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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power for Approval of Power Purchase Agreement between PacifiCorp and Monticello Wind Farm, L.L.C.	)	Docket No. 17-035-68 Motion for Summary Judgement

Pursuant to Utah Code § 54-10a-301, Utah Admin. Code r. 746-1-105 and Utah R. Civ. P. 56(c), the Office of Consumer Services ("Office") files this Motion for Summary Judgement seeking an Order from the Utah Public Service Commission ("Commission") ruling that the instant Power Purchase Agreement ("PPA") cannot be approved in its present form because the avoided cost pricing for Monticello Wind Farm L.L.C.'s ("Monticello") electricity contained in the PPA was not calculated at either the time of delivery of the electricity or the time the obligation to purchase the electricity occurred, as required by 18 C.F.R. § 292.304(d). Therefore, any Order by this Commission allowing Monticello to use an avoided cost pricing calculation that is inconsistent with 18 C.F.R. § 292.304(d) is preempted by Federal Law. Because this issue concerns *implementation* of the Federal Energy Regulatory Commission's ("FERC") regulations promulgated under the Public Utility Regulatory Policies Act ("PURPA"),

final review of any Commission order addressing this issue is vested in the FERC and the federal courts.[1]

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Monticello obtained indictive pricing for its wind project on May 22, 2013. (May 22, 2013 Letter from Paul Clements of PacifiCorp d/b/a Rocky Mountain Power ("RMP") to Kimberly Ceruti of Ellis-Hall Consultants, obtained in response to Discovery Request OCS 1.2, attached as Exhibit "A.")

2. The PPA between RMP and Monticello was signed on December 13, 2017. (PPA attached as Exhibit "A" to RMP's Application for Approval of Power Purchase Agreement between PacifiCorp and Monticello Wind Farm. L.L.C.)

3. The price to be paid to Monticello for its electricity under the December 13, 2017 PPA is the same as the indicative pricing obtained in May 22, 2013. See Exhibit A attached hereto, and Exhibit A attached to Monticello's PPA.

4. The Commission can take "judicial notice" of Rocky Mountain Power's quarterly avoided cost filings applicable during early 2013 and late 2017 to see the significant disparity in pricing for the time periods associated with the 2013 indicative pricing and the execution of the PPA. *See* Docket No. 03-035-14 (2009 quarterly filing made on March 10, 2010) and Docket No. 17-035-37 (quarterly filing made on October 2, 2017).

[1] *See* 16 U.S.C. § 824 a-3(h) and *Greenwood V. N.H. Pub. Util. Comm'n,* 527 F. 3d 8, 10 (1st Cir. 2008); *Portland Gen. Elec. Co. v. FERC*, 854 F. 3d 692, 699 (D.C. Cir. 2017).

STANDARD OF DECISION

Summary Judgement should be granted when, viewing the facts and reasonable inferences that can be drawn from the facts in the light most favorable to the nonmoving party, there is no issue of genuine fact and the moving party is entitled to a judgement as a matter of law. Utah R. Civ. P. 56(c); *Suarez v. Grand County*, 2012 UT 72, ¶ 18, 296 P.3d 688.

ARGUMENT

In *Ellis-Hall Consultants v. Pub. Serv. Comm'n*, 2016 UT 34, 379 P.3d 1270, the Utah Supreme Court held that Ellis-Hall Consultants, now Monticello, was entitled to rely on the methodology employed in the indicative pricing proposal offered on May 22, 2013, and has "no obligation to submit a request for new indicative pricing as it moves forward in negotiations over a power purchase agreement with Rocky Mountain Power." *Id.* at ¶ 48. The Supreme Court reached this conclusion despite a change in methodology that occurred after Ellis-Hall obtained indicative pricing but before it had signed and obtained regulatory approval of a PPA. *Id.*

Specifically, the Supreme Court first ruled that it grants this Commission no discretion in reviewing this Commission's interpretation of its own orders and regulations. *Id. at* ¶¶ 27-31. The Supreme Court then turned to two orders from this Commission ("Methodology Orders")[2] relating to change in methodology for calculating avoided costs for large wind projects. In the first order the Commission denied a stay in the proceedings for obtaining regulatory approval for large wind project PPAs while the Commission considered RMP request to change methodology and allowed all wind projects to continue the process for obtaining a regulatory approved PPA under the existing methodology. *Id.* at ¶ 11. In the second order this Commission adopted a

[2] The two orders were issued by this Commission in Docket No. 12-035-100 on December 20, 2012 (Order on Motion to Stay Agency Action) and August 16, 2013 (Order on Phase II Issues), respectively.

new methodology for determining avoided costs for all wind projects "going forward." *Id.* at ¶ 12.

At the time of the second order, Ellis-Hall had obtained indicative pricing under the old methodology but had not yet signed a PPA. Relying on the second order, RMP refused to negotiate a PPA with Ellis-Hall under the indicative pricing arrived at under the old methodology. *Id.* at ¶ 13. Ellis-Hall filed a complaint with this Commission asserting its right to rely on the old indicative pricing. This Commission ruled against Ellis-Hall leading to an appeal resulting in the *Ellis-Hall* opinion. Again, in *Ellis-Hall*, the Supreme Court interpreted the two Methodology Orders and Schedule 38, de novo, and held that Ellis-Hall was entitled to "rely on the indicative pricing proposal it was provided in the past, and it has no obligation to submit a request for new indicative pricing." *Id.* at ¶ 48.

However, the Supreme Court did not reach this Commission's contention made at oral argument that state and federal law would prevent this Commission from approving a PPA based on indicative pricing under the old methodology ruling that this issue was not ripe. *Id.* at 47-48. After the *Ellis-Hall* opinion, RMP and Ellis-Hall negotiated a PPA based on the March 22, 2013 indicative pricing and presented the PPA for approval in the instant docket. At this point in time, the issue first raised by this Commission at oral argument is ripe for decision, i.e., does state and federal law prohibit the approval of a PPA based on indicative pricing received several years prior to the date the PPA was signed? The answer to this question is yes.

Although the Supreme Court opinion interpreting the Methodology Orders is unquestionably state law, federal law preempts these orders from application in the instant proceeding to approve Monticello's PPA.[3] As this Commission is aware, pursuant to the Federal

[3] The holdings provided by the Utah Supreme Court in *Ellis-Hall,* do not require the use of a particular price in the final PPA. The case merely held that Rocky Mountain and this Commission must follow contractual and regulatory

Power Act, 16 U.S.C. §§ 824(a)-(c) (2006), the FERC has preclusive jurisdiction over the wholesale interstate electricity market. PURPA provides a limited exception to the FERC's jurisdiction by authorizing the states to implement provisions of the federal statute. 16 U.S.C. § 824a-3(f). However, in implementing the federal statute the states must act in accordance of the mandates of PURPA and the FERC's rules promulgated under PURPA. *See Southern California Edison Co.*, 70 FERC 61,215, 66,676 (1995). If a state takes an action contrary to the FERC's regulations, it constitutes an act outside PURPA's jurisdictional exemption and is therefore preempted by federal law. *Connecticut Light & Power Co.*, 70 FERC 61,012, 61,012 (1995). Here, if the Methodology Orders, as interpreted by the Supreme Court, are used to implement an out-of-date price for avoided costs in a PPA consummated more than four years later, the result conflicts with the FERC's regulation 18 C.F.R. § 292.304(d)(2) and is therefore preempted.

By holding that pursuant to the Methodology Orders Ellis-Hall may *rely* on the indicative pricing it received on March 22, 2013 and that RMP cannot require Ellis-Hall to submit a new request for indicative pricing, the *Ellis-Hall* opinion has been interpreted as requiring a calculation of avoided costs for Ellis-Hall's electricity as of the time Ellis-Hall received its indicative pricing, regardless of the status of PPA's negotiations. As such, this interpretation of the Methodology Orders results in a PPA that stands in direct conflict with 18 C.F.R. § 292.304(d)(2), which provides that if a wind project seeks to sell its "energy or capacity pursuant to a legally enforceable obligation . . . over a specific term" as is the case in the instant docket, "rates for such purchases shall . . . be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred."

requirements in the *negotiation* of PPA contracts. It did not address issues related to a final PPA or mandate the imposition of an out-of-date pricing model in a legally enforceable obligation executed several years later that would violate federally promulgated regulations.

Here, the PPA sets the price for the electricity throughout the PPA term (and not for the price to be determined at the time of delivery). Accordingly, for the calculation of avoided costs to be consistent with 18 C.F.R. § 292.304(d)(2), the avoided costs must be calculated at the time the obligation was incurred. While the time a legally enforceable obligation ("LEO") occurs under section 292.304(d)(2) can be a complex issue, it is clear that under both federal and state law, a LEO cannot arise at the time when a prospective wind project receives indicative pricing, regardless of the status of the PPA's negotiations. *See generally In the Matter of the Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Thayn Hydro L.L.C.,* Docket No. 16-035-04, Order at pg. 13-15 (July 29, 2016 Utah P.S.C.)

Section 292.304(d)'s term "legally enforceable obligation" is broader than the common law concept of contractual obligation and this broader concept is meant to "prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract." *Cedar Creek Wind, LLC,* 137 FERC ¶ 61,006 at P. 36 (2011); *see also* Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,880. In addition to preventing a utility from circumventing its obligations under PURPA, the LEO doctrine is also based on the unilateral nature of a PURPA PPA stemming from PURPA's mandatory purchase requirement. *See* 18 C.F.R. § 292.303(a). That is "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations." *Cedar Creek Wind, LLC,* 137 FERC ¶ 61145 at P. 24 (2012); *see also JD Wind 1,* 129 FERC ¶ 61,148, at P. 25 (2009).

While the FERC's regulations and decisions set out the general parameters of the LEO doctrine, the determination of the precise date that a LEO arises is left to state law and the discretion of state authorities. *West Penn*, 71 FERC ¶ 61,153 at P. 61495 (1995). However, the

deference given to the states in determining the date of a LEO "is subject to the terms of the [FERC's] regulations. *West Penn* does not . . . give states the unlimited discretion to limit the ways a legally enforceable obligation is incurred." *Cedar Creek Wind, LLC,* 137 FERC ¶ 61,006 at P. 35 (2011). In several dockets the FERC has issued Declaratory Orders ruling that the state commissions' decisions establishing the time a LEO arises are contrary to its regulations. *Hydrodynamics Inc.*, 146 FERC ¶ 61,193, P. 33 (2014); *Grouse Creek Wind Park, LLC,* 142 FERC ¶ 66,187, at P. 40 (2013). Finally, there is apparent consensus among the states that have considered the issue that for a LEO to arise the QF project must be sufficiently developed to demonstrate its viability. *Whitehall Wind LLC v. Montana Public Service Comm'n,* 347 P.3d 1273, 1276-77 (Mont. 2015); *South River Power Partners v. Penn. Public Utility Comm'n*, 696 A.2d 926, 930 (Penn. 1997).

Here, construing the Methodology Orders as requiring the calculation of the avoided costs at the time of indicative pricing regardless of status of the negotiations, conflicts with 18 C.F.R. § 292.304(d)(2). Setting avoided costs at the time of indicative pricing regardless of the status of the PPA negotiations is contrary to the FERC's rationale underlying the LEO doctrine and, as is demonstrated by the facts in this case, can lead to a QF obtaining an avoided costs calculation years prior to when the PPA is signed. This use of outdated pricing also violates the principle of ratepayer indifference, i.e., ratepayers should remain indifferent to whether the utility obtains its energy from a QF or from a conventional source, because of the disparity in the Monticello pricing from the time the original indicative pricing was provided compared to the more current avoided cost pricing. See 16 U.S.C. §§ 824a-3(b)(1)-(2), 824a-3(d); 18 U.S.C. C.F.R. 292.101(b)(6), 292.304(a)(2).

CONCLUSION

The Office seeks an Order from the Commission ruling that the instant PPA cannot be approved in its present form because the avoided cost pricing for Monticello's electricity contained in the PPA was not calculated at either the time of delivery of the electricity or the time the obligation to purchase the electricity occurred, as required by 18 C.F.R. § 292.304(d). The avoided costs calculation contained in the PPA based on an interpretation of the Methodology Orders construed by the Utah Supreme Court embraces outdated pricing and is inconsistent with and preempted by federal law.

Respectfully submitted, March 9, 2018

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