ROCKY MOUNTAIN POWER
A DIVISION OF PACIFICORP

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June 21, 2018

VIA ELECTRONIC FILING

Utah Public Service Commission
Heber M. Wells Building, 4th Floor
160 East 300 South
Salt Lake City, UT 84114

Attention: Gary Widerburg
Commission Secretary

RE: **Docket No. 17-035-68—In the Matter of the Application of Rocky Mountain Power for Approval of Power Purchase Agreement Between PacifiCorp and Monticello Wind Farm, LLC**

Rocky Mountain Power (the "Company") hereby submits for filing its Response to Monticello Wind Farm's Request for Rehearing in the above referenced matter.

The Company respectfully requests that all formal correspondence and requests for additional information regarding this filing be addressed to the following:

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Sincerely,

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Monticello Wind Farm, LLC	DOCKET NO. 17-035-68 **Response to Monticello Wind Farm's Request for Rehearing**

PacifiCorp dba Rocky Mountain Power ("Company"), pursuant to Utah Admin. Code R746-1-801, responds to the June 6, 2018, Petition of Monticello Wind Farm, LLC ("Monticello Wind") for Reconsideration and Rehearing ("Petition") of the Public Service Commission of Utah ("Commission") order issued May 7, 2018. In support of its response, the Company states as follows:

I. BACKGROUND

The Company initiated this proceeding December 20, 2017, by filing an application for approval of its power purchase agreement ("PPA") with Monticello Wind. On March 9, 2018, the Division of Public Utilities ("Division") filed a motion for summary judgment on the basis that, contrary to Utah Schedule 38 requirements, execution of the PPA occurred more than six months after Monticello Wind received indicative pricing, and did not occur within five months after its

receipt by Monticello Wind. Specifically, the Division argues that Schedule 38 timing requirements were effective when the PPA was being negotiated, and that enforcing those timing requirements is consistent with the decision in *Ellis-Hall Consultants, LLC v. PSC*, 2016 UT 34 (referred to as, "*Ellis-Hall*"). Concurrently, the Office of Consumer Services ("Office") also filed a motion for summary judgment stating that approval should be denied because the avoided cost pricing in the PPA was calculated using an old methodology that the Office argued was inconsistent with the requirements of Public Utility Regulatory Policy Act of 1978 and its companion regulations ("PURPA"). In its motion, the Office also notes that the *Ellis-Hall* decision did not include a determination on whether PURPA requirements would prevent the Commission from approving a PPA based on that pricing methodology.

The Commission's May 7, 2018, order ("Order") granted both the Division's and the Office's motions for summary judgment ("Motions"). In the Order, the Commission reached four central findings: 1) *Ellis-Hall* does not entitle Monticello Wind to five-year-old pricing because such pricing is inconsistent with PURPA's requirements; 2) the PPA negotiation process did not meet Schedule 38's timing requirements and, even under the former version of Schedule 38, the pricing is too stale for the Commission to approve it; 3) the request for agency action did not allege the existence of a legally enforceable obligation; and 4) if Monticello Wind wishes the Commission to adjudicate the LEO issue it should file a separate request setting forth, in detail, the basis for such determination. On April 12, 2018, Monticello Wind filed a notice of appearance of counsel and on June 6, 2018, Monticello Wind filed the Petition.

II. INTRODUCTION

The Company takes no position on whether the Commission should reconsider or rehear the application for approval of the PPA between the Company and Monticello Wind's qualifying

facility ("QF"), as being consistent with Utah's implementation of PURPA. However, the Company is compelled to respond because, rather than focus on the substantive issues, the Petition strays far afield from the questions before the Commission in this proceeding.

The Company filed for Commission approval of the PPA it entered into *with* Monticello Wind. Despite having executed a PPA with the Company, subject to Commission approval, the Petition focuses on new allegations and on past disputes Monticello Wind and Ellis Hall Consultants, LLC have had with the Company that were, and remain, largely unrelated and irrelevant to the Motions or even to the Commission's decision on whether to approve the PPA. The Petition misstates many facts and important elements of the law. The Petition also seeks rulings from the Commission that could have lasting impacts on Utah's PURPA implementation, would deprive the Company of due process, and would be based on substantially less than a fully developed record.

III. ARGUMENT

A. A claim of a legally enforceable obligation is outside the scope of this docket and is improper in the context of an executed PPA, in any event.

As stated in the Order, if Monticello Wind wishes to raise a claim for a legally enforceable obligation ("LEO") under the Federal Energy Regulatory Commission's ("FERC") PURPA regulations, it can file a complaint with the Commission laying out those allegations, although LEO claims are only properly raised when there is no executed PPA, contrary to the circumstances in this case.

Instead of heeding this direction from the Order, a substantial portion of the Petition is devoted to alleging that a LEO has already been established. At many points in the Petition, Monticello Wind simply assumes that it has established a LEO, claiming the PPA is the LEO's

"contractual manifestation,"[1] relying on the record from other proceedings where the existence of a LEO was not at issue, to show that it has been established,[2] and stating that the "undisputed factual record" reflects that Monticello Wind established a LEO.[3] However, submitting over 800 pages of information that is irrelevant to the issues before the Commission—whether to grant the Motions and whether to approve the PPA—does not make that irrelevant information part of an "undisputed factual record." If the Commission were to grant the request in the Petition and issue findings that a LEO was incurred on June 25, 2013,[4] it would deprive the Company and other interested parties of their due process rights.

Granting the Petition also risks cementing a distorted interpretation of PURPA into Utah's implementation of the law. The Petition confuses the purpose of LEOs under FERC's PURPA regulations. In its Order 69, FERC stated its LEO regulation was "intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility."[5]

The purpose of a LEO is to give a QF recourse when a utility actually refuses to sign a contract or needlessly delays doing so, but in this case the Company sought approval of an executed PPA with Monticello Wind. Monticello Wind's claim that the PPA is a "contractual manifestation" of a LEO cannot be reconciled with FERC's explanation of a LEO's purpose. As noted by Monticello Wind's counsel in comments at FERC on behalf of the Solar Energy Industries Association ("SEIA"), "[FERC]'s regulations provide for sales by QFs pursuant to

[1] Petition at p.2.
[2] Petition at p.9.
[3] *See e.g.* Petition at p.12.
[4] Petition at p.38.
[5] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. 12214, 12224, FERC Order No. 69 (Feb. 25, 1980).

contracts or legally enforceable obligations…"[6] In other words, a QF can either have an executed contract or a LEO, but not both.

The Company has not refused to enter into a PPA with Monticello Wind in this case or even throughout the long history of PPA negotiations with Monticello Wind beginning in 2012. What has delayed the execution and Commission approval of the PPA with Monticello Wind has consistently been ongoing disagreement over the avoided costs methodology. The Commission's finding that the prices in the signed PPA are inconsistent with avoided costs does not give rise to a valid claim for a LEO. As counsel for Monticello Wind further clarified in his comments on behalf of SEIA, a QF may raise a LEO claim "[w]hen faced with a utility *unwilling* to come to reasonable contractual terms to satisfy their mandatory purchase obligations…" (emphasis added).[7] Therefore, if the Commission were to make any LEO determination at this stage of the proceeding, it should be that Monticello Wind cannot possibly have a LEO, because the Company did not needlessly delay or refuse to sign the PPA. To the contrary, the Company executed the PPA and sought the Commission's approval to satisfy its mandatory purchase obligation.[8]

B. The PPA before the Commission is not effective until approved.

The Petition includes several claims regarding the interpretation and construction of the PPA with the Company. Monticello Wind claims that by not taking a position against the Motions, the Company somehow waived its right to defend the effectiveness or enforceability of the PPA.[9]

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[6] *Implementing the Public Utilities Regulatory Policies Act: FERC Must Preserve the Foundation of Competitive Markets, Written Comments by Todd Glass, Wilson Sonsini Goodrich & Rosati, on Behalf of the Solar Energy Industries Association (SEIA)*, FERC Docket No. AD16-16-000, June 29, 2016, at p.7, (emphasis in the original) (*available at*, http://www.ferc.gov/CalendarFiles/20160616092501-Glass,%20SEIA.pdf).
[7] *Id.*, at p.9.
[8] *See Id.*, at p.9
[9] Petition at p.14.

Monticello Wind encourages the Commission to ignore, and even to strike, the clause in the PPA it negotiated with the Company that makes the PPA effective only upon Commission approval.

Section 2.1 of the PPA clearly states that the PPA is not effective until it is approved by the Commission.[10] As the Commission notes in the Order, "Schedule 38…articulates a requirement for PSC approval prior to the agreements becoming effective."[11] This requirement protects customers from rates that may not be in the public interest, and the Company against disallowance of such rates. Monticello Wind ignores the strong public policy reasons referenced in the Order that gave rise to Section 2.1 and instead requests that the Commission strike the approval requirement "as contrary to public policy."

Section 2.1 is standard in the Company's QF power purchase agreements and, in fact, a similar provision is currently included in the Company's generic online form power purchase agreement for Utah QFs larger than 1 MW.[12] Rejection of the PPA does not prevent Monticello Wind from seeking a new PPA under current avoided cost pricing methodologies and Schedule 38's timelines. Monticello Wind continues to have the opportunity to sell its power to the Company under PURPA, thus no countervailing public policy reason exists for the Commission to grant Monticello Wind's request to strike the approval language from Section 2.1.

The Petition also includes several unilateral assertions about the rates in the contract, which the Commission found to be in excess of the Company's avoided costs. The Petition claims the PPA prices are a "negotiated rate" which would not be barred under PURPA even if in excess of avoided cost.[13]

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[10] Docket No. 17-035-68, Application, Exhibit A, at p.16.
[11] Order at p.8.
[12] *See* "Power Purchase Agreement for QFs greater than 1 MW", Section 2.1, available at https://www.rockymountainpower.net/content/dam/pacificorp/doc/Efficiency_Environment/Net_Metering_Customer_Generation/Power_Purchase_Agreement_for_Utah.pdf.
[13] *See* Petition at p. 17.

Putting aside the claim that PURPA allows negotiated rates in excess of an appropriately calculated avoided cost, there are a litany of reasons that a "negotiated rate" is not the situation here. First, the long history surrounding the PPA demonstrates that the Company has made significant efforts to ensure it will not be paying any more for the power than its avoided costs. The Company was ultimately compelled by the *Ellis-Hall* decision to use an older avoided cost methodology to calculate pricing for Monticello Wind. Second, the Company has no economic incentive to agree to pay Monticello Wind a price for its power that it is not highly confident it will be permitted to recover through its rates. Third, the Petition presses the Commission to view the PPA as a "freely negotiated," "voluntarily executed" agreement, while ignoring the fact that PPAs under PURPA are not "freely negotiated" contracts because of the "must purchase" obligation. Therefore, applying traditional contractual principles may not be appropriate for such agreements.[14] In the case of the PPA, the Company was arguably even more restricted from freely bargaining with Monticello Wind than it would have been with any other QF, given the requirements of the *Ellis-Hall* decision.

Finally, the Petition claims that the Company had an incentive to agree to rates which may be higher than its avoided costs to "avoid any further litigation related to the developer's long-alleged discrimination claims…" The suggestion that the Company would voluntarily subject itself

[14] *See, New York State Elec. & Gas Corp. v. Saranac Power Partners L.P.*, 117 F Supp 2d 211, at pp. 253-4 (NDNY 2000), aff'd, 267 F3d 128 (2d Cir 2001) ("Application of these 'sound' contractual principles is difficult in the present circumstances because in the first instance, NYSEG alleges it did not freely contract with the subject QFs. Rather, the utility claims it was forced to enter these contracts pursuant to PURPA…"; and "the Court questions whether traditional contractual principles even apply to the PPAS"); *see also, Snow Mountain Pine v Maudlin*, 734 P.2d 1366, at p. 1370 ("CP's obligation is not governed by common law concepts of contract law, it is created by statutes, regulations and administrative rules. ORS 758.525 requires a utility to purchase power from a qualifying facility. Similarly, 18 CFR 292.303(a) and OAR 860-29-030 provide that an electric utility 'shall purchase' any energy and capacity 'which is made available from a qualifying facility.' Thus, the obligation to purchase power is imposed by law on a utility; it is not voluntarily assumed."); *and see, Philadelphia Corp. v. Niagara Mohawk Power Corp.*, 207 AD2d 176, 176, 621 NYS2d 237, 239 (1995) (citing *Snow Mountain Pine v Maudlin*, "Here, the output seller's commercial good faith must be subjected to particular scrutiny because defendant's obligation to enter into the contracts was not voluntarily assumed but imposed by law.").

to a disallowance risk simply to settle Monticello Wind's years of ongoing disputes with the Company is illogical. Section 2.1 of the PPA clearly demonstrates the Company's desire to avoid incurring any risk of disallowance for QF PPAs.

After attempting to dismiss the fact that Section 2.1 requires Commission approval for the PPA to be effective, the Petition argues that Section 5.5 of the PPA, which references the *Mobile-Sierra* doctrine,[15] insulates the rates in the PPA from any challenge that they are not just and reasonable.[16] In arguing that the Company should be held to the requirements of Section 5.5, the Petition ignores the fact that the contract is not effective until the Commission approves it, including the *Mobile-Sierra* clause. Section 5.5 is intended to protect both parties from rate challenges only *after* the Commission approves the PPA. Section 5.5 was not included to allow the sort of "end run" around the Order denying approval that Monticello Wind is attempting in the Petition. The Commission need not look to the *Mobile-Sierra* clause or the underlying case law here, because, under a plain reading of the PPA's terms, the PPA is clearly not yet effective, and that includes Section 5.5.

C. The Petition's interpretation of the Company's burden of proof is inconsistent with the law.

The Petition includes several misstatements about which parties bear the burden under the law, and how such burden applies in this case. Commission acceptance of these misstatements could materially impact both the Company and Utah's implementation of PURPA. The Petition

[15] A *Mobile-Sierra* clause is typically employed to limit the ability of regulators to modify the rates or terms and conditions of wholesale power transactions. The line of cases leading to its use in such contracts can be summarized as holding that a contract freely negotiated by parties at arm's length is presumed to be just and reasonable, and, absent extraordinary circumstances where the public will be severely harmed, regulators are foreclosed from modifying the rates under the contract. *See generally*, United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 338-39 (1956); Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348 (1956); see also Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008); NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n, 558 U.S. 165 (2010).

[16] Petition at pp.19–20; *see also*, 17-035-68, Application, Exhibit A, at p.28.

uses the term "burden" throughout and explains it in different ways. Sometimes its explanations are not consistent with the law, and, in one instance, not consistent with the authority cited for support. For example, the Petition states that:

> "FERC explained in Order No. 688, the purchasing utility bears the burden to establish that sufficient legal basis exists to relieve an 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."[17]

This citation is not applicable to this case, to the Company, or even to this region of the country.

Order 688 was issued to amend FERC's regulations governing PURPA in light of new statutory provisions that were added by the Energy Policy Act of 2005. The new statutory provisions enabled FERC to relieve utilities of PURPA's "must purchase" obligation to the extent the utilities were part of an independently administered organized wholesale market to which QFs had nondiscriminatory access.[18] The cited passages refer to FERC's explanation for why it was including a rebuttable presumption that QFs, sized at 20 MW or smaller, lack nondiscriminatory access to those markets. The "burden" referred to in the portion of Order 688 cited is therefore referring to the burden on a utility to rebut that presumption before the utility can be relieved of its PURPA "must purchase" obligation pursuant to the Energy Policy Act of 2005.

In contrast, this case involves the Company's QF obligations in Utah which is not part of a region with an independently administered wholesale market, and a QF that is substantially larger than 20 MW. In addition, the Company has not sought to be relieved of its "must purchase" obligation under PURPA in this case. It filed for approval of the PPA, and the Commission rejected it based on the Motions. If Monticello Wind were to seek another QF PPA with updated avoided cost prices, the Company would proceed consistent with its PURPA obligations and the findings

[17] Petition at p.13.
[18] *See* FERC, Order 688 at p.1 "Summary" (October 20, 2006); *and see* 16 U.S.C. § 824a-3(m).

of this Commission. The Petition's use of Order 688 to establish whether or not the Company bears a "burden" in this context is clearly incorrect and improper.

In describing which party bears the burden on a motion for summary judgment, the Petition again misapplies Order 688 to support its claim that the Company had a burden to show "that sufficient legal basis exists to relieve [the Company] of the obligation to enter into a new contract or obligation to purchase electric energy from any QF."[19] As noted above, the Petition's reliance on Order 688 to support this claim, in this context, is incorrect. Further, the claim itself is a backwards conception of what this case is about. The Company sought approval of the PPA in an effort to *fulfill*, not to be relieved of, its "must purchase" obligations under PURPA. While Monticello Wind may be disappointed that the Company chose not to oppose the Motions, there is no requirement under PURPA, and no cases holding that, a utility is required to exhaust every legal option in its attempts to gain approval of a QF PPA from a state commission.

The Petition also discusses "burden" in the context of whether the Company should bear "the burden of ensuring cost-recovery for purchases for QF contracts." The Company agrees with Monticello Wind's use of "burden" in the cost-recovery context. The long history of legal disputes between Monticello Wind and the Company regarding these QFs reflect the Company's understanding that it bears a cost-recovery burden. The Company's Electric Service Schedule No. 38 reflects the same understanding, as does Section 2.1 in the PPA, which provides the Commission the opportunity to determine if the PPA is consistent with PURPA's requirements and Utah law.

However, the Petition improperly attempts to use the Company's cost-recovery burden in conjunction with the *Ellis-Hall* decision to argue that, since the Company was not required under

[19] Petition at p.13.

the decision to enter into the PPA using the outdated 2013 avoided cost methodology, the Company "voluntarily" executed the PPA and is thereby "burdened" to gain the Commission's approval of it in this docket to assure cost-recovery.

The Petition proceeds to suggest that if the Company fails to meet this unsupported extension of the cost-recovery burden, then it would be appropriate to saddle the Company with any of the corresponding costs of the QF subsequently disallowed by the Commission. Put differently, the *Ellis-Hall* decision mandated that the Company negotiate with Monticello Wind using the 2013 methodology, PURPA mandates that the Company purchase power offered by QFs, and if the Company responds to both of those mandates by entering into a PPA using the 2013 methodology, but fails to convince the Commission to accept that pricing, then, Monticello Wind contends, the Company should be forced to bear any disallowed costs. This is a self-serving and distorted application of the Company's cost-recovery burden for QF purchases. The Company meets its burden here by first seeking Commission approval of its QF PPAs, which are drafted specifically so they will never take effect without that approval. The Petition's depiction of the Company's cost-recovery burden is self-serving and distorted and should be rejected.

IV. CONCLUSION

The Company takes no position on whether the Commission should reconsider or rehear the application for approval of the PPA, as being consistent with Utah's implementation of PURPA. The Company respectfully requests that the Commission focus any determinations on rehearing or reconsideration of this case on whether granting of the Motions was proper based on the record evidence, and on whether the PPA should or should not be approved. The Petition strays far afield from these questions, and granting rehearing or reconsideration based on the portions of the Petition covered in this response would risk cementing a distorted interpretation of PURPA

into Utah's implementation of the law, deprive the parties of their due process rights, and would be based on substantially less than a fully developed record.

DATED this 21st day of June, 2018.

Respectfully submitted,

Daniel E. Solander
Attorney for Rocky Mountain Power

CERTIFICATE OF SERVICE

Docket No. 17-035-68

I hereby certify that on June 21, 2018, a true and correct copy of the foregoing was served by electronic mail to the following:

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