avoided-cost methodology approved by the PSC. Once the PSC makes that determination and approves a PPA, its limited jurisdiction over wholesale electricity rates, and the tasks it is required to perform under PURPA and Utah PURPA, are effectively complete. This jurisdictional delineation is significant because the price PacifiCorp pays for wholesale QF power (like all other prudent sources of power used by PacifiCorp to serve its retail customers) is ultimately passed through *via* rates to PacifiCorp's retail electric service customers as part of the cost of providing electric service. *See, e.g.*, Utah Code Ann. § 54-7-13.5. The Commission therefore has jurisdiction to approve the rates charged by PacifiCorp to its retail electric service customers. *See* Utah Code Ann. § 54-4-4.

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<sup>2</sup> *See In the Matter of Blue Mountain Power Partners, LLC's Request that the Public Service Commission of Utah Require PacifiCorp to Provide the Approved Price for Wind Power for the Blue Mountain Project*, Docket No. 12-2557-01 (Order on Request for Agency Action; September 20, 2012); *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); and *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).

The Utah Supreme Court has affirmed the PSC's limited jurisdiction over PPAs as follows:

In considering the parties' power purchase agreements for approval, the PSC is tasked with a narrow, specific inquiry—to approve the agreed-upon power purchase *rates* as consistent with the public interest.

...

The public interest, in this legal context, does not encompass any and all considerations of interest to the public.... Instead, the words "public interest" in a regulatory statute take meaning from the purposes of the regulatory legislation in question. And here those purposes are limited—focusing on the setting of reasonable prices[.]

...

Again, the PSC's role in approving a ... power purchase agreement is to confirm that the *rates* agreed to are in the "public interest." And that question is resolved conclusively ... by the avoided-cost terms of the [agreement].

Once that determination [is] (properly) made, there [is] no work left for the PSC to do. Thus, the PSC [is] not thereafter tasked to assess the vagueness or enforceability of the [agreement].

*Ellis-Hall Consultants, LLC v. PSC of Utah*, 342 P.3d 256, 260-262 (Utah 2014) (emphasis in the original; internal punctuation, citations, and ellipses omitted).

In sum, and as explained by the Utah Supreme Court in the *Ellis-Hall* case, in considering approval of a PPA, the PSC's role is to evaluate whether the parties have correctly calculated the utility's avoided costs and used that calculation to establish wholesale rates.

**B. Serious Questions Exist as to Whether the PSC Has Subject Jurisdiction over this Matter, and the PSC Concludes the Breach of Contract Blue Mountain Alleges is Better Adjudicated in Court.**

In light of the foregoing, the PSC acknowledges that bright lines do not exist in every circumstance with respect to its subject matter jurisdiction. Utah law is clear, however, that

district courts have subject matter jurisdiction over a legal claim unless adjudicative authority for that claim is specifically delegated to an administrative agency. *Mack v. Utah State Dep't of Commerce*, 2009 UT 47 at ¶33.

Regardless of whether the PSC's statutory subject matter jurisdiction is broad enough to encompass Blue Mountain's claims, a district court certainly has jurisdiction over the matter, which, in essence, is a claim for breach of contract. The core of this dispute involves the proper interpretation of the force majeure clause in Blue Mountain's PPA; whether the various actions of the parties and non-parties qualify as a force majeure; and ultimately whether PacifiCorp has breached its contract. These are all issues better adjudicated in a court of law because, in approving the PPA at issue here, the PSC already exercised its limited jurisdiction over wholesale electricity contracts to ensure the pricing of the PPA was consistent with the requirements of PURPA and Utah PURPA – namely, that the pricing contained in the PPA was consistent with the avoided-cost methodology approved by the PSC for large wind facilities.<sup>3</sup>

To adjudicate the force majeure language at issue, the PSC would now have to determine whether events that have delayed Blue Mountain's performance were foreseeable; whether they were within the control of the parties; or whether other contractual language that would excuse nonperformance has been triggered. These are issues going to whether the PPA has been

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<sup>3</sup> The PSC acknowledges that circumstances could arise where a QF developer might invoke the PSC's jurisdiction to resolve a dispute with PacifiCorp as to whether the contract terms upon which PacifiCorp insists are reasonable. This would generally occur prior to contract execution and PSC approval of the PPA. The instant matter is very different. The parties have an executed PPA and a dispute has erupted concerning whether one party has breached the executed contract.

breached. The PSC finds, therefore, these issues are more appropriately addressed in a court of law.

The propriety of this conclusion is further illustrated when considered in the broader context of the PSC's regulatory role. Under Utah contract law, "the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law." *WebBank v. Am. Gen. Annuity Serv. Corp.*, 54 P.3d 1139, 1145 (Utah 2002), citing *Cent. Fla. Invests., Inc.*, 2002 UT 3 at ¶12. The adjudicator of a dispute involving a wholesale contract between vendor and vendee should not generally be concerned with the ramifications the result might have on the vendee's retail customers. However, the PSC must be ever mindful of the effects its decisions might have on PacifiCorp's retail customers. Otherwise, it risks abdicating one of its most essential statutory duties: to establish retail rates that are just, reasonable, and in the public interest.

Utah Code § 54-4a-6 sets forth the objectives that PSC action must serve. One of the stated objectives requires the PSC to "protect the long-range interest of consumers in obtaining continued quality and adequate levels of service at the lowest cost[.]" This requirement to consider the public interest has been further established in case law. In *Bradshaw v. Wilkinson Water Co.*, 94 P.3d 242, 249 (Utah 2004), the Utah Supreme Court stated, "Unlike traditional court proceedings, hearings before the Commission are not designed to consider only the interests of the litigating parties. The Commission must consider the interests of the utility's customers and the interests of the public." *See also Gilchrist v. Interborough Rapid Transit Co.*,



279 U.S. 159 (U.S. 1929): "The power of regulation is never exercised except in the public interest."

In short, under its statutory mandate and applicable case law, the PSC may not limit consideration of this complaint to the plain language of the contract and the interests of the parties thereunder. However, under contract law, the parties are generally entitled to precisely such an adjudication.

Finally, it is possible that the outcome of Blue Mountain's claim will have financial implications for PacifiCorp. If the outcome is adverse to PacifiCorp, the utility might later argue that it cannot honor the ruling without obtaining a rate increase, an issue squarely within the PSC's jurisdiction. The broader public interest considerations set forth in Utah Code § 54-4a-6 would apply, and the PSC would not be limited by the narrow considerations permitted in an adjudication under PURPA. Nor would the PSC be required to consider the contract to be in the public interest, simply because it was considered enforceable under contract law.<sup>4</sup> Therefore, the PSC finds that it should not rule on the meaning and application of the force majeure language at issue in this complaint, lest such ruling be alleged or found to limit its consideration of the public interest in a subsequent adjudication.

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<sup>4</sup> See *Hi-Country Estates Homeowners Ass'n. v. Bagley & Co.*, 262 P.3d 1188, 1191 (Utah App 2011), in which the Court found certain contractual provisions to be privately enforceable "unless the PSC intervenes and determines otherwise" under its statutory mandate to protect the long-range interests of consumers.

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ORDER

Given the foregoing, the PSC declines to exercise subject matter jurisdiction and dismisses the November 23, 2016 complaint of Blue Mountain Power Partners, LLC against PacifiCorp d/b/a Rocky Mountain Power.

DATED at Salt Lake City, Utah, March 28, 2017.

/s/ Jennie T. Jonsson  
Administrative Law Judge

Approved and confirmed March 28, 2017 as the Order of the Public Service Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg  
Commission Secretary  
DW#292676

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 PSC 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 PSC 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 PSC'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 March 28, 2017, a true and correct copy of the foregoing was served upon the following as indicated below:

By Electronic-Mail:

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