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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

APPLICATION OF ROCKY MOUNTAIN POWER FOR APPROVAL OF POWER PURCHASE AGREEMENT BETWEEN PACIFICORP AND MONTICELLO WIND FARM, LLC	Docket No. 17-035-68 **DIVISION MOTION FOR SUMMARY JUDGMENT**

Pursuant to Utah Admin. Code r.746-100 and Rules 7 and 56 of the Utah R. Civ. P., the Utah Division of Public Utilities ("Division") files this Motion for Summary Judgment. The undisputed facts establish that the Power Purchase Agreement ("PPA") submitted by Rocky Mountain Power ("RMP") in this docket does not comply with Rocky Mountain Power Electric Service Schedule No. 38 ("Schedule 38") and should not be approved by the Public Service Commission of Utah ("Commission"). The Commission should grant summary judgment in favor of the Division and deny the Application.

INTRODUCTION

On December 20, 2017, Rocky Mountain Power filed with the Commission an Application for approval of a Power Purchase Agreement ("PPA") with Monticello Wind Farm, LLC ("MWF"). MWF is a subsidiary of Ellis-Hall Consultants, LLC ("EHC") and is the entity created for the EHC wind project in southern Utah. EHC received indicative pricing for a proposed wind project in 2012. EHC's receipt of indicative pricing in 2012 was prior to the Commission issuing an Order in Docket No. 12-035-100 that changed the method for calculating QF pricing.[1] EHC challenged the application of that order to its indicative pricing proposal. The matter was argued before the Utah Supreme Court, which issued an order on July 2, 2016.[2]

Beginning in 2014, the Commission reviewed the procedures for QF contract negotiations.[3] The Commission issued a final order changing the procedure for QF contract negotiations, including new milestone deadlines. Schedule 38 and Commission final orders are law.[4] Those procedural requirements are applicable to all QF contracts on a going forward basis whether new or in the queue. The contract negotiation process between MWF and RMP did not comply with the requirements. The operation of the new Schedule 38 procedures requires that the MWF QF project be removed from the queue and the associated indicative prices and proposed agreement be invalidated.[5]

[1] *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).
[2] *Ellis-Hall Consultants v. Public Service Commission*, 2016 UT 34, 379 P.3d 1270.
[3] *In the Matter of the Review of Electric Service Schedule No. 38, Qualifying Facilities Procedures, and Other Related Procedural Issues*, Docket No. 14-035-140.
[4] *Ellis-Hall*, 2016 UT 34, ¶ 31, 379 P.3d 1270, 1274.
[5] *See* Rocky Mountain Power Electric Service Schedule No. 38, Effective August 8, 2015.

The Commission issued a Scheduling Order in this docket setting March 9, 2018, as the date for dispositive motions. The Division's Motion, if granted, is dispositive of the Application. The Division requests summary judgment that the PPA did not meet the procedural requirements of Schedule 38 and therefore it must be rejected.

STATEMENT OF MATERIAL UNDISPUTED FACTS

1. EHC received its first indicative pricing in 2012.
2. MWF received notice that the Commission had issued an Order changing Schedule 38 on July 21, 2015.
3. MWF was a QF in the QF pricing queue on and after July 28, 2016.
4. RMP provided updated indicative pricing after July 28, 2016 for the MWF project on or before October 10, 2016.
5. RMP provided a proposed PPA to MWF on or before October 10, 2016.
6. RMP and MWF did not sign a final PPA before December 13, 2017.

ARGUMENT

The Commission should grant the Summary Judgment in favor of the Division. Summary Judgment shall be granted if "the moving party shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[6] The undisputed material facts in this case entitle the Division to summary judgment because the PPA is inconsistent with binding Schedule 38 procedure.

[6] Utah R. Civ. P. 56(c).

In Docket No. 14-035-140, the Commission investigated and resolved issues including queue management and power purchase agreement milestones. Schedule 38 procedure was ultimately modified by the Commission's June 9, 2015 Order in Docket No. 14-035-140 ("Schedule 38 Procedure Order").[7] The Schedule 38 Procedure Order is final. The time for appeal has passed. The updates to Schedule 38 procedure are therefore final and must be treated as law unless otherwise amended or modified by the Commission.

In the Schedule 38 Procedure Order the Commission "approve[d] the Settlement Agreement, and all of its terms and conditions, as modified by the following Schedule 38 language changes…" The only change potentially relevant to the instant docket was to "[p]repare a consistent definition of the term 'months' and insert it in Schedule 38, as discussed above."[8] The definition of the term "Month" to be included means 30 days.[9] With those changes, the Settlement Agreement was approved in its entirety, including the proposed Schedule 38 procedures. The Commission directed RMP to file a revised Schedule 38 with the requested modifications. RMP did so in Docket No. 15-035-T10. The revised Schedule 38 was filed on July 9, 2015, and approved by the Commission on August 3, 3015. The effective date of the current Schedule 38 was August 8, 2015.

EHC was a party to Docket No. 14-035-140 and had the opportunity to participate and full knowledge of the outcome. In fact, EHC filed a Motion to Stay the proceeding[10] as well as a

[7] *In the Matter of the Review of Electric Service Schedule No. 38, Qualifying Facilities Procedures, and Other Related Procedural Issues*, Docket No. 14-035-140, (Order Approving Settlement Agreement on Schedule 38 Procedures; June 9, 2015).
[8] *Id* at 10.
[9] *Id*.
[10] *In the Matter of the Review of Electric Service Schedule No. 38, Qualifying Facilities Procedures, and Other Related Procedural Issues*, Docket No. 14-035-140, (Ellis-Hall Consultants, LLC Motion to Stay; June 9, 2015).

Petition for Review and Rehearing.[11] The Commission denied both EHC's Motion to Stay and its Petition for Review and Rehearing on July 21, 2015. EHC did not appeal.

Because the Schedule 38 Procedure Order is final, the Commission cannot now waive the requirements. The Utah Supreme Court was very clear that "Schedule 38 is law. So are the orders issued by the Commission."[12] The Court held that "[b]ecause the words in the Commission's orders have the force of law, the Commission has no right to *revise* them by a later 'interpretation.' It is the Commission's orders and tariffs that have the force of law, not its privately held intentions." [13] The Court went on to explain that "an agency has no authority to override the terms of an issued order by vindicating the agency's 'true' intent. Agencies make law by issuing orders or promulgating regulations. Privately held intentions that contradict such rules are not law."[14] This reasoning is directly applicable to the facts at issue. When applied here *Ellis-Hall* demands rejection of the PPA.

The *Ellis-Hall* Court relied on three reasons for its ruling that EHC was entitled to proceed with the market proxy method. First, the court held that "the Phase One order nowhere mandates a new avoided cost methodology."[15] Rather it merely said that a new method *may* be necessary. "Second, the Phase Two order does not mandate retroactive application of the new Proxy/PDDRR methodology; it deems that methodology a "reasonable" one "for determining wind resource indicative prices going forward."[16] Importantly, to reach this conclusion the Court

[11] *In the Matter of the Review of Electric Service Schedule No. 38, Qualifying Facilities Procedures, and Other Related Procedural Issues*, Docket No. 14-035-140, (Ellis-Hall Consultants, LLC's Petition for Review and Rehearing and Reply in Support of its Motion to Stay; July 2, 2015).
[12] *Ellis-Hall*, 2016 UT 34, ¶ 31, 379 P.3d 1270, 1274.
[13] *Id*.(emphasis in original).
[14] *Id*.
[15] *Id.* at ¶ 38.
[16] *Id*. at ¶ 39.

relied only on the plain language of the order. "Nothing in the Phase Two order requires or even permits Rocky Mountain Power to issue a new indicative pricing proposal."[17] RMP was permitted only to follow the plain language of Schedule 38 and Commission orders. Third, the Court held that a "would-be qualifying facility [has] a right to receive 'indicative' pricing and does so for the purpose of allowing the wind power developer 'to make determinations regarding project planning, financing, and feasibility.'"[18]

Ellis-Hall recognized a critical distinction between interpretation of a new administrative order and enforcement of the plain language of an order. While *Ellis-Hall* involved interpretation, it did not foreclose the ability of the Commission to change schedule 38. "An agency, of course, may have the authority in certain circumstances to repeal a prior order and issue a new one. But such power is distinct from the power to *interpret* an existing order. And the Commission has not repealed Schedule 38 or either of its operative orders."[19] Recognition of that distinction is critical here. The language of the two administrative orders in *Ellis-Hall* did not allow RMP to withdraw the pricing method, but that does not foreclose the Commission from modifying Schedule 38 going forward.[20]

Just as predicted by the Court, the Commission *has* now repealed the prior Schedule 38 procedure and replaced it with the current Schedule 38. And while the *Ellis-Hall* court did not have knowledge of the changes being made to Schedule 38, that does not render them ineffective

[17] *Id.* at ¶ 40.
[18] *Id.* at ¶ 41.
[19] *Id*. at FN3.
[20] *Id.* at ¶ 44 ("That does not mean that Ellis–Hall has a right to require Rocky Mountain Power to enter into a power purchase agreement, or to require the Commission to approve such an agreement").

or exclude RMP or MWF from the requirements to follow them or the consequences of failure to do so. Utah case law is well settled that changes to procedural law apply.

> [P]rocedural statutes enacted subsequent to the initiation of a suit which do not enlarge, eliminate, or destroy vested or contractual rights apply not only to future actions, but also to accrued and pending actions as well. Generally, new procedural rules do not affect proceedings completed prior to enactment. Further proceedings in a pending case are governed by the new law. However, when the purpose of an amendment is to clarify the meaning of an earlier enactment, the amendment may be applied retroactively in pending actions.[21]

The Commission, RMP, EHC, and MWF are bound to the terms of the Commission's orders and changes to Schedule 38 procedure during the intervening time.

The Schedule 38 Procedure Order is unequivocal. Paragraph 25 of the adopted Settlement Agreement plainly states that all QFs currently in the QF pricing queue will be subject to the milestones and timing. RMP notified EHC on July 21, 2015 pursuant to that requirement.[22] The language of Schedule 38 further supports this. It states under the heading "APPLICATION" that it applies to "owners of existing or proposed QFS… who desire to make sales to the Company…"[23]

Arguably the clock should have begun running on the August 8, 2015 effective date of the new Schedule 38 procedures. However, that issue is not necessary to address. Giving the most favorable, plausible application of timing, assuming the clock was tolled during pendency of the appeal, the Order in *Ellis-Hall* was issued on July 28, 2016. As of that date EHC was in possession of its original indicative pricing and required to meet the timelines going forward.

[21] *State, Dept. of Social Services v. Higgs*, 656 P.2d 998, 1000–01 (Utah 1982)(internal citations omitted).
[22] Confidential Attachment A; ([redacted]).
[23] Schedule 38 p.3.

And even if the later updated indicative pricing and proposed PPA dates that were provided after the July 28, 2016 date are used, the PPA is still not compliant.

Effective August 6, 2015, Schedule 38 I.B.9 requires a pricing and method update to the proposed MWF project. It states that:

> Required Pricing Update. The prices in the proposed power purchase agreement provided by the Company under Section I.B.6 shall be recalculated by the Company using the most recent available pricing inputs and methods approved by the Commission, but without a change in the QF project's pricing queue priority, if the QF Developer and the Company have not executed a power purchase agreement within six (6) months after indicative pricing was provided by the Company under Section I.B.4, except to the extent delays are caused by Company actions or inactions, which may include delays in obtaining legal, credit or upper management approval by the Company.

By operation of Schedule 38 I.B.9 if six months (180 days) have passed without a signed agreement after indicative pricing was provided, the project *shall* be repriced with the most recent pricing inputs and methods. Even if the July 28, 2016 date is not considered the date of receipt of the indicative pricing, the current PPA still fails to meet the milestones by significant margins. After the Supreme Court's Order in *Ellis-Hall*, a new updated pricing was requested on or before September 2, 2016.[24] The Division has not yet identified the exact date that indicative pricing was provided to MWF. However, it is reasonably certain that the new indicative pricing post *Ellis-Hall* was provided on or before October 12, 2016 because MWF's own communications confirm it was in receipt of a PPA that would include indicative pricing.[25] Therefore Schedule 38 procedures required the PPA to be executed within six months of October

[24] Confidential Attachment B ([redacted]).
[25] Confidential Attachment C ([redacted]).

10, 2016. The PPA was not executed for over a year from that date. The PPA does not comply with Schedule 38. It must be rejected by the Commission.

Similarly, Schedule 38 I.B.10 requires that EHC's project be removed from the queue and the indicative prices be invalidated.

> Removal from QF Pricing Queue. In addition to the circumstances described in I.B.5 and I.B.7, at any time during the process outlined in I.B.3 through I.B.9, the Company shall remove a QF project from the QF pricing queue, and any associated indicative prices, proposed prices or proposed agreement previously provided will no longer be valid, if any of the following occurs with respect to a QF project:
>
> …(e) A PPA has not been executed by both parties within five (5) months after the proposed PPA was provided by the Company to the Developer, except to the extent delays are caused by Company actions or inactions.

RMP's PPA with MWF was not executed by both parties within five months (120 days) after the proposed PPA was provided by the RMP to MWF. Ellis Hall was in possession of a draft PPA on or before October 13, 2016.[26] Schedule 38 plainly states that it must be completed within five months or the QF *shall* be removed from the pricing queue. The PPA was not completed within five months. In fact, it was not completed within ten months. It was signed on December 13, 2017, over a year later.[27] It clearly did not meet the five-month procedural requirement from the date most favorable to RMP and MWF. Therefore, the MWF QF must be removed from the queue and the pricing invalidated.

Under both provisions of Schedule 38 as ordered by the Commission, the PPA presented by RMP in this docket must be rejected.

[26] *Id*.
[27] Arguably, it remains incomplete, with significant, relevant provisions missing such as site location.

CONCLUSION

Schedule 38 is law. Commission final orders are law. Procedural changes in law are applicable to further proceedings in pending cases. The Commission's Schedule 38 Procedural Order must be applied to proceedings in MWF. The milestone deadlines in Schedule 38 were effective as of August 8, 3015. They apply to all QFs in the pricing queue, including this one. The PPA proposed by RMP did not meet multiple required deadlines. By the plain language of Schedule 38, RMP was required to remove the MWF PPA from the queue and invalidate the pricing. The law applied to undisputed material facts entitles the Division to summary judgment. The Commission must deny the Application.

Submitted this 9th day of March 2018.

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