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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE REQUEST OF ROCKY MOUNTAIN POWER FOR APPROVAL OF RESOURCE DECISION TO CONSTRUCT WIND RESOURCE AND TRANSMISSION FACILITIES	)))	Docket No.17- 035-40

ANSWER TESTIMONY OF GREGORY F. JENNER

FILED ON BEHALF OF

THE INTERWEST ENERGY ALLIANCE

DECEMBER 5, 2017

I. INTRODUCTION AND SUMMARY

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Gregory F. Jenner. My business address is Stoel Rives LLP, 601 13th Street NW, Suite 850 N, Washington, DC 20005.

Q. BY WHOM ARE YOU EMPLOYED AND HOW ARE YOU RETAINED IN THIS PROCEEDING?

A. I am a partner in the law firm of Stoel Rives LLP. I am retained by the Interwest Energy Alliance to provide expert testimony in this docket. I do not provide tax advice to any party herein, but I am retained to provide my opinions about how the production tax credits can provide value to electricity consumers through the acquisition of the new wind projects and transmission development proposed by Rocky Mountain Power in this proceeding. I have never testified before the Utah Public Service Commission. My bio is attached as Exhibit IEA 1.1, GFJ-1.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. I testify about the respective impact of the production tax credit and proposed corporate tax rate reduction on values of the production tax credit and how changes to the tax structure can affect utilities which pass on the benefits of renewable energy acquisitions to consumers.

Q. PLEASE PROVIDE A SUMMARY OF YOUR PRIMARY CONCLUSIONS AND RECOMMENDATIONS.

A. I conclude that the production tax credit can provide substantial savings to electricity consumers in the event of timely acquisitions by Rocky Mountain Power as proposed in this proceeding. I provide high level description of how utilities have flexibility related to their responses to changes to the tax structure as contemplated by current tax reform measures in Congress.

Q. PLEASE DESCRIBE YOUR BACKGROUND AND EXPERIENCE RELATED TO TAX ISSUES AS THEY APPLY TO RENEWABLE ENERGY.

A. Since joining Stoel Rives in 2008, I have spent and continue to spend approximately 85 percent of my billable time on tax issues related to renewable energy. My work includes advising clients on the laws and regulations in order to qualify for tax incentives for renewables, structuring and negotiating transactions that permit investors to claim most of the available tax benefits, advocating on behalf of clients with the Congress, Treasury Department and IRS, and representing clients in audits and controversies opposite the IRS.

I also act informally as the firm's expert of tax policy issues, particularly focused on developments in Washington, DC, whether in Congress, the courts, the Internal Revenue Service or the Treasury Department's Office of Tax Policy.

In addition, during my periods of service in the government, I worked on various energy issues. In particular, I was Treasury's point person on energy during Congressional consideration of the 2004 tax bill (the American Jobs Creation Act of 2004).

I also speak frequently at industry and technical seminars on renewable energy tax issues, as well as on tax policy issues such as tax reform.

II. ANALYSIS AND RECOMMENDATIONS REGARDING THE PTC

Q. ARE THE EXISTING FEDERAL TAX POLICIES CURRENTLY FAVORABLE FOR RENEWABLE ENERGY INVESTMENTS?

A. Yes, the federal production tax credit ("PTC") available for wind energy has (on an inflation-adjusted basis) just reached its highest value ever. Pursuant to amendments enacted in 2015, the PTC will begin to phase down (based on when construction of the project begins), eventually reaching zero for projects the construction of which begins after 2019. Because of that scheduled phase down, taxpayers are accelerating their development of and investments in wind projects, including large utilities like PacifiCorp.

The PTC (as set forth in IRC § 45) is determined based on the amount of electricity produced by the facility and sold to unrelated third parties. Owners of wind facilities may claim the PTC over 10 years, at the current rate of 2.4 cents per kilowatt hour (adjusted for inflation).[1]

[1] Tax credits, such as the PTC and the ITC (discussed below), provide a dollar-for-dollar offset of tax liability. In other words, $1 of credit reduces the taxpayer's tax liability by $1.

The Energy Investment Tax Credit ("ITC"), available for solar and, by election, other technologies, is equal to 30 percent of the qualified cost of the energy facility (rather than the amount of electricity produced and sold). Like the PTC, the ITC (as set forth in IRC § 48) also is subject to a phase down, eventually reaching 10 percent (not zero) for projects the construction of which begins after 2021.[2]

Utilities are also heavily investing in grid-scale solar energy to acquire those benefits for their electricity consumers. Over the last decade, the cost of producing solar energy has declined dramatically, making solar (when combined with the various tax incentives) a strong competitor for investment dollars.

Finally, although not as pertinent as the two tax credits described above, both wind and solar are entitled to accelerated depreciation at an extremely fast rate (five years), adding to the value of tax incentives provided by the federal government.

Q. PLEASE DESCRIBE GENERALLY HOW ROCKY MOUNTAIN POWER INTENDS FOR ITS ELECTRICITY CONSUMERS TO BENEFIT FROM THE FEDERAL TAX CREDITS AVAILABLE FOR WIND ENERGY.

A. The PTC may only be claimed by an owner (direct or indirect) of the facility that produces and sells the electricity to an unrelated person. Rocky Mountain Power ("RMP") will own wind facilities, either by building the projects itself ("self-built") or by acquisition of

[2] The House of Representatives version of the tax reform bill would (in section 3502 of the bill), if enacted, reduce the ITC to zero for projects the construction of which began after 2027.

projects built by others.[3] RMP, as owner, would be eligible to claim the PTC for electricity produced and sold by these projects. In addition, RMP could purchase electricity produced by wind facilities owned by independent power producers. RMP would not be eligible to claim the PTC with respect to these projects but, presumably, would benefit indirectly from the PTC as result of lower cost for purchased electricity.

Q. WHAT VALUES DOES ROCKY MOUNTAIN POWER PROJECT FOR THE PRODUCTION TAX CREDITS?

A. According to projections provided by PacifiCorp, the benefits vary depending on various assumptions developed during the Integrated Resource Planning Process. These projects are included in the Rocky Mountain Power testimony and discovery, and I will not repeat the range here but in the aggregate they are likely to be substantial, assuming the most predictable range of potential changes in the federal tax code.[4] The benefits are also affected by natural gas price and carbon price assumptions and other variables, which I do not provide testimony about here.

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[3] This could be done by means of "build-transfer" arrangement, whereby an independent developer arranges for RMP to acquire the project upon completion, or by the acquisition of an already-completed project that has been in service for fewer than 10 years.

[4] As of the date of this testimony, it appears highly likely that a tax cut bill will be enacted before the end of 2017. Both the House and Senate versions (as passed) would enact a 20 percent corporate tax rate. However, it is highly likely that this rate will be adjusted upward as the bills are reconciled in conference committee, probably in the range of 22-23 percent.

Q. HAVE YOU EXPERIENCE RELATED TO VALUATION OF THE BENEFITS OF PRODUCTION TAX CREDITS TO OWNERS OF WIND ENERGY GENERATION PLANTS?

A. Yes. Because many developer-owners of wind facilities lack sufficient tax liability to fully utilize the PTCs available from a project, they frequently seek out investors whose primary return from their investment will be the tax benefits generated by the project (called "tax equity investors"). Tax equity investment enables developers to maximize the tax benefits provided by the government for wind (as well as solar and other technologies). Tax equity investments are highly structured and extremely complex, requiring sophisticated tax advice to both sides (developers and investors). A significant portion of my legal practice involves tax equity transactions. I estimate that I have been involved in over $5 billion of such transactions. Each such transaction keys off of the amount of tax benefits being provided to the project through the PTC (or ITC) as well as through tax losses generated primarily by accelerated depreciation.

I do not and did not in this case conduct any modeling, but I have reviewed the analyses provided in Exhibits JKL-2 and JKL-3 attached to Jeff Larson's pre-filed testimony submitted with the Application in this proceeding, and discovery responses OCS Requests 3.1-1 and 3.1-2. The phase down of the PTC (based on when construction of the facility began) will, in general, provide a direct reduction in the tax benefits available for a project. For example, a wind project for which construction began in 2016 would produce PTCs equal to $24 (assuming the current PTC rate) for each megawatt-hour of electricity produced over 10 years, whereas a wind project for which construction began in 2017 would produce PTCs equal to only $19.20 for the same megawatt-hour of electricity produced.[5]

Q. ROCKY MOUNTAIN POWER HAS INDICATED THAT TIME IS OF THE ESSENCE FOR UTAH'S APPROVAL OF ITS NEW WIND PROJECTS ALONG WITH THE ASSOCIATED TRANSMISSION INVESTMENTS. DO THEY NEED TO MOVE QUICKLY TO QUALIFY FOR THE 100% PTC?

A. Yes. PacifiCorp has modeled the wind projects to be cost effective assuming they qualify for 100% of the PTC. Full eligibility for the PTCs required commencement of construction by December 31, 2016. In order to be treated by the IRS as having begun construction, PacifiCorp must have in place a plan for continuous construction (or continuous efforts).[6] According to IRS Guidance (the latest being Notice 2017-4), PacifiCorp will be considered to have such a plan in place if it places the project in service not later than the end of the fourth year following the year in which construction began. Thus, a project for which construction began in 2016 will be treated as meeting the "continuity" requirement if the project is placed in service not later than December 31, 2020.

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[5] The calculation of the effect of the phase down for solar is more complicated because of the requirement under IRC § 50(c) that the tax basis of energy property eligible for the ITC be reduced by 50 percent of the ITC claimed.

[6] Under IRS Guidance, a taxpayer can begin construction in one of two, alternative ways:
(1) physical work of a significant nature; and (2) the so-called 5 percent safe harbor. We understand that PacifiCorp used the 5 percent safe harbor, which is met if the taxpayer pays or incurs 5 percent or more of the total qualified cost of the facility by the end of the year in which construction is considered to have begun.

According to Chad Teply's pre-filed direct testimony filed in this docket at page 7 (June, 2017), PacifiCorp purchased the necessary equipment to qualify for the 5 percent safe harbor by the end of December, 2016.[7] In addition, PacifiCorp has proposed benchmark projects which will include assignment of the safe harbored investments by third party developers under an EPC contract.[8] Projects that do not qualify for PTCs at the 100% level (because construction was begun after 2016) are also able to compete in the RFP, although it is still assumed they will be online by December 31, 2020.

Rocky Mountain Power requests approval by March 30, 2018, with signature of EPC contracts (assuming utility benchmark projects are selected from the RFP) or final negotiation of PPAs soon thereafter. Wind projects can be completed within 2 years under normal circumstances. The transmission line development will depend on a number of other factors which I have not reviewed in detail.

In order to be "deemed" to meet the continuity requirement described above, the wind facilities must be "placed in service" for tax purposes not later than December 31, 2020. The IRS considers an asset to be "placed in service" when the asset is in a "condition or state of readiness and availability for its specifically assigned function." If the wind projects are not

[7] I have not reviewed whether such purchases met the requirements for beginning construction by means of the 5 percent safe harbor.

[8] IRS Guidance (specifically Notices 2013-60 and 2014-46) permits certain transferees of projects for which construction was begun by other taxpayers to nevertheless be treated as having begun construction for purposes of the PTC.

placed in service by the end of 2020, they may still be considered to meet the "continuity" requirement based on the various facts and circumstances.[9]

In order to be placed in service, a wind facility generally must be ready to operate. If it is not (or is prevented from doing so), then it is possible the IRS could argue that the facility is not in service. So, for example, if a wind facility cannot transfer power to the grid because it is not connected to a transmission line, the IRS could argue that the facility was not yet in service because it was not yet in a state of readiness for its assigned function.

Therefore, PacifiCorp seeks to be interconnected to the new line on or before December 31, 2020 in order to be: (1) in service; (2) thus meeting the "continuity" requirement; (3) qualifying for the full PTC; and (4) thereby providing to customers the full benefit of tax incentives provided by the federal government. We note that the same analysis should apply to projects developed and owned by independent power producers, should their projects be selected pursuant to the RFP. Instead, the actual bids submitted in the RFP will be modeled and the most cost-effective projects chosen.

[9] Not surprisingly, developer/owners of projects seek certainty by attempting in all instances to place the facility in service within four calendar years of the year in which construction begins. The IRS Guidance sets forth factors the IRS will consider in determining whether continuity has been achieved under a facts and circumstances analysis but given the magnitude of an investment in wind developers are not willing to take the risk that the IRS will rule in their favor.

Q. ROCKY MOUNTAIN POWER HAS INDICATED THAT INDIVIDUAL WIND TURBINES MAY BE TREATED AS HAVING BEEN "PLACED IN SERVICE" RATHER THAN THE ENTIRE WIND FACILITY. IS IT POSSIBLE, FOR PURPOSES OF THE DECEMBER 31, 2020 DEADLINE, THAT INDIVIDUAL TURBINES WILL BE CONSIDERED TO BE PLACED IN SERVICE?

A. Yes. The IRS Guidance provides, in general, that each wind turbine will be treated as a separate facility. Therefore, it is entirely possible that fewer than all the wind turbines making up a project can be treated as being in service for tax purposes even though the entire project is not. For example, assume that a project consists of 100 turbines, only 50 of which have been "commissioned" by December 31, 2020. Assuming that the turbines can be operated and metered separately, those 50 turbines will be considered to have been placed in service in 2020. The remaining 50 turbines would be treated as in service when they met that requirement.

Any delay in approval of the projects, therefore, can be mitigated by a developer/owner by focusing construction on as many turbines as the developer/owner can place in service before the end of 2020.

Q. DOES THE CORPORATE TAX RATE AFFECT THE VALUE OF PRODUCTION TAX CREDITS?

A. No. As noted earlier, the PTC provides a dollar-for-dollar offset against the taxpayer's tax liability. Unlike a tax deduction a tax credit is not affected by the rate of tax applicable to the taxpayer.

It is possible that a reduction of tax rates could reduce a taxpayer's overall tax liability (including taxes payable on other income of the taxpayer) below the point at which the taxpayer can use all the PTCs available to the taxpayer. In that instance, however, the taxpayer is permitted to "carry" the PTC back to the preceding tax year and then forward to the following 20 years.[10]

An example would be useful. Assume an owner of a wind facility has income of $100 in 2021, and PTCs of $30. If the applicable tax rate in 2021 is 35%, the taxpayer could apply all of its PTCs in that year, reducing its tax liability to $5. A reduction of tax rates applicable to the taxpayer would not change the amount of PTCs for which it eligible but would reduce the tax liability (before credits) of the taxpayer. Assume, instead, that the applicable tax rate is 25%. In that case, the tax liability before credits would only be $25, meaning that the taxpayer could only use $25 of PTCs to reduce its tax liability to zero. In that case, the taxpayer could first "carry" the $5 of unused PTCs back to tax year 2020 (filing for a refund) and then forward to tax years 2022-2041.

The inability of a taxpayer to use all of its PTCs in the year they are generated could affect their value slightly to the taxpayer on a present value basis. In other words, the present value of a tax credit claimed next year would be less than a tax credit claimed this year. That is the only way in which the reduction in corporate tax rates would affect the value of PTCs.[11]

[10] IRC § 39.
[11] There should be no diminution in the value of PTCs, even on a present value basis, to the extent they can be carried back to the preceding tax year.

Q. IS THIS A LINEAR REDUCTION YEAR BY YEAR DURING THE TERM OF THE PPA OR LIFE OF THE PROJECT?

A. No. The ability to carry credits back one year and forward twenty years means that the possible effect of rate reductions is virtually non-existent. The tax liability of utilities, like other sectors, will vary from year to year depending on the rates of return on equity and a myriad of other values affecting profits and losses.

Q. DO YOU HAVE ANY EXPERIENCE RELATED TO ANALYSIS OF THE IMPACT OF CONGRESSIONAL ACTION ON THE VALUE OF FEDERAL TAX CREDITS FOR RENEWABLE ENERGY FACILITIES?

A. Yes. Because my practice (and that of my firm generally) is heavily focused on renewable energy, we spend considerable amounts of time evaluating the effect of tax changes.

Q. ARE YOU CURRENTLY MONITORING THE ACTIVITIES OF CONGRESS RELATED TO TAX REFORM?

A. Yes. Because of my substantial experience in the tax policy process, including my service in Congress and at Treasury, my clients and my law firm look to me as a primary source of information on tax reform. I have given numerous speeches about the process and likely outcome. To say I am immersed in tax reform is not an exaggeration.

Q. WHAT ARE YOUR OVERALL IMPRESSIONS AS THEY RELATE TO REVIEW OF FEDERAL TAX CREDITS?

A. On November 16, the House of Representatives passed its version of tax reform. On the same day, the Senate Finance Committee approved a tax reform bill to be considered on the Senate floor. That bill has now passed the Senate. The two versions (House and Senate) must still be reconciled in a conference committee and resubmitted to the two chambers for final passage.

It is our current impression that the legislation being considered will not have a significant direct impact on renewable energy, at least in the short term. The House bill does contain limitations on the PTC, however, which could affect the amount of PTCs available for future projects. In essence, the House bill repeals the inflation adjustment for the PTC, making projects for which construction begins after the date of enactment eligible only for a 1.5 cent per kilowatt hour PTC instead of the current 2.4 cent per kilowatt hour credit (reduced further by the phaseout of the credit depending on the year in which construction begins).

The Senate bill would not have a direct effect on renewables owned by a utility. The other change which could inject uncertainty relates to the "continuity" requirement discussed previously. The House bill purports to "codify" the IRS Guidance regarding continuity. It is not yet clear what the goal of this codification is and what its effect would be, if finally enacted. My expectation, however, is that the provision will not be enacted. There is significant opposition to it being expressed in the Senate and, not surprisingly, furious efforts to ensure it is not included in the final bill.[12]

Q. WHY NOT?

A. My observations are that it would be politically untenable to renege on commitments made to step down the production tax credits in a predictable manner as was included in the 2015 Act. Billions of dollars of investment are riding on Congress not retroactively changing the rules after investment decisions have been made, including those made by some of the largest utilities and national and international corporations. In addition, wind energy is a strong economic driver in many rural areas around the country, which is recognized by powerful members of the Senate, such as Senators Charles Grassley (R-IA) and John Thune (R-SD).

Q. WHEN WILL WE KNOW?

A. Predicting when Congress will act is always tricky. There are many factors, including some extraneous to tax reform itself, that could interfere.

The President and Congressional leadership have expressed the goal of passing tax legislation by Christmas. I believe that is highly likely at this point. However, the complexity involved in reconciling the two versions of the bill, together with the other tasks Congress must accomplish by year end, makes it possible (although unlikely) that the legislation could spill over

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[12] See GTM: Nov 6, 2017 “House Tax Proposal Unsettles the US Wind Industry”. The House bill destabilizes tax equity, 80-20 repowering efforts and the 80 percent PTC value safe-harboring of turbines, threatening to severely curtail the upcoming four-year installation forecast for the wind industry if it were to become law. Attached as Exhibit IEA 1.2, GFJ-2.

into 2018. If that occurs, it will not spill over too far, first because Congress will want to keep up momentum and second because members (particularly in the House) will begin to focus on reelection instead

Q. WHAT ARE YOUR OVERALL IMPRESSIONS AS THEY RELATE TO THE CORPORATE TAX RATE?

A. Congress is invested, as is the President, in a significant reduction in the corporate tax rate. Both the House and Senate bills reduce the corporate rate to 20 percent.[13] That said, political pressure may be such that provisions that provide offsetting revenues may have to be dropped or significantly cut back. Because the aggregate tax cuts cannot exceed $1.5 trillion over ten years,[14] it is possible that the final bill provides a corporate tax rate somewhat higher than 20 percent (but not significantly so).

Q. DO CORPORATE TAX RATES AFFECT THE VALUE OF THE PRODUCTION TAX CREDITS FOR A UTILITY WHICH OWNS A WIND ENERGY FACILITY OR ITS PURCHASING POWER FROM A WIND ENERGY FACILITY UNDER A PURCHASE POWER AGREEMENT?

A. Not directly. As noted above, a reduction in corporate tax rates could affect the "tax appetite" for PTCs. Absent that, however, there would be no direct effect.

[13] The Senate bill delays that rate reduction to 2019, however.
[14] Pursuant to the budget resolution under which the tax bill is being considered.

Q. DO CORPORATE TAX RATES AFFECT THE VALUE OF PRODUCTION TAX CREDITS FOR ROCKY MOUNTAIN POWER'S PROPOSED WIND FACILITIES?

A. Yes, Rocky Mountain Power has provided analysis of how a change in corporate tax rates will affect the value of production tax credits which it anticipates it will acquire by virtue of ownership of or purchase of power from the new wind facilities.

This would come about because the higher the corporate tax rate, the greater the benefit to ratepayers. In effect, the investment in renewables feeds back into the rate structure providing a benefit directly correlated to the rate of tax.[15]

Q. ARE OTHER UTILITIES USING THE SAVINGS PROVIDED FROM PRODUCTION TAX CREDITS TO SPUR INVESTMENTS IN WIND ENERGY AND THE GRID?

Absolutely. The wind industry is thriving and many utilities are participating. This is due partially to the enacted phase down of the PTC, the reduced price for renewables and the increasing demand among consumers.[16]

PacifiCorp's proposal is expansive but pencils out under medium and high natural gas prices. It is likely to bring substantial savings. Concerns about the stability of federal tax

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[15] Referred to as the "Gross Up for Taxes."
[16] https://www.fool.com/investing/2017/09/28/4-utilities-betting-billions-on-renewable-energy.aspx

policy should not be used to oppose the projects because these policies will likely stabilize favorably for the wind industry in the near future.

Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?

A. Yes, it does.

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AFFIDAVIT, OATH AND VERIFICATION

Gregory F. Jenner, ("Affiant") being of lawful age and being first duly sworn, hereby deposes and states as follows:

1. My name is Gregory F. Jenner. I am a partner in the law firm of Stoel Rives, LLP. I have been retained to provide expert testimony on behalf of the Interwest Energy Alliance, which is a party in this matter.

2. Attached hereto and made a part hereof for all purposes is my Direct Testimony and Exhibits, which have been prepared in written form for introduction into evidence in Docket No. 17-035-40.

3. I hereby swear and affirm that my answers contained in the testimony are true and correct and constitute my recommendations in my capacity as expert witness in this matter.

Dated this 1st day of December, 2017.

Gregory F. Jenner

~~STATE OF~~ District of Columbia
) ss
County of ______________)

Subscribed and sworn to before me by Gregory F. Jenner on this 1st day of December, 2017.

Witness my hand and official seal.

My commission expires:

Notary Public

KATHY E. MCDANIEL
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires July 14, 2021

KATHY E. MCDANIEL
NOTARY PUBLIC
EXP. 7-14-21
DISTRICT OF COLUMBIA