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September 8, 2017

***VIA ELECTRONIC FILING***

Public Service Commission of Utah
Heber M. Wells Building, 4th Floor
160 East 300 South
Salt Lake City, UT 84114

Attention: Gary Widerburg
Commission Secretary

RE: **Docket No. 17-035-36** – Response to Glen Canyon Motion for Preliminary Injunction and Reply in Support of Motion to Dismiss

Rocky Mountain Power hereby submits for electronic filing its Response to Glen Canyon Motion for Preliminary Injunction and Reply in Support of Motion to Dismiss in the above referenced matter.

Rocky Mountain Power respectfully requests that all formal correspondence and requests for additional information regarding this filing be addressed to the following:

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Sincerely,

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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| In the Matter of Glen Canyon Solar A, LLC and Glen Canyon Solar B, LLC's Request for Agency Action to Adjudicate Rights and Obligations under PURPA, Schedule 38 and Power Purchase Agreements with Rocky Mountain Power | Docket No. 17-035-36<br><br>**ROCKY MOUNTAIN POWER'S RESPONSE TO GLEN CANYON SOLAR'S MOTION FOR PRELIMINARY INJUNCTION** |

## I. INTRODUCTION

In accordance with Utah Code § 63G-4-204(1), Utah Admin. Code R746-1-105, R746-1-203, R746-1-206, and the Order Granting Motion to Amend Procedural Schedule issued by the Public Service Commission of Utah (Commission) in this docket on August 25, 2017, PacifiCorp d/b/a Rocky Mountain Power submits this Response to Glen Canyon Solar A, LLC and Glen Canyon Solar B, LLC's (collectively, Glen Canyon) August 11, 2017 Motion for Preliminary Injunction. The Commission should deny the Motion for Preliminary Injunction because it lacks jurisdiction to grant the request and, even if the Commission had jurisdiction, Glen Canyon fails

to meet any of the requirements for a preliminary injunction set forth in Utah R. Civ.Pro. 65A(e).

## II. SUMMARY OF ARGUMENT

Glen Canyon's Motion for Preliminary Injunction is fatally flawed because, like many regulatory bodies, the Commission lacks the authority to grant injunctive relief. The statute under which Glen Canyon moves (Utah Code Ann. § 63G-4-501) requires an agency like the Commission to seek any injunctive relief from a court of relevant jurisdiction. The Commission may not itself issue an injunction. Even if it could issue an injunction, Glen Canyon does not actually seek injunctive relief. As Glen Canyon concedes, the purpose of injunctive relief is to "preserve the status quo pending the outcome of the case."[1] Here, however, Glen Canyon does not want to preserve the *status quo*. Instead, Glen Canyon requests that the Commission rule summarily, now, on one of the primary points of relief Glen Canyon seeks in its Request for Agency Action. In other words, Glen Canyon does not seek an injunction. Rather, it wants to win on the merits sooner.

Finally, even if the Commission could issue the type of procedural relief Glen Canyon seeks, the subject matter involves transmission service, which is solely regulated by the Federal Energy Regulatory Commission (FERC). Transmission service is an area outside of the Commission's jurisdiction, and an area where a Commission order could be preempted by federal law. Setting aside these procedural and legal bars to issuing the requested injunction, Glen Canyon's motion also fails to satisfy the standards for injunctive relief. For these reasons, Rocky Mountain Power respectfully requests that the Commission deny the Motion for Preliminary Injunction.

[1] Glen Canyon Solar's Motion for Preliminary Injunction, Docket No. 17-035-36, 24 (Aug. 11, 2017) (quoting *Zagg, Inc.*, 2015 UT App 52, ¶ 8 ("Injunctive relief is fundamentally preventive in nature, and an injunction serves to preserve the status quo pending the outcome of the case.") (internal quotation marks omitted)).

## III. BACKGROUND

On May 1, 2017, Rocky Mountain Power filed a request for this Commission to confirm that, consistent with its own prior rulings and the dictates of the Public Utility Regulatory Policies Act of 1978 (PURPA), qualifying facilities (QFs) are financially responsible for all interconnection costs needed to allow the company to receive the QF's net output on a firm basis.[2] One such QF developer, Glen Canyon, separately filed the pending Request for Agency Action, asking this Commission to compel PacifiCorp's transmission function to study Glen Canyon's interconnection request assuming that a transmission-service-related generation redispatch tool would be used to relieve Glen Canyon of the obligation to pay for the facilities or upgrades necessary to interconnect its projects.[3]

On July 14, 2017, PacifiCorp filed a Motion to Dismiss Glen Canyon's Request for Agency Action, arguing that the Commission should dismiss Glen Canyon's request because it seeks relief this Commission cannot lawfully provide and the claim is not ripe.[4] Glen Canyon and Rocky Mountain Power submitted direct testimony in support of their positions on June 29 and August 31, 2017, respectively, and a hearing is scheduled October 5, 2017.

On August 11, 2017, Glen Canyon filed a Motion for Preliminary Injunction, asking the Commission to require PacifiCorp's merchant function (energy supply management or ESM) to "promptly communicate to PacifiCorp Transmission Services (PacTrans) all information, directions, requests or assumptions required to ensure that PacTrans will perform interconnection

[2] *Rocky Mountain Power's Request for Declaratory* Ruling, Docket No. 17-035-25, 1 (May 1, 2017). In an order issued on June 19, 2017, this Commission suspended the schedule and stayed the docket pending further action by the parties or the Commission. *Order Suspending Schedule and Staying Docket*, Docket No. 17-035-25, 1 (June 19, 2017).
[3] *Glen Canyon Solar's Request for Agency Action*, Docket No. 17-035-36 (June 7, 2017).
[4] *Rocky Mountain Power's Motion to Dismiss Glen Canyon Solar A, LLC and Glen Canyon Solar B, LLC's Request for Agency Action*, Docket No. 17-035-36, 16-23 (Jul. 14, 2017).

studies relating to the Glen Canyon Solar QF projects that will include assumptions regarding the use of RMP's existing transmission rights and resource re-dispatch options and the resulting potential to avoid unnecessary Network Upgrades." Rocky Mountain Power responds to Glen Canyon's reply to the company's Motion to Dismiss in a separate pleading filed concurrently with this response to Glen Canyon's Motion for Preliminary Injunction.

## IV. ARGUMENT

Glen Canyon's Motion for Preliminary Injunction should be dismissed. The relief it seeks is the same relief sought in its Request for Agency Action. As Rocky Mountain Power explained in its Motion to Dismiss, the Commission lacks jurisdiction over any claim regarding FERC-jurisdictional transmission service. Even if it had jurisdiction, the Commission lacks the legal authority to issue the injunction Glen Canyon seeks, and Glen Canyon fails to meet the standards for injunctive relief. Because its motion fails at each of these critical turns, it should be rejected.

### A. The Commission Cannot Issue Injunctions

Glen Canyon's motion should be rejected solely on the grounds that the Commission is not empowered to grant injunctive relief. The Commission is only able to pursue such relief from the courts.

Utah Code Ann. § 63G-4-501, the relevant code section upon which Glen Canyon's motion depends,[5] provides: "In addition to other remedies provided by law, an agency may seek enforcement of an order by seeking civil enforcement in the district courts."[6] That section of the code further provides that a *court* may, among other things, issue "temporary or permanent

[5] Motion for Preliminary Injunction at 1. In its Motion for Preliminary Injunction, Glen Canyon also relies on Utah Admin. Code R746-1-301 (motions) and Utah Code Ann. §§ 63G-4-201 (commencement of adjudicative proceedings). Neither provides a legal basis for the Commission to issue injunctions.
[6] Utah Code Ann. § 63G-4-501(1)(a).

injunctive relief[.]"[7] Further, the code section specifically addressing injunctive relief to enforce orders from this Commission, Utah Code Ann. § 54-7-24—which Glen Canyon does not cite—requires the Commission to "direct the commencement of an action" in court if it believes "any public utility is failing or omitting, or is about to fail or omit, to do anything required of it by law, or by any order, decision, rule, direction or requirement of the commission[.]"[8] The Commission has previously recognized this limit on its authority.[9] It is clear, therefore, that the Commission may not lawfully issue an injunction, much less the one Glen Canyon seeks.

### B. Glen Canyon Really Seeks Summary Judgment, Not an Injunction

Glen Canyon's motion does not actually seek a preliminary injunction—it seeks summary judgment on the merits of its case. In its Motion for a Preliminary Injunction, Glen Canyon seeks an order of the Commission

> …requiring PacifiCorp's merchant function, Rocky Mountain Power ("RMP"), to promptly communicate to PacifiCorp Transmission Services ("PacTrans") all information, directions, requests or assumptions required to ensure that PacTrans will perform interconnection studies relating to the Glen Canyon Solar QF projects that will include assumptions regarding the use of RMP's existing transmission rights and resource re-dispatch options and the resulting potential to avoid unnecessary Network Upgrades.[10]

This is the same relief Glen Canyon seeks in its Request for Agency Action. In the Request for Agency Action, Glen Canyon requests, among other things, that the Commission issue an order requiring PacifiCorp to: (1) "Submit a timely and appropriate request that PacTrans perform interconnection studies for the GC Resources in a manner consistent with transmission studies that

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[7] *Id*. § 63G-4-501(1)(d)(ii).
[8] Utah Code § 54-7-24 ("Whenever the commission…shall be of the opinion that any public utility is failing or omitting, or is about to fail or omit, to do anything required of it by law…it shall direct the commencement of an action or proceeding in the name of the state, for the purpose of having such violations or threatened violations stopped or prevented.").
[9] *In the Matter of the Complaint of Cindy Nichols, Complainant v. Utah Power & Light Co., Respondent*, Docket No. 97-035-09, n. 8 (Aug. 18, 1998) (noting the Commission's ability to seek injunctive relief in court).
[10] Motion for Preliminary Injunction at 1-2.

assume resource redispatch"; and (2) "Utilize and request studies of operational redispatch options consistent with the redispatch of resources assumed in setting avoided cost prices in the GC PPAs."[11]

These are the questions pending before the Commission on the merits of this case and, more imminently, Rocky Mountain Power's Motion to Dismiss. The relief that Glen Canyon seeks by way of injunction assumes its success on the merits. This stands in contrast to the traditional notion of an injunction, which is, as Glen Canyon points out, "to preserve the power to render a meaningful decision on the merits,"[12] or, as the Supreme Court has noted, "to preserve the relative positions of the parties until a trial on the merits can be held."[13] Indeed, it is "generally inappropriate" to grant final judgment on the merits at the preliminary injunction stage,[14] which is what Glen Canyon essentially requests in its Motion for Preliminary Injunction.

### C. The Commission Lacks Subject Matter Jurisdiction to Issue a Preliminary Injunction

The Commission should also reject Glen Canyon's injunction request because the relief it seeks is not a course of action that exists under PacifiCorp's OATT, and the subject matter is outside of the Commission's jurisdiction.

Glen Canyon's injunction request continues to confuse the difference between FERC-jurisdictional transmission and state-jurisdictional QF interconnection service. In the context of its interconnection request, Glen Canyon seeks to invoke a process (redispatch under an amendment

[11] Request for Agency Action at 2.
[12] Motion for Preliminary Injunction at 24 (citing *Tri-State Generation & Transmission Assoc., Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986)).
[13] *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.").
[14] *Id*. (describing the limited purpose of preliminary injunctions and noting: "In light of these considerations, it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.").

to a transmission-service-related network operating agreement, or NOA) that is only available under requests for FERC-jurisdictional transmission service. PacifiCorp's Motion to Dismiss addresses this issue in detail. There, PacifiCorp explained:

> This confusion between interconnection service and transmission service leads Glen Canyon to assert that the Company must use its redispatch option under the *FERC-jurisdictional* NOA Amendment to reduce Glen Canyon's responsibility for the costs associated with its *state-jurisdictional* interconnection service—at the expense of the Company's customers. Glen Canyon's flawed theory blends interconnection service and transmission service into one service and misunderstands the purpose of—and the regulatory body with jurisdiction over—the NOA Amendment.[15]

Glen Canyon's injunction request suffers from the same flaw underlying its Request for Agency Action. Redispatch under the FERC-jurisdictional, transmission-service-related NOA amendment is simply not available in a state-jurisdictional QF interconnection study. More directly, the injunction request seeks an avenue of relief that simply does not exist, and therefore cannot be granted.[16]

Setting aside Glen Canyon's continued confusion between transmission and interconnection service, the injunction request is necessarily subject to FERC's exclusive

[15] Motion to Dismiss at 3.

[16] *See* Motion to Dismiss at 16 ("Glen Canyon claims this Commission can disregard the costs associated with QF interconnection by simply directing the Company's merchant function to tell its transmission function that the QF's interconnection study assumptions should be adjusted to reflect that the merchant function will use its transmission-service-related NOA Amendment to prevent those costs. Glen Canyon's flawed theory: (1) blends interconnection and transmission into one service; (2) misunderstands the purpose of, and regulatory body with jurisdiction over, the NOA Amendment; (3) fails to recognize that interconnection costs would not simply disappear if the NOA Amendment is used, but rather would be borne by the Company's customers; and (4) oversimplifies the impact of a utility being forced to discontinue using its existing transmission rights for their current purposes to deliver even a 'perfectly sized' QF project, including, in Glen Canyon's case, the potential interference with the Company's contractual obligations to a third party under FERC-jurisdictional legacy transmission contracts.").

jurisdiction.[17] Specifically, Glen Canyon asks this Commission to insert itself into the transmission-service arrangements between PacifiCorp's merchant function as transmission customer and PacifiCorp transmission as transmission service provider. FERC's jurisdiction over interstate transmission service is generally referred to as exclusive jurisdiction, leaving no room for state regulation.[18] This Commission would interfere with this exclusively federal jurisdiction if it issued an order to compel PacifiCorp to take any particular action under the OATT that was contrary to its rates, terms, and conditions.[19]

### D. Glen Canyon Fails to Meet the Standard for a Preliminary Injunction

Even if the Commission could grant an injunction and had jurisdiction over transmission service agreements, Glen Canyon nonetheless fails to meet the requirements for a preliminary injunction.

Under Utah R.Civ. Pro. 65A(e), a preliminary injunction is only available if the applicant establishes four elements: (1) "The applicant will suffer irreparable harm unless the order or injunction issues"; (2) "The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause to the party restrained or enjoined"; (3) "The order or injunction, if issued, would not be adverse to the public interest"; ***and*** (4) "There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents

[17] FERC has exclusive jurisdiction over the "transmission of electric energy in interstate commerce," and over the "sale of electric energy at wholesale in interstate commerce," and over "all facilities for such transmission or sale of electric energy." 16 USC § 824(b) (2012). *New York v. FERC*, 535 U.S. 1, 12 (2002) ("However, the unbundled transmission service involves only the provision of 'transmission in interstate commerce' which, under the FPA, is exclusively within the jurisdiction of the Commission."); *see also Central Hudson Gas & Electric Corporation*, 109 FERC ¶ 61,032 at P 22 (2004) ("the fact remains that the Commission has exclusive jurisdiction over the Filed OATT rates."); *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1211 (D.C. Cir. 2009) ("Section 201 of the Federal Power Act… grants FERC exclusive jurisdiction over the transmission and sale of electric energy in interstate commerce.").

[18] *New York*, 535 U.S. at 12; *Central Hudson*, 109 FERC ¶ 61,032 at P 22, *Exxon Mobil Corp.*, 571 F.3d at 1211.

[19] Such an action would likely be invalid as preempted by federal law. As the Supreme Court explained in *Arizona v. United States*, 567 U.S. 387, 401 (2012), "[w]here Congress occupies an entire field…, even complementary state regulation is impermissible."

serious issues on the merits which should be the subject of further litigation."[20] As explained below, Glen Canyon fails to meet these requirements.

### 1. Glen Canyon Will Not Suffer Irreparable Harm if the Injunction is Not Issued

Glen Canyon pleads that it satisfies the irreparable harm standard because a Commission ruling in its favor on the Commission's established schedule may jeopardize the development timelines associated with its projects. The only argument that Glen Canyon offers in support of its alleged "irreparable harm" is that the Commission is scheduled to act too slowly (despite the accelerated schedule in this docket). This argument may justify expedited Commission action on the merits of Glen Canyon's claim, but it does not justify Glen Canyon's requested injunctive relief. In addition, a Commission order granting Glen Canyon's requested injunction could itself introduce additional delays into the study process. For example, if the Commission grants Glen Canyon's inappropriate preliminary injunction request but ultimately rules in Rocky Mountain Power's favor on the merits of this case, then the company would have to change, yet again, the parameters of the interconnection study process for the Glen Canyon QFs, which would cause further delay.

### 2. The Threatened Injury to Glen Canyon is Not Outweighed by the Damage that Glen Canyon's Requested Injunction Would Impose on Rocky Mountain Power's Customers

Glen Canyon next argues that there would be no harm to Rocky Mountain Power in granting the injunction. It may be true that the company will suffer no immediate monetary damage or other harm, but the ultimate result of granting Glen Canyon the relief it seeks—whether in the form of a preliminary injunction or a decision on the merits—will shift the costs of interconnecting

[20] Utah R.Civ. Pro. 65A(e).

the Glen Canyon QFs to Rocky Mountain Power's *customers*. Glen Canyon's request for an unprecedented QF interconnection study also threatens the non-discriminatory nature of PacifiCorp's FERC-jurisdictional open-access transmission process and the limited transmission-service-related application of the FERC-jurisdictional NOA amendment.

### 3. An Injunction Would be Contrary to the Public Interest

The next element to justify injunctive relief is whether the requested injunction would act in a manner contrary to the public interest. As addressed above and in PacifiCorp's Motion to Dismiss, the public interest would be violated by granting Glen Canyon's requested relief. Glen Canyon seeks to shift costs associated with its interconnection to PacifiCorp's retail customers, the very customers who are to be held harmless from a QF's interconnection under PURPA. This Commission has explained: "One of our key objectives in implementing PURPA is to maintain ratepayers' indifference to whether power is provided by the utility or the QF."[21] As Rocky Mountain Power explained in its Motion to Dismiss:

> Granting Glen Canyon's Request would violate these policies by shifting the cost of Glen Canyon's QF interconnection to the Company's customers in one of two ways. First, if the network upgrades required for Glen Canyon's interconnection are inappropriately shifted to the transmission service study and constructed, the costs of those upgrades will be paid for by customers through transmission rates. Second, if the Company uses its NOA Amendment to inappropriately avoid construction of the upgrades necessary to accommodate Glen Canyon's state-jurisdictional QF interconnection, then the Company will have to increase how much it needs to back down its generation resources to make room for the QF power to interconnect. This will not only shift operational flexibility-related costs to customers, but it will also rapidly diminish the value of the finite NOA Amendment redispatch tool. That is, the Company can redispatch its resources to allow only so

[21] *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, 13 (Dec. 20, 2012). This policy is consistent with PURPA's statutory mandate. For example, Section 210(b) provides that purchases from QFs must be at rates that are: (1) just and reasonable to electric consumers and in the public interest; (2) not discriminatory against QFs; and (3) not in excess of "the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. §824a-3(b) (2012). Section 210(d) of PURPA, in turn, defines "incremental cost of alternative electric energy" as "the cost to the electric utility of the electric energy which, but for the purchase from [the QF], such utility would generate or purchase from another source." *Id.* § 824a-3(d).

much QF power to flow before even that operational change does not create enough room on a constrained system to let additional QFs interconnect.[22]

This issue has also been further addressed in Rocky Mountain Power's direct testimony in this case.[23] Shifting potentially significant costs related to Glen Canyon's interconnection to PacifiCorp's customers, who are legally required to be held harmless, is a direct and significant threat to the public interest.

#### 4. The Serious Issues Presented are Already Subject to Litigation

Glen Canyon's attempt to satisfy the fourth requirement for injunctive relief reveals the weaknesses of its case. Glen Canyon does not argue that it is likely to prevail on the merits, but rather only that "serious issues" are presented that "should be the subject of further litigation." The Utah Rules of Civil Procedure do allow a movant seeking injunctive relief to demonstrate that "serious issues" are present that "should be the subject of further litigation."[24] But that phrasing clearly indicates that the point of an injunction is to preserve an issue for a court or agency (here, the Commission), not to expedite the relief on the merits already requested.

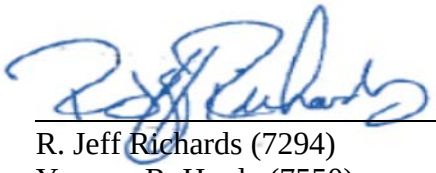
## V. CONCLUSION

Glen Canyon's Motion for a Preliminary Injunction should be denied because the Commission lacks the authority to grant injunctive relief, and injunctive relief is not the type of relief Glen Canyon truly seeks. Rather, Glen Canyon requests that the Commission rule summarily, now, on one of the primary points of relief sought in Glen Canyon's Request for Agency Action. Even if the Commission could issue the type of procedural relief Glen Canyon seeks, the subject matter involves FERC-jurisdictional transmission service—an area outside of

[22] Motion to Dismiss at 20.
[23] *See, e.g.* Direct Testimony of Rick A. Vail, Docket No. 17-035-36, 21-26 (Aug. 31, 2017); Direct Testimony of Kelcey A. Brown, Docket No. 17-035-36, 3-5 (Aug. 31, 2017).
[24] Utah R.Civ. Pro. 65A(e)(4).

the Commission's jurisdiction. Finally, Glen Canyon's motion fails to satisfy the standards for injunctive relief.

RESPECTFULLY SUBMITTED: September 8, 2017



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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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| In the Matter of Glen Canyon Solar A, LLC and Glen Canyon Solar B, LLC's Request for Agency Action to Adjudicate Rights and Obligations under PURPA, Schedule 38 and Power Purchase Agreements with Rocky Mountain Power | Docket No. 17-035-36<br><br>**ROCKY MOUNTAIN POWER'S REPLY IN SUPPORT OF MOTION TO DISMISS** |

## I. INTRODUCTION

In accordance with Utah Code § 63G-4-204(1), Utah Admin. Code R746-1-105, R746-1-203, R746-1-206, and the Order Granting Motion to Amend Procedural Schedule issued by the Public Service Commission of Utah (Commission) in this docket on August 25, 2017, PacifiCorp d/b/a Rocky Mountain Power submits this Reply in support of its July 14, 2017 Motion to Dismiss Glen Canyon Solar A, LLC and Glen Canyon Solar B, LLC's (collectively, Glen Canyon) June 7, 2017 Request for Agency Action (Request for Agency Action).

## II. EXECUTIVE SUMMARY

Glen Canyon stakes its entire case on the use of a *transmission*-service-related generation redispatch tool to relieve Glen Canyon of its obligation to pay for any facilities or upgrades necessary to grant its *interconnection* request. Rocky Mountain Power's Motion to Dismiss raised fatal jurisdictional problems with Glen Canyon's approach. In response, Glen Canyon attempted to distance itself from the transmission redispatch tool, now claiming it is requesting nothing more than a narrow Commission order directing a simple communication between PacifiCorp's business units.

Glen Canyon's request is not narrow or simple. Glen Canyon seeks an unprecedented interconnection study using a generation redispatch tool that is set forth in an amendment to a FERC-jurisdictional *transmission*-service network operating agreement (NOA) that governs the FERC-jurisdictional *transmission* service that PacifiCorp's transmission function, PacifiCorp transmission, provides to PacifiCorp's merchant function, PacifiCorp energy supply management (ESM), to deliver Glen Canyon's qualifying facility (QF) power to load. PacifiCorp explicitly proposed and FERC approved this redispatch tool as a *transmission*-service-related study assumption, not an *interconnection*-service-related study assumption.[1] The Commission lacks the jurisdiction to modify, enforce, or expand the language in the transmission service agreement beyond its FERC-approved scope.

Glen Canyon implies that a simple communication from ESM to PacifiCorp transmission is all that is needed to ensure Glen Canyon will get the novel interconnection study it seeks. As

[1] *PacifiCorp*, FERC Docket No. ER15-741, Network Operating Agreement Amendment at p. 2 (Dec. 24, 2014) (stating that PacifiCorp was "not proposing any modification to its OATT, including, but not limited to, the *interconnection process*, the transmission service reservation process, or the transmission planning process. Rather, the NOA amendment simply allows PacifiCorp to meet its PURPA must-take obligations by providing firm transmission service to deliver QFs, while at the same time avoiding the need to undertake potentially uneconomic transmission expansions.") (emphasis added).

described by Mr. Vail in his direct testimony, Glen Canyon's basis for believing that a letter from PacifiCorp ESM to PacifiCorp transmission could change the interconnection process is wrong because it was based on an erroneous representation by a PacifiCorp employee.[2] The employee's error is regrettable, but PacifiCorp informed Glen Canyon that the information was incorrect *before* Glen Canyon filed its Request for Agency Action. Glen Canyon nonetheless continues to assert its erroneous arguments.

There are fundamental and fatal flaws in Glen Canyon's suggested approach. The communication between PacifiCorp business units that Glen Canyon asks the Commission to order is not an option under the interconnection rules in the OATT. And, as Rocky Mountain Power discussed in detail in its Motion to Dismiss, this Commission lacks jurisdiction over the transmission service that PacifiCorp transmission provides ESM under the NOA.

Rocky Mountain Power disagrees with Glen Canyon's suggestion that the Commission can overcome these fatal jurisdictional flaws because the Commission has jurisdiction over a particular PacifiCorp business unit. The Commission has jurisdiction over the rates, terms, and conditions of certain activities (*e.g.*, the purchase of QF power, the provision of interconnection service to a QF), not the particular utility business unit engaging in the jurisdictional activity. Likewise, while Rocky Mountain Power agrees that the Commission has broad authority to establish QF interconnection policies, the company disagrees that the Commission's jurisdiction over QF interconnections extends to the modification of FERC-jurisdictional transmission service

[2] *See* Direct Testimony of Rick A. Vail, lines 562-71, Docket No. 17-035-36 (Aug. 31, 2017).

agreements.[3]

Finally, while the jurisdictional infirmities alone provide sufficient grounds for dismissal of Glen Canyon's Request for Agency Action, the relief Glen Canyon seeks cannot be granted in any event. PacifiCorp's obligations to Arizona Public Service Company (APS) under a FERC-jurisdictional legacy transmission contract prohibit the NOA amendment redispatch tool from being used to prevent the need for the facilities or upgrades necessary to grant Glen Canyon's interconnection request, even if doing so were appropriate. This means that the facilities or upgrades necessary to grant Glen Canyon's interconnection will need to be constructed no matter what. If Glen Canyon does not pay for them, then Rocky Mountain Power's customers will.

## III. BACKGROUND

On May 1, 2017, PacifiCorp filed a request for this Commission to confirm that, consistent with its own prior rulings and the dictates of the Public Utility Regulatory Policies Act of 1978 (PURPA), QFs are financially responsible for all interconnection costs needed to allow PacifiCorp to receive the QF's net output on a firm basis.[4] Glen Canyon separately filed the pending Request for Agency Action, asking this Commission to compel PacifiCorp transmission to study Glen

[3] In addition to Glen Canyon's misguided jurisdictional arguments, Glen Canyon's Response introduces a host of factual disputes that are not germane to a Motion to Dismiss because, as Glen Canyon itself describes, the Commission is free to interpret facts in Glen Canyon's favor for purposes of the motion. As a result, Rocky Mountain Power is not responding to each factual misrepresentation because the Commission simply does not have the jurisdiction to grant the relief Glen Canyon seeks, regardless of the disputed facts. Rocky Mountain Power addressed the factual claims in detail in its August 31, 2017 direct testimony in this docket. *See, e.g.*, Direct Testimony of Rick A. Vail (explaining why Glen Canyon's NOA amendment theories effectively allow Glen Canyon to secure a lower-level interconnection service and shift the costs associated with Glen Canyon's decision to site in a constrained area of PacifiCorp's system to retail customers); Direct Testimony of Kelcey A. Brown (discussing why ESM's contractual limitations over the Sigurd-GC line under the APS agreement would make Glen Canyon's interconnection study ineligible for a redispatch alternative under the NOA amendment, even if it were appropriate); Direct Testimony of Daniel J. MacNeil (explaining PacifiCorp's avoided-cost pricing and refuting Glen Canyon's theory that Rocky Mountain Power's avoided-cost modeling should be determinative in studying the Glen Canyon QF's interconnection service under the OATT process). Glen Canyon also introduces a new theory about Rocky Mountain Power testimony filed in Wyoming. Response at 15-16. Contrary to Glen Canyon's inaccurate description of the isolated testimony excerpts it cites in its Response, Rocky Mountain Power will not rely on the redispatch tool to interconnect the new wind projects at issue in that Wyoming docket.

[4] Rocky Mountain Power, Request for Declaratory Order, Docket No.17-035-25 (May 1, 2017).

Canyon's interconnection request assuming that a transmission-service-related generation redispatch tool would be used to relieve Glen Canyon of the obligation to pay for the facilities or upgrades necessary for the interconnection of its projects.[5]

On July 14, 2017, Rocky Mountain Power filed a Motion to Dismiss Glen Canyon's Request for Agency Action, arguing that the Commission should dismiss Glen Canyon's request because it seeks relief this Commission cannot lawfully provide and the claim was not ripe. Glen Canyon and Rocky Mountain Power submitted direct testimony in support of their positions on the merits on June 29 and August 31, 2017. A hearing is scheduled October 5, 2017.

On August 11, 2017, Glen Canyon submitted a Response to Rocky Mountain Power's Motion to Dismiss, as well as a Motion for Preliminary Injunction. Rocky Mountain Power responds to Glen Canyon's Motion for Preliminary Injunction in a separate pleading filed concurrently with this Reply in support of PacifiCorp's Motion to Dismiss.

## IV. ARGUMENT

The Commission should dismiss Glen Canyon's Request for Agency Action. Glen Canyon's attempt to distance itself from the FERC-jurisdictional NOA, recasting its requested relief as dealing solely with the Commission's regulation of QF interconnections, fails. Even if the Commission could establish jurisdiction to address this issue, the relief Glen Canyon seeks cannot be granted because NOA-amendment redispatch is not available for interconnection service, and (even if redispatch were available and appropriate) PacifiCorp lacks the necessary transmission rights over the applicable transmission path.

### A. Glen Canyon Reframed its Request in its Response to the Motion to Dismiss

Glen Canyon seems to have entirely reframed its argument in response to the company's

[5] Glen Canyon Solar's Request for Agency Action, Docket No. 17-035-36 (June 7, 2017).

Motion to Dismiss. Glen Canyon's Request for Agency Action was grounded almost entirely on the notion that PacifiCorp should be compelled to exercise a redispatch option contained in the NOA amendment, filed with and approved by FERC. The Request for Agency Action mentioned the NOA roughly *90 times*, and devoted two-thirds of its total length to appending: (1) PacifiCorp's NOA amendment filing at FERC (including the amended NOA); and (2) FERC's order accepting the NOA amendment. Rocky Mountain Power's Motion to Dismiss emphasized that the Commission lacks the jurisdiction to regulate the NOA in the way Glen Canyon suggests it should. In its response to Rocky Mountain Power's argument, Glen Canyon reframes its arguments and now references the NOA a scant *five times*.

In an attempt to avoid its obvious jurisdictional problem, Glen Canyon now argues that it really is not asking for any relief under the NOA; rather, it is simply asking the Commission to compel PacifiCorp to act under the Commission's "broad authority to adjudicate disputes related to PURPA compliance and electricity rates."[6] Glen Canyon now claims that it only "***references*** the re-dispatch options available to RMP under the Amended NOA and RMP's avoided cost pricing model to demonstrate that RMP can avoid any risk—to Glen Canyon Solar, PacifiCorp or RMP's ratepayers—of unnecessary and uneconomic Network Upgrades."[7] As discussed further below, Glen Canyon's new approach is no more defensible than Glen Canyon's initial arguments.

### B. Glen Canyon's Recast Arguments do not Overcome the Jurisdictional Barriers

Rocky Mountain Power's Motion to Dismiss details why the relief Glen Canyon seeks is beyond the jurisdiction of this Commission. Rocky Mountain Power will not repeat that entire analysis here, but will highlight key points that reveal the weakness of Glen Canyon's changing

[6] Glen Canyon Response to Rocky Mountain Power's Motion to Dismiss Glen Canyon Solar A, LLC and Glen Canyon Solar B, LLC's Request for Agency Action, Docket No. 17-035-16, 12 (Aug. 11, 2017).
[7] *Id.* at 13-14 (emphasis added).

theories. As Rocky Mountain Power explained in its motion:

> The crux of Glen Canyon's Request is that it does not want to pay for any network upgrades needed to interconnect its qualifying facilities (QFs). Instead, Glen Canyon wants to shift these costs—costs that are caused by the interconnection of Glen Canyon's QFs—to the Company's retail customers. Glen Canyon claims that the Company should use a "redispatch option" contained in an amendment to the NOA, referred to as the "NOA Amendment," in lieu of requiring Glen Canyon to pay for the necessary interconnection-related network upgrades. But the Company's NOA governs the transmission service that its transmission function provides to its merchant function. That transmission service, and the agreement itself, are within FERC's exclusive jurisdiction.
>
> The fundamental flaw in Glen Canyon's Request is the failure to recognize the distinction between two different services provided by the Company's transmission function—interconnection service and transmission service. Generally speaking, the Federal Energy Regulatory Commission (FERC) has jurisdiction over both services. But under the Public Utility Regulatory Policies Act of 1978 (PURPA), state regulatory commissions have jurisdiction over one of these services—interconnection service—when a QF seeks to interconnect with a utility. Even under PURPA, FERC retains jurisdiction over transmission service.[8]

Glen Canyon mischaracterizes the company's argument as "a facial challenge to the competency of the Commission[.]"[9] This inaccurate claim attempts to muddle the basic distribution of authority between federal and state government under PURPA and the Federal Power Act. While states have considerable authority, there is no room for the states to act in matters reserved for the federal government's exclusive jurisdiction.[10]

The Commission has recognized the limits of its authority in this area and rejected the same argument Glen Canyon makes here. *In the Matter of the Utah Public Service Commission*

[8] Rocky Mountain Power's Motion to Dismiss Glen Canyon Solar A, LLC and Glen Canyon Solar B, LLC's Request for Agency Action, Docket No. 17-035-26, 2 (Jul. 14, 2017).
[9] Glen Canyon Response at 3.
[10] *See, e.g. New York v. FERC*, 535 U.S. 1, 12 (2002) ("However, the unbundled transmission service involves only the provision of 'transmission in interstate commerce' which, under the FPA, is exclusively within the jurisdiction of the Commission."); *see also Central Hudson Gas & Electric Corporation*, 109 FERC ¶ 61,032 at P 22 (2004) ("the fact remains that the Commission has exclusive jurisdiction over the Filed OATT rates."); *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1211 (D.C. Cir. 2009) ("Section 201 of the Federal Power Act… grants FERC exclusive jurisdiction over the transmission and sale of electric energy in interstate commerce.").

*Exercising Jurisdiction Over Schedule 38 and, as Adopted, PacifiCorp's OATT Part IV*, the Commission disposed of the notion that it has jurisdiction over PacifiCorp's OATT.[11] There, a renewable developer, Sage Grouse Energy Project, LLC (SG), sought a declaratory judgment from the Commission that it has jurisdiction over both Schedule 38 and, by virtue of Schedule 38's incorporation by reference of the OATT interconnection process, the OATT itself. The Commission responded unequivocally that Sage Grouse's position "is nonsensical." The Commission "acknowledge[d] it has a role in regulating and allocating interconnection costs under the Public Utility Regulatory Policies Act and attendant federal regulations," but concluded that "PacifiCorp's OATT is a FERC-approved document and a matter of federal regulation."[12]

Like Sage Grouse, Glen Canyon's request inappropriately asks the Commission to wade into FERC's jurisdiction by expanding FERC's interpretation of an OATT-based transmission service agreement—the NOA. The NOA is an integral part of the provision of network transmission service under PacifiCorp's OATT. The pro forma NOA is found in the OATT,[13] and the executed NOA between PacifiCorp ESM and PacifiCorp transmission is on file with FERC as a FERC-jurisdictional rate schedule.

In its Response to the Motion to Dismiss, Glen Canyon suggests it really is not asking for any action that pertains to transmission service, and that the Commission should act under its broad jurisdiction over QF interconnections.[14] This new theory is contradicted by the relief Glen Canyon asks the Commission to grant. Specifically, Glen Canyon asks the Commission to order PacifiCorp

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[11] *In the Matter of the Utah Public Service Commission Exercising Jurisdiction Over Schedule 38 and, as Adopted, PacifiCorp's OATT Part IV*, Docket No. 15-2582-01 (Oct. 22, 2015).
[12] *Id*. at 5-6.
[13] PacifiCorp OATT, Attachment G.
[14] Glen Canyon further uses its Response to press its position that, regardless of whether the NOA applies, it should not be required to pay for transmission system upgrades. *See* Response at n.14. This argument is beyond the scope of this case and wrong in any event. That question is pending before the Commission in Docket No. 17-035-25. There, Rocky Mountain Power discusses at length how the Commission's existing statutes, orders, and rules already require a QF to pay for all interconnection costs associated with an network resource interconnection.

ESM to request that PacifiCorp transmission consider redispatch options available to ESM in receiving *transmission* service under the NOA amendment in studying Glen Canyon's request for *interconnection* service. But PacifiCorp ESM does not have a role in the interconnection process. ESM is the QF off-taker and *transmission customer*. As Rocky Mountain Power explained in its Motion to Dismiss:

> In the PURPA context, a transmission provider is:
>
> - Required to provide two different services to two different customers—the **interconnection customer** (the QF) and the **transmission customer (**the utility, who is required under FERC precedent to request firm transmission service to deliver a QF's power); and
>
> - Subject to two different regulatory regimes—the state regulatory commission (with jurisdiction over the QF interconnection); and FERC (with jurisdiction over the transmission service).[15]

Glen Canyon is the interconnection customer. PacifiCorp ESM is the transmission customer. The QF *interconnection* process, which is subject to this Commission's jurisdiction, is a matter between Glen Canyon as interconnection customer and PacifiCorp transmission as transmission provider under the OATT. Even Glen Canyon acknowledges this critical jurisdictional distinction and the two separate processes:

> The above-referenced process for an Interconnection Request does not, even after a LGIA is executed, guarantee transmission service for the QF's output. Rather, the transmission customer (RMP) must submit a TSR to PacTrans to obtain transmission service for QF output. The TSR process is governed by Section III of the OATT. The TSR process is separate and distinct from the Interconnection Request process, although the studies performed and the results of the Interconnection Request process inform the TSR process.[16]

Glen Canyon's new assertion that it is not resting its case on the FERC-jurisdictional NOA

[15] Motion to Dismiss at 3 (emphasis added).
[16] Glen Canyon Solar's Motion for Preliminary Injunction, Docket No. 17-035-36, 7 (Aug. 11, 2017).

is belied by the fact that on August 11, 2017, the same day Glen Canyon submitted its Response to the Motion to Dismiss, Glen Canyon filed a Motion for a Preliminary Injunction, again asking the Commission to compel PacifiCorp ESM, as the *transmission customer*, "to promptly communicate to PacifiCorp Transmission Services . . . all information, directions, requests or assumptions required to ensure that PacTrans will perform interconnection studies relating to the Glen Canyon Solar QF projects that will include assumptions regarding the use of RMP's existing transmission rights and resource re-dispatch options and the resulting potential to avoid unnecessary Network Upgrades."[17] Again, Glen Canyon bases its request in the FERC-jurisdictional NOA amendment. As if to underscore this point, the Motion for Preliminary Injunction again attaches PacifiCorp's FERC NOA amendment filing and the FERC order accepting it. Glen Canyon attempts to simultaneously argue for relief under the FERC-jurisdictional NOA (which cannot be granted in the interconnection process because the NOA governs transmission—not interconnection—service) while maintaining that this issue is entirely state jurisdictional. These two positions cannot reasonably be reconciled.

In its response to Rocky Mountain Power's Motion to Dismiss, the Division of Public Utilities (DPU) makes a similar claim regarding this Commission's jurisdiction to grant the relief. DPU acknowledges that "the NOAA and its application are exclusively FERC jurisdictional matters."[18] However, the DPU concludes: "While the Commission may lack authority to either apply the NOAA directly to the Glen Canyon facility or any other transmission agreement, the Commission has authority to require RMP to operate in a manner that is the lowest cost to customers. Moreover, the Commission has authority to require RMP to act prudently."[19]

[17] *Id.* at 1-2.
[18] Utah Division of Public Utilities' Response to Rocky Mountain Power's Motion to Dismiss, Docket No. 17-035-35, 3 (Aug. 11, 2017) (hereinafter DPU Response).
[19] *Id.* at 4.

Rocky Mountain Power agrees with DPU in one critical respect. The best way to protect customers is to honor PURPA's requirement that customers be held harmless from the economic effects of incorporating a QF's output on the system, which is precisely Rocky Mountain Power's goal.[20] DPU's broad theory of over-arching state jurisdiction that could be used to order the company to redispatch generation to accommodate a QF interconnection would not only appear to render FERC's exclusive jurisdiction over transmission a nullity, but it unequivocally would ***not*** result in the lowest cost to customers. Consistent with this Commission's policies, QFs must be held financially responsible for all interconnection costs needed to allow the company to receive the QF's net output on a firm basis. Shifting those costs to customers—whether in the form of generation redispatch or the construction of upgrades—is inconsistent with PURPA's core principle of customer indifference.

### C. Accepting the Facts as True Still Requires Dismissal

In its Response, Glen Canyon argues that Rocky Mountain Power introduced factual disputes in its Motion to Dismiss that, in Glen Canyon's view, reveal the need for a hearing on the merits. Glen Canyon is wrong. Glen Canyon takes issue with Rocky Mountain Power's jurisdictional analysis and its description of the OATT process. However, even viewing all facts in a light most favorable to Glen Canyon, the jurisdictional analysis is entirely a legal question, the resolution of which requires dismissal of Glen Canyon's Request for Agency Action. If this Commission concludes, as Rocky Mountain Power respectfully suggests it should, that it does not have the authority to insert itself into the relationship between PacifiCorp ESM as transmission customer and PacifiCorp transmission as transmission provider under the OATT and the NOA,

[20] While not germane to the Motion to Dismiss, PacifiCorp categorically rejects the notion asserted by Glen Canyon that PacifiCorp is trying to "thwart" QF development to "benefit" PacifiCorp. Response at 11. PacifiCorp does not benefit from the incorrect allocation of upgrade costs. PacifiCorp's customers, however, will bear a direct burden if required to pay for upgrades caused by QF interconnections.

then the disputed facts are of no importance. Rocky Mountain Power's Motion to Dismiss explains in detail why this case should be dismissed on those grounds alone. The existence of disputed facts, if any, is irrelevant.

### D. Glen Canyon's Claim Remains Unripe

In its Motion to Dismiss, Rocky Mountain Power explained that this case is not yet ripe because the interconnection study process is still underway, and Glen Canyon's liability for network upgrade costs has not yet been determined. If the higher-queued projects require network upgrades that can also facilitate Glen Canyon's interconnection, then Glen Canyon's interconnection study may not identify any additional network upgrades, which would render Glen Canyon's Request moot. Thus, Glen Canyon is merely seeking the hypothetical application of a provision of a FERC-jurisdictional agreement to a future interconnection study that might not even identify network upgrade costs that Glen Canyon disputes. Indeed, due to the long queue of projects ahead of Glen Canyon, such a determination at this point would be highly speculative at best.

Glen Canyon disagrees and believes its claims have now "sharpened into an actual or imminent clash of legal rights and obligations."[21] DPU similarly argues the claim is now ripe.[22] Glen Canyon and DPU characterize the ongoing nature of the interconnection study as merely an "intervening event" that should not stand in the way of an otherwise justiciable claim. This argument understates the fluid nature of interconnection studies. As of the date of this filing, there are seven higher-queued projects in line for interconnection service that need to be studied before the Glen Canyon interconnection request. Higher-queued projects often require transmission

[21] Glen Canyon Response at 24.
[22] DPU Response at 4-5.

facilities that then negate the need for a later project to fund that same upgrade. The interconnection process, which is ongoing and incomplete, is not an insignificant "intervening" event; rather, it is the critical event giving rise to the costs that Glen Canyon seeks to avoid, but those costs simply have not yet been assigned to Glen Canyon. Courts have disfavored ruling in cases in which there is no "actual or imminent clash of legal rights and obligations."[23]

### E. Glen Canyon's Relief Cannot be Granted in Any Event

While the jurisdictional analysis alone provides sufficient grounds for dismissal of Glen Canyon's Request for Agency Action, Rocky Mountain Power emphasizes that the relief Glen Canyon seeks cannot be granted in any event. Redispatching generation under the NOA amendment requires that transmission is available. Here, however, the transmission required to deliver the output of the Glen Canyon QFs is not available because of PacifiCorp's obligations to APS under a FERC-jurisdictional legacy transmission contract. Rocky Mountain Power noted this restriction in its Motion to Dismiss and then describes it in more detail in the direct testimony in this case filed on August 31, 2017.[24]

## V. CONCLUSION

The Commission should grant Rocky Mountain Power's Motion to Dismiss because FERC has exclusive jurisdiction over the NOA amendment, which is a key element of Glen Canyon's requested relief, and because Glen Canyon's Request is unripe.

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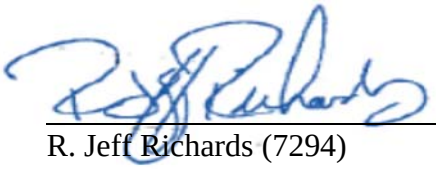
[23] *See, e.g., Redwood Gym v. Salt Lake County Comm'n*, 624 P.2d 1138, 1148 (Utah 1981) (noting that ripeness occurs when "a conflict over the application of a legal provision [has] sharpened into an actual or imminent clash of legal rights and obligations between the parties thereto."). *See also, Boyle v. Nat'l Union Fire Ins. Co.*, 866 P.2d 595, 598 (Utah Ct. App. 1993) (determining that the appellant's claim was unripe because it would have required the trial court to determine whether certain insurance policies issued by the defendant insurance company to the insured co-defendants were valid and enforceable before there was any determination of liability on behalf of the insureds); *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Lindberg*, 238 P.3d 1054, 1066 (Utah 2010) (rejecting a plaintiff's claim as unripe because it alleged only that the district court might use religion as a basis for determining property distributions, but did not allege that any such determination by the district court had taken place or was imminent).

[24] Direct Testimony of Kelcey A. Brown, Docket No. 17-035-36, lines 31-52 (Aug. 31, 2017).

RESPECTFULLY SUBMITTED: September 8, 2017



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**CERTIFICATE OF SERVICE**

Docket No. 17-035-36

I hereby certify that on September 8, 2017, a true and correct copy of the foregoing was served by electronic mail to the following:

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