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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 DIVISION OF PUBLIC UTILITIES' MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Ellis-Hall Consultants, LLC and Monticello Wind Farm, LLC (collectively, "MWF") oppose the Division of Public Utilities' ("DPU's") motion for summary judgment (the "DPU Motion").[1] The Public Service Commission (the "PSC") should deny the DPU Motion because the DPU Motion violates numerous rules required to carry its burden and the DPU's support of retroactivity is wrong and based on abrogated law. In the alternative, the PSC should approve MWF's Power Purchase Agreement ("PPA") due to extenuating circumstances and Utah-PURPA.[2]

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

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

RESPONSE TO STATEMENT OF MATERIAL UNDISPUTED FACTS

The DPU's *Statement of Material Undisputed Facts* is not "supported by citing to materials in the record under paragraph (c)(1) of this rule." Utah R. Civ. P. 56(a)(1). In fact, the DPU's *Statement of Material Undisputed Facts* does not include a single evidentiary reference. Consequently, the DPU cannot carry its burden. The PSC must deny the DPU Motion.

1. EHC received its first indicative pricing in 2012.

RESPONSE: The DPU's statement does not follow Utah R. Civ. P. 56(a)(1). Consequently, DPU fails its burden and a response is, therefore, unnecessary. Notwithstanding and not waiving the foregoing, MWF admits that it is entitled to 2012 market proxy methodology for its PPA. In fact, MWF first requested indicative pricing on May 25, 2012. (Ex. 45). After PacifiCorp ignored this request, MWF made another request on April 15, 2013. 2013.04.18 (Ex. 25).

2. MWF received notice that the Commission had issued an Order changing Schedule 38 on July 21, 2015.

RESPONSE: The DPU's statement does not follow Utah R. Civ. P. 56(a)(1). Consequently, the DPU fails its burden and a response is, therefore, unnecessary. Notwithstanding and not waiving the foregoing, disputed. Disputed. MWF did not receive the purported notice. To the contrary, PacifiCorp engaged in intentional conduct to ensure that the purported notice was not received. *See* Hall Decl. ¶¶ 1-21 (Ex. 1); *see also*, PPA Application Excerpts (Ex. 5); 2013.04.18 email (Ex. 25); LGIA 80 MW 76 (Ex. 20); LGIA 80 MW Excerpts 74 (Ex. 21); PPA Ex. 4.6 - 20.

3. MWF was a QF in the QF pricing queue on and after July 28, 2016.

RESPONSE: The DPU's statement does not follow Utah R. Civ. P. 56(a)(1). Consequently, DPU fails its burden and a response is, therefore, unnecessary. Notwithstanding and not waiving the foregoing, MWF responds that it does not have sufficient information to admit or dispute this purported fact. MWF states that neither PacifiCorp, the DPU, the OCS, or the PSC informed MWF when it was added to the purported QF pricing queue and what position it held thereon. Hall Decl. ¶ 21 (Ex. 1). Further, the Supreme Court of Utah has held that MWF is entitled to rely on the market proxy methodology. *Ellis-Hall Consultants, LLC v. Public Service Commission of Utah*, 2016 UT 34 (Ex. 2). Consequently, the QF pricing queue is irrelevant as applied to Monticello Wind Farm Project.

4. RMP provided updated indicative pricing after July 28, 2016 for the MWF project on or before October 10, 2016.

RESPONSE: The DPU's statement does not follow Utah R. Civ. P. 56(a)(1). Consequently, DPU fails its burden and a response is, therefore, unnecessary. Notwithstanding and not waiving the foregoing, MWF disputes. After successfully appealing PacifiCorp's illegal demand that MWF request new indicative pricing, MWF requested "pricing for our PPA that we are entitled to under the Utah Supreme Court's July 28, 2016 Order." *See* DPU Motion Ex. B. PacifiCorp calculated the PPA contract pricing following the market proxy methodology as required by the Supreme Court of Utah.

5. RMP provided a proposed PPA to MWF on or before October 10, 2016.

RESPONSE: The DPU's statement does not follow Utah R. Civ. P. 56(a)(1). Consequently, DPU fails its burden and a response is, therefore, unnecessary. Notwithstanding and not waiving the foregoing, MWF admits in part and disputes in part. MWF admits that no later than April **2013**, MWF requested PacifiCorp to provide a draft PPA. *See* May 25, 2012

Request Excerpts (Ex. 45); 2013.05.31 MWF email (Ex. 3). PacifiCorp did not send the document, despite its agreement to do so. *See* 2013.06.03 email (Ex. 4); *see also*, PPA Application Excerpts (Ex. 5). In June 2013, PacifiCorp sent MWF a generic draft PPA. *Id.; see also*, 2013.06.03 Clements email (Ex. 6). MWF objected and requested a site specific PPA. 2013.06.26 MWF email (Ex. 7). Nevertheless, PacifiCorp and MWF began negotiating the PPA. *See e.g.*, 2013.08.13 email (Ex. 4). After PacifiCorp illegally changed MWF's indicative pricing purportedly due to the PSC's Phase II Order, Mr. Hall requested that PPA negotiations continue during the pendency of the appeal. 2013.11.05 email (Ex. 8).

6. RMP and MWF did not sign a final PPA before December 13, 2017.

RESPONSE: The DPU's statement does not follow Utah R. Civ. P. 56(a)(1). Consequently, DPU fails its burden and a response is, therefore, unnecessary. Notwithstanding and not waiving the foregoing, MWF admits.

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); May 25, 2012 Request Excerpts (Ex. 45).

4. MWF submitted an indicative pricing request in May 2012. *See* May 25, 2012 Request Excerpts (Ex. 45). PacifiCorp ignored the application until MWF challenged Mr. Griswold in November 2012. Only then did PacifiCorp state that it was deficient. Ceruti Decl. ¶¶ 9-10 (Ex. 9); *see also*, 2012.11.16 Clements Testimony 9 (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).

5. MWF requested the necessary documents to make an indicative pricing request, to which Mr. Griswold sent P.S.C.U. No. 49 Schedule 38 (the "Original Schedule 38") (Ex. 10).

6. On April 15, 2013, Mr. Hall, for MWF, hand delivered a second "Qualified Facility (QF) Power Purchase Agreement (PPA) Application" so that PacifiCorp could not again ignore receipt of the application. 2013.04.18 email (Ex. 25).

7. PacifiCorp belatedly provided Monticello Wind Farm Project indicative pricing on May 22, 2013 (Ex. 18). This was provided a year late from MWF's first request. *See* May 25, 2012, PPA Application Excerpts (Ex. 45).

8. On June 9, 2015, the PSC updated Original Schedule 38 to Am. Schedule 38 and ordered PacifiCorp to promptly notice each QF project in the QF pricing queue of its status and the next step to remain in the QF pricing queue. June 9, 2015, Order (Ex. 24).

9. MWF submitted every document and complied with every provision under Original Schedule 38 before Am. Schedule 38 took effect on August 8, 2015. *See* Assignment Assumption (Ex. 11); *see also*, 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).

10. Even if the PSC's June 9, 2015, Order applied to MWF, and it does not, PacifiCorp did not send MWF the notice as required. June 9, 2015, Order (Ex. 24). *See* PSC's June 9, 2015, Order (Ex. 24); *see also*, Hall Decl. ¶¶ 14-20; 2012.03.27 email (Ex. 27); Ceruti Decl. ¶¶ 1-24 (Ex. 9); PPA Application Excerpts (Ex. 5); 2013.04.18 email (Ex. 25); LGIA 80 MW 76 (Ex. 20); LGIA 80 MW Excerpts 74 (Ex. 21); PPA Ex. 4.6 – 20.

11. Even if the PSC's June 9, 2015, Order applied to MWF, and it does not, PacifiCorp further violated the PSC June 9, 2015, Order by failing to notify MWF of its status and the amount of time remaining to complete the next step to remain on the QF pricing queue. *Compare* June 9, 2015, Order 29, ¶ 25 (Ex. 24) *with* Hall Decl. ¶ 21 (Ex. 1); *and* DPU Motion Ex. A; 2015.07.21 email (Ex. 26); 2013.06.03 email (Ex. 4); PPA Application Excerpts (Ex. 5); 2013.06.26 email (Ex. 7).

12. By June 9, 2015, MWF's next step under any version of Schedule 38 was ***not*** to request indicative pricing. May 25, 2012, PPA Application Excerpts (Ex. 45); PPA Application Excerpts (Ex. 5).

13. On September 20, 2016, the Supreme Court of Utah held and remitted its order that MWF had the right to rely on the market proxy methodology and did not need to again request indicative pricing. 2016.09.20 Supreme Court Order (Ex. 2).

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

I. THE PSC SHOULD DENY THE DPU MOTION BECAUSE THE DPU MOTION FAILS TO FOLLOW THE RULES.

The DPU's *Statement of Material Undisputed Facts* is not "supported by citing to materials in the record under paragraph (c)(1) of this rule." Utah R. Civ. P. 56(a)(1). In fact, the DPU's *Statement of Material Undisputed Facts* does not include a single citation in support. Consequently, the DPU cannot carry its burden under the applicable standard. The PSC must deny the DPU Motion.

II. APPLYING THE NEW SCHEDULE 38 TO MWF WOULD VIOLATE UTAH LAW AND MWF'S DUE PROCESS RIGHTS.

In November 2012, MWF requested, and PacifiCorp sent, P.S.C.U. No. 49 Schedule 38 (the "Original Schedule 38") (Ex. 10). As explained below, MWF began to rely on the Original

Schedule 38. The DPU, however, argues that the PSC should retroactively apply P.S.C.U. No. 50 Schedule 38 (as revised) (the "Am. Schedule 38") (Ex. 23) pursuant to the PSC's June 9, 2015, Order in PSC Dkt. No. 14-035-140 (the "June 9, 2015, Order") (Ex. 24).[3] The DPU's reliance on a 30-year-old abrogated case is misplaced.[4] The Original Schedule 38 governs this docket and the approval of the instant PPA.

A. <u>The PSC Cannot Apply Orders Retroactively.</u>

Utah law does not empower the PSC to retroactively apply new orders. In the administrative context, "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by [the legislature] ***in express terms***." *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").[5] Even then, however, "administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.*

> The Utah legislature has granted the PSC with the limited power and jurisdiction,
>
> to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction . . . .

Utah Code Ann. § 54-4-1.

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[3] As the DPU notes, the Am. Schedule 38 was not effective until August 3, 2015. DPU Motion 4.

[4] The PSC's June 9, 2015, Order explicitly intends to uphold Utah's law. *See* June 9, 2015, Order 11 ("Our approval of the Settlement Agreement, as in similar cases, is not intended to alter any existing [PSC] policy or to establish any [PSC] precedent.").

[5] The Supreme Court of Utah has expressly adopted the federal courts' approach to retroactivity, holding that the "federal rule is entirely sound." *Thomas v. Color Country Management*, 2004 UT 12, ¶ 35, 84 P.3d 1201.

Thus, the Utah legislature has ***not*** conveyed to the PSC "the power to promulgate retroactive rules . . . in ***express*** terms." *Georgetown*, 488 U.S. at 208 (emphasis added). Consequently, the PSC's order regarding the Am. Schedule 38 cannot be retroactively applied to MWF who had already begun the Schedule 38 process and would have executed a PPA under that process had PacifiCorp not "refused to proceed with negotiations [with MWF] on a power purchase agreement under its earlier indicative pricing." *Ellis-Hall Consultants v. Public Service Commission of Utah*, 2016 UT 34, ¶ 2.[6]

B. Am. Schedule 38 Cannot Apply to MWF Where Retroactivity Is Barred and the DPU Has Not, and Cannot, Rebut the Presumption of Substantiveness.

Even if the legislature had granted the PSC power to deem Am. Schedule 38 retroactive, and it has not, it cannot apply Am. Schedule 38 retroactively in this matter. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence." *Warne v. Warne*, 2012 UT 13, ¶ 25, 275 P.3d 238 (Utah 2012). Thus, "[r]etroactivity is not favored in the law." *Thomas v. Color Country Management*, 2004 UT 12, ¶ 35, 84 P.3d 1201 (quoting *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). Indeed, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Warne v. Warne*, 2012 UT 13, ¶ 25, 275 P.3d 238 (Utah 2012) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)).[7]

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[6] PacifiCorp's OATT similarly rejects retroactivity, stating states, "[i]f an LGIA has been submitted to FERC for approval before the effective date of the LGIP, then the LGIA would be grandfathered." OATT IV § 40.1.1.3 (Ex. 20).

[7] "[T]he courts of this state operate under a statutory bar against the retroactive application of newly codified laws." *Wasatch Cnty. v. Okelberry*, 2015 UT App 192, ¶ 17, 357 P.3d 586 (internal citations omitted).

The DPU contends that Am. Schedule 38 can be applied to MWF because procedural changes are retroactive, citing *State, Dept. of Social Services v. Higgs*, 656 P.2d 998, 1000-01 (Utah 1982). DPU Motion 7. The DPU's contention is wrong for a host of reasons. First, *Higgs* is bad law. In January 2015, over 30 years after *Higgs* (and before the PSC's June 9, 2015, Order), the Supreme Court of Utah abrogated prior decisions that "sometimes suggested that amendments to procedural statutes are retroactive because they apply presently to cases whose causes of action arose in the past." *State of Utah v. Perez*, 2015 UT 13, ¶ 10, 345 P.3d 1150 (internal citations omitted). The Court held that "the line between substance and procedure is ***not*** ultimately an *exception* to the rule against retroactivity." *Id.* at ¶ 11 (explaining, "[i]t is simply a tool for identifying the relevant event being regulated by the law in question") (emphasis added). Accordingly, Utah law states that the applicable law is "the law as it exists at the time of the event regulated by the law in question." *Id.*[8]

MWF submitted every document and complied with every provision under Original Schedule 38 before Am. Schedule 38 took effect on August 8, 2015. Thus, Original Schedule 38 is the relevant law because it was the law as it existed when Monticello Wind Farm Project, for example, completed the following:

- On February 22, 2012, purchased the land rights necessary for the PPA footprint, as required by Original Schedule 38 I(B)(4)(b). *See* Assignment Assumption (Ex. 11).[9]

[8] No one disputes that Am. Schedule 38, as applied to MWF, would require a retroactive application. "[A] law is understood as retroactive if it attaches new legal consequences to events completed before its enactments." *See State v. Perez*, 2015 UT 13, 345 P.3d 1150, ¶ 13 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994)).

[9] This is the same footprint as the Blue Mountain Wind 1, LLC PPA in PSC Docket 11-035-196, PPA Exhibit 3.2.4 and 3.27.

- On March 19, 2012, submitted a Large Generator Interconnection Request for a Large Generating Facility (LGIP App'x 1), as required by Original Schedule 38 II(A)-(B). *See* LGI Request Excerpts (Ex. 12).
- On March 26, 2012, obtained Large Generation Interconnection ("LGI") Queue position and PacifiCorp assigned a queue number, as required by Original Schedule 38 II(A)-(B). *See id; see also,* PacifiCorp OASIS, LGI Queue.
- On April 13, 2012, met with PacifiCorp in the initial Scoping Meeting/Conference, in furtherance of Original Schedule 38 II(A)-(B). *See* 2012.04.13 Scoping Meeting (Ex. 13).
- On April 19, 2012, obtained a San Juan County conditional use permit, as required by Original Schedule 38 I(B)(4)(c). *See* 2012.04.19 SJC Minutes (Ex. 14).
- In May 2012, MWF submitted an indicative pricing request, as required by Original Schedule 38 I(B)(2)). *See* May 25, 2012 Request Excerpts (Ex. 45); *see also*, Ceruti Decl. ¶¶ 9-10 (Ex. 9); 2012.11.16 Clements Testimony 9 (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).
- On August 31, 2012, completed its LGI Feasibility Study Report (LGIP App'x 2), as required by Original Schedule 38 II(A)-(B). *See* PacifiCorp OASIS, LGI Queue.

- On September 7, 2012, met with PacifCorp in the Feasibility Study Report Review Meeting/Conference Call, in furtherance of Original Schedule 38 II(A)-(B). *See* 2012.04.13 Feasibility Report Review (Ex. 15).
- On January 14, 2013, obtained a San Juan County building permit, as required by Original Schedule 38 I(B)(4)(c). *See* 2013.01.14 SJC Minutes (Ex. 16).
- On January 30, 2013, completed its LGI System Impact Study Report (LGIP App'x 3), as required by Original Schedule 38 II(A)-(B). *See* LGI Request Excerpts (Ex. 12); *see also*, PacifiCorp OASIS, LGI Queue.
- On February 4, 2013, met with PacifiCorp for a System Impact Study Report Review Meeting/Conference, in furtherance of Original Schedule 38 II(A)-(B). *See* 2013.02.04 SIS Report Review (Ex. 17).
- On April 5, 2013, again requested a draft PPA, as required by Original Schedule 38 I(B)(5). *See* PPA Application Excerpts (Ex. 5).
- On April 15, 2013, again requested indicative pricing, as required by Original Schedule 38 I(B)(2)). *See* 2013.04.18 email (Ex. 25); *see also*, PPA Application Excerpts (Ex. 5).
- On May 22, 2013, received indicative pricing under the market proxy methodology, as required by Original Schedule 38 I(B)(3). *See* May 22, 2013 Indicative Pricing (Ex. 18).
- On May 31, 2013, continued making repeated requests for a draft PPA, as required by Original Schedule 38 I(B)(4). *See* 2013.05.31 email (Ex. 3).

- On or about June 26, 2013, received a generic draft PPA and began negotiating thereto, pursuant to Original Schedule 38 I(B)(5)-(6). 2013.06.03 email (Ex. 4).
- On July 12, 2013, met with PacifiCorp for a Facilities Study Report Review Meeting, in furtherance of Original Schedule 38 II(A)-(B). *See* 2013.07.12 Facilities Study Meeting (Ex. 19).
- On August 6, 2013, completed its LGI Facilities Study Report (LGIP App'x 4), as required by Original Schedule 38 II(A)-(B). *See* PacifiCorp OASIS, LGI Queue.
- On August 27, 2013, PacifiCorp illegally withdrew Monticello Wind Farm Project's indicative pricing and market proxy methodology (which was later reversed and remitted by the Supreme Court of Utah on September 20, 2016). *Ellis-Hall Consultants, LLC v. Public Service Commission of Utah*, 2016 UT 34.
- On February 18, 2014 and April 24, 2014, executed LGIAs (LGIP App'x 6), as required by Original Schedule 38 II(A)-(B). *See* LGIA 80 MW Excerpts (Ex. 20) and LGIA 45 MW Excerpts (Ex. 21).
- On April 7, 2014, provided San Juan County an update pursuant to its building permit, in furtherance of Original Schedule 38 I(B)(4)(c). *See* 2014.04.07 SJC Minutes (Ex. 22).

All of this occurred ***before*** the PSC's June 9, 2015, Order and the August 8, 2015, effective date of the Am. Schedule 38. No one argues anything to the contrary.

Even if Utah's antiquated retroactivity scheme still operated, and it does not, the DPU's argument is still wrong. Am. Schedule 38 constitutes substantive, not merely procedural, changes. Changes in law are presumptively substantive; and, Utah courts rely on the "general

rule against retroactive application when the presumption of substantiveness is not clearly rebutted." *Thomas*, 2004 UT 12 at ¶ 36 ("[W]hen in doubt, [courts] should find that the statute is substantive."). The DPU does not attempt, let alone carry, its burden to clearly rebut the presumption of substantiveness.

Even a cursory review of Am. Schedule 38 would note substantive changes that "enlarge, eliminate, or destroy substantive rights." *See B.A.M. Development, L.L.C. v. Salt Lake County*, 2006 UT 2, ¶ 6, 128 P.3d 1161 (Utah 2006).[10] Am. Schedule 38 introduced new and onerous timelines that would prejudice MWF. The DPU expressly relies on these changes to the timelines as the basis to deny the instant PPA. For example, Am. Schedule 38(I)(B)(9)'s new 180-day requirement to execute a PPA after indicative pricing is provided does not exist in the Original Schedule 38, under which MWF operates. Motion 7-8; *compare* Am. Schedule 38 I(B)(5)-(11) (Ex. 23) *with* Original Schedule 38 (Ex. 10). Similarly, Am. Schedule 38 newly requires that PPA execution must be "completed within five months or the QF shall be removed from the pricing queue." Am. Schedule 38(I)(B)(10)(e) (Ex. 10). Am. Schedule 38 also limits PPAs to a new "proposed length of contract term; not to exceed 15 years." *Compare* Original Schedule 38 (Ex. 10) *with* Am. Schedule 38 (I)(B)(2)(j) (Ex. 23).[11] And, Am. Schedule 38 would also illegally change MWF's indicative pricing under the market proxy methodology in violation of the Supreme Court's Order.[12] These are all substantive changes because they would

[10] Substantive law is "the positive law which creates, defines and regulates the rights and duties of the parties." *Harvey*, 2010 UT 12, ¶¶ 14, 24, 227 P.3d 260 (finding the change of a benefit's mere possibility to being foreclosed is substantive).

[11] This significantly decreases from MWF's prior right to PPA term-length of 20 years. *See* October 31, 2005, *In the Matter of the Application of PacifiCorp for Approval of an IRP-Based Avoided Cost Methodology for QF Projects Larger than One Megawatt*, Dkt. No. 03-35-14.

[12] Am. Schedule 38 specifically requires that 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

materially impact MWF's PPA. That these are substantive changes is all the more evident given that PacifiCorp attempted to apply the June 9, 2015, Order to require MWF to start over with the entire Schedule 38 process.[13]

There is no dispute that MWF began, relied on, and performed under the provisions of the Original Schedule 38—beginning in 2012. *See* Original Schedule 38 email (Ex. 10). The PSC should approve MWF's PPA under the existing Schedule 38 when MWF began the Schedule 38 process—long prior to June 9, 2015.[14] *See State of Utah v. Perez*, 2015 UT 13, ¶ 10, 345 P.3d 1150 (stating, the applicable law is "the law as it exists at the time of the event regulated by the law in question"). Altering MWF's Schedule 38 process midstream is not fair, not right, and not legal.[15]

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available pricing inputs and methods approved by the Commission . . . ." Am. Schedule 38 (I)(B)(9). Because the Supreme Court has already determined that MWF is entitled to rely on the market proxy methodology, Am. Schedule 38's required use of the PDDRR pricing methodology is not only substantive but a gross violation of the Supreme Court's order in *Ellis-Hall v. Public Service Commission of Utah*, 2016 UT 34, ¶ 48.

[13] After the June 9, 2015, Order, PacifiCorp, relying on the Am. Schedule 38, demanded MWF to start the process anew and, again, request a new draft PPA. 2015.07.21 PacifiCorp Letter ("Pursuant to Section I.B.5 of the revised Schedule 38, you must request a draft PPA from PacifiCorp within sixty days of the receipt of indicative prices . . .") (DPU Motion Ex. A).

[14] The DPU makes the bizarre, but ultimately irrelevant argument, that "a new updated pricing was requested on or before September 2, 2016" and that "new indicative pricing post *Ellis-Hall* was provided on or before September 2, 2016. DPU Motion 8. This is not at all true. The Supreme Court held that Ellis-Hall "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." *Ellis-Hall*, 2016 UT 34 at ¶ 48. Ellis-Hall did ***not*** request new indicative pricing. Rather, Ms. Ceruti requested "pricing for our PPA." DPU Motion Ex. B. In fact, Ms. Ceruti made this particularly clear when she stated, "[w]e wish to move forward ***with our PPAs for the indicative pricing Pacificorp issued in May 2013***. Please advise what the next step is." 2016.08.29 email (Ex. 30). Furthermore, the unsolicited, erroneous, illegal, and purported "updated" indicative pricing that PacifiCorp provided MWF was drafted on September 5, 2013. 2013.09.05 (Ex. 43).

[15] *See Harvey*, 2010 UT 12 at ¶ 29 ("Instead of simply modifying how a disconnection petition is filed, for example, these amendments altered the criteria for determining whether disconnection is allowed.").

III. THE OPERATIVE SCHEDULE 38 IS ULTIMATELY IMMATERIAL BECAUSE MWF IS ENTITLED TO RELY ON MARKET PROXY PRICING METHODOLOGY.

The DPU's argument also fails because FERC has prohibited the use of bright line rules that change eligibility criteria. *Murphy Flat*, 141 FERC ¶ 61,145, at ¶¶ 6, 23-24. Am. Schedule 38 cannot now undermine or alter MWF's rights. MWF hereby refers and incorporates its arguments in opposition to the Office of Consumer Service's motion for summary judgment.

IV. TO THE EXTENT THAT P.S.C.U. 50 SCHEDULE 38 IS EFFICACIOUS, THE PSC SHOULD STILL APPROVE THE PPA.

A. PacifiCorp Violated the PSC Order Requiring Notice.

Assuming the Am. Schedule 38 is effective against MWF, and it is not, the PSC cannot apply it against MWF because PacifiCorp violated the PSC June 9, 2015, Order, which states:

> [PacifiCorp] will ***promptly notify*** each QF project currently in the QF pricing queue for which a power purchase agreement as not yet been executed of the requirements of this Stipulation and the new tariff provisions, of such project's status under the new tariff provisions, and of the ***amount of time remaining*** for such project to complete the ***next step*** to remain in the QF pricing queue under the new tariff requirements, which time shall be a minimum of thirty (30) additional days from the date of notice.

June 9, 2015, Order 29, ¶ 25 (emphasis added) (Ex. 24).

The DPU purports that PacifiCorp sent this notice on July 21, 2015, stating:

> [Y]ou ***must request a draft PPA*** from PacifiCorp within sixty days of the ***receipt*** of indicative prices or they will be removed from the QF pricing queue. While this deadline has passed, as a transitional measure you have thirty days from the ***receipt*** of this notice to request draft PPAs for your Monticello 1 and Monticello 2 wind projects and retain your position in the QF pricing queue."

PacifiCorp July 21, 2015, Letter (emphasis added) (DPU Motion Ex. A).

As explained below, PacifiCorp did not notify MWF "of [MFW's] status under the new tariff provisions, and of the amount of time remaining for such project to complete the next step . . ." June 9, 2015, Order (Ex. 24).[16]

1. PacifiCorp Did Not Send the Required Notice to Monticello Wind Farm, LLC.

On July 21, 2015, PacifiCorp purports to have sent Mr. Tony Hall, Monticello 1 LLC, and Monticello 2 LLC a purported notice pursuant to the June 9, 2015, Order (Ex. 24). PacifiCorp waited from June 9, 2015, to July 21, 2015—1 ½ months—to send out the purported notification—which was not received until 2018 (as explained below). This does not constitute a "prompt" notification, as required.

Second, PacifiCorp waited to send this notification because it was engaging in deceitful conduct to ensure that this notice was not received. Hall Decl. ¶¶ 14-20 (Ex. 1). The DPU purports that PacifiCorp sent this notification via one Tuba Avcisert—someone completely unknown to MWF. *Id.* at ¶¶ 9-13. PacifiCorp did not send it through their long-term contacts at PacifiCorp. *Id.* at ¶ 14. In addition, PacifiCorp did not send the notification as they had done before, by letter, or to any variety of other persons, including Ms. Ceruti, or Ellis-Hall, Ms. Ceruti, and Mr. Hall's counsel of record at the time. *Id.* at ¶ 14-20. In fact, this purported notice was not received by Mr. Hall until 2018. *See* Hall Decl. ¶¶ 1-14.

PacifiCorp's deceitful conduct is further evidenced by the fact that MWF had repeatedly instructed PacifiCorp how to contact it with questions or additional information. For example, PacifiCorp had requested to "have one e-mail address for the EHC customer file" and

[16] Monticello Wind Farm Project is a multi-phase project located in San Juan County, Utah. The first phase of this project is Monticello Wind Farm, LLC—the signatory to the instant PPA.

acknowledged that mail@ehc-usa.com as that email." 2012.03.27 email (Ex. 27); *see also*, May 25, 2012 Request Excerpts (Ex. 45); Ceruti Decl. ¶ 3 (Ex. 9) ("I confirmed that mail@ehc-usa.com was the correct contact email for EHC"). In addition, MWF's second PPA application – like the first – specifically stated, "Should you have any questions or require additional information, kindly contact me via email, at mail@ehc-usa.com." PPA Application Excerpts (Ex. 5). Ms. Ceruti similarly requested Mr. Clements to "contact me via email should you require anything else" relating to the PPA process. 2013.04.18 email (Ex. 25). Furthermore, the two LGIA Appendix F both require notifications by mail and does not provide for email notifications. LGIA 80 MW 76 (Ex. 20); LGIA 80 MW Excerpts 74 (Ex. 21). And the instant PPA requires notification to be sent to Monticello Wind Farm LLC, Ellis-Hall Consultants, LLC, and Ms. Ceruti at Kimberly.Ceruti@ehc-usa.com. PPA Ex. 4.6 - 20. Accordingly, PacifiCorp's purported "notice" is not reasonable and does not pass legal muster. *See Lavallee v. Med-1 Solutions, LLC*, 1:15-cv-01922-DML-WTL (S.D. Ind. September 29, 2017) ("Not opening an email attachment is not the same as failing to open a letter one receives through the United States Post Office mail system. It is the proven reliability of the latter system-the very high probability that a properly addressed letter reaches its destination-that led to the common law mailbox rule presumptions. The same cannot be said for documents delivered as a web-based email attachment.").

Lastly, PacifiCorp's service of this notice is otherwise invalid. PacifiCorp did not provide a certificate of service or any of the other required information for this notice to be effective in accordance with Utah R. 746-1. And, to the extent the PSC regulations are silent as

to service, PacifiCorp did not serve MWF the notice pursuant to Utah R. Civ. P. 5(a)(1)(F). Consequently, the purported July 21, 2015, notice is legally inefficacious.

2. PacifiCorp's Notice Violated the PSC's Order.

In addition to the other infirmities of PacifiCorp's purported July 21, 2015, notice, PacifiCorp blatantly violated the PSC June 9, 2015, Order by failing to notify MWF of its "***status*** under the new tariff provisions, and of the ***amount of time remaining*** for such project to complete the ***next step*** to remain in the QF pricing queue." June 9, 2015, Order 29, ¶ 25 (Ex. 24). This, of course, assumes that the June 9, 2015, order applies to MWF, which it did not.

First, PacifiCorp's purported letter did not inform MWF of its "status." *See id; see also*, Hall Decl. ¶ 21 (Ex. 1); DPU Motion Ex. A; 2015.07.21 email (Ex. 26).

Second, PacifiCorp was required to notice "the amount of time remaining for such project to complete the next step to remain in the QF pricing queue under the new tariff requirements . . . ." June 9, 2015, Order. PacifiCorp's notice does not do this. Rather, the July 21, 2015, notice states "you ***must request a draft PPA*** from PacifiCorp within sixty days of the ***receipt*** of indicative prices or they will be removed from the QF pricing queue." DPU Motion Ex. A. The problem, however, is that this was not MWF's next step. MWF had requested ***and received*** a draft PPA by June 3, 2013. *See* 2013.06.03 email (Ex. 4).[17] Although Ellis-Hall had repeatedly struggled to get PacifiCorp to provide a draft PPA for a very long time, it cannot be disputed that Ms. Ceruti, on behalf of MWF, made the request for a generic PPA in May 2012 and then no later than April 5, 2013, and a site specific PPA on June 27, 2013, consistent with Original

[17] Because MWF had already requested and received a draft PPA, it is all the more difficult to believe that PacifiCorp's July 21, 2015, notice was intended for MWF.

Schedule 38 I(b)(5), requiring a draft PPA "containing a comprehensive set of proposed terms and conditions . . . ." *Id.* ("As well, could you advise if you will be able to send the PPA by days end as agreed?"); *see also,* 2012.05.25 PPA Application Excerpts (Ex. 45); 2013.06.03 PPA Application Excerpts (Ex. 5); 2013.06.26 email (Ex. 7) ("I am in recept of what appears to be a generic draft PPA from 2011. What I had expected from you was a full PPA for this project for proof reading and signature if agreement could be reached. Given that we have suppied all the requested information many weeks ago I fail to see why this document was forwarded. I look forward to a site specific PPA."). PacifiCorp's "notice" that MWF must presumably request a PPA was ***over three years late.***

Consequently, even if the Am. Schedule 38 applies to MWF, and it does not, PacifiCorp's July 21, 2015, letter violated the PSC's order by failing to provide notice to MWF, failing to provide notice of MWF's status and "the amount of time remaining for such project to complete the ***next step*** to remain in the QF pricing queue under the new tariff requirements." June 9, 2015, Order 29, ¶ 25 (emphasis added). To enforce Am. Schedule 38 against MWF without proper notice would be a gross violation of due process.

B. <u>Am. Schedule 38 is Unconstitutionally Vague.</u>

Am. Schedule 38 cannot be applied against MWF because it is also unconstitutionally vague. "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." *Federal Communications Commission v. Fox TV Stations, Inc.,* 567 U.S. 239, 253 (2012); *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 discriminatory way." *Id.*

In this case, the requirements the DPU leverages against MWF are unconstitutional because they are vague and violate MWF's constitutional fair notice protections. Am. Schedule 38 proffers what is "typically applicable." Am. Schedule 38, 1 (Ex. 23). This single phrase, without more, leaves MWF guessing as to whether it is a "typical" or "atypical" case. Indeed, for all the reasons stated herein and in MWF's opposition to the OCS's motion, MWF has every reasonable belief that it is not the typical case and that Am. Schedule 38 does not apply. More worrisome, however, is that this language opens the flood gates for PacifiCorp, and others, to enforce the law in "an arbitrary or discriminatory way." In fact, PacifiCorp has used vagueness in the past to discriminate against MWF.[18] Am. Schedule 38 does not apply in this matter because it is unconstitutionally vague.

[18] MWF hereby refers and incorporates its explanation of the "Vrba Docket" as set forth its Opposition to the Office of Consumer Services, filed contemporaneously herewith.

C. MWF Requests, and the PSC Should Grant, Such Extensions Necessary to Approve MWF's PPA Due to Numerous Extenuating Circumstances—Namely, the PSC's Erroneous Order Regarding EHC's Indicative Pricing that Caused Substantial and Unnecessary Delay.

Even if P.S.C.U. No. 50 Schedule 38 was the appropriate version of Schedule 38 to apply to MWF—and it is not—the PSC should grant MWF such extensions to the deadlines and necessary waivers sufficient to approve MWF's PPA.

MWF refers and incorporates its opposition to the Office of Consumer Services' motion for summary judgment, which more specifically details MWF's legal rights prior to the PSC's June 9, 2015, Order, and the associated delays. Indeed, MWF also contends that it was PacifiCorp's delays, and the PSC's erroneous support thereof, that prejudiced MWF's ability to meet the requirements of the Original Schedule 38.

On May 22, 2013, EHC received indicative pricing for the Monticello Wind Farm Project from PacifiCorp. 2013.05.22 Indicative Pricing (Ex. 18). On August 27, 2013, PacifiCorp purportedly withdrew EHC's indicative pricing pursuant to the PSC's August 16, 2013, Phase II Order. 2013.08.27 Letter (Ex. 28). EHC filed an informal and then formal complaint with the PSC in Docket No. 2014-035-24. On June 17, 2014, the PSC issued a final agency action against EHC denying EHC's complaint. EHC then appealed. On September 20, 2016, the Supreme Court held in EHC's favor, reversed the PSC, and remitted the matter back to the PSC. Supreme Court Methodology Order (Ex. 2).

The result of these chain of events is that PacifiCorp and the PSC delayed EHC's PPA approval for ***over three*** years. Almost two years had passed from PacifiCorp's August 27, 2013, purported withdrawal of EHC's withdrawal of indicative pricing to the PSC's June 9, 2015, Order and PacifiCorp's submission of the Am. Schedule 38 on August 6, 2015. *See* Motion 8.

In contrast, after the Supreme Court's order and remittur on September 20, 2016, MWF and RMP were able to execute the instant PPA in significantly less time. Consequently, PacifiCorp's erroneous rescission of EHC's indicative pricing, and the PSC's erroneous support thereto, are the actual and proximate causes of MWF's inability to comply with the Am. Schedule 38 timelines that did not exist and would not have applied by the time the PPA was executed.

V. UTAH-PURPA PROVIDES INDEPENDENT GROUNDS TO APPROVE THE PPA.

Independent of all else that has been said, the PSC should approve the PPA pursuant to Utah-PURPA. In *Ellis-Hall Consultants, LLC v. Public Service Commission of Utah*, No. 20131146-SC and 20131147-SC, Blue Mountain Power Partners, LLC argued:

> Utah statutes do not generally require PPAs between public utilities and power producers to be submitted to the [PSC] for approval. Indeed, Utah-PURPA expressly provided that public utilities and QFs "may agree to rates, terms, or conditions for the sale of electricity . . . which differ from the rates, terms, and conditions adopted by the [PSC]." Utah Code § 54-12-2(3). Thus, a QF PPA need not even adhere to [PSC]-approved rates if the utility is willing to risk disallowances if its prices are later challenged as imprudent in ratemaking proceedings before the [PSC].

BMPP Appellee Brief, 22.

This rationale applies to MWF. PacifiCorp and MWF have negotiated rates, terms, and conditions for the sale of electricity. Under the statute, the PSC still should approve the PPA because PacifiCorp and MWF are not limited to those adopted by the PSC—including Schedule 38. Indeed, nothing in the PPA requires the PSC to first find that the rates, terms, and conditions are consistent with any order of the PSC before approving the PPA.

CONCLUSION

The DPU fails to carry its burden. The DPU failed to follow the rules and relies on bad law. In addition, the PSC is legally barred from applying Am. Schedule 38 to MWF. Further, PacifiCorp acted in bad faith and violated the PCS's June 9, 2015, order. PacifiCorp did not notice MWF of both its status and the amount of time remaining to complete the next step to remain in the QF pricing queue. In the alternative, the PSC should approve the PPA due to extenuating circumstances in that the PSC actually and proximately caused MWF's ability to execute a PPA due to its erroneous decision that was overruled by the Supreme Court of Utah.

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 DIVISION OF PUBLIC UTILITIES' MOTION FOR SUMMARY JUDGMENT** was emailed to the following in Utah Docket 17-035-68:

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/s/ Kimberly Ceruti
Kimberly Ceruti