JUSTIN C. JETTER (#13257)
PATRICIA E. SCHMID (#4908)
Assistant Attorney Generals
Counsel for the DIVISION OF PUBLIC UTILITIES
SEAN D. REYES (#7969)
Attorney General of Utah
160 E 300 S, 5th Floor
P.O. Box 140857
Salt Lake City, UT 84114-0857
Telephone (801) 366-0335
jjetter@agutah.gov
pschmid@agutah.gov
Attorneys for the Utah Division of Public Utilities

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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

Pursuant to Utah Admin. Code r.746-1 and Utah R. Civ. P 7 and 56, the Utah Division of Public Utilities ("Division") files this Reply Memorandum Supporting Motion for Summary Judgment. The undisputed facts establish that the Power Purchase Agreement ("PPA") submitted by Rocky Mountain Power ("RMP") in this docket does not comply with Rocky Mountain Power Electric Service Schedule No. 38 ("Schedule 38"). The Public Service Commission of Utah ("Commission") cannot approve the PPA as a matter of law and should not approve the PPA as a matter of public policy. The Commission should grant summary judgment in favor of the Division and deny the Application.

INTRODUCTION

The Commission issued a Scheduling Order in this docket setting March 9, 2018, as the date for dispositive motions. The Division and OCS filed motions for summary judgment which, if granted, are dispositive of the Application. On March 26, 2018 MWF filed its Memorandum in Opposition to the Division's Motion for Summary Judgment. Pursuant to the Commission's Scheduling Order the Division files its Reply.

The Division requests summary judgment that the PPA did not meet the procedural requirements of Schedule 38 and therefore it must be rejected. Monticello Wind Farm's ("MWF") response is unpersuasive in its challenge to the legal matter of whether the PPA followed Schedule 38 and why approval must be denied. The Division's Reply address the issues raised in MWF's Memorandum opposing the Division's Motion. It will explain why the uncontested facts are supported by admissions by MWF, were cited in the body Division's Motion and provided in attachments, were known to the Commission from previous dockets with MWF and are clear from the record and should be accepted as such by the Commission pursuant to Utah R. Civ. P. 56.

Schedule 38 and the Commission's June 9, 2015 Order Approving Settlement Agreement on Schedule 38 Procedures were unequivocal that the application applied to all QFs, including those in the queue. Therefore, the Commission need not even consider whether the changes are procedural or substantive. The application was prospective in nature applying only to the future procedures for MWF and RMP and it did not have any retroactive effect on any vested right of MWF or RMP. It was clear that it applied only to the future steps of the process.

Finally, the Division will address the additional arguments new made by MWF. The July 21, 2015 notice to MWF is not necessary to application of Schedule 38 to the MWF PPA

process. Ignorance of the law does not excuse its operation.[1] The disputed notice was sent to an email in current use by MWF. If MWF objects to RMP's use of the email used by Tony Hall its venue for objection is through a complaint. The Commission lacks authority to grant the extensions requested. If it could, it should decline for public policy reasons. Utah's PURPA analog does not provide an exception for Commission approval of exceptions to the process of negotiating a PPA under Schedule 38.

REPLY TO MWF'S RESPONSE TO STATEMENT OF MATERIAL UNDISPUTED FACTS

1. EHC received its first indicative pricing in 2012.

The Utah Supreme Court in *Ellis-Hall* stated that "Ellis–Hall received an indicative pricing proposal in 2012."[2] MWF asserts that it did not receive its initial indicative pricing until 2013. MWF's Formal Complaint in Docket No. 14-035-24 states that it received indicative pricing on May 22, 2013.[3] The Division accepts that its Motion and the Utah Supreme Court was in error and the indicative pricing was first provided in 2013.

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

MWF asserts that it did not receive the notice. It is undisputed that EHC was a party to Docket No. 14-035-140.[4] EHC filed a Petition for Review and Rehearing in that docket. It was plainly on notice. MWF asserts that the email address used by RMP was the incorrect one and

[1] *Skeen v. Craig*, 86 P. 487, 491 (Utah 1906)
[2] *Ellis-Hall Consultants v. Public Service Commission,* 2016 UT 34, ¶ 2, 379 P.3d 1270, 1271.
[3] *In the Matter of the Formal Complaint of Ellis-Hall Consultants against PacifiCorp/Rocky Mountain Power*, Docket No. 14-035-24, (*Formal Complaint,* March 3, 3014).
[4] *In the Matter of the Review of Electric Service Schedule No. 38, Qualifying Facilities Procedures, and Other Related Procedural Issues*, Docket No. 14-035-140, (Order *Granting Intervention of Ellis-Hall Consultants, LLC*; May 19, 2015).

RMP engaged in intentional conduct to ensure notice was not received.[5] MWF continued to communicate with RMP using that email address before and after the notice.[6] MWF was both on notice as a participant of the proceeding and by direct communication from RMP.

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

If MWF was not a QF in the pricing queue at any time after it received its pricing request, it would be required by every prior version of Schedule 38 as well as the current one to be repriced as a new QF. If MWF asserts that it was not a QF in the Schedule 38 pricing queue on or at any time after July 28, 2016, the Commission needs no further facts and may dismiss on this basis alone.

4. RMP Provided a proposed PPA to MWF on or before October 10, 2016.

MWF admits that it received a proposed PPA on or before October 10, 2016.

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

MWF admits.

ARGUMENT

I. The Division's Motion and Supporting Materials Show that the Division is Entitled to Summary Judgment

MWF objects to the Division's statement of uncontested facts on the basis that the facts were not specifically cited in the fact section of the Division's Motion. Utah R. Civ. P. R. 56(c) states that the party asserting a fact is undisputed must support the assertion by "citing to particular parts of materials…" It further provides in that the Commission may "give an

[5] This is not a complaint and the assertion of intentional misconduct is not before the Commission in this proceeding.

[6] *See* Confidential Attachment A containing ongoing email communications between RMP and Mr. Hall in October of 2015 continuing to use the same email address at which MWF claims to not have received the notice as well as an email dated as recently as August of 2017 requesting RMP continue to cc Mr. Hall at the same email address.

opportunity to properly support or address the fact"[7] and "grant summary judgment if the motion and supporting materials… show that the moving party is entitled to it."[8] As explained *supra* the relevant undisputed facts remain undisputed with one exception that is immaterial to the application of law. The Division cited and provided reference for each of the undisputed facts in its Motion and further clarifies in this Reply. Importantly, the only material facts that are necessary for Summary Judgment as a matter law are the fact that MWF was in possession of both a PPA and pricing on or before October 19, 2016 and that it did not sign a final PPA until December 13, 2017. MWF admits these facts. The Commission should grant summary judgment because the motion and supporting materials show that the Division is entitled to it.

II. Under Utah Law the Changes to Schedule 38 in the June 9, 2015 Procedural Order Apply to MWF.

Applying the June 9, 2015 Procedural Order to MWF is not a question of retroactive application of new law. Rather, it is the application of law to events occurring after the law's adoption. In this case, the June 9, 2015 Procedural Order is the law. It dictates a schedule for progress for prospective QFs. The Division's motion does not seek to apply new provisions to past actions. Rather, it proposes to apply plain law to events subject to that law after its adoption. This is not retroactive application of the law. Nevertheless, the Division addresses retroactivity provisions to illustrate why, even if retroactivity were sought, the Division's requested relief should be granted.

Under Utah Law, the bar on retroactive application of law applies when the law is silent as to whether it does or does not apply. Retroactive application is unnecessary for the conclusion that it applies prospectively. However, even if it were considered retroactive and substantive it

---

[7] Utah R. Civ. P. 56(e)(1).
[8] Utah R. Civ. P. 56(e)(4).

Schedule 38 still applies. "[T]he intent to have a statute operate retroactively may be indicated by explicit [statutory] statements to that effect, or by clear and unavoidable implication that the statute operates on events already past"[9] When the intent is given either by explicit statements or clear implication, no further inquiry is necessary. The law will have retroactive application.

The June 9, 2015 Procedural Order was explicit. Paragraph 25 of the adopted Settlement Agreement plainly states that all QFs currently in the QF pricing queue will be subject to the milestones and timing. The language approved for the tariff similarly explicitly stated that "owners of existing or proposed QFS… who desire to make sales to the Company…"[10] Both the Procedural Order and the Schedule 38 language are explicit in the statements and include clear and unavoidable implication that the new procedure applies to all existing or proposed QFs. MWF was an existing QF on June 9, 2015, on the August 6, 2015 effective date, and on July 28, 2016 when the Utah Supreme Court issued its order in *Ellis-Hall*. The Commission should not inquire further as the remaining analysis is unnecessary. Schedule 38 applies to MWF. Even if further analysis were required, MWF's arguments otherwise are unavailing.

Schedule 38 timelines are procedural. WMF mistakenly claims that the Division's cited authority, *Higgs,* was abrogated and is now "bad law." This is simply wrong with respect to the concept of law cited by the Division. *Gressman V. State* abrogated the clarification amendment exception to the rule against retroactive application of substantive law changes. The Division did not argue or rely on that exception.

The "line between substance and procedure is not ultimately an exception to the rule against retroactivity. It is simply a tool for identifying the relevant "event" being regulated by the

[9] *Waddoups v. Noorda*, 2013 UT 64, ¶ 6, 321 P.3d 1108, 1111–12.
[10] Rocky Mountain Power Electric Service Schedule No. 38, Effective August 8, 2015, sheet 38.3.

law in question."[11] "[I]f the law regulates a motion to intervene, we apply the law as it exists at the time the motion is filed. A change in the procedural rule would not apply retroactively to prior motions to intervene."[12] In the instant case the change in Schedule 38 regulates the period available to negotiate a PPA on a forward-looking basis to all QFs. It explicitly placed all existing QFs into their respective stage in the process and required that they complete the stage in the required time plus an additional grace period. In other words, no past action is being regulated.

The procedural changes in Schedule 38 did not act in any way to enlarge, eliminate, or destroy any substantive rights held by MWF. MWF did not hold any substantive right to an extended contract negotiation period. The court in *Ellis-Hall* was very clear that Ellis Hall was not entitled to a contract. Rather it was entitled to proceed with the pricing method it had sought indicative pricing under in 2013. Nothing more. The procedural updates to Schedule 38 applied to *all* projects in the queue regardless of what pricing method was used. It neither granted nor revoked any substantive rights to any party. QFs had never held a substantive right to any time period to complete negotiations of a PPA. Moreover, QFs have proceeded and completed PPAs within the timelines. The updates were applied prospectively from wherever a QF happened to be in the process.

While arguably many of the earlier dates would also apply, July 28, 2016 is unquestionably a date upon which MWF was a QF in the queue. It was thus subject to Schedule 38, and had its indicative pricing in hand. The undisputed facts require that MWF be removed from the pricing queue and repriced. MWF had no vested rights to anything in July 2016 other

---

[11] *State v. Perez*, 2015 UT 13, ¶ 11, 345 P.3d 1150, 1152.
[12] *Id.*

than to proceed with the market proxy pricing method. Schedule 38 substantive changes to pricing method were not applied in July 2016. However, Schedule 38 procedural changes applied prospectively to MWF. It failed to comply.

Schedule 38 I.B.6 plainly states that if 180 days have passed without a signed agreement after indicative pricing was provided the project *shall* be repriced. Similarly, I.B.10 also plainly states that if a PPA has not been executed within 150 days after the proposed PPA was provided the QF *shall* be removed from the pricing queue. The operation of Schedule 38 requires that MWF be removed from the pricing queue and repriced if it wishes to proceed with its project. Therefore, the Commission cannot approve the PPA because it is inconsistent with Commission ordered process in Schedule 38.

III. Ignorance of the Law Does Not Provide and Exception for MWF to Avoid the Application of Schedule 38.

MWF claims that it lacked timely notice that Schedule 38 had been amended. This claim is irrelevant to the requirements of Schedule 38. First, ignorance of the law does not excuse MWF or RMP from its application. This has been the state of Utah law for over a century. "It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof." [13] No further inquiry into the question of notice is necessary. Nevertheless, even if further inquiry were warranted, MWF had or should have had actual notice of the changes.

MWF's claim of its failure to be notified cannot withstand even a cursory review of EHC's involvement in the 14-035-140 docket or its continued use of the email. First, EHC was a

[13] *Skeen v. Craig*, 86 P. 487, 491 (Utah 1906).

party to Docket No. 140-35-140.[14] EHC filed a Petition for Review and Rehearing of the very Order at issue. EHC (thus MWF) was plainly on notice of the outcome.

MWF's claim that notice was insufficient was because RMP emailed the letter to the wrong address. The email address to which the letter was sent was commonly used by Tony Hall both before and after the date that it was sent. MWF was both on notice as a participant of the proceeding and through direct communication from RMP.

MWF also appears to raise an issue with RMP's actions. If MWF seeks review of its treatment by RMP it needs to do so through a complaint. An application by RMP for approval of PPA under Schedule 38 is not the docket for resolving MWF's claims that RMP did or did not follow its tariffs. Section III of Schedule 38 directs MWF to file a complaint to resolve these types of matters.

IV. Schedule 38 Is Not Unconstitutionally Vague.

Schedule 38 is not unconstitutionally vague. MWF asserts that Schedule 38 cannot be applied because it is unconstitutionally vague. MWF seeks to apply the vagueness test generally reserved for criminal law and those limited civil laws that restrict constitutionally protected conduct.[15] This argument has little merit. It is neither a criminal statute nor does it involve any constitutionally protected conduct. Even if there were some context in which Schedule 38 could be construed to infringe on constitutionally protected conduct it would not be void for vagueness. To be found void for vagueness on its face a statute must be vague in all its applications. "A

---

[14] *In the Matter of the Review of Electric Service Schedule No. 38, Qualifying Facilities Procedures, and Other Related Procedural Issues*, Docket No. 14-035-140, (Order *Granting Intervention of Ellis-Hall Consultants, LLC*; May 19, 2015).

[15] *See ex. State v. Green*, 2004 UT 76, ¶ 43, 99 P.3d 820, 830 ("As generally stated the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited…")(quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

statute that is clear as applied to a particular complainant cannot be considered impermissibly vague in all of its applications and thus will necessarily survive a facial vagueness challenge."[16] There is little question that Schedule 38 applies to MWF.

The only language MWF relies upon for its argument is the preface portion of Schedule 38 that states that it is typically applicable to projects already under development. It is information for QF developers regarding the appropriate time to begin the Schedule 38 process. Schedule 38 is specific as to what project types it applies. In the Application section it states clearly that it applies to, "owners of existing or proposed QFs with a design capacity greater than… 3,000 kW for a Small Power Production facility who desire to make sales to the Company."[17] Unless MWF does not meet one of those elements, Schedule 38 applies. MWF has made no claim that it is not proceeding under Schedule 38, nor has it asserted that it does not meet the elements. Schedule 38 is clear as to its application to MWF. Therefore, it cannot be vague on its face nor in application and necessarily survives MWF's vagueness challenge. Schedule 38 applies to the PPA.

V. The Commission cannot grant the extensions requested by MWF.

Ellis-Hall was clear. "Schedule 38 is law. So are the orders issued by the Commission."[18] The Commission cannot now reinterpret new language or exceptions into Schedule 38. Nor does it have authority to interpret Schedule 38 in a way that conflicts with its plain language. The plain language of Schedule 38 requires that MWF be removed from the queue and repriced.

Even if the Commission had authority to do so, it should decline to do so in the interest of public policy. The time periods were set in a docket in which MWF was a party and had

[16] *State v. MacGuire*, 2004 UT 4, ¶ 12, 84 P.3d 1171.
[17] Rocky Mountain Power Electric Service Schedule No. 38, Effective August 8, 2015, sheet 38.3.
[18] *Ellis-Hall*, 2016 UT 34, ¶ 31, 379 P.3d 1270, 1274.

opportunity to participate. The time periods require efficient processes for QFs to move through the queue at a reasonable pace. This protect customers from unfair rates and protect other developers from queue squatters. Public policy does not support extensions or special treatment for MWF and RMP related to this PPA. MWF's PPA negotiation has taken far longer than the allowable time. The Commission should enforce the provisions of Schedule 38.

VI. Utah Statute Does Not Provide Additional Grounds for Approval.

MWF further argues that Utah Code Ann. §54-12-2(3) provides additional grounds for approval of the PPA. MWF relies on a misunderstanding of the distinction between the process and the contract rates, terms, and conditions. §54-12-2(2) requires the Commission in establishing the rates, terms, and conditions to "either establish a procedure under which qualifying power producers offer competitive bids for the sale of power to purchasing utilities or devise an alternative method..." Section 54-12-2(3) does allow RMP to agree to "rates, terms, or conditions for the sale of electricity or electrical capacity which differ from the rates, terms, and conditions adopted by the commission…" That does mean the nonconforming agreements rates, terms, or conditions are not subject to the *procedure* required in §54-12-2(2) as set forth in Schedule 38. Schedule 38 procedural requirements remain applicable to the MWF PPA regardless of the terms, rates, or conditions of the PPA. Section 54-12-2(3) does not provide RMP or MWF an alternative to the procedural requirements of Schedule 38.

CONCLUSION

The Division is entitled to summary judgment as a matter of law. "Schedule 38 is law. So are the orders issued by the Commission."[19] Schedule 38 and the June 9, 2015 Procedure Order are both explicit that the new milestones apply to all QFs. The bar against retroactive application

[19] *Id.*

does not apply. Even if it did apply, the application was prospective only. MWF's objection to the notice provided by RMP does not change the requirement to follow Schedule 38. Schedule 38 does not infringe on constitutionally protected activity and is not vague on its face or as applied to MWF. Finally, Utah law does not provide an exception to the procedural requirements of Schedule 38.

It is undisputed that MWF was in possession of both a PPA and indicative pricing on June 6, 2016. It is undisputed that MWF and RMP did not execute a PPA until December 13, 2017. December 13, 2017 is 555 days after June 6, 2016. Schedule 38 I.B.6 plainly states that if 180 days have passed without a signed agreement after indicative pricing was provide the project *shall* be repriced. Similarly, I.B.10 also plainly states that if a PPA has not been executed within 150 days after the proposed PPA was provided the QF *shall* be removed from the pricing queue. The operation of Schedule 38 requires that MWF be removed from the pricing queue and repriced if it wishes to proceed with its project. RMP did not remove MWF from the queue as required by Schedule 38. Application of Utah law including Schedule 38 to the undisputed facts entitles the Division to summary judgment.

Submitted this 5th day of April 2018.

/s/ Justin C. Jetter
Justin C. Jetter
Assistant Attorney General
Utah Division of Public Utilities