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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power for Approval of Power Purchase Agreement between PacifiCorp and Monticello Wind Farm, L.L.C.	)	Docket No. 17-035-68 Reply Memorandum in Support of the Office of Consumer Services' Motion for Summary Judgment

Pursuant to Utah Code § 54-10a-301, Utah Admin. Code r. 746-1-105 and Utah R. Civ. P. 56(c), the Office of Consumer Services ("Office") files this Reply Memorandum in Support of its Motion for Summary Judgment. In response to the Office's Motion, intervenors Monticello Wind Farm L.L.C.'s and Ellis-Hall Consultants, LLC (collectively "Monticello") argue that Monticello need not obtain a legally enforceable obligation ("LEO"), that it has obtained a LEO and that PacifiCorp prevented it from obtaining a LEO. *See* Monticello Wind Farm, LLC and Ellis-Hall Consultants, LLC's Joint Memorandum in Opposition to the Offices of Consumer Services' Motion for Summary Judgment ("Opposition Memorandum") at 11-24. These arguments evidence a fundamental misunderstanding of the central contention in the Office's Motion for Summary Judgment. The Office is not arguing that Monticello failed to obtain a LEO. Monticello has a signed Power Purchase Agreement ("PPA"). The LEO doctrine has no application to Qualifying Facilities ("QF") with a signed PPA.

Rather, the Office is arguing that Monticello cannot rely on the Utah Public Service Commission's ("Commission") Methodology Orders, as interpreted by the Utah Supreme Court, as granting them the right to the indicative pricing Monticello received prior to the implementation of the new pricing methodology. This is because while "the Supreme Court opinion interpreting the Methodology Orders is unquestionably state law, federal law preempts these orders from application in the instant proceeding to approve Monticello's PPA." Office's Summary Judgment Motion at 4. Specifically, the Methodology Orders themselves are preempted by federal law because they essentially calculate the avoided costs at the time a QF receives indicative pricing regardless of the status of the PPA negotiations and therefore conflict with, and are preempted by, 18 C.F.R. § 292.304(d)(2). The Methodology Orders are therefore void and cannot be relied upon as granting Monticello, or any QF in Monticello's position, the right to obtain a PPA price calculated at the date they first received indicative pricing.

ARGUMENT

Because of Monticello's misunderstanding of the Office's central contention it is not necessary to address each counter argument in the Opposition Memorandum. Accordingly, the Office will only address one fact that is disputed and reassert its central argument.

A. Disputed Fact

Monticello contests the Office's undisputed material fact number three, which provides: "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." Office's Motion for Summary Judgment at 2. Specially, Monticello argues that: "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." Opposition Memorandum at 2.

Monticello is referring to the fact that because the pricing in the original May 22, 2013 proposed indicative pricing letter begins and ends at a different date then the pricing in the December 13, 2017 PPA, the pricing varies in the two documents. *See* Exhibit A attached to the Office's Motion for Summary Judgment and Exhibit A attached to Monticello's PPA. However, the prices for any year covered by both documents, i.e. the price for 2019, 2020, 2021 etc., are identical. *Id.* Accordingly, 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. Indeed, throughout the Opposition Memorandum, Monticello argues that the December 13, 2017 PPA should be approved because it is entitled to the pricing receive in the May 22, 2013 indicative pricing letter. *See e.g.* Opposition Memorandum at 6-7. Therefore, the Office's fact number three is undisputed.

B. Central Contention

Monticello's arguments that it does not need a LEO, that it has obtained a LEO and that PacifiCorp prevented it from obtaining a LEO are misplaced. Opposition Memorandum at 11-24. The LEO doctrine, in its most fundamental form, is meant to "prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract." *Cedar Creek Wind, LLC,* 137 FERC ¶ 61,006 at P. 36 (2011); *see also* Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,880. Accordingly, the LEO doctrine has no application to a QF with a signed PPA.

The Office's discussion of the LEO doctrine did not argue that Monticello needed and did not have a LEO. Rather, the Office's discussion of the LEO doctrine was limited to the contention that the Methodology Orders are void because they conflict with 18 C.F.R. § 292.304(d)(2), which requires that the avoided costs be calculated either at the time of delivery of the electricity or at the time a legally enforceable obligation ("LEO") to purchase the electricity occurred. As discussed below, the Methodology Orders do not comply with 18 C.F.R. § 292.304(d)(2) and therefore conflict with, and are preempted by, federal law.[1] This is because the Methodology Orders, as interpreted by the Supreme Court, calculate the avoided costs at the time indicative pricing without regard to the status of the PPA's negotiations. Office's Summary Judgment Motion at 7. This contention is outside the parameters of the federal LEO doctrine and is therefore preempted. This result would apply to any QF that obtained indicative pricing before the second Methodology Order but had yet to sign a PPA, not just Monticello.

As the Supreme Court observed in *Ellis-Hall*, indicative pricing is used to determine a project's feasibility. *Ellis-Hall*, 2016 UT 34, ¶ 42. When the feasibility of a project is not yet known a LEO cannot arise. The rationales on which the LEO doctrine is based compel this conclusion. The FERC has set out two rationales supporting the LEO doctrine. First, the doctrine is meant to "prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract." *Cedar Creek Wind, LLC,* 137 FERC ¶ 61,006 at P. 36 (2011); *see also* Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,880. Second, the LEO doctrine is based on the unilateral nature of PURPA's mandatory purchase requirement. *See* 18 C.F.R. § 292.303(a). That is "a QF, by committing itself to sell to an electrical utility, also commits the electrical utility to buy from the QF; these commitments result either in contracts or in non-contractual but

[1] While the FERC's regulations and decisions set out the general parameters of the LEO doctrine, the determination of the precise date that a LEO arises is left to state law. *West Penn,* 71 FERC ¶ 61,153 at P. 61,495 (1995). However, the deference given to the state in determining the date that a LEO arises is left is "subject to the terms of the [FREC's] regulations. *West Penn* does not . . . give states the unlimited discretion to limit the ways a legally enforceable obligation is incurred." *Cedar Creek Wind, LLC,* 137 FERC ¶ 61,006 at P. 35 (2011). In several dockets the FERC has issued Declaratory Orders ruling that the state commission's decisions establishing the time a LEO arises are contrary to its regulations. *Hydrodynamics Inc.*, 146 FERC ¶ 61,193, P. 33 (2014); *Grouse Creek Wind Park. LLC.* 142 FERC ¶ 66,187, at P. (2013).

binding, legally enforceable obligations." *Cedar Creek Wind, LLC,* 137 FERC ¶ 61145 at P. 24 (2012); *see also JD Wind I,* 129 FERC ¶ 61,148, at P. 25 (2009).

At the time a utility provides a prospective QF indicative pricing before the feasibility of the project is known the concerns of a utility not signing the PPA are not implicated. Nor does the rationale of relating to the unilateral nature of the PURPA's must purchase obligation support the establishment of a LEO at this stage in the negotiations. If the feasibility of a project is not yet known and a QF cannot demonstrate its viability, it cannot commit itself "to sell to an electric utility [and] also commit[] the electric utility to buy from the QF." *Cedar Creek Wind, LLC,* 137 FERC ¶ 61,006 at 35 (2011); *see generally Whitehall Wind LLC v. Montana Pub. Serv. Comm'n,* 347 P.3d 1273, 1276-77 (Mont. 2015); *South River Power Partners v. Penn Pub. Serv. Comm'n*, 696 A.2d 926, 930 (Penn. 1997).

Accordingly, the rationales advanced by the FERC for establishing a LEO negated the assertion that a LEO arises when a QF receives indicative pricing regardless of the status of the negotiations. Therefore, the Methodology Orders, as interpreted by the Supreme Court, allowing all wind projects that received indicative pricing to rely on the indicative pricing regardless of the status of the negotiations are contrary to, and therefore preempted by, 18 C.F.R. § 292.304(d)(2). Thus, as a matter of law, Monticello cannot rely on the Methodology Orders as the basis for the approval of the instant PPA.

While the above analysis may seem to conflict with the holding in *Ellis-Hall*, a careful reading of the Supreme Court opinion reveals that this analysis is consistent with the reasoning of the case. In *Ellis-Hall* the Supreme Court expressly did not reach the Commission's contention made at oral argument that state and federal law would prevent the Commission from approving the PPA based on indicative pricing under the old methodology ruling that the issue was not ripe. *Ellis-Hall*, 2016 UT 34, ¶¶ 47-48. Indeed, the *Ellis-Hall* decision provides "our holding is that Ellis-Hall has won a short-term battle. It remains to be seen whether it will prevail in the larger war." *Id.* at ¶ n. 7. Now, at this stage in the proceeding, the issue of whether federal law prevents the approval of the PPA based on pricing received when Ellis-Hall/Monticello first obtained indicative pricing is ripe for adjudication. As discussed above, the answer to the issue first raised by this Commission is that federal law prevents the approval of the PPA because the avoid costs pricing was not calculated consistent with 18 C.F.R. § 292.304(d)(2). Therefore, the Methodology Orders which calculated avoided costs in a manner inconsistent with 18 C.F.R. § 292.304(d)(2) are void and cannot be relied on by Monticello or any QF for the basis of the approval of a PPA.

CONCLUSION

Monticello's arguments are misplaced. The Office is not arguing that Monticello needs or has failed to obtain a LEO. Rather, the Office argues that the Methodology Orders which Monticello relies on to assert the right to rely on indicative pricing in obtaining approval of a PPA are preempted by 18 C.F.R. § 292.304(d)(2). Accordingly, Monticello cannot rely on the Methodology Orders to obtain the pricing contained in the instant PPA and the PPA must be rejected as a matter of law.

Respectfully submitted, April 5, 2018.

__Robert J. Moore_____
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