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THE PUBLIC SERVICE COMMISSION OF UTAH

In re: Application of Rocky Mountain Power for Approval of Power Purchase Agreement Between PacifiCorp and Monticello Wind Farm, LLC,	Docket No. 17-035-68 **MONTICELLO WIND FARM, LLC AND ELLIS-HALL CONSULTANTS, LLC'S JOINT MEMORANDUM IN OPPOSITION TO THE OFFICE OF CONSUMER SERVICES' MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Ellis-Hall Consultants, LLC and Monticello Wind Farm, LLC (collectively, "MWF") oppose the Office of Consumer Services ("OCS'") motion for summary judgment (the "OSC Motion").[1] The Public Service Commission (the "PSC") should deny the OCS Motion. The PSC cannot apply a legally enforceable obligation ("LEO") against MWF because the PSC has not undertaken proper rulemaking procedures to create an LEO standard. Even if it had, and it has not, MWF entered into an LEO in early 2012, under the market proxy pricing methodology. Further, PacifiCorp[2] and Utah agencies repeatedly delayed MWF's from being in possession of

[1] MWF's exhibits are filed together in response to the motions for summary judgment of both the OCS and DPU.

[2] PacifiCorp and its subsidiaries and divisions, namely, Rocky Mountain Power, are herein referred to collectively as "PacifiCorp."

an executed power purchase agreement ("PPA") prior to the Phase II Order[3] The PSC should approve the PPA.

RESPONSE TO 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.")

RESPONSE: Admits.

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.)

RESPONSE: Admits.

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.

RESPONSE: Disputed. The PPA contract price is calculated based on the market proxy methodology in the indicative pricing proposal. *See also*, *Ellis-Hall Consultants v. Public Service Commission of Utah*, 2016 UT 34 at ¶ 37 (Ex. 2) (holding, MWF has "a right to rely on the methodology employed in an indicative pricing proposal once it is given."). Multiple party delays, however, pushed back the commercial operation date and forced adjustments under the market proxy methodology. Accordingly, the OCS Motion's Exhibit A is not the PPA contract pricing.

[3] Both the OCS and the Division of Public Utilities took adverse positions against MWF in its docket to rely on the market proxy methodology pursuant to its May 22, 2013, indicative pricing (PSC Dkt. No. 14-035-24). These positions were overruled by the Supreme Court of Utah as illegal. *See Ellis-Hall Consultants v. Public Service Commission of Utah,* 2016 UT 34 at ¶ 37 (Ex. 2).

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).

RESPONSE: Movant's statement does not follow Utah R. Civ. P. 56(a)(1). Consequently, Movant fails its burden and a response is, therefore, unnecessary. A response is further unnecessary given that Movant's response impermissibly states a legal standard as a fact. Notwithstanding and not waiving the foregoing, disputed. MWF disputes the OCS's characterization of these documents and affirmatively states that the documents speak for themselves. MWF further objects on the basis of relevance and that the Supreme Court of Utah has already held that MWF is entitled to the PPA contract pricing calculated under the market proxy methodology. *See Ellis-Hall Consultants v. Public Service Commission of Utah*, 2016 UT 34 at ¶ 37 (Ex. 2). Any disparity that the OCS attempts to apply to prejudice MWF is due to multiple delays and interference by multiple parties, including the OCS.

MWF'S STATEMENT OF ADDITIONAL MATERIAL FACTS

1. Mr. Anthony (Tony) Hall is and always has been the Senior Project Manager of Ellis-Hall Consultants, LLC and Monticello Wind Farm, LLC. Hall Decl. ¶ 2 (Ex. 1).

2. Ellis-Hall is the owner and developer of Monticello Wind Farm, LLC. Hall Decl. ¶ 3 (Ex. 1).

3. Ms. Kimberly Ceruti is and always has been the Executive Director of Ellis-Hall for all pertinent times related to this PPA, and PacifiCorp knew that she was the primary

administrator and contact person for the Monticello Wind Farm Project. Ceruti Decl. ¶¶ 2-3 (Ex. 9).

4. MWF incurred a LEO prior to the PSC August 16, 2013, Phase II Order. *See e.g.*, Assignment and Assumption (Ex. 11); Ceruti Decl. ¶¶ 1-24 (Ex. 9); 2012.11.16 Clement Testimony (Dkt. No. 12-035-100) (Ex. 29); 2012.11.05 email (Ex. 10); 2013.04.13 email (Ex. 25); 2012.11.05 email (Ex. 10); 2013.04.18 email (Ex. 25); May 22, 2013 Indicative Pricing (Ex. 18); LGI Request Excerpts (Ex. 12); PacifiCorp OASIS, LGI Queue; 2012.04.13 Scoping Meeting (Ex. 13); 2012.04.19 SJC Minutes (Ex. 14); 2012.04.13 Feasibility Report Review (Ex. 15); 2013.04.05 PPA Application Excerpts (Ex. 5); 2013.01.14 SJC Minutes (Ex. 16); 2013.02.04 SIS Report Review (Ex. 17); May 22, 2013 Indicative Pricing (Ex. 18); 2013.05.31 email (Ex. 3); 2013.06.03 email (Ex. 4); 2013.07.12 Facilities Study Meeting (Ex. 19); LGIA 80 MW Excerpts (Ex. 20); LGIA 45 MW Excerpts (Ex. 21); 2014.04.07 SJC Minutes (Ex. 22); May 25, 2012 Request Excerpts (Ex. 45).

5. In the alternative, PacifiCorp delayed MWF from incurring an LEO for approximately 5 ½ years. *See e.g.*, PSC Dkt. No. 13-035-22 at 2013.03.25 RMP Response, 7-8; 2013.11.18 email (Ex. 31); 2013.04.18 email (Ex. 25); PacifiCorp OASIS #384, #426; PacifiCorp OATT; PacifiCorp LGI Process; 2013.09.22 email (Ex. 32); February 18, 2014, 80 MW LGIA Excerpts § 5.1 (Ex. 20); April 24, 2014, 45 MW LGIA Excerpts § 5.1 (Ex. 21); Ceruti Decl. ¶¶ 1-24; 2013.05.31 email (Ex. 3); 2013.06.26 email (Ex. 7); 2013.08.08 emails (Ex. 33); 2013.08.28 email (Ex. 34); 2013.10.16 email (Ex. 35); 2013.10.21 email (Ex. 36); 2013.10.22 emails (Ex. 37); 2013.11.15 email (Ex. 38); 2013.08.27 Letter (Ex. 28); 2017.12.19

SJC Meeting Update (Ex. 44). In fact, MWF intended a commercial operation date on or before January 1, 2014. 2013.09.22 email (Ex. 32); May 25, 2012 Request Excerpts (Ex. 45).

6. MWF successfully challenged PacifiCorp's withdrawal of its May 22, 2013, indicative pricing market proxy methodology. *See Ellis-Hall Consultants v. Public Service Commission of Utah*, 2016 UT 34 at ¶ 37 (Ex. 2). The Supreme Court held, MWF has "a right to rely on the methodology employed in an indicative pricing proposal once it is given." *Id.*

7. On October 3, 2013, the PSC approved the PPA for Blue Mountain Power Partners, LLC ("BMPP") in PSC Dkt. No. 13-035-115.

8. On or about September 22, 2015, BMPP filed a purported complaint with the PSC stating, "PacifiCorp by killing and terminating the Blue Mountain PPA; has effectively destroyed the Blue Mountain wind project . . . ." BMPP Complaint (Ex. 39); PSC Dkt. No. 16-035-47.

STANDARD OF REVIEW

Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). "Utah law does not allow a summary judgment movant to merely point out a lack of evidence in the nonmoving party's case, but instead ***requires*** a movant to affirmatively provide factual evidence establishing that there is no genuine issue of material fact." *Orvis v. Johnson*, 2008 UT 2, ¶ 16, 177 P.3d 600 (emphasis added). Only after this burden is satisfied, "the burden then shifts to the *nonmoving* party, who 'may not rest upon the mere allegations or denials of the pleadings,' but 'must set forth specific facts showing that there is a genuine issue for trial.'" *Id.* at ¶ 18 (citing Utah R. Civ. P. 56(e)) (emphasis in original).

ARGUMENT

The Utah Office of Consumer Services contends that Monticello Wind Farm, LLC's PPA pricing conflicts with 18 C.F.R. § 292.304(d)(2), arguing that state and federal law prohibits approval of its PPA based on pricing received several years prior to the date the PPA was signed. The OCS's analysis is made from whole cloth. There is no "several years" standard under the law. More egregious, is that the "several years" between MWF's receipt of indicative pricing and its PPA execution is directly tied to the OCS's erroneous opposition to MWF's indicative pricing complaint in PSC Dkt. No. 14-035-24.[4]

The OCS also fails to acknowledge that MWF is entitled to the avoided cost calculated at the time that an LEO was incurred—prior to the PSC Phase II, August 16, 2013, Order that changed the pricing methodology—and that PacifiCorp is prohibited from doing anything to delay the incurrence of the LEO. Notably, the OCS fails to calculate the day that MWF incurred an LEO and puts on no evidence of the same. The OCS, therefore, fails its burden on its motion, *ab initio*. Furthermore, MWF incurred an LEO prior to the PSC's August 16, 2013, Phase II Order, and would have been in possession of an executed power purchase agreement if not for PacifiCorp's and Utah agencies' delays. Indeed, the Supreme Court of Utah has already found in favor of MWF.

I. THE SUPREME COURT HAS ALREADY RULED THAT MWF MAY RELY ON THE MARKET PROXY METHODOLOGY.

The Supreme Court of Utah has held that MWF "had no obligation under the Phase Two order to submit a new request [for indicative pricing]." *Ellis-Hall Consultants v. Public Service*

[4] The OSC and DPU should use this docket as an opportunity to acknowledge their failed opposition that contributed to these "several years."

Commission of Utah, 2016 UT 34, ¶ 40 (Ex. 2). This is undisputed. The OCS, however, stops too short and thereby mischaracterizes the Supreme Court of Utah's holding. The Supreme Court of Utah also held that entities like MWF have "a ***right*** to rely on the methodology employed in an indicative pricing proposal once it is given." *Ellis-Hall Consultants v. Public Service Commission of Utah*, 2016 UT 34, ¶ 37 (emphasis added) (Ex. 2). The Supreme Court of Utah also explicitly stated the objective of this reliance:

> Schedule 38 gives a would-be qualifying facility a right to receive "indicative" pricing . . . An *indicative* pricing proposal is one that "show[s] the way to or the direction of" the pricing that ***Rocky Mountain Power ultimately has in mind for the power purchase agreement***. Thus, the precise terms of Rocky Mountain Power's indicative pricing could change as a result of "updated information" or "changes to [Rocky Mountain Power's] avoided-cost calculations." But to be *indicative*, the pricing proposal would have to "point[] out more or less exactly" the ***methodology*** of Rocky Mountain Power's pricing proposal, or in other words would have to "reveal[]" it "fairly clearly."
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> *Ellis-Hall Consultants v. Public Service Commission of Utah*, 2016 UT 34, ¶ 41.

The OCS did not appeal this holding to the federal courts. Consequently, the OCS is barred from collaterally attacking the Supreme Court of Utah's decision. MWF has the ***right*** to rely on the market proxy methodology "for the power purchase agreement." *Id.* Failing to approve the PPA would eradicate MWF's right of reliance and undermine the Court's order.[5]

II. FEDERAL LAW AFFORDS MWF THE RIGHT TO PPA PRICING CALCULATED PURSUANT TO THE MARKET PROXY METHODOLOGY.

The OCS attempts to collaterally attack the Supreme Court of Utah's decision in *Ellis-Hall Consultants v. Public Service Commission of Utah*, on the basis that it conflicts with federal

[5] The OCS contends that the Court did not address the ultimate question of MWF's PPA pricing because it was premature to do so. Now, this posture is but a distinction without a difference. MWF's right to rely on the market proxy methodology pricing "for the power purchase agreement" is the same legal issue then and now. The legal question is already decided. Only the status of the PPA has changed. The PSC should reject the OCS's collateral attack on the Supreme Court of Utah, cease the historic institutional attempt to erode MWF's rights, and approve the PPA.

law. 2016 UT 34. The OCS's argument is without merit. Federal Energy Regulatory Commission ("FERC") rules and orders make it clear that MWF is entitled to market proxy methodology pursuant to an LEO and because PacifiCorp, the PSC, and others delayed MWF's ability to execute and seek approval of its PPA before the PSC changed the market proxy methodology on August 16, 2013 in Dkt. No. 12-035-100.[6]

A. Federal Legal Framework.

Congress charged FERC to prescribe such rules to discourage utility abuse and encourage cogeneration and small power production facilities. 16 U.S.C. § 824a-3(a).[7] FERC has likewise obligated electric utilities to purchase all electric energy and capacity made available from qualifying cogeneration and small power production facilities ("QFs"). 18 C.F.R. § 292.303. In turn, FERC has granted QFs the option "[t]o provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term . . . based on . . . [t]he avoided costs calculated at the time the obligation is incurred." 18 C.F.R. § 292.303, 292.304(d); *see also, JD Wind 1*, 129 FERC ¶ 61,148, ¶ 29.[8] "[A]voided cost rates are a safe-harbor of reasonableness in advancing the public's interest in protecting ratepayers." *Ellis-Hall v. Public Service Commission*, 2014 UT 52, ¶ 25, 342 P.3d 256. Thus, once an avoided cost is calculated, the public interest analysis ends.

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[6] The Phase II Order acknowledges that the market price proxy was in effect prior to the change. *See* Phase II Order at 2, 17.

[7] Congress believes that increased use of these sources of energy would reduce the demand for traditional fossil fuels," but it recognized that "traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities," and that this reluctance impeded the development of such facilities. *FERC v. Mississippi*, 456 U.S. 742, 750 (1982).

[8] No one disputes that MWF meets the requirements of a QF.

Federal law typically authorizes states to determine "the date at which a legally enforceable obligation is incurred under State law." *W. Penn Power Co.*, 71 FERC § 61,153, 495 (1995). This, however, is not without its limits. "[A] state may take action under PURPA only to the extent that that action is in accordance with [FERC's] rules." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at ¶ 27 (October 4, 2011).[9] For example, a state violates PURPA if it limits the "circumstances under which a legally enforceable obligation [arises]," such as making a "fully-executed contract a condition precedent to a legally enforceable obligation." *Grouse Creek*, 142 FERC ¶ 61,187, at ¶¶ 36, 38; *see also*, *Murphy Flat*, 141 FERC ¶ 61,145, at ¶¶ 6, 23-24.[10]

Equally important, and completely ignored by the OCS, is that, "[a]s [FERC] has made clear, section 292.304(d) . . . does not vest a utility with the authority to delay creation of that legally enforceable obligation by insisting that a QF enter into a contract." *In re: Virginia Electric and Power Co.*, 151 FERC ¶ 61,038, at ¶ 28 (April 16, 2015); *see also*, *Grouse Greek*, 142 FERC ¶ 61,187, at ¶¶ 36, 38. Indeed, the law prevents "an electric utility from avoiding its PURPA obligations by refusing to sign a contract, or . . . delaying the signing of a contract, so

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[9] FERC has found violations of the federal "legally enforceable obligation" in a series of cases: *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (October 4, 2011) (hereafter, "*Cedar Creek*"), *Rainbow Ranch Wind, LLC, et al.*, 139 FERC ¶ 61,077 (April 30, 2012), *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 (November 20, 2012) (hereafter, "*Murphy Flat*"), and *Grouse Creek Wind Park, LLC, et. al.*, 142 FERC ¶ 61,187 (March 15, 2013) (hereafter, "*Grouse Creek*").

[10] The OCS contends that MWF's "outdated pricing" violates the principle of ratepayer indifference, citing a string citation for support. OCS Motion 7. The OCS's supporting string citations, however, do not define "outdated pricing." In fact, it is a term the OCS creates from whole cloth. Rather, the citations refer to the utility's obligation to by power at the utility's "avoided costs." 16 USC §§ 824a-3(b)(1)-(2); 18 CFR 292.304(a)(2). And under federal law, those avoided costs "are calculated at the time the [legally enforceable] obligation is incurred." 18 C.F.R. § 292.304(d). A QF's avoided costs at the time of a legally enforceable obligation are irrefutably reasonable. *Ellis-Hall v. Public Service Commission*, 2014 UT 52, ¶ 25, 342 P.3d 256 ("[A]voided cost rates are a safe-harbor of reasonableness in advancing the public's interest in protecting ratepayers.").

that a later and lower avoided cost is applicable." *Murphy Flat*, 141 FERC ¶ 61,145 at ¶ 24 (citing *Cedar Creek*, 137 FERC ¶ 61,006, at ¶¶ 32, 36); *see also*, FERC Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880 (the term "legally enforceable obligation" is intended to "prevent a utility from circumventing the requirement that provides capacity credit for an eligible facility merely by refusing to enter into a contract with a qualifying facility").

As explained below, it is not appropriate to address or apply an LEO standard in this docket. Nevertheless, such an analysis need not address more than the following three questions—each of which require the PSC to approve the PPA: (1) Does MWF have the right to rely on the market proxy methodology used in its May 22, 2013, indicative pricing? (2) Did MWF incur a legally enforceable obligation prior to the PSC's August 16, 2013, Phase II Order changing the pricing methodology upon which MWF relies? (3) If not, did the utility do anything to delay MWF's incurrence of an LEO? The answer to these questions is yes.

B. MWF's PPA Properly Relies on Market Proxy Pricing Methodology.

1. The Supreme Court of Utah Has Definitively Held that MWF May Rely on the Market Proxy Methodology.

As explained above, the Utah Supreme Court held that entities like MWF have "a right to rely on the methodology employed in an indicative pricing proposal once it is given." *Ellis-Hall Consultants v. Public Service Commission of Utah*, 2016 UT 34, ¶ 37. And, because "avoided cost rates are a safe-harbor of reasonableness in advancing the public's interest in protecting ratepayers," the PSC must approve the PPA using market proxy methodology. *Ellis-Hall v. Public Service Commission*, 2014 UT 52, ¶ 25, 342 P.3d 256.

2. The State of Utah Has No Established Legally Enforceable Obligation Standard and Cannot Apply One Any More Stringent than Federal Law Would Accept.

Before analyzing MWF's LEO, it is first necessary to examine Utah's LEO standard. The problem, however, is that this framework does not exist. The closest attempt to establishing some semblance of an LEO standard was the PSC's Order in *In re: Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Thayne Hydro, LLC.*, PSC Dkt. No. 16-035-04 ("*Thayne*").[11] In *Thayne*, the PSC characterized the LEO concept as "perplexing" and noted that "the distinction between a 'legally enforceable obligation' and a 'contract' is not intuitive or easy to discern." *Thayne* July 29, 2016, Order. Nevertheless, the PSC held that "a QF that satisfies the [stringent "but for" LEO] standard has made a showing *sufficient* to establish an LEO." *Id*. Yet, the PSC "reserve[d] judgment as to whether an LEO might be shown to exist under other circumstances wherein a QF presents evidence that it 'committed itself' to provide energy or capacity but cannot show, for whatever reason, a contact would have existed 'but for' the utility's actions." Thus, in *Thayne*, the PSC highlighted that an LEO standard did not exist and could do no more other than approve Thayne's PPA. Indeed, to establish an LEO standard in *Thayne*—as in this docket—would have been illegal.

Federal law requires "each State regulatory authority shall, ***after notice and opportunity for public hearing***, implement such rule (or revised rule) for each electric utility for which it has

[11] In December 2, 2015, the PSC refused to address LEO after the parties failed to adequately brief the matter in *In re: Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Three Peaks Power, LLC*, Doc. No. 15-035-70.

ratemaking authority." 16 U.S.C. § 824a-3(f)(1) (emphasis added). For almost 40 years, neither the Utah legislature nor the PSC has taken any steps to fulfill this requirement. Similarly, Utah's Administrative Rulemaking Act requires rulemaking procedures "when an agency issues a written interpretation of a state or federal legal mandate." Utah Code Ann. § 63G-3-201(3). Utah's rulemaking procedures are numerous. Utah Code Ann. § 63G-3-301. For example, rulemaking requires, among other things, a lengthy proposal and analysis process that must be filed with the Utah Office of Administrative Rules. *Id.* at -301(4)(a). Utah has not defined its LEO under these procedures. Consequently, the OCS cannot apply an LEO standard that does not yet exist in this limited and time-sensitive docket.

Because Utah does not have an LEO standard, the PSC cannot apply one against MWF. It does not have authority to do so.[12] Any attempt to do so would be a gross violation of federal and state rulemaking laws and MWF's constitutional due process rights under both the state and federal constitutions.[13] The PSC must approve MWF's PPA because it cannot determine that MWF did not incur an LEO before the PSC abandoned the market proxy methodology.

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[12] *Compare Bowen v. Georgetown University*, 488 U.S. 204, 208 (emphasis added) ("Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant") *with* Utah Code Ann. § 54-4-1 (the statutory grant of power and jurisdiction to the PSC that does not expressly grant retroactive rule making authority).

[13] *See Federal Communications Commission v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *see also, State ex rel. W.C.P.*, 974 P.2d 302, 1999 UT App 035, ¶ 18 (Utah App. 1999) ("A law is void for vagueness if it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.") (both quoting *Connally v. General Construction Company*, 269 U.S. 385, 391 (1926)). "This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *Id.* It requires the invalidation of laws that are impermissibly vague." *Id.* "[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or

3. MWF Entered into a Legally Enforceable Obligation Prior to the PSC's August 16, 2013, Phase II Order.

Even if the PSC could apply an LEO standard to MWF, and it cannot, the PSC must embrace the full breadth and liberality of the federal LEO scope because it has not undertaken the necessary rulemaking procedures. MWF meets this standard.

FERC has ***never*** held that a State has implemented an LEO standard that violated federal law for being ***too*** liberal or permissive.[14] To the contrary, FERC has reiterated that states do not have "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) (emphasis added). Thus, despite no LEO standard in Utah, if the PSC elects to apply an LEO standard in this case it must apply any *de minimis* LEO standard that passes muster under federal law.

In understanding LEO, FERC provided additional guidance in *FLS Energy, Inc.* after *Thayne*.[15] 157 FERC ¶ 61,211 (December 15, 2016). In *FLS Energy, Inc.*, FERC held:

> We find that, just as requiring a QF to have a utility-executed contract, such as a PPA, in order to have a legally enforceable obligation is inconsistent with PURPA and our regulations, ***requiring a QF to tender an executed interconnection agreement is equally inconsistent with PURPA*** and our regulations. Such a requirement allows the utility to control whether and when a legally enforceable obligation exists—e.g., by delaying the facilities study or by delaying the tendering by the utility to the QF of an executable interconnection agreement.

FLS Energy, Inc., 157 FERC ¶ 61,211, at ¶ 23 (December 15, 2016) (emphasis added).

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discriminatory way." *Id.* MWF further refers to and incorporates its arguments in opposition to the DPU's motion for summary judgment.

[14] The OSC's argument is both elusive and illusive. The OCS contends that setting avoided costs at the time of indicative pricing regardless of the status of the PPA negotiations is contrary to state and federal law. OCS Motion 6-7. The OCS's citation to *Thayne*, however, supports nothing of the sort. In fact, the words "status" and "indicative pricing" are nowhere found in the *Thayne* July 29, 2016, *Order*. The argument is based on pure fiction. The OCS offers nothing to support its argument.

[15] In *Thayne*, the PSC found "the distinction between a 'legally enforceable obligation' and a 'contract' is not intuitive or easy to discern." *Thayne* July 29, 2016, Order, 10.

FERC's position is clear. An LEO cannot depend on anything over which the utility can exercise any degree of control. To do so would undermine the whole policy supporting LEOs and federal interest in mitigating utility abuses. *See* 16 U.S.C. § 824a-3(a); FERC Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880.

Thus, a "legally enforceable obligation" cannot be a legally enforceable obligation with the utility. Rather, under the plain meaning of the phrase, an LEO can only arise from legally enforceable obligations with others.[16] In other words, MWF not only entered into an LEO when it entered into material agreements with the utility (e.g. LGIA), but others such as landowners, manufacturers, contractors, and others that create a legally binding commitment—although not directly to the utility— "for the delivery of energy or capacity over a specified term . . . ." 18 CFR § 292.303, 292.304(d).[17] Indeed, MWF is legally committed to other parties and must meet those legally enforceable obligations under the terms of the corresponding contracts.

Specifically, MWF entered a legally enforceable obligation when it purchased the developmental rights to properties located in San Juan County for the development of wind generation under a QF PPA. This occurred on February 22, 2012, when Ellis-Hall purchased seven sets of land rights from Sustainable Power Group, LLC for the development of a wind farm in San Juan County, Utah, and agreed to submit itself to the legally enforceable obligations contained in those contracts. *See* Assignment and Assumption (Ex. 11).

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[16] It is important to distinguish that while a utility cannot require a QF to enter into a contract with the utility to create an LEO, doing so would clearly still constitute an LEO.

[17] As explained below, PacifiCorp required MWF to complete the LGI study process and execute an LGIA prior to executing a PPA. As part of the LGI and PPA processes, PacifiCorp required MWF to demonstrate robust site control. MWF obtained the necessary land rights in February 2012. MFW's site control, therefore, constitutes a legally enforceable obligation incurred for the purpose of constructing and operating a QF generation facility—even though PacifiCorp's requirements were illegal.

MWF meets any variety of other possible LEO standards. MWF incurred significant expense in procuring interconnection studies, proceeding through the LGI and PPA processes, and challenging the PSC's attempted abrogation of MWF's market proxy pricing methodology before the Supreme Court of Utah. MWF incurred an LEO long-prior to the PSC's Phase II Order. *See e.g.*, Assignment and Assumption (Ex. 11); Ceruti Decl. ¶¶ 1-24 (Ex. 9); 2012.11.16 Clement Testimony (Dkt. No. 12-035-100) (Ex. 29); 2012.11.05 email (Ex. 10); 2013.04.13 email (Ex. 25); 2012.11.05 email (Ex. 10); 2013.04.18 email (Ex. 25); May 22, 2013 Indicative Pricing (Ex. 18); LGI Request Excerpts (Ex. 12); PacifiCorp OASIS, LGI Queue; 2012.04.13 Scoping Meeting (Ex. 13); 2012.04.19 SJC Minutes (Ex. 14); 2012.04.13 Feasibility Report Review (Ex. 15); 2013.04.05 PPA Application Excerpts (Ex. 5); 2013.01.14 SJC Minutes (Ex. 16); 2013.02.04 SIS Report Review (Ex. 17); 2013.05.31 email (Ex. 3); 2013.06.03 email (Ex. 4); 2013.07.12 Facilities Study Meeting (Ex. 19); LGIA 80 MW Excerpts (Ex. 20); LGIA 45 MW Excerpts (Ex. 21); 2014.04.07 SJC Minutes (Ex. 22).

C. In the Alternative, PacifiCorp Otherwise Delayed MWF from Incurring a Legally Enforceable Obligation.[18]

As noted above, federal law prevents "an electric utility from avoiding its PURPA obligations by refusing to sign a contract, or . . . delaying the signing of a contract, so that a later and lower avoided cost is applicable." *Murphy Flat*, 141 FERC ¶ 61,145 at ¶ 24 (citing *Cedar Creek*, 137 FERC ¶ 61,006, at ¶¶ 32, 36); *see also*, FERC Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880 (the term "legally enforceable obligation" is intended to "prevent a utility from

[18] It is important to note that PacifiCorp's delays were possible because of the existence of Blue Mountain Power Partners, LLC.

circumventing the requirement that provides capacity credit for an eligible facility merely by refusing to enter into a contract with a qualifying facility").

In this case, PacifiCorp has delayed virtually every facet of the PPA process. In fact, the OCS supported PacifiCorp's repeal of MWF's market proxy pricing methodology to prejudice MWF. The PSC has further permitted, with the OCS's support, PacifiCorp's ability to control the PPA process and to refuse to negotiate with MWF. The PSC cannot let this stand. The PSC should approve the PPA because PacifiCorp's delays, supported by the OCS, both individually and in the aggregate, violate federal law. *See Cedar Creek*, 137 FERC ¶ 61,006 at P 32. If MWF was prevented from incurring an LEO prior to the PSC's August 16, 2013, Phase II Order, it was due to PacifiCorp and Utah agencies' delays.

1. PacifiCorp Delay 1 – PacifiCorp Refused to Provide MWF Indicative Pricing for Almost One Year.

Monticello Wind Farm Project requested indicative pricing in or about May 2012, which PacifiCorp did not even acknowledge for many months later. *See* May 25, 2012 Request Excerpts (Ex. 45); *see also*, Ceruti Decl. ¶¶ 9-10 (Ex. 9); 2012.11.16 Clements Testimony (Dkt. No. 12-035-100) ("The Company has received one formal request for indicative pricing since filing its Request for Agency Action Motion to Stay on October 9, 2012. The request was not complete and did not include all the required information under Schedule 38") (Ex. 29). Ms. Ceruti then called Mr. Griswold of PacifiCorp to follow-up on the application and to discuss moving the development of Ellis-Hall's wind farm project forward. Mr. Griswold stated that PacifiCorp would not negotiate the execution of PPAs with MWF until MWF had completed the LGI study process and had obtained executed LGIAs. Mr. Griswold was vague about what was

needed. Mr. Griswold never addressed the request or its deficiencies, if any. Ceruti Decl. ¶¶ 9-10.

On November 11, 2012, Mr. Griswold, for PacifiCorp, sent Ms. Ceruti, for Ellis-Hall, the required documents to execute a PPA. *See* 2012.11.05 email (Ex. 10). Mr. Griswold included the applicable Schedule 38—P.S.C.U. No. 49, Schedule 38 (the "Original Schedule 38"). *Id.* Mr. Griswold told Ms. Ceruti that MWF was required to comply with this document. Mr. Griswold provided no caveats or further conditions as to the current or future application of this tariff. Ceruti Decl. ¶ 11 (Ex. 9).

For the next six months, Ms. Ceruti repeatedly spoke to Mr. Clements requesting indicative pricing. *Id.* at ¶¶ 9-12 (Ex. 9). Mr. Clements continually made an issue of the land rights, stating that he did not have to deal with MWF because MWF could not build on its proposed site. *Id.* Mr. Clements argued that MWF's proposed site was owned by another project (Blue Mountain Power Partners, LLC), and that Monticello Wind Farm Project did not hold the land rights. Of course, Mr. Clements position was incorrect. *Id.* at ¶¶ 12-13; *see also*, Assignment and Assumption (Ex. 11). The discussion continued until Ms. Ceruti accused Mr. Clements of violating Schedule 38. Only thereafter did PacifiCorp provide MWF with indicative pricing, on May 22, 2013. Ceruti Decl. at ¶¶ 14-17.

After MWF submitted the PPA Application, Mr. Clements belatedly sent Ms. Ceruti an email request for a 12x24 matrix in Excel format knowing that Ms. Ceruti was going into the hospital. Ms. Ceruti received this email in the hospital and responded the day after she was discharged, on April 24, 2013. Ceruti Decl. ¶ 16 (Ex. 9); *see also*, 2013.04.13 email (Ex. 25).

2. PacifiCorp Delay 2 – PacifiCorp Illegally Required MWF to Complete the LGI Study Process and Execute an Interconnection Agreement Before Negotiating and Executing a PPA, thus Delaying MWF Over One Year.

FERC has found "that a requirement for a facilities study or an interconnection agreement, given that the utility can delay the facilities study or delay tendering an executable interconnection agreement, as a predicate for a legally enforceable obligation is inconsistent with PURPA and [FERC's] regulation under PURPA." *FLS Energy, Inc.*, 157 FERC ¶ 61,211 at ¶ 20. PacifiCorp violated *FLS Energy, Inc.* and illegally attempted to delay MWF's incurring an LEO by discriminatorily requiring MWF to enter into a large generator interconnection agreement ("LGIA") prior to negotiating and executing a PPA.

On February 22, 2013, Mr. Ros Vrba complained before the Utah PSC contending that PacifiCorp required him, unlike other projects, to execute an LGIA before executing a PPA in violation of PURPA's prohibition of "unequal treatment." PSC Docket No. 13-035-22 ("*Vrba*"). PacifiCorp justified its conduct under the Original Schedule 38, which states: "PacifiCorp reserves the right to condition execution of the power purchase agreement upon simultaneous execution of an interconnection agreement . . . ." Original Schedule 38 I(B)(7). PacifiCorp argued that "***it is critical that prior to executing a PPA the QF complete the interconnection process to the point of executing an interconnection agreement*** that sets forth a definitive schedule for the project to come online and meet its PPA obligations. Without this due diligence

completed, [PacifiCorp] ***cannot*** enter into a PPA that protects its customers from the risk of non-performance." Vrba at 2013.03.25 RMP Response, 7-8 (emphasis added).[19]

Giving these reasons, PacifiCorp originally refused to negotiate and execute PPAs with MWF without first completing the LGI study process and executing LGIAs. *See* Ceruti Decl. ¶¶ 9-12. PacifiCorp continued to maintain the position that PacifiCorp would not execute PPAs with MWF without executed LGIAs. *Id*. PacifiCorp similarly told Mr. Hall that the Monticello Wind Farm Project would require completion of the LGI study process and execution of LGIAs before PacifiCorp would execute PPAs, pursuant to Schedule 38. Hall Decl. ¶ 5 (Ex. 1). Mr. Hall memorialized this understanding in his November 18, 2013, email to PacifiCorp. 2013.11.18 email (Ex. 31) ("the PPA for Q420 [the corresponding interconnection queue for MWF] can't be signed until the LGIA is signed . . . .").

On Monday, April 15, 2013, Mr. Hall hand-delivered the required documentation for the Monticello Wind Farm Project pursuant to the Original Schedule 38. 2013.04.18 email (Ex. 25). Remarkably, a mere ***four days*** later, on Friday, April 19, 2013, PacifiCorp completely reversed its own position and put a full stop to the *Vrba* docket. PacifiCorp filed a notice with the PSC, advising that they were about to settle the dispute by executing—not one but two—80 MW PPAs[20] and requested that the PSC cancel the April 26, 2012, hearing which it did. *Vrba* at 2013.04.19 Letter. PacifiCorp did not want a PSC order because, regardless of the ruling,

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[19] Mr. Vrba noted that PacifiCorp did not require the (REDCO) Blue Mountain Wind 1 (PSC Dkt. No. 11-035-196) or the (Wasatch Wind) Pioneer Ridge Wind (PSC Dkt. No. 05-35-09) projects to obtain executed LGIAs prior to executing PPAs. *See* Vrba 2013.02.22 Exhibit C.

[20] Mr. Vrba's PPAs were approved in PSC Dockets Nos. 13-035-117 and 13-035-118 without any demonstration site control and without LGIAs. *See* -116, -117 PPA Applications, Exhibit 6.1; *see also*, Vrba Letter (Ex. 42) (noting Long Ridge Wind I and II PPAs). With these PPAs, Mr. Vrba then sold these projects.

PacifiCorp would be unable to discriminatorily apply the LGIA requirement to MWF but waive it for others, namely Blue Mountain Power Partners, LLC ("BMPP") and Latigo Wind Park, LLC ("Latigo"). This is precisely what PacifiCorp did.

On July 9, 2013, PacifiCorp stunningly contradicted its argument in the *Vrba* docket and sought the Utah PSC to approve executed PPAs with BMPP and Latigo despite neither of them having executed LGIAs. *See e.g.* PSC Dkt. No. 13-035-115, -116. Latigo did not execute an LGIA for over another month on August 12, 2013. *See* PacifiCorp OASIS # 384. BMPP did not enter an LGIA until almost a year later, on May 5, 2014. *See* PacifiCorp OASIS # 426. Nevertheless, PacifiCorp still required MWF to execute LGIAs prior to executing PPAs.

Thus, PacifiCorp's arbitrary, discriminatory, and illegal requirement forcing MWF to complete the LGI study process and execute LGIAs before executing PPAs delayed MWF over a year.

3. PacifiCorp Delay 3 – PacifiCorp Repeatedly Delayed the LGI Study Process for Over Four Months.

On August 6, 2013, PacifiCorp produced to MWF a final facilities study report. Pursuant to PacifiCorp's OATT, § 46.2, PacifiCorp had 60 calendar days to finalize negotiations of the LGIA. PacifiCorp OATT (Ex. 40); *see also*, PacifiCorp LGI Process Chart (Ex. 41). From August 6, 2013, to February 18, 2014, Mr. Hall repeatedly spoke to Tom Fishback (LGI Manager for PacifiCorp Transmission Services) and requested that he send an LGIA for execution. Mr. Fishback delayed four more months with various excuses. *See e.g.,* 2013.09.22 email (PacifiCorp conducting an erroneous study and attempting to delay negotiations) (Ex. 32). MWF believes that the reason for this delay was to prejudice MWF from building its own substation instead of commissioning PacifiCorp to build it. Indeed, PacifiCorp changed its

LGIAs in March 2014 to forbid this option, which is evident in the difference between the February 18, 2014, 80 MW LGIA Excerpts § 5.1 (Ex. 20) and April 24, 2014, 45 MW LGIA Excerpts § 5.1 (Ex. 21) (providing and then removing the option to build).

4. PacifiCorp Delay 4 – PacifiCorp Belatedly Required an Immediate Impedance Study.

PacifiCorp attempted to sandbag MWF and remove MWF from the LGI process and off the LGI queue. On or about October 29, 2012, Mr. Tom Fishback, PacifiCorp's LGI manager, called the MWF office and left a message stating that there was a problem that needed immediate resolution. This was odd because he always contacted Ms. Ceruti on her cellular phone, as they had agreed that he would do. She had previously informed Mr. Fishback that she was to be in Canada and Mr. Hall was in the United Kingdom. An MWF staffer, that happened to stay late, checked the answering machine and then called Ms. Ceruti to inform her about the message. Ms. Ceruti immediately called him back. Mr. Fishback sheepishly informed Ms. Ceruti that if MWF did not provide the collector cable impedance study sent to PacifiCorp that night that MWF would be removed from the LGI queue. If this happened, the Monticello Wind Farm Project would have been dead. This is a very complex study and Ms. Ceruti was in an almost impossible position to fulfill the last-minute demand. She bantered with Mr. Fishback and reminded him that he had already advised MWF that its impedance study requirements had been satisfied. Nevertheless, from abroad, MWF was able to conclude and timely submit the results to PacifiCorp to meet Mr. Fishback's sudden demand. The next morning, Mr. Fishback called Ms. Ceruti to inform her that PacifiCorp had removed MWF from its LGI queue position because he had not received MWF's study. Ms. Ceruti responded by telling Mr. Fishback he needed to check his emails because the required information was sent. Mr. Fishback called Ms. Ceruti

back, apologized, and advised her that PacifiCorp would commence with the next scheduled study, the System Impact Study (LGIP App'x 3) and that MWF was not "removed" from the LGI queue. Ceruti Decl. ¶¶ 21-24 (Ex. 9).

5. PacifiCorp Delay 5 – PacifiCorp Delayed the PPA Negotiations.

After PacifiCorp provided MWF indicative pricing on May 22, 2013, Ms. Ceruti again requested a site-specific draft PPA on May 31, 2013. 2013.05.31 email (Ex. 3). Mr. Clements delayed sending even a generic PPA to MWF. *See* 2013.06.26 email (Ex. 7). MWF continued to ask for a site-specific draft PPA. Mr. Clements continued to refuse, telling MWF to first negotiate some general terms before including site specific information that was still needed for PPA execution. *See* 2013.08.08 emails (Ex. 33). In fact, Mr. Clements made certain verbal commitments only to not make good on those commitments. *Id.* (noting Mr. Clements failed to provide a site-specific PPA as he committed to do). *See* Ceruti Decl. ¶ 18 (Ex. 9).

It makes no sense that PacifiCorp delayed a month to send a pre-drafted, generic PPA to MWF that Mr. Clements had readily available unless his purpose was to delay long enough until the PSC could issue the Phase II Order and presumably void MWF's May 22, 2013, market proxy pricing methodology. That's exactly what happened.

PacifiCorp continued to delay the PPA negotiation process. For example, MWF submitted proposed changes to its PPA on August 19, 2013, and had not received a response by August 28, 2013. 2013.08.28 email (Ex. 34). In addition, on October 16, 2013, MWF was still waiting for a response after PacifiCorp had agreed to already provide comments on an updated draft after MWF desired to continue negotiating a PPA despite PacifiCorp's improper attempts to require MWF to make a new indicative pricing request. 2013.10.16 email (Ex. 35). This delay

continued despite PacifiCorp's commitment to the contrary. 2013.10.21 email (Ex. 36). PacifiCorp further refused to negotiate certain provisions on the basis that other unrelated information was provided. *See* 2013.10.22 emails (Ex. 37). Furthermore, Mr. Hall explicitly asked to proceed forward with PPA negotiations "to a point where the pricing as proposed in the original offer is the final issue to be agreed . . . ." 2013.11.15 email (Ex. 38).

6. PacifiCorp Delay #6 –MWF's PPA Was Delayed Three Additional Years.

On August 16, 2013, the PSC issued its Phase II Order changing the avoided cost pricing methodology from market proxy to PDDRR for all future requests of indicative pricing. On August 27, 2013, PacifiCorp sent a letter to MWF indicating that it was retracting the May 22, 2013, indicative pricing. 2013.08.27 Letter (Ex. 28). This led to a lengthy delay in MWF's ability to negotiate and execute a PPA relying on the market proxy pricing methodology.

In fact, the Supreme Court of Utah has already found that PacifiCorp "***refused*** to proceed with negotiations on a power purchase agreement under its earlier [May 22, 2013] indicative pricing" after the PSC "issued an order adopting a new pricing methodology." *Ellis-Hall Consultants v. Public Service Commission of Utah*, 2016 UT 34, ¶ 2. The Supreme Court of Utah remitted the matter on September 20, 2016. Thus, PacifiCorp (and the Utah agencies) delayed MWF's PPA approval ***three additional years***.

PacifiCorp's illegal withdrawal of MWF's indicative pricing and refusal to negotiate fit squarely within FERC's prohibition against utility delay. FERC has made clear that such conduct cannot stand.

III. MWF'S MARKET PROXY METHODOLOGY PRICING SATISFIES RATEPAYER INDIFFERENCE.

As a final consideration, the OCS argues that MWF's market proxy methodology violates rate-payer indifference. OCS Motion 7. In addition to all else that has been said, this is not true as a matter of practicality.

PacifiCorp included Blue Mountain Wind 1, LLC ("BMW 1") as an 80 MW wind resource in its IRP and quarterly updates, namely PacifiCorp's *March 8, 2012, Quarterly Compliance Filing - 2012.Q1 Avoided Cost Input Changes* in Docket No. 03-035-14. The BMW 1 footprint included lands owned by John Edward and Corrine Nielson Roring Revocable Trust, Michael N. Roring, and the Roring Family Trust. On September 20, 2012, the PSC, in PSC Dkt. No. 12-2557-01, issued an ordered "indicative avoided cost pricing for the Project based on the market price proxy method for wind resources up to the IRP target level using the Dunlap I contract." PSC Dkt. No. 12-2557-01, September 20, 2012, Order. This docket relied on the same Roring lands used in the BMW 1 footprint. PSC Dkt. No. 12-2557-01 was opened by Blue Mountain Power Partners, LLC ("BMPP").

On October 3, 2013, the PSC approved the PPA for BMPP in PSC Dkt. No. 13-035-115. Accordingly, beginning in October 2013, rate-payers expected to pay for wind-generated energy under the market proxy methodology. On or about September 22, 2015, however, BMPP filed a purported complaint with the PSC stating, "PacifiCorp by killing and terminating the Blue Mountain PPA; has effectively destroyed the Blue Mountain wind project . . . ." BMPP Complaint (Ex. 39); PSC Dkt. No. 16-035-47.

MWF's PPA relies on the same land rights as those in the BMW 1 PPA, as contemplated in PacifiCorp's IRP and quarterly filing in 12-2557-01. *See* 2012.03.19 LGI Request Excerpts

(Ex. 12). Thus, the rate-payers will receive exactly what they anticipated to receive—albeit through a different independent generator that owns the developmental rights to the Roring lands. The rate-payers are indifferent as to who owns the Roring land and the power generated and supplied from that land. *See Ellis-Hall v. Public Service Commission*, 2014 UT 52, ¶ 25, 342 P.3d 256 ("[A]voided cost rates are a safe-harbor of reasonableness in advancing the public's interest in protecting ratepayers.").

CONCLUSION

The OCS disingenuously contends that state and federal law prohibits approval of a PPA based on indicative pricing received several years prior to the date the PPA was signed. In fact, both state and federal law support MWF's reliance on market proxy methodology. MWF incurred a legally enforceable obligation in early 2012, repeatedly overcame PacifiCorp's arbitrary and discriminatory delays, and succeeded in appealing the PSC's erroneous order withdrawing MWF's market proxy methodology to the Supreme Court of Utah. The rate-payer indifference standard is met as a matter of law and practicality. Indeed, the rate-payer has anticipated this project for many years. The PSC should approve MWF's PPA and reject the OCS's arguments.

DATED this 26th day of March, 2018.

/s/ Kimberly Ceruti

CERTIFICATE OF SERVICE

I certify that on March 26th, 2018, I electronically filed a true and correct copy of the foregoing **MONTICELLO WIND FARM, LLC AND ELLIS-HALL CONSULTANTS, LLC'S JOINT MEMORANDUM IN OPPOSITION TO THE OFFICE OF CONSUMER SERVICES' MOTION FOR SUMMARY JUDGMENT** was emailed to the following in Utah Docket 17-035-68:

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