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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

PETITION OF MONTICELLO WIND FARM, LLC FOR RECONSIDERATION AND REHEARING OF COMMISSION ORDER ISSUED MAY 7, 2018

Pursuant to Utah Code §§ 54-7-15 and 63G-4-302, and Rule R746-1-801 of the Utah Administrative Code, Monticello Wind Farm, LLC ("Monticello") hereby submits this Petition for Reconsideration and Rehearing of the Public Service Commission of Utah's ("PSC") May 7, 2018 Order denying the December 20, 2017 Application[1] submitted by Rocky Mountain Power ("RMP") (the "May 7 Order").[2] For the reasons discussed below, Monticello respectfully requests that the PSC reconsider, and/or grant rehearing of, the May 7 Order to remedy the violations of the Public

[1] Application for Approval of the Power Purchase Agreement between PacifiCorp and Monticello Wind Farm, LLC dated November 21, 2017, Docket No. 17-035-68 (Dec. 20, 2017) ("RMP Application") (providing a copy of the Power Purchase Agreement Between Monticello Wind Farm, LLC and PacifiCorp as Exhibit A).

[2] *In the Matter of the Application of Rocky Mountain Power for Approval of Power Purchase Agreement between PacifiCorp and Monticello Wind Farm, LLC*, Docket No. 17-035-68 (May 7, 2018).

Utility Regulatory Act of 1978 ("PURPA") and restore Monticello's federal right to sell the output of its generating facility to RMP pursuant to Section 210 of the Federal Power Act ("FPA") and the implementing regulations and guidance issued by the Federal Energy Regulatory Commission ("FERC").[3] For avoidance of doubt, Monticello has elected to administer the legally enforceable obligation through the executed PPA, which sets forth the terms and conditions by which Monticello will provide the identified energy and capacity products, over a specified term, with the rates for such purchases based on the avoided costs calculated at the time the obligation was incurred.[4]

In *Ellis-Hall Consultants v. Public Service Commission of Utah* ("*Ellis-Hall II*"),[5] the Supreme Court of Utah concluded that the PSC committed legal error when it authorized RMP to rescind the May 22, 2013 indicative pricing proposal that was provided to Monticello pursuant to the

[3] 16 U.S.C. 824a-3 (2012); *Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880 *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part & vacated in part sub nom. Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp*., 461 U.S. 402 (1983). Failing to restore Monticello's rights may lead to irreparable injury as RMP has stated that it does not intend to solicit additional resources through its existing tariff processes.

[4] *Compare* 18 C.F.R. § 292.304(d)(2)(ii); Comments of Wasatch Wind Intermountain, Docket No. 11-2035-01 (June 11, 2012) (questioning whether RMP was artificially constraining wind resources in its IRP modeling and explaining that "the company will not acquire local, risk mitigating wind resources that do not require costly rate payer funded projects like the Gateway West and South . . . the risk is that the modeling results will be used to justify the Company's refusal to provide proper indicative funding for Utah wind resources. . . . [B]ecause the modeling is constrained such that it cannot select wind in the near term, the Company is using this IRP result to deny wind developers avoided cost pricing based on the methodology developed for wind resources."); Notice, Docket No. 17-035-48 (Aug. 31, 2017) (notifying the Commission that, based on IRP results, "the Company does not reasonably anticipate it will acquire any additional renewable resources at this time. However, the Company may acquire renewable resources in 2018 if the right opportunity arises.")

[5] *Ellis-Hall Consultants v. Public Service Commission*, 2016 UT 34, 379 P.3d 1270 ("*Ellis-Hall II*").

terms of the then-effective Electric Service Schedule No. 38 ("Schedule 38 Tariff").[6] The court explained that Monticello was "entitled to proceed in reliance on the methodology set forth in the indicative pricing proposal it received from Rocky Mountain Power," but clarified that it "does not mean that Ellis-Hall has a right to require Rocky Mountain Power to enter into a power purchase agreement."[7] Following issuance of the decision in *Ellis-Hall II*, RMP resumed arms-length negotiations with the developer of Monticello and executed a contract documenting that "Seller desires to sell, and PacifiCorp desires to purchase, the Net Output expected to be delivered by the Facility and all associated green tags in accordance with the terms and conditions hereof."[8]

Neither *Ellis-Hall II*, nor FERC's regulations, obligated RMP to execute this contract with Monticello. There exists no record evidence, law, or regulation that warrants summarily disposing of a freely-negotiated PPA – the contractual manifestation of Monticello's legally enforceable obligation created under PURPA. Allowing RMP to utilize the May 7 Order as a means to avoid its legally enforceable obligation to purchase from Monticello at the rates and terms voluntarily agreed to rewards the purchasing utility for "Rope-a-Dope" tactics that discourage and inhibit development of small power production facilities in the state. Monticello requests that the PSC reconsider the issues and summarily affirm that RMP is obligated to purchase from Monticello pursuant to the terms and conditions in the mutually-agreed upon PPA submitted with RMP's December 20, 2017 Application. If the PSC declines to summarily affirm the PPA, Monticello requests that the PSC grant rehearing and issue findings of fact and conclusions of law consistent with those presented

[6] *Id.* at ¶¶ 37-44.

[7] *Id.* at ¶¶ 43-44.

[8] *See* RMP Application, Exhibit A at 2. The developer of Monticello reached out to PacifiCorp on August 29, 2016 to confirm that "we wish to move forward with our PPAs for the indicative pricing PacifiCorp issued in 2013.").

below. If, after a review of the record, the PSC determines that there are genuine disputes as to material factual issues, Monticello respectfully requests that the PSC immediately resume expedited hearing procedures.

I. Background

PURPA was enacted as federal law by the United States Congress to encourage, among other things, the development of non-utility sources of generation.[9] As the United States Supreme Court has explained, Congress "felt that two problems impeded the development of nontraditional generating facilities: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development."[10] In order to overcome the first of these perceived problems, Congress designed a regulatory structure where FERC promulgates the rules requiring utilities to offer to purchase electricity from, "qualifying" cogeneration and small power production facilities ("Qualifying Facilities" or "QFs"),[11] and the state regulatory authorities administer and apply the federal standards to the utilities within their jurisdiction.[12] As both the United States Supreme Court and FERC have explained, while local regulatory authorities have discretion in how

[9] *See, e.g., FERC v. Mississippi,* 456 U.S. 742, 751-52 (1982) (explaining the system of cooperative federalism and the role of PURPA); s*ee also* H.R. Conf. Rep. No. 95-1750, 95th Cong., 2d Sess. 98 (1978), U.S.Code Cong. & Admin. News 1978, pp. 7659, 7832.

[10] *FERC v. Mississippi*, 456 U.S. at 751-52.

[11] *Id.*; 18 C.F.R. §§ 292.203 (2018).

[12] *See, e.g., West Penn Power Co*., 71 FERC 61,153 at 61,495 (1995) ("It is up to the States, not the PSC, to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law. Similarly, whether the particular facts applicable to an individual QF necessitate modifications of other terms and conditions of the QF's contract with the purchasing utility is a matter for the States to determine. The Commission does not intend to adjudicate the specific provisions of individual QF contracts.").

to apply the federal laws to individual utilities, such entities are obligated to act in compliance with federal law.[13]

A. PURPA Implementation in Utah

PURPA is implemented in Utah pursuant to UCA § 54-12-1(2), and the PSC has stated that the Schedule 38 Tariff "establishes procedures for purchases of power by RMP from Qualifying Facilities (QF) with a design capacity greater than 1,000 kW."[14] Beginning in the early 2000s, potential developers cited the lack of a clear process for discovering both the rate a QF is likely to be paid and the steps required to obtain a timely purchase power contract.[15] Through involvement of the Utah Legislative Energy Policy Task Force, the parties ultimately came together and agreed on a Schedule 38 Tariff that would set forth the process to negotiate a PPA. In response to the concerns raised by developers that PacifiCorp could use the Schedule 38 Tariff process to unfairly delay the contracting process, PacifiCorp argued that "it is inappropriate to establish some certain time limitation within which negotiations must be completed," but committed to exercise a good faith commitment to not unreasonably delay negotiations.[16] With this commitment, PacifiCorp urged the PSC to accept the procedures in Schedule 38 Tariff, and the PSC approved the Schedule 38 Tariff in its Order on February 24, 2003 and required the Company to continue the QF work group and file

[13] *See, e.g., FERC v. Mississippi*, 456 U.S. 742 (1982) (explaining and upholding the statutory arrangement for cooperative federalism); *see also American Paper Institute, Inc. v. Am. Elec. Power Corp.*, 461 U.S. 402 (1983) (explaining and upholding FERC's determination to mandate that a utility provide, at a minimum, an offer to purchase at the full avoided cost); *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 (2013) (explaining a state commission's obligation to comply with federal PURPA laws).

[14] *In the Matter of Proposed Pacificorp Tariff P.S.C.U. No. 44, for Schedule 38*, Docket 02-035-T11 (February 24, 2003) ("February 24, 2003 Order").

[15] *See, e.g.,* Memorandum of October 31, 2002 from the Division of Public Utilities to the Utah Public Service Commission, Docket No. 02-035-T1 (Oct. 31, 2002).

[16] *See* PacifiCorp Reply Comments at 5, Docket No. 02-035-T11 (Dec. 13, 2002).

within 90 days an avoided cost method and a generic PPA for large QFs.[17] Over the course of the next two years, the Commission addressed the issues in developing an avoided cost method and generic PPA and as the Commission explained in its 2005 Order, "[t]he absence of a consensus resolution from the task force on how larger QFs, who have no contract with the Company, should be treated was the genesis of Spring Canyon's request in Docket No. 05-035-08 and Pioneer Ridge/Mountain Wind's request in Docket No. 05-035-09, both seeking QF contracts."[18]

In October 2012, in compliance with the 2005 Order's direction to include a description of dispute resolution procedures in the Schedule 38 Tariff, RMP requested that the PSC authorize the company to impose a requirement that, "[b]efore filing a complaint with the Utah Public Service Commission on any specific power purchase agreement term not agreed upon between the counterparty and the Company, a counterparty must wait 60 calendar days from the date it notifies the Company in writing that it cannot reach agreement on a specific term."[19] The PSC rejected this proposed addition to Schedule 38 in its March 21, 2013 Order, explaining that it was inconsistent with the intent of the working group.[20] On April 15, 2013, RMP submitted revised tariff sheets in compliance with the March 21, 2013 Order to remove the offending provisions, and the PSC approved these revised tariff sheets for the Schedule 38 Tariff on June 10, 2013.[21] In its April 15, 2013 submission, RMP also provided a copy of "transparent check list or table which incorporates

[17] *See* Feb. 24, 2003 Order at 3.

[18] *In the Matter of the Application of PacifiCorp for Approval of an IRP-Based Avoided Cost Methodology for QF Projects Larger than One Megawatt*, Docket No. 03-035-14 (Oct. 31, 2005)

[19] *See* Application of Rocky Mountain Power for Approval of Changes to Tariff Schedule No. 38, Qualifying Facility Procedures, Docket No. 12-035-101 (Oct. 19, 2012).

[20] *See In the Matter of the Application of Rocky Mountain Power for Approval of Changes to Tariff Schedule No. 38, Qualifying Facility Procedures*, Docket No. 12-035-101 (Mar. 21, 2013).

[21] *See In the Matter of the Application of Rocky Mountain Power for Approval of Changes to Tariff Schedule No. 38, Qualifying Facility Procedures*, Docket No. 12-035-101 (June 10, 2013).

the decisions in the 2005 Order and allows QF developers to view the process for determining QF pricing."[22]

As shown below, Monticello fully complied with the transparent checklist and, but for RMP's failure to produce an executable PPA in response to Monticello's timely demand, Monticello would have completed the QF contracting process under the Schedule 38 Tariff on or about June 25, 2013.

B. Docket History

This docket arises out of an extensive chain of events where Ellis-Hall Consultants ("Ellis-Hall"), as the principal developer of the Monticello wind farm project, has consistently claimed that RMP is attempting to avoid the legally enforceable obligation to purchase the full output of the Monticello wind farm project. In *Ellis-Hall II* the Supreme Court of Utah held that "[n]othing in the Phase Two order requires or even permits Rocky Mountain Power to issue a new indicative pricing proposal," and affirmed that Monticello had the right "to rely on the methodology set forth in the 'indicative pricing proposal' it received from Rocky Mountain Power."[23] In its decision the court concluded that under the terms of the applicable tariff, "[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."[24] RMP voluntarily executed a PPA with Monticello on on December 13, 2017.

On December 20, 2017, RMP filed its Application and submitted a copy of the executed PPA providing the rates and terms by which RMP agreed to purchase the output from Monticello. On

[22] *See* Rocky Mountain Power Compliance Submission, Docket No. 12-035-101 (Apr. 15, 2013).

[23] *Ellis-Hall II* at ¶ 37, 40.

[24] *Id.* at ¶ 48.

March 9, 2018, the Division of Public Utilities ("DPU") and the Office of Consumer Services ("OCS") submitted motions for summary disposition.[25] Monticello, together with Ellis-Hall, opposed the requests of the DPU and OCS to summarily dispose of this docket through their Joint Memorandum in Opposition on March 26, 2018.[26] On March 30, 2018, DPU and OCS filed a motion to strike the Monticello/Ellis-Hall Opposition, noting procedural infirmities;[27] on April 2, 2018 Monticello and Ellis-Hall submitted an Errata[28] and on April 4, 2018 Monticello and Ellis-Hall opposed the DPU and OCS motion to strike.[29] On April 5, 2018 RMP submitted a Motion explaining that it "takes no legal position on the Motions for Summary Judgment and the Memorandums in Opposition thereto."[30] The DPU and OCS filed Reply Memoranda in support of their requests for summary disposition on April 5, 2018,[31] and Joint Reply Memorandum in support

[25] Office of Consumer Services Motion for Summary Judgment, Docket No. 17-035-68 (Mar. 9, 2018) ("OCS Motion"); Division of Public Utilities' Motion for Summary Judgment, Docket No. 17-035-68 (Mar. 9, 2018) ("DPU Motion").

[26] Monticello Wind Farm, LLC and Ellis-Hall Consultants, LLC's Joint Memorandum in Opposition, Docket No. 17-035-68 (Mar. 26, 2018) (including exhibits and documentation into the record on relevant factual issues).

[27] Joint Motion for Order to Show Cause Why Monticello Wind Farm, LLC's Memorandums Should Not be Stricken, Docket No. 17-035-68 (Mar. 30, 2018).

[28] Monticello Wind Farm, LLC and Ellis-Hall Consultants, LLC's Joint Errata to the Joint Memorandum in Opposition to the Division of Public Utilities' Motion for Summary Judgement, Docket No. 17-035-68 (Apr. 2, 2018).

[29] Monticello Wind Farm, LLC's Opposition to the Division of Public Utilities and Office of Consumer Services' Joint Motion for Order to Show Cause why Monticello Wind Farm, LLC's Memorandums Should not be Stricken, Docket No. 17-035-68 (Apr. 4, 2018).

[30] Rocky Mountain Power's Response to Memorandums in Opposition to Motions for Summary Judgment, Docket No. 17-035-68 (Apr. 5, 2018).

[31] Reply Memorandum in Support of the Office of Consumer Services' Motion for Summary Judgment, Docket No. 17-035-68 (Apr. 5, 2018); Division of Public Utilities' Reply Memorandum Supporting Motion for Summary Judgment, Docket No. 17-035-68 (Apr. 5, 2018).

of their motion to strike on April 9, 2018.[32] In response to the April 9, 2018 Joint Reply Memorandum, Monticello retained the undersigned counsel on April 11, 2018 and counsel submitted a Notice of Appearance on behalf of Monticello on April 12, 2018.[33]

In the May 7 Order, the PSC granted the DPU and OCS motions for summary disposition and concluded that the PPA for which RMP sought approval "does not contain rates reflective of RMP's avoided costs consistent with Schedule 38 and that RMP has not shown it is obliged under federal or state law to purchase electricity from [Monticello] at the rates enumerated in the PPA."[34]

C. Factual Record[35]

The factual record in this docket, as well as the other proceedings in which the PSC has considered similar and related issues, makes clear that as of June 25, 2013 Monticello had fully complied with the procedural steps set forth in then-effective Schedule 38 Tariff and had committed itself to sell to RMP, establishing the legally enforceable obligation. After Ellis-Hall pursued litigation in an attempt to secure a contract with RMP to administer the legally enforceable obligation, and Ellis-Hall received a favorable decision in *Ellis-Hall II*, RMP resumed negotiations with Ellis-Hall and voluntarily executed a PPA to purchase the full output of the QF at a rate that is based on the avoided cost tariff in effect at the time the legally enforceable obligation was incurred. As the record reflects RMP was legally obligated to purchase the output of the Monticello facility

[32] Division of Public Utilities' and Office of Consumer Services' Joint Reply Memorandum in Support of Joint Motion for Order to Show Cause, Docket No. 17-035-68 (Apr. 9, 2018).

[33] Notice of Appearance of Counsel for Monticello Wind Farm, LLC, Docket No. 17-035-68 (Apr. 12, 2018).

[34] May 7 Order at 1.

[35] To assist the Commission in its decisionmaking, Monticello has included Exhibit I to this Reply, categorizing the evidentiary record and presenting the undisputed material issues of fact.

prior to the PSC's Phase Two Order[36] and, in fact, agreed to so purchase from the facility at the rates, terms, and conditions set forth in the duly-executed PPA submitted as part of the December 20, 2017 Application.[37]

On April 15, 2013, RMP provided the following checklist as part of the Schedule 38 Tariff process to list the steps a developer must take to secure a PPA. The record reflects that Ellis-Hall complied with this process and, but for RMP producing an executable contract, Ellis-Hall would have completed the contracting process on or before June 25, 2013.

Action	Completed
Request pricing pursuant to Utah Schedule No. 38, Section I.A.: http://www.rockymountainpower.net/content/dam/rocky_mountain_power/doc/About_Us/Rates_and_Regulation/Utah/Approved_Tariffs/Rate_Schedules/Qualifying_Facility_Procedures	**May 2012, April 2013.** *See* Exhibit 9, ¶ 9 ("I submitted an indicative pricing request in or about May 2012."); Exhibit 9, ¶ 14-15, Exhibit 45.
Provide project information for calculation of pricing pursuant to Utah Schedule No. 38, Section I.B.2.: http://www.rockymountainpower.net/content/dam/rocky_mountain_power/doc/About_Us/Rates_and_Regulation/Utah/Approved_Tariffs/Rate_Schedules/Qualifying_Facility_Procedures	**April 2013.** *See* Exhibit 9, ¶ 15 ("I submitted another application following Mr. Griswold's instructions and included any possible updates I believed PacifiCorp could possibly request."); Exhibit 45.
If necessary, provide additional information for calculation of pricing pursuant to Utah Schedule No. 38, Section I.B.4.: http://www.rockymountainpower.net/content/dam/rocky_mountain_power/doc/About_Us/Rates_and_Regulation/Utah/Approved_Tariffs/Rate_Schedules/Qualifying_Facility_Procedures	**April 2013** *See* Exhibit 9, ¶ 16 ("I received this email while I was in the hospital. I responded the day after I was discharged from the hospital, on April 24, 2013."); Exhibit 18 ("We received the application and are reviewing now. We will advise if additional information is required. One thing for now is a 12x24 matrix in Excel format.").
Contemporaneously with initial pricing request, request interconnection pursuant to Utah Schedule No. 38, Section II.B.: http://www.rockymountainpower.net/content/dam/rocky_mountain_power/doc/About_Us/Rates_and_Regulation/Utah/Approved_Tariffs/Rate_Schedules/Qualifying_Facility_Procedures	**March 2012** *See* Exhibit 9, ¶ 9 ("Mr. Griswold stated that PacifiCorp would not negotiate the execution of PPAs with Ellis-Hall until Ellis-Hall had completed the LGI study process and had obtained executed

[36] *Compare Ellis-Hall II* at ¶¶ 43-44.

[37] *See* RMP Application at Exhibit I (providing a copy of the executed PPA).

Action	Completed
***Information needed for interconnection will be in addition to the information listed herein.**	LGIAs. Mr. Griswold was vague about what else was needed."); Exhibit 9, ¶¶ 21-24 (explaining the effort to maintain the interconnection position); Exhibit 12 (providing a copy of the interconnection request); Exhibits 13, 15, 17, 19 (providing evidence of a scoping meeting with PacifiCorp transmission); Exhibits 20, 21 (providing a copy of excerpted pages from the LGIA);
Calculate avoided costs rates for large qualifying facilities, seek waivers of certain requirements, and other relevant information pursuant to the Order(s), as they may be modified, at: http://www.psc.utah.gov/utilities/electric/05orders/Oct/0303514ro.pdf http://www.psc.utah.gov/utilities/electric/06orders/Feb/0303514orc.pdf *For the full body of orders affecting avoided cost rates and methodologies in Utah, refer the Utah Public Service Commission website at http://www.psc.utah.gov/	**May 2013** Exhibit 9, ¶ 17 ("Only then did Mr. Clements process our application and provide us with indicative pricing on May 22, 2013."); Exhibit 18 (providing a copy of the May 22, 2013 indicative pricing proposal).
After receipt of non-binding letter from PacifiCorp indicating non-binding rates, request form power purchase agreement pursuant to Utah Schedule No. 38, Section I.B.4.: http://www.rockymountainpower.net/content/dam/rocky_mountain_power/doc/About_Us/Rates_and_Regulation/Utah/Approved_Tariffs/Rate_Schedules/Qualifying_Facility_Procedures	**May 2013** Exhibit 9, ¶ 18 ("I then requested that Mr. Clements send me a site-specific PPA. Mr. Clements verbally committed to include site specific information in a draft PPA but then he did not. This continued for some time."); Exhibit 5.
Provide detailed list of project information (different from information provided in initial pricing request) pursuant to Utah Schedule No. 38, Section I.B.4.: http://www.rockymountainpower.net/content/dam/rocky_mountain_power/doc/About_Us/Rates_and_Regulation/Utah/Approved_Tariffs/Rate_Schedules/Qualifying_Facility_Procedures ***PacifiCorp may request additional information not specifically listed, pursuant to Utah Schedule No. 38, Section I.B.4.**	**May 2013** Exhibit 33 at 2 ("All of the data/information requested by PacifiCorp and required by Schedule 38 was provided in the QF application that was hand delivered . . . on April 15, 2013. A confirmation of receipt of the Application on said day was received via email on Thursday April 18, 2013. Would you kindly provide a PPA site specific to the data/information to the Monticello Project? Please ensure the pricing at a minimum reflects the pricing request quoted in your letter of Wednesday May 22, 2013."); Exhibit 5.
If project is eligible and meets foregoing requirements, begin contract negotiations with PacifiCorp pursuant to Utah Schedule No. 38, Section I.B.5 – I.B.7.: http://www.rockymountainpower.net/content/dam/rocky_mountain_power/doc/About_Us/Rates_and_Regulation/Utah/Approved_Tariffs/Rate_Schedules/Qualifying_Facility_Procedures	**June 25, 2013 (demand)** Exhibit 33 at 3 ("Kimberly, In response to your written request for a generic PPA . . attached is a draft Utah wind QF PPA for your review. The documentation you submitted with your pricing request was of sufficient detail that we did not require additional

Action	Completed
	information in order to provide a draft PPA under Schedule 38."); Exhibit 33 at 3 ("Kimberly, we don't typically send out hard copies since the normal procedure is to redline the electronic version. We find this the most efficient way to negotiate the PPA. Thanks, Paul."); Exhibit 7 (demanding a PPA for proofread and signature); Exhibit 8; Exhibit 30.
Execute power purchase agreement and seek approval thereof from the Utah Public Service Commission.	**December 13, 2017** December 20, 2017 Application, Docket No. 17-035-68 (providing a copy of the PPA).

As the undisputed factual record reflects, the developer of the Monticello wind farm project complied with all of these tasks and it is undisputed that as of June 25, 2013, Monticello had done everything within its power to commit itself to sell to RMP and only an act of acceptance by RMP remained.

II. Request for Rehearing

The factual record, clearly establishing that the legally enforceable obligation was incurred on or before June 25, 2013, provides a sufficient basis for the PSC to summarily approve the fully negotiated and executed PPA submitted with RMP's December 20, 2017 Application. If the PSC declines to summarily affirm the duly-executed contract that sets forth the terms and conditions by which the legally enforceable obligation incurred by RMP on or before June 25, 2013 will be administered, then Monticello requests that the PSC grant rehearing and issue findings of fact and conclusions of law consistent with those presented below. If the PSC determines it is necessary to further develop the factual record, Monticello requests that the PSC immediately resume expedited hearing procedures. Contrary to the May 7 Order's suggestion that Monticello bears the burden to open a new proceeding in which to offer to prove RMP's legally enforceable obligation, as discussed

infra, this docket is the appropriate place to determine the proper means by which to administer the legally enforceable obligation that has clearly been established.

A. Request to Summarily Affirm the Executed PPA

In reviewing a motion for summary disposition, a regulator must view the evidence and draw reasonable inferences therefrom in a light most favorable to the non-moving party; unsupported conclusory allegations do not, however, create a genuine issue of fact.[38] Utah's summary judgment standard is the same as the federal standard, as affirmed recently by the Utah Supreme Court in *Salo v. Tyler*.[39] In *Salo*, the Supreme Court of Utah explained that "the moving party always bears the burden of establishing the lack of a genuine issue of material fact," and clarified that "the moving party may carry its burden of persuasion without putting on any evidence of its own—by showing that the nonmoving party has no evidence to support an essential element of a claim."[40]

The burden here appropriately lies with DPU/OCS as movants, and equally to RMP as the applicant. As FERC explained in Order No. 688, the purchasing utility bears the burden to establish that sufficient legal basis exists to relieve a electric utility of the obligation to enter into a new contract or obligation to purchase electric energy from any QF and it would be unfair to shift that burden to non-utility generators that "may not have access to the level of information that electric utilities have and that some QFs lack the resources and expertise to participate in Commission litigation."[41] RMP has not carried or offered to fulfill any portion of this burden in this proceeding,

[38] *See, e.g., Equal Opp. Employ. Comm'n v. C.R. England, Inc.*, 644 F.3d 1028, 1037 (10th Cir. 2011).

[39] *Salo v. Tyler*, 2018 UT 7, ¶ 2 (Ut. 2018) ("*Salo*"); Utah R. Civ. P. 56(a).

[40] *Salo* at ¶ 2.

[41] See New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities, Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 104 (2006), *order on*

for a contract that it voluntarily executed, and any presumptions should be in favor of Monticello – the party with no burden at all. Presumably, RMP planned on defending the PPA in its prefiled testimony and during the hearing, which has been denied by the PSC's summary rejection of the contract in the May 7 Order.[42] Consequently, all facts must be viewed in the light most favorable to Monticello, which bears no burden and has been denied the opportunity to defend the contract through testimony and hearing in this docket.[43]

As a practical matter, this issue arises because RMP, in executing its form contract has included Section 2.1 ("Term; Inter-jurisdictional Cost Allocation") and also included Section 5.5 ("Rates Not Subject to Review").[44] While RMP submitted the Application to the PSC, RMP stated that it "takes no legal position on the Motions for Summary Judgment and the Memorandums in Opposition thereto," arguably waiving any defense to contract formation or enforcement. Monticello strongly believes that the burden of ensuring cost-recovery for purchases from QF contracts should be borne by the purchasing utility, consistent with Congressional intent,[45] and

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reh'g, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 (2007), *appeal denied sub nom. American Forest and Paper Assoc. v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008) ("Order No. 688").

[42] On or about April 14, 2018, counsel for RMP expressed a commitment to defend the form of PPA executed between RMP and Monticello. Monticello requested that RMP join in this request for rehearing to defend the mutual agreement, but RMP declined.

[43] To the extent the PSC determines necessary, Monticello requests waiver of any procedural requirements that would limit the length or content of this response. No party is prejudiced by any such waiver and, in fact, the public interest is served by ensuring that the legal claims are properly vetted by the PSC and RMP remains in compliance with state and federal laws.

[44] *Compare United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103, 113 (1958) (explaining that parties could contract out of *Mobile-Sierra* by inclusion of what has come to be known as a "Memphis Clause").

[45] *See*, H.R.Conf. Rep. No. 95-1750, 95th Cong., 2d Sess. 98 (1978), U.S. Code Cong. & Admin. News 1978, pp. 7831-7832. ("The conferees recognize that cogenerators and small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis-a-vis the sale of power to the utility and whose risk in proceeding forward in

allowing a utility to avoid PURPA's mandatory purchase obligation through a contracting clause and ineffective advocacy would be contrary to state and federal law and policy.[46] To properly implement PURPA, a state commission's primary role must be to apply the federal standards to the facts of the specific case and ensure that a QF is not denied the opportunity to obtain a non-discriminatory contract that memorializes the terms on which the legally enforceable obligation will be administered.

Monticello requests rehearing of the May 7 Order's conclusion, via summary disposition, that the PPA is invalid because it "does not contain rates reflective of RMP's avoided costs consistent with Schedule 38 and that RMP has not shown it is obliged under federal or state law to purchase electricity from [Monticello] at the rates enumerated in the PPA." Monticello respectfully requests that the PSC reconsider the holding in the May 7 Order and summarily approve the executed PPA for the reasons set forth below. The December 20, 2017 Application, along with the detailed Excel spreadsheets provide sufficient documentation to show that the rates are compliant with 18 C.F.R. § 292.304 and are consistent with the administration of RMP's legally enforceable obligation to purchase from the QF. Further, Section 5.5 of the executed PPA submitted with RMP's Application includes a *Mobile-Sierra*[47] clause insulating the rate from challenge, and the

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the cogeneration or small power production enterprise is not guaranteed to be recoverable."); *see also* American Paper 461 U.S. 402 (103 S.Ct. 1921, 76 L.Ed.2d 22). As an administrative matter, Section 17 of the PPA allows for the PSC to sever the language "and has been approved by the Commission" from Section 2.1.

[46] *Compare Virginia Elec. Power Corp*., 151 FERC ¶ 61,038 (2015) (explaining the proper procedures for a utility to undertake should it wish to waive its obligation to enter into a new contract with a QF) ("*VEPCO*").

[47] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp*., 350 U.S. 332, 338-39 (1956) ("*Mobile*"); *Fed. Power Comm'n v. Sierra Pac. Power Co*., 350 U.S. 348 (1956) ("*Sierra*"); *see also Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty*., 554 U.S. 527 (2008) ("*Morgan-Stanley*"); *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010).

PSC has failed to explain how the May 7 Order is consistent with the state and federal statutes requiring that the rate for purchases is sufficient to encourage the development of small power production facilities.

1. Monticello and RMP Elected a Negotiated Rate Consistent with Federal Law

The May 7 Order improperly implements PURPA and errs by rejecting a negotiated rate contract that is fully-compliant with federal law, as the PPA signed by RMP fairly administers the legally enforceable obligation it incurred in 2013 to purchase from Monticello at an avoided-cost rate computed on the Market Proxy methodology. The May 7 Order misinterprets PURPA and errs in concluding that the role of the PSC is to ensure that "RMP pays no more than its avoided cost." As FERC's website plainly explains: "With limited exceptions, QFs generally have the option of selling to a utility either at the utility's avoided cost or at a negotiated rate." FERC has been clear that a negotiated rate contract is fully consistent with PURPA, and the PSC's conclusion that a purchasing utility is prevented by federal law from agreeing to pay a QF a rate other than the avoided cost is legal error.

As the PSC is well-aware, RMP and the principals of Monticello have been engaged in a difficult and protracted contracting process.[48] As explained in the RMP Application and as set forth in the contract, however, in their negotiated agreement the parties settled on a term of twenty years and Monticello agreed to sell to RMP the "energy and green tags to be generated by Monticello from its wind-powered generation facility located in San Juan County, Utah with a nameplate capacity of 79.2 megawatts."[49] In agreeing to this contract price, and agreeing to sell the green-tags to RMP

[48] *See, e.g.,* Exhibit 9 (providing a detailed recounting of such challenges).

[49] *See* RMP Application at P 3.

despite a long-held pricing dispute,[50] Monticello gave up other potential compensation measures and did not limit the use of its resource in any way. This flexibility, in turn, allows RMP the option to use Monticello's QF resource to provide ancillary services to RMP's local system and also allows RMP to rely on Monticello's QF for market optimization, with Monticello receiving no additional compensation despite the possibility of contributing substantial value to RMP's resource portfolio. In addition, the contract was projected to save both parties and the PSC substantial litigation expenses and is consistent with the expressed goals of both the federal and state legislation to encourage QF development.

Although the record is devoid of factual evidence that the contract rate is different from the RMP's full avoided cost, nothing in federal law would restrict RMP's ability to agree to pay a QF a rate in excess of an avoided cost proxy methodology. By executing the contract, RMP also avoided any further litigation related to the developer's long-alleged discrimination claims that the PSC has repeatedly explained should be considered if/when the PSC considers RMP's obligation to purchase from Monticello.[51] The negotiated-rate PPA executed by RMP represents a resolution to a complex case, and has not been shown to violate the public interest. There is nothing in the record to show that the rate that RMP agreed to pay is inconsistent with federal or state law.

In denying Monticello the right to the executed contract that administers the legally enforceable obligation it incurred in 2013, the PSC is improperly implementing PURPA and acting

[50] *See, e.g.,* Division Memorandum and Exhibit A, Docket No. 03-035-14 (Sept. 29, 2005) (documenting disagreement as to whether avoided cost computations included value for green tags and capacity contributions).

[51] *See, e.g.,* Exhibit 39 (documenting the origins of the dispute and alleging that PacifiCorp was provided access to confidential information and offered to purchase the project); *Compare USA Power, LLC v. PacifiCorp*, 235 P.3d 749 (Ut. 2010) (alleging misappropriation of confidential information and trade secrets); 2016 UT 20 (2016) (upholding the conclusion and the remedy for PacifiCorp's misappropriation of trade secrets and confidential information).

inconsistent with the clear direction of the state Supreme Court of Utah in *Ellis-Hall II*. Accordingly, Monticello requests that the PSC reconsider the holding in its May 7 Order and summarily affirm the contract. If necessary, Monticello requests that the PSC strike the language "and has been approved by the Commission" from Section 2.1 as contrary to public policy.

2. The Negotiated Rate is Just and Reasonable

The avoided cost methodology serves as a proxy for a just and reasonable rate, but the avoided cost is needed only "in the absence of a waiver or a specific contractual agreement."[52] FERC's regulations are clear "Nothing in this subpart requires an electric utility to pay more than the avoided costs for purchases."[53] *Ellis-Hall II* was clear – RMP was not required to enter into a contract with Monticello.[54] As the United States Supreme Court explained approximately sixty-five years ago, "it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain."[55] Monticello requests rehearing of the PSC's failure to consider the impact of the *Mobile-Sierra* provision in Section 5.5 of the executed contract as part of the May 7 Order. The *Mobile-Sierra* doctrine is framed with a view of protecting ratepayers and clearly instructs a regulatory to reject a contract rate that "seriously harms the consuming public."[56]

In the PPA executed by the contracting parties – RMP and Monticello – Section 5.5 provides:

> 5.5 Rates Not Subject to Review. The rates for service specified herein shall remain in effect until expiration of the Term, and **shall not be subject to change for any reason, including regulatory review, absent**

[52] *American Paper*, 461 U.S. at 417.

[53] 18 C.F.R § 292.304(a)(2).

[54] *Ellis-Hall II* at ¶ 44.

[55] *See Sierra*, 350 U.S. at 355.

[56] *Morgan Stanley*, 554 U.S. at 531-535.

> **agreement of the parties.** Neither Party shall petition FERC pursuant to the provisions of Sections 205 or 206 of the Federal Power Act (16 U.S.C. § 792 et seq.) to amend such prices or terms, or support a petition by any other person seeking to amend such prices or terms, absent the agreement in writing of the other Party. Further, absent the agreement in writing by both Parties, the standard of review for changes hereto proposed by a Party, a non-party or the FERC acting *sua sponte* shall be the "public interest" application of the "just and reasonable" standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co*., 350 U.S. 348 (1956) and clarified by *Morgan Stanley Capital Group. Inc. v. Public Util. Dist. No. 1 of Snohomish*, 554 U.S. 527, 128 S. Ct. 2733 (2008).

As the United States Supreme Court held in *NRG Power Marketing*, where the contracting parties elect to include a *Mobile-Sierra* clause, a regulator must presume that the rate for wholesale power meets the "just and reasonable" requirement, unless the regulator concludes that the contract seriously harms the public interest.[57] As the Court reasoned, a presumption applicable to contracting parties only, and inoperative as to everyone else (*i.e.*, consumers, advocacy groups, state utility commissions, etc) would not provide the contract stability *Mobile-Sierra* aimed to secure."[58] In *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 479 (2002), the United States Supreme Court framed the issue of as follows: "When a buyer and a seller agree upon a rate, 'the principal regulatory responsibility [i]s not to relieve a contracting party of an unreasonable rate, … but to protect against potential discrimination by favorable contract rates between allied businesses to the detriment of other wholesale customers."[59] RMP voluntarily executed a contract with a QF-counterparty and included Section 5.5 providing that the rates in the contract "shall not be subject to

[57] As the United States Supreme Court explained, the public interest standard is not a separate standard, but defines what it means for a rate to satisfy the just-and-reasonable standard in the contract context. *See NRG Power Marketing*, 558 U.S. 165 (2010).

[58] *Id.*; *see also Morgan Stanley*, 554 U.S. at 531-535.

[59] *Verizon*, 535 U.S. at 479-480 (internal citations omitted).

change for any reason, including regulatory review, absent agreement of the parties."[60] RMP should be held to this contract provision. As the PSC has recognized "It would not serve the public interest expressed in the federal and state statutes to reject power purchase agreements that QFs have negotiated in good faith and in conformance with Schedule 38."[61]

The May 7 Order asserts, without justification, that the contract rate violates the public interest because the "pricing is based on outdated avoided cost calculations."[62] The Order, however, fails to discuss or analyze the cost support data submitted by RMP with the Application, including the cost comparison data justifying the rate and providing comparable prices. As the United States Supreme Court held, it is appropriate for a regulator to revise the rate in a freely-negotiated contract only where allowing the rate will so "adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."[63] Negotiated, fixed-rate contracts are to be presumed just and reasonable and should not be revised without a finding that the public interest requires contract modification. The May 7 Order is devoid of any public-interest analysis whatsoever and the failure to consider the issue is arbitrary, capricious, and inconsistent with reasoned decisionmaking.

[60] *See* RMP Application, PPA Section 5.5

[61] *In the Matter of the Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and BlueMountain Power Partners, LLC* at 3, Docket No. 13-035-115 (Nov. 25, 2013).

[62] May 7 Order at 12.

[63] *Sierra*, 350 U.S. at 354-55.

3. The Record Does Not Support "Limited Exception" Rate Revision

The rates for such purchases from QFs must be just and reasonable to the ratepayers of the utility, in the public interest, and must not discriminate against QFs.[64] In the May 7 Order, the PSC did not issue findings or consider whether the contract rate is, in fact, an approximation of RMP's full avoided cost. The May 7 Order concluded, without analysis, that "the Application forecloses our finding the PPA's pricing accurately reflects avoided costs under Schedule 38," simply because it employed the Market Proxy methodology in accordance with the direction of *Ellis-Hall II*. Even presuming that the rate in the contract is in excess of RMP's full avoided cost (and there is no record evidence that the rate is in excess of RMP's avoided cost), FERC's regulations allow a state commission to reduce the contract rate only if the state commission determines that a lower rate (1) is sufficient to encourage small power production, (2) is just and reasonable, and (3) does not discriminate against small power production facilities.[65]

Without a reasoned basis, the May 7 Order rejects a valid and freely-negotiated contract rate based on a well-established avoided cost methodology endorsed by the Supreme Court of Utah in *Ellis-Hall II*, and fails to institute a new rate to administer the legally enforceable obligation RMP incurred in 2013 to purchase from Monticello, and thus cannot arguably be compliant with the limited exception. As explained in the Application, the PPA relied on the Market Proxy methodology that RMP used when it issued the indicative pricing to Monticello in 2013 in accordance with the direction of the Supreme Court of Utah in *Ellis-Hall II*. It is inconsistent with federal law to void Monticello's negotiated-rate PPA where there is no evidence in the record that the prices which RMP agreed to pay are unjust, unreasonable, or inconsistent with the public interest,

[64] 18 C.F.R. § 292.304(a).

[65] *Id.* at § 292.304(b)(3).

particularly where there is record evidence asserting claims of undue discrimination from the purchasing utility.[66] Monticello respectfully requests that the PSC reconsider its finding that the rate in the contract is eligible for revision.

B. In the Alternative, Request for Findings of Fact and Conclusions of Law

Should the PSC determine that it will not summarily approve the PPA, Monticello respectfully requests that the PSC issue findings of fact and conclusions of law consistent with those presented below. The undisputed factual record, clearly establishing that the legally enforceable obligation was incurred on or before June 25, 2013, provides a sufficient basis for the PSC to summarily approve the PPA as consistent with state and federal law. As the PSC observed, RMP executed the contract and submitted the Application for approval yet "RMP makes no attempt to allege the existence of a LEO in its Application and takes no position on the matter in its briefing on the Motions." While Monticello has accepted the invitation to carry the burden on the legally enforceable obligation on rehearing in the interest of conserving resources and enforcing its long-denied rights, shifting this burden to the QF does not appear to be consistent with state or federal law and discriminates in favor of the purchasing utility.[67]

1. Requested Findings of Fact and Conclusions of Law

As the moving parties, neither OCS nor DPU provided any evidence to call into question the lawfulness of RMP's cost support, submitted as Exhibit A and described as the "confidential

[66] *See, e.g.,* Exhibit 9; Exhibit 39 at 4 (claiming that PacifiCorp was motivated to defend "against the charges of Ellis-Hall that PacifiCorp showed negligence to Ellis-Hall when in fact it is due to PacifiCorp's lack of properly administering its PURPA responsibilities and improper conduct of the PSC renewable process."

[67] *Compare* Order No. 688 at PP 102-106 (comparing and discussing the relevant differences between a QF and a regulated utility and concluding that it was appropriate for the purchasing utility, not the QF, to carry the burden).

spreadsheets supporting the derivation of PPA prices with all spreadsheet formulae intact."[68] While the PSC notes that RMP, the non-moving party "makes no effort to explain" the calculations that it submitted, consistent with *Salo v. Tyler*, the unrefuted evidence in the record must be viewed in the light most favorable to Monticello – a party with no burden at all.[69]

Findings of Fact

1. As of June 25, 2013, Monticello had provided all requisite information to RMP and was in compliance with Schedule No. 38, Section I.B.2.

2. As of June 25, 2013, the 30 day period for information review, as provided in Schedule No. 38, Section I.B.3, had lapsed.

3. As of June 25, 2013, Monticello had requested in writing that RMP prepare a draft power purchase agreement as provided in Schedule No. 38, Section I.B.4.

4. As of June 25, 2013, RMP had confirmed that no additional project information was necessary for the preparation of the draft power purchase agreement consistent with Schedule No. 38, Section I.B.4.

Conclusions of Law

1. Monticello established a legally enforceable obligation on or about June 25, 2013.

2. As of June 25, 2013, RMP was obligated to calculate the avoided cost by reliance on the Market Proxy methodology, consistent with 18 C.F.R. 304(d)(2)(ii).

3. As of June 25, 2013, RMP was obligated to by the Schedule 38 Tariff to deliver an executable PPA to Monticello.

4. RMP is obligated to purchase the output from Monticello pursuant to the terms and conditions of the executed contract.

[68] RMP Application at P 3.

[69] To assist the Commission in its decisionmaking, Monticello has included Exhibit I to this Reply, categorizing the evidentiary record and presenting the undisputed material issues of fact.

Monticello does not take a position on whether RMP should be allowed to pass the costs of the contract to its retail ratepayers, as Monticello lacks the appropriate insight into the adequacy of the cost recovery methods and the relation to RMP's financial security.[70]

2. The PPA Administers the Legally Enforceable Obligation Incurred that RMP Incurred on or before June 25, 2013

While a state commission has discretion to determine the date on which a legally enforceable obligation is incurred, FERC has provided clear guidance to state commissions that, at a minimum, federal law mandates that a utility purchase from any QF that commits itself to sell.[71] FERC has invalidated state application of the federal test where a state unreasonably interfered with a QF's PURPA rights and created practical disincentives to amicable contract formation.[72] In *Virginia Electric Power Co.*, FERC held that a utility may not avoid the creation of a legally enforceable obligation by refusing to sign a contract,[73] and explained that while a utility's PURPA obligations may be effectuated through voluntary contracting, "if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable,

[70] *Compare Sierra*, 350 U.S. at 354-55. The United States Supreme Court explained that when the seller has agreed to a rate that it later challenges as too low, "the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Id.*

[71] *See, e.g., FLS Energy Inc.*, 157 FERC ¶ 61,211 (2016); *See, e.g., JD Wind 1, LLC*, 129 FERC ¶ 61,148, at P 25 (2009) ("Under our regulations, [the QF] has the right to choose to sell pursuant to a legally enforceable obligation . . . ."); *see also Cedar Creek Wind. LLC*, 137 FERC ¶ 61,006, P 32 (2011); *Grouse Creek Murphy* Flat P 24 ("a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations").

[72] *See, e.g., Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, P 40 (2013).

[73] *VEPCO*, 151 FERC ¶ 61,038, P 25 (2015).

obligation will be created pursuant to the state's implementation of PURPA."[74] FERC has repeatedly held that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF."[75]

While FERC provides the state commission discretion to set the parameters it will evaluate, FERC has made clear that it is consistent with PURPA and the implementing regulations to find that a QF establishes a LEO by "committing itself to sell to an electric utility."[76]

3. Monticello Committed Itself to Sell on or Before June 25, 2013

Monticello first requested indicative pricing from RMP, following the procedures set forth in the then-effective Schedule 38 Tariff, in May 2012 and the declarations provided as confidential Exhibits 1 and 9 provide a detailed explanation of the process.[77] On November 5, 2012 a member of the development staff for Monticello's wind farm project contacted RMP and asked: "In anticipation of Good Faith PPA negotiations with your office, what are the required documents for PPA execution?"[78] RMP promptly responded to this inquiry, provided a copy of then-effective tariff Schedule 38, and explained that once the utility received sufficient documentation it would provide a draft PPA and that the parties would then work together to finalize an executable document.[79] The parties then began a series of negotiations, with Monticello providing sufficient documentation to

[74] *See also* Order No. 688 at P 212.

[75] *See, e.g., JD Wind*, 129 FERC at P 25 (2009); *Cedar Creek*, 137 FERC at P 32.

[76] *JD Wind*, 129 FERC at P 25.

[77] *See* Exhibit 1 (providing a declaration of Mr. Tony Hall); Exhibit 9 (providing a declaration of Ms. Kimberly Ceruti); Exhibits 2-8;10-40 (providing copies of relevant material). *See* Exhibit 9 at ¶ 11 (explaining that in the early stages of process under the Schedule 38 Tariff, a utility employee had "muttered an offensive sexist and racial epithet, and refused to assist me.")

[78] *See* Exhibit 10.

[79] *Id.*

demonstrate site control and resolve disputes about the land rights associated with the development site.[80] On April 15, 2013, the project developer submitted a site specific QF PPA Application and provided additional information on April 24, 2013 via email.[81] RMP provided Monticello with an indicative pricing proposal on May 22, 2013 stating that Monticello could "obtain a final power purchase agreement through full compliance with the procedures as detailed in Schedule 38."[82] On June 3, 2013 RMP confirmed that "the documentation you submitted with your pricing request was of sufficient detail that we did not require additional information in order to provide a draft PPA under Schedule 38."[83] Monticello reviewed the *pro-forma* PPA provided by RMP on June 3, 2013, along with the May 22, 2013 indicative pricing proposal, determined that it was prudent to proceed with development of the QF, and attempted to obtain the executable contract from RMP.[84] On June 25, 2013 the principal developer of Monticello requested that RMP provide a document "for proof reading and signature."[85]

As of June 25, 2013, by following the procedures of the then-effective Schedule No 38 Tariff and demanding an executable version of the PPA, Monticello had done everything within its power to commit itself to sell, and obligate RMP to buy.

a) **Monticello's Full Compliance with Schedule 38 Procedures**

In the then-effective version of Schedule 38, Steps 1-3 set forth the procedure by which a QF would request indicative pricing and in Step 4, the tariff provided that, if the owner desires to

[80] *See, e.g,.* Exhibit 9 at ¶¶ 10-15.

[81] *Id.* at ¶¶ 15-16.

[82] Exhibit 18.

[83] Exhibit 10.

[84] Exhibit 9 at ¶ 18.

[85] *See* Exhibit 7; *see also* Exhibit 5; Exhibit 33 at 3.

proceed forward, "it may request in writing that the Company prepare a draft power purchase agreement to serve as the basis for negotiations between the parties."[86] In Step 5, the tariff obligated RMP to "provide the owner with a draft power purchase agreement containing a comprehensive set of proposed terms and conditions." Steps 6 and 7 laid out general parameters for negotiation, with RMP agreeing that it "will not unreasonably delay negotiations and will respond in good faith," and obligating RMP to "prepare and forward to the owner a final, executable version of the agreement."[87] No party has alleged, and there are no facts in dispute, that Monticello failed to comply with the "detailed steps of the negotiation process" that was set forth in the Schedule 38 Tariff effective during the 2012-2013 timeframe.[88]

Following the checklist that RMP submitted to the PSC on April 15, 2013 in compliance with the October 2005 Order, Monticello had received the "non-binding letter from PacifiCorp indicating non-binding rates, request form power purchase agreement pursuant to Utah Schedule No. 38, Section I.B.4," Monticello had completed the "request form power purchase agreement pursuant to Utah Schedule No. 38, Section I.B.4," and RMP had confirmed that no further information was required from Monticello pursuant to Utah Schedule No. 38, Section I.B.4. As of June 25, 2013, by following the procedures of the RMP's checklist and then-effective Schedule 38 Tariff, Monticello had done everything within its power to commit itself to sell, and obligate RMP to buy.

b) **Project Has Remained Viable**

When Monticello requested a PPA for execution on June 25, 2013, and all that remained to complete the contracting exercise was for RMP to produce an executable version of the draft PPA,

[86] *See* Schedule 38 Tariff (provided as Exhibit II).

[87] *Id.*

[88] *Id.*

the non-contractual, but still legally enforceable, obligation was secured.[89] Monticello has clearly demonstrated that it is ready, willing, and able to proceed with the construction and interconnection of its project. There is no legitimate dispute to the project's viability on or after June 25, 2013, as the developer has managed to maintain the viability of its project, despite extensive litigation and potential discrimination. Monticello has dutifully obtained (and maintained) land rights, required permits, development contracts, and the interconnection position. The Commission must not reward the purchasing utility for "Rope-a-Dope" tactics that have the effect of discouraging development of small power production facilities in the state.

The law is clear: where a QF has done everything within its power to create such an obligation, and only an act of acceptance by the utility or an act of approval by the local regulatory authority remains to establish the existence of a contract, then the legally enforceable obligation contemplated by § 292.304(d)(2) has been established and the QF is entitled to rates based on avoided costs calculated from the date of the QF's action."[90] While state agencies have discretion in determining the manner in which the rules will be implemented, action must be reasonably designed to give effect to FERC's rules.[91] To the extent that a state commission's standard for evaluating a legally enforceable obligation does not measure the QF's commitment to sell or serves as an

[89] *Compare VEPCO*, 151 FERC ¶ 61,038, P 25 (2015) (discussing a utility's burden if it wishes to relieve itself of the obligation to enter into a new contract or legally enforceable obligation with a QF). Ellis-Hall has consistently argued that the legally enforceable obligation as created when RMP required it, unlike any other QF developers, to have in place an executed LGIA which required Ellis-Hall's participation and completion of Pacificorp's LGIP.

[90] *Armco Advanced Materials Corp. v. Pennsylvania Public Utility Comm'n,* 634 A.2d 207, 209-212 (Pa. 1993) (explaining that "We are not, after all, dealing with completely free enterprise. We are, rather, dealing with the twilight world of regulated monopolies."); *Snow Mountain Pine Co. v. Maudlin*, 734 P.2d 1366, 1367 (Or. App. 1987).

[91] *FERC v. Mississippi,* 456 U.S. 742, 751 (1982).

insurmountable bar, that standard must be rejected as inconsistent with, and contrary to, FERC's rules and as an improper implementation of PURPA.[92]

4. Later Revisions to Schedule 38 Process Inapplicable

Monticello requests that the PSC reconsider its conclusion that the Schedule 38 Tariff put into effect in June 2015 governs either the negotiated-rate contract voluntarily executed by the parties in 2017 or the legally enforceable obligation incurred by RMP in June 2013.[93] The unsupported conclusion that Monticello was obligated to comply with a six-month process in a tariff that was not made effective until after the legally enforceable obligation was established is a collateral attack on the Utah Supreme Court's ruling in *Ellis-Hall II*, and is arbitrary, capricious, inconsistent with reasoned decisionmaking and violates the rule against retroactive ratemaking.[94]

In *Ellis-Hall II*, the Supreme Court of Utah held that Monticello "is entitled to proceed in reliance on the methodology set forth in the indicative pricing proposal it received from Rocky

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[92] *See FLS Energy*, 157 FERC at P 20 ([H]owever, we elect to also issue a declaratory order regarding legally enforceable obligations, finding 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 the Commission's regulations under PURPA.); *Cedar Creek*, 137 FERC at PP 35-36 (explaining that a requirement made for a fully-executed contract as a condition precedent to the creation of a legally enforceable obligation was inconsistent with PURPA).

[93] May 7 Order at 8.

[94] *See, e.g., Public Serv. Comm'n v. Diamond State Tel. Co.*, 468 A.2d 1285, 1298 (Del. 1983) ("A pervasive and fundamental rule underlying the utility rate-making process is that rates are exclusively prospective in application."; *Louisiana Power & Light Co. v. Louisiana Pub. Serv. Comm'n*, 377 So. 2d 1023, 1028 (La. 1979) ("Pervading the utility rate making process is the fundamental rule that rates are exclusively prospective in application and that future rates may not be designed to recoup past losses."); *New England Tel. & Tel. Co. v. Public Util. Comm'n*, 358 A.2d 1, 20 (R.I. 1976) ("A fundamental rule of rate-making is that rates are exclusively prospective in nature."). *Compare Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (requiring, through the filed rate doctrine, that a utility may only charge rates that are properly on file). *See also People ex rel. Hartigan v. Illinois Commerce Comm'n*, 561 N.E.2d 711 (1990) (explaining the filed rate doctrine and rule against retroactive ratemaking).

Mountain Power."[95] While the court declined to issue an advisory ruling with regards to RMP and the PSC's future obligations to Monticello, the court's opinion supports a conclusion that Monticello established a legally enforceable obligation under PURPA on or before June 25, 2013. As the court explained, the PSC is forbidden from revising a tariff rule by later interpretation as it is the "orders and tariffs that have the force of law, not [the PSC's] privately held intentions."[96]

As the court recounted in its decision in *Ellis-Hall II*, the established legal errors of RMP and the PSC began in the summer of 2013 when RMP unlawfully rescinded the indicative pricing proposal provided to Monticello.[97] While the Phase Two order directed RMP to cease issuing indicative pricing proposals based on the Market Proxy methodology, the Phase Two order did not address how to handle developers that had received, and relied upon, indicative pricing proposals provided by RMP before the Phase Two order.[98] The Supreme Court of Utah rejected the PSC's assertion that Monticello was required to submit a request for new indicative pricing before it could proceed with a PPA, and found that the Schedule 38 Tariff governed the lawful bounds of the party's conduct.[99] In *Ellis-Hall II*, the court concluded that neither the then-effective Schedule 38 Tariff, nor the Phase Two order, required Monticello to submit a new request for indicative pricing in order to receive a PPA from RMP.[100] The Supreme Court of Utah held that the Phase Two order mandates

[95] *Ellis-Hall II* at ¶ 43.

[96] *Id.* at ¶ 31.

[97] *Id.* at ¶ 37.

[98] *Id.* at ¶¶ 38-40.

[99] *Id.*

[100] *Id.*

that the new methodology would be applicable only to "future requests for indicative pricing,"[101] explaining that:

> We construe the terms of the Phase Two order, when read in light of the Phase One order and Schedule 38, to yield a right to a wind power developer to rely on the methodology set forth in the "indicative pricing proposal" it receives from Rocky Mountain Power . . . . the operative terms of the Commission's orders and of Schedule 38 give entities like Ellis-Hall a right to rely on the methodology employed in an indicative pricing proposal once it is given.[102]

The court concluded that both RMP and the PSC had erred in the interpretation of the Schedule 38 Tariff and the Phase Two order and held that Monticello was "entitled to proceed in reliance on the methodology set forth in the indicative pricing proposal it received from Rocky Mountain Power."[103]

Monticello respectfully requests that the PSC reconsider its conclusion that Monticello was somehow required to comply with the Schedule 38 Tariff that was put into place in 2015,[104] approximately two years after Monticello demanded an executable PPA from RMP. The record reflects that the developers of Monticello completed all the necessary steps of the then-effective Schedule 38 Tariff and only the act of producing an executable contract remained. The PSC's application of the six-month limitation put in place in June 2015 attaches legal consequences to events years after RMP incurred the legally enforceable obligation to purchase from Monticello and is a clear violation of the rule against retroactive ratemaking.

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[101] *Id.* at ¶ 39.

[102] *Id.* at ¶ 37.

[103] *Id.* at ¶ 43.

[104] May 7 Order at 8-10. Should the Commission have wished to apply the 2015 tariff to the parties conduct, the issue should have been briefed and argued to the court in *Ellis-Hall II*.

5. No New Docket or Application Is Needed To Recognize Monticello's Legally Enforceable Obligation

The May 7 Order correctly observes that RMP, the Applicant, has not made any attempt to discuss at what point it incurred the legally enforceable obligation to purchase from Monticello.[105] The May 7 Order errs, however, in suggesting that the record is insufficient to make such a determination. To the extent the May 7 Order is intended to require Monticello to establish a new docket for adjudication of issues related to the factual or legal underpinnings of the obligation of RMP to purchase from this facility, Monticello requests rehearing. RMP submitted the Application pursuant to the Section 54-12-2 of the Utah Code, and the May 7 Order's conclusion that the legal issues concerning RMP's obligation to purchase from Monticello should be litigated in some other docket appears is inconsistent with the statutory direction to adopt rules "which encourage the development of small power production and cogeneration facilities."[106]

As explained *supra*, the factual record before the PSC is sufficient to issue findings of fact and conclusions of law affirming that the legally enforceable obligation was established on or about June 25, 2013.[107] The May 7 Order's suggestion that Monticello bears the burden of establishing the legally enforceable obligation in some other docket, or through some other process, is inconsistent with PURPA, the factual record, and attempts, improperly, to disambiguate the executed PPA from

[105] May 7 Order at 13-14.

[106] Utah Code Ann. § 54-12-2(4); *see also In the Matter of the Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Blue Mountain Wind 1, LLC*, Docket No. 11-035-196 (Dec. 19, 2011) (suspending consideration of a PPA related to the land right dispute among the parties to allow for Rocky Mountain Power and Blue Mountain to negotiate and modify the contract); *In the Matter of the Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Blue Mountain Wind 1, LLC*, Docket No. 11-035-196 (Apr. 27, 2015) (suspending Ellis-Hall's petition to intervene).

[107] *See* Exhibit I (providing a chronology of contracting negotiations demonstrating Monticello's commitment to sell, and the parties meeting the minds, before issuance of the Phase Two Order).

the legally enforceable obligation that was discussed in *Ellis-Hall II*. Requiring Monticello to carry the burden of opening a new docket to prove RMP's obligation to purchase from the facility would disregard the contract that RMP and Monticello executed and would be inconsistent with the Supreme Court of Utah's decision in *Ellis-Hall II*.[108] The fact that RMP failed to make the case as to a legally enforceable obligation is simply a reflection of the fact the PPA satisfies the PURPA mandatory purchase obligation and administers the legally enforceable obligation. Once a PPA is executed between a purchasing utility and a developer, the issue of when/how the legally enforceable obligation was established is moot. Even acting on a reasonably expedited schedule, opening a new docket or establishing a new process would impose additional unnecessary delay into an already protracted litigation process and may cause substantial harm to Monticello, particularly to the extent Monticello is required to post additional interconnection deposit or security to maintain its interconnection position pending litigation over the enforcement of RMP's obligation to purchase.

C. As Necessary, Hearing Procedures to Adjudicate Disputed Issues of Material Fact

If the PSC does not approve the PPA and affirm that RMP is obligated to purchase from Monticello at the rates and terms agreed to by the parties, then Monticello respectfully requests that the PSC immediately resume hearing procedures to develop the factual record as to, among other concerns, the date on which RMP became legally obligated to purchase the output of Monticello's project, and whether any delays in contracting after June 25, 2013 are due to RMP's attempt to unlawfully avoid the mandatory purchase obligation set forth in FPA Section 210 "so that a later and

[108] *Ellis-Hall II* at ¶ 37 (explaining that the Ellis-Hall had a right to rely on the indicative pricing proposal provided to Monticello on May 22, 2013: "the operative terms of the Commission's orders and of Schedule 38 give entities like Ellis-Hall a right to rely on the methodology employed in an indicative pricing proposal once it is given.").

lower avoided cost is applicable."[109] FERC's regulations require that, in administering its responsibilities under PURPA, the purchasing utility and the regulatory body not discriminate against QFs,[110] and any hearing should allow parties to introduce all relevant evidence of discrimination from February 2012 to present.[111]

1. Delaying the Signing of Contracts with the Effect that a Later and Lower Avoided Cost is then Claimed to be Applicable

The PSC has entertained – and denied – other complaints from this time period alleging that RMP was intentionally delaying the signing of the QF contracts, with the effect that a later and lower avoided cost is then claimed to be applicable.[112] For example, one similarly-situated wind developer described that it had timely submitted a 12 x 24 matrix with its indicative pricing request in Microsoft word format, and it took approximately three months before RMP replied that it required the information in Excel format.[113] This same developer, following the procedures of then-effective Schedule 38, requested a draft PPA from RMP on January 15, 2013 and "received a nearly-blank PPA form on January 25, containing only information regarding a different project."[114] As the

[109] *Compare VEPCO*, 151 FERC ¶ 61,038, at P 15 (2015).

[110] 18 C.F.R § 292.304(a)(2).

[111] *See, e.g,* Exhibit 39 at 4-10 (listing allegations of bad faith and undue discrimination); *infra* note 120.

[112] *See, e.g.,* Exhibit 42; Formal Complaint of Ros Vrba for Energy of Utah, Docket No. 13-035-22 (Feb. 22, 2013); Direct Comments of Thayn Hydro, LLC, Docket No. 16-035-04 (Mar. 2, 2016); *In the Matter of the Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and BlueMountain Power Partners, LLC*, Docket No. 13-035-115 (Nov. 25, 2013) (explaining that the PSC "reviews power purchase agreements to assure PacifiCorp has properly administered Schedule 38 in its dealings with a counterparty and, in particular, that PacifiCorp has properly determined avoided cost pricing.").

[113] Energy of Utah Reply to Rocky Mountain Power (Company) Response, Docket No. 13-035-22 (Apr. 8, 2013).

[114] Formal Complaint of Ros Vrba for Energy of Utah at 2, Docket No. 13-035-22 (Feb. 22, 2013).

developer explained, "it was our expectation that the Company would provide the owner with a draft [PPA] containing a comprehensive set of proposed terms and conditions, including a specific pricing proposal for purchases from the project, per Schedule 38 guidelines."[115]

Given this pattern of conduct, Monticello specifically requests that the PSC consider the extent to which the record contains sufficient facts to determine if RMP unfairly delayed contracting in an attempt to force Monticello to accept a lower avoided cost rate and/or to avoid its legally enforceable obligation to purchase from Monticello. For example, the facts and circumstances surrounding RMP's response to Monticello's June 25, 2013 email requesting an executable PPA may answer the question as to whether RMP delayed the delivery of the PPA. Facts and circumstances surrounding the developer's continued attempts to meet with RMP to sign a PPA throughout the summer of 2013, as well as facts and circumstances surrounding RMP's responses to such overtures, may answer the question as to whether RMP delayed the delivery of the PPA. Facts and circumstances surrounding RMP's control of the interconnection process, and whether RMP unlawfully conditioned receipt of a power purchase agreement upon execution of an interconnection agreement,[116] would also be relevant to the issues. Further, the more recent facts and circumstances surrounding RMP's decision to condition effectiveness on the PPA on the PSC's approval, the interaction between RMP's merchant function and its transmission function with regards to information sharing for this project, and RMP's decision to not defend its application against the motions for summary rejection, may further bear on the determination as to the relief to which

[115] *Id.*

[116] *Compare FLS Energy*, 157 FERC at P 26 (finding unlawful a requirement to condition a legally enforceable obligation on the interconnection process); Formal Complaint of Ros Vrba for Energy of Utah, Docket No. 13-035-22 ("We were notified that the [draft PPA] would not be signed until an interconnection agreement had been executed.").

Monticello is entitled. As RMP stated, it "reserves the right to rebut" Monticello's statements to the extent they provide an "an inaccurate description of the facts and circumstances that resulted in the Company's execution of the PPA."[117]

2. Extenuating Circumstances or Undue Discrimination

The PSC may also want to consider a host of other facts as part of its investigation into the evaluation on whether RMP was legally obligated to purchase from Monticello at a date other than June 25, 2013. If the PSC finds that a legally enforceable obligation was not incurred as of June 25, 2013, then the PSC must consider to what extent delays are attributable to RMP and whether such delays constitute "extenuating circumstances" in the event the PSC continues to rely on the version of Schedule 38 Tariff made effective in June 2015.[118] A hearing would investigate whether RMP discriminated in-favor of developers that elected to forfeit green-tag compensation or accept less-favorable contracting terms. A hearing would also investigate whether RMP provided any preferential treatment to its affiliate Pacific Wind Development LLC in either the process of indicative pricing development, interconnection, or contracting with Monticello.[119]

As the PSC is well-aware, Ellis-Hall has raised claims of discriminatory treatment with regards to its development activities in southern Utah consistently over the past six years, and the record calls into question whether there has been undue discrimination in the course of the

[117] RMP Response to Memorandums in Opposition to Motions for Summary Judgment at P 4, Docket No. 17-035-68 (April 5, 2018).

[118] *Compare* 2015 Schedule 38 Tariff to Exhibit 10 at 6-13 (providing a copy of the Schedule 38 Tariff in effect when the legally enforceable obligation was incurred).

[119] *See, e.g.,* Exhibit 9 at ¶ 7; Exhibit 39.

contracting or approval process,[120] yet the May 7 Order disregards the unrefuted record evidence of such conduct. These concerns do not appear to be unfounded. In 2002, U.S. Magnesium explained that if the administration of PURPA was left to the discretion of RMP "resources will not be developed unless and until the utility wants them to be developed," and warned that unless the PSC exercised strict oversight, the Schedule 38 Tariff could be used by the purchasing utility to discriminate against developers by failing to provide an executable power purchase agreement in a timely manner.[121] As a similarly-situated developer recounted, the risk faced by developers was substantial and RMP was aware of its role in this business risk.[122] The PSC's failure to consider Monticello's claims of undue discrimination in its May 7 Order is arbitrary, capricious, and inconsistent with reasoned decisionmaking.

[120] *See, e.g.,* Petition for Intervention Filed by Ellis-Hall Consultants, LLC, Docket No. 12-035-115 (explaining ownership of certain leases that are within the geographic footprint of the project commonly referred to as the Blue Mountain Wind Project) (July 19, 2013); Ellis-Hall Consultants, LLC's Petition for Review or Rehearing, Docket No. 11-035-196 (May 26, 2015) (explaining relevance to disputed land rights); Ellis-Hall Consultants, LLC's Petition for Review or Rehearing, Docket No. 12-2557-01 (May 28, 2015) (explaining the disputed land rights and relationship to contracting); Ellis-Hall Consultants, LLC's Petition for Review and Rehearing and Reply in Support of its Motion to Stay, Docket No. 14-035-140 (July 2, 2015) (explaining that PacifiCorp's failure to comply with the site control requirements of the OATT in administering interconnection was potentially unlawful and unduly discriminatory); Ellis-Hall Consultants, LLC's Objection to Rocky Mountain Power's Motion to Dismiss, Docket No. 15-2582-01 (Aug. 13, 2015) (explaining the origin of an interconnection dispute related to, in Summer 2012, "PacifiCorp informed Ellis-Hall that its connector substation must accommodate all generating facilities within five miles of the substation . . . This required Ellis-Hall to acquire a larger area of land for the substation footprint and to bear the redesign costs of the substation.").

[121] Comments from U.S. Magnesium, Docket No. 02-035-T11 (Dec. 2, 2002).

[122] Formal Complaint of Ros Vrba for Energy of Utah, Docket No. 13-035-22 (explaining that "Because of the considerable delays encountered to-date, we requested that [a $25/kW development deposit due 90 days after PPA execution] be refundable, should the Federal Wind Production Tax Credit not be extended beyond the current January 1, 2014 deadline. The Company declined, despite the lack of control over this variable by either party.").

III. Conclusion

Monticello requests that the PSC reconsider the issues and summarily approve the PPA, a freely-negotiated wholesale power contract, as consistent with federal and state law. If the PSC declines to summarily rules in favor of Monticello, Monticello requests that the PSC reconsider, issue the following findings of fact and conclusions of law, and set for hearing as necessary:

Findings of Fact

1. As of June 25, 2013, Monticello had provided all requisite information to RMP and was in compliance with Schedule No. 38, Section I.B.2.

2. As of June 25, 2013, the 30 day period for information review, as provided in Schedule No. 38, Section I.B.3, had lapsed.

3. As of June 25, 2013, Monticello had requested in writing that RMP prepare a draft power purchase agreement as provided in Schedule No. 38, Section I.B.4.

4. As of June 25, 2013, RMP had confirmed that no additional project information was necessary for the preparation of the draft power purchase agreement consistent with Schedule No. 38, Section I.B.4.

Conclusions of Law

1. Monticello established a legally enforceable obligation on or before June 25, 2013.

2. As of June 25, 2013, RMP was obligated to calculate the avoided cost by reliance on the Market Proxy methodology, consistent with 18 C.F.R. 304(d)(2)(ii).

3. As of June 25, 2013, RMP was obligated to by the Schedule 38 Tariff to deliver an executable PPA to Monticello.

4. RMP is obligated to purchase the output from Monticello pursuant to the terms and conditions of the executed contract.

If the PSC declines to reconsider and issue the above findings of fact and conclusions of law, Monticello requests that the PSC immediately resume hearing procedures to adjudicate disputed issues of material fact, including issues related to the date on which Monticello established a legally enforceable obligation and whether Monticello experienced undue discrimination.

Respectfully submitted,

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June 6, 2018

Exhibit I – Chronology of the Legally Enforceable Obligation

Date	Event	Reference
January 2012	Developer begins plans to develop QF project through acquisition of distressed assets	Exhibit 9, ¶ 4
February 2012	Planned acquisition is completed	Exhibit 9, ¶ 6
March 19, 2012	Ellis-Hall begins interconnection; submits $10,000 application fee	Exhibit 12 at 1
April 19, 2012	Developer receives necessary permit	Exhibit 14
May 25, 2012	First indicative pricing request submitted for the Monticello wind farm project	Exhibit 45
May 2012	PacifiCorp instructs developer to complete interconnection process as a condition precedent to PPA contracting	Exhibit 9, ¶ 9 Exhibit 1, ¶ 5
November 5, 2012	PacifiCorp notifies developer that the May 25, 2012 indicative pricing request is deficient	Exhibit 9, ¶ 10
November 5, 2012	PacifiCorp provides a copy of Schedule 38 Tariff and explains QF contracting process	Exhibit 10
November 2012 - April 2013	PacifiCorp disputes site control – claims that contested land rights belong to Blue Mountain Power Partners, LLC. PacifiCorp refuses to contract; phone calls unreturned and land right dispute continues. Ellis-Hall attempts to raise issue at Commission through contesting the PPAs involving the disputed land rights.	Exhibit 9, ¶ 11-12, 21-22
April 5, 2013	Developer begins Schedule 38 Tariff process again, despite lack of response to May 2012 attempts to obtain indicative pricing	Exhibit 5
April 2013	PacifiCorp confirms that information provided by developer is sufficient	Exhibit 9, ¶ 16
May 22, 2013	PacifiCorp provides indicative pricing	Exhibit 18
May 31, 2013	Developer confirms PacifiCorp has all required information pursuant to Schedule 38 Tariff asks for PPA "by days end as agreed"	Exhibit 3
June 3, 2013	PacifiCorp provides *pro forma*	Exhibit 4
June 25, 2013	Developer demands PPA for execution; objects to failure to provide site-specific information despite providing all relevant information	Exhibit 7
June 27, 2013	Developer demands PPA for execution; objects to failure to provide site-specific information despite providing all relevant information	Exhibit 4
July 10, 2013	PacifiCorp corresponds but fails to provide site-specific PPA	Exhibit 4
August 2, 2013	PacifiCorp verbally agrees to contract with Monticello based on indicative pricing proposal	Exhibit 4
August 13, 2013	Developer notifies PacifiCorp that it intends to continue pursuing PPA based on May 22 indicative pricing proposal. PacifiCorp confirms meeting of the minds to enter into a contract as proposed by developer.	Exhibit 4
August 16, 2013	PSC issues Phase Two Order.	12-035-100
August 19, 2013	Developer provides a markup of the draft PPA, as agreed to prior to August 13, 2013	Exhibit 32
August 23, 2013	PacifiCorp mails hard copy of draft LGIA to developer	Exhibit 32
August 27, 2013	In reliance on the Phase Two Order, PacifiCorp rescinds indicative pricing proposal	Exhibit 28
August 28, 2013	Developer contests PacifiCorp's attempt to rescind indicative pricing proposal; developer claims discrimination.	Exhibit 32
September 5, 2013	Ellis-Hall Petitions for Rehearing of the Phase II Order	12-035-100
October 4, 2013	PSC Denies Ellis Hall Petition for Rehaering	12-035-100
October 2013	Developer and PacifiCorp continue to meet and negotiate PPA	Exhibit 35

November 5, 2013	Developer advises PacifiCorp that it wishes to continue negotiation during pendency of appeal	Exhibit 38
March 3, 2014	Ellis-Hall Files Complaint against RMP based on improper rescission of indicative price	14-035-24
July 28, 2016	Supreme Court of Utah issues decision in *Ellis-Hall II* finding that the Phase Two Order improperly permitted recission of the indicative pricing proposal issued to Monticello	2016 UT 34

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Petition for Reconsideration and Rehearing was served upon the following persons by e-mail on June 6, 2018:

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