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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

<p>APPLICATION OF ROCKY MOUNTAIN POWER FOR APPROVAL OF POWER PURCHASE AGREEMENT BETWEEN PACIFICORP AND MONTICELLO WIND FARM, LLC</p>	<p>Docket No. 17-035-68</p> <p>DIVISION REPLY TO MWF PETITION FOR RECONSIDERATION AND REHEARING</p>
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Pursuant to Utah Admin. Code r.746-1 and Utah R. Civ. P 7 and 56, the Utah Division of Public Utilities (“Division”) files this Reply to Monticello Wind Farm’s (“MWF”) Petition for Reconsideration and Rehearing (“Petition”). The undisputed facts establish that the Power Purchase Agreement (“PPA”) submitted by Rocky Mountain Power (“RMP”) in this docket does not comply with Rocky Mountain Power Electric Service Schedule No. 38 (“Schedule 38”). The Public Service Commission of Utah (“Commission”) cannot approve the PPA as a matter of law and should not approve the PPA as a matter of public policy. The Commission correctly granted the Division’s and OCS’ motions for summary judgment and should deny reconsideration or rehearing.

Nothing in the Petition presents new information or new issues that support reconsideration or rehearing. MWF's primary arguments in favor of reconsideration are either the existence of a legally enforceable obligation ("LEO") or discrimination by RMP. The Commission has already addressed the procedure that it deems appropriate if MWF or RMP wish to seek a ruling on whether a LEO exists and what the terms of would be. The Commission should deny the request.

INTRODUCTION

The Commission recognized in its May 7, 2018 Order that the full history of this matter includes "an extensive chain of events going back to, at least, April 2013..." The Division will not repeat the full history beyond a brief introduction of the filings in this docket.

On December 20, 2017, RMP filed an Application for the approval of a PPA between RMP and MWF. The Application was for a contract pursuant to Schedule 38. Specifically, the Application states that RMP is a "purchasing utility" obligated to purchase power from MWF pursuant to PURPA and Utah Code Ann. §54-12-1, *et seq.* as well as that MWF has identified itself as a qualifying small power production facility (QF) as per the terms of the PPA.¹

A Scheduling Conference was held on December 22, 2017. The Commission issued a Scheduling Order and Notice of Hearing on January 5, 2018. Notably, the deadline for dispositive motions was set on March 9, 2018 for all parties. On March 9, 2018, the Division and OCS filed their respective Motions for Summary Judgment. MWF and Ellis Hall Consultants (EHC) filed joint Memorandums in Opposition to both motions on March 27, 2018. The Division and OCS

¹ Application at p. 1-2.

filed replies on April 5, 2018. On May 7, 2018, the Commission issued its Order granting both the Division's and OCS' respective Motions for Summary Judgment.

On June 6, 2018 MWF filed its Petition requesting that the Commission either summarily affirm the PPA, that the Commission issue findings of fact and conclusions of law that support the PPA's approval, or order further activity in this docket to explore discrimination claims against RMP. The Commission should not grant what is effectively an untimely motion for summary disposition and should also deny the request for review of discrimination claims outside of the appropriate complaint procedure.

ARGUMENT

The Commission should deny MWF' Petition. This docket is a proceeding to review an application filed by RMP requesting approval of a PPA that was entered into between MWF and RMP pursuant to Schedule 38. The Petition presents new arguments that were not made earlier in the docket, is effectively an untimely motion for summary disposition that fails to comply with the requirements for such filings, and further requests new and additional relief in the form of a request to investigate claims of discrimination by RMP that are not before the Commission. Further, the Petition does not provide a persuasive legal basis or dispute the factual basis that would justify reconsidering the Commission's correct conclusion that the PPA is inconsistent with Schedule 38.

A. The Requests for Summary Disposition in MWF's Petition are Untimely and Fail to Meet the Filing Requirements.

The Petition is, in significant part, an untimely and incomplete motion for summary disposition in both its request for summary approval of the PPA and its request for findings of

fact and conclusions of law. MWF's two requests for relief in its Petition are not truly reconsideration of the Commission's decision, but rather requests for summary disposition.² The Commission's January 5, 2018 Scheduling Order and Notice of Hearing in this docket set the deadline for dispositive motions as March 9, 2018. A request for reconsideration is not an appropriate filing through which to seek summary disposition. The requests for such summary disposition contained in MWF's Petition should be denied as untimely.

MWF first requests summary affirmation of the PPA. MWF asserts that RMP is a purchasing utility that bears the burden of proof for avoiding the must purchase obligation under PURPA and that RMP has not carried its burden to prove that it is not required to purchase MWF's output. MWF therefore claims that the Commission should grant approval of the PPA as a matter of law. This line of argument is plainly an application of the law to asserted facts and seeks a final disposition of the matter as a result. Therefore, it is, by definition, a request for summary disposition.

MWF's second request is for findings of fact and conclusions of law.³ Like its first request for summary disposition, a request for findings of fact and conclusion of law is not a request for reconsideration. Instead, it is a request for summary disposition in favor of MWF.

Additionally, MWF did not request summary disposition prior to its Petition for Reconsideration. Thus MWF cannot seek a Commission ruling that would reverse its decision and instead issue an order in favor of MWF's competing motion for summary disposition. In seeking summary disposition, MWF would bear the burden of proof with respect to the facts necessary for such a conclusion. These requests are not supported and do not satisfy the

² Petition at 13.

³ Petition at p. 22.

minimum requirements or any facsimile of the requirements for summary disposition, such as including a statement of material facts that MWF claims are not genuinely disputed.⁴

MWF's requests for summary affirmation of the PPA and findings of fact and conclusions of law are both requests for summary disposition. The Commission plainly set out the deadlines for such motions in its scheduling order. The Commission should deny the Petition with respect to both requests on the grounds that they are both untimely and incomplete.

B. MWF's Petition Does Not Provide A Persuasive Legal or Factual Basis to Reconsider the Commission's Conclusion that the PPA Is Not Consistent with Schedule 38.

The Commission should also deny MWF's Petition because the Commission correctly determined that the PPA was inconsistent with Schedule 38. As explained in greater detail in the Division's Motion to Dismiss,⁵ RMP and MWF failed to meet the black-letter law requirements of Schedule 38. Schedule 38 is law.⁶ MWF's request for reconsideration does not provide a basis for ignoring or bypassing those requirements. MWF does not claim that it met Schedule 38 I.B.9's requirement that a final PPA be signed within six months of receipt of indicative pricing. It is undisputed that more than six months passed between the receipt of indicative pricing and the signing of a PPA – regardless of whether this was the indicative pricing provided in 2013 or in 2016. The Commission's Order in Docket No. 14-035-140 was clear that it applied to all projects currently in the queue on a going forward basis.⁷ As such, regardless of pricing or even

⁴ See Utah R. Civ. P. 56(a).

⁵ Motion to Dismiss 17-035-68.

⁶ *Ellis-Hall Consultants v. Public Service Commission*, 2016 UT 34 ¶31, 379 P.3d 1270.

⁷ *In the Matter of the Review of Electric Service Schedule No. 38, Qualifying Facilities Procedures, and Other Related Procedural Issues*, Docket No. 14-035-140 (Order Approving Settlement Agreement on Schedule 38 Procedures; June 9, 2015).

pricing method, there is no further inquiry needed. Schedule 38 sets forth the process for QF contracting. The PPA is not consistent with Schedule 38. MWF's Petition should be denied.

C. The Application is Not for a Freely-Negotiated PPA and the Application is Not a Complete Filing for a Voluntary Request for Approval of a Resource Decision.

MWF argues that the Commission could approve the PPA on the alternate ground that it is a freely-negotiated contract. That reasoning is not consistent with either MWF's other claims in its own Petition, and the Application does not support treating the PPA as a voluntary request for approval of a resource decision. The Division does not dispute that RMP could contract with a third-party generation facility for the purchase of power and seek approval by the Commission. The Application is insufficient for such a review, and such a review would be inconsistent with the Application and the terms of the PPA. The Commission should reject that line of argument as a ground for reconsideration.

The PPA must either be a QF contract or not. MWF argues that a QF and a utility may agree to a negotiated contract that is for a price higher than avoided costs.⁸ This may be possible outside of the bounds of PURPA, but not within. The plain language of 16 U.S. Code § 824a-3 (b)(2) states that “[n]o such rule prescribed... shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.” It further defines the incremental cost as “the cost... which, but for the purchase..., such utility would generate or purchase from another source.”⁹ PURPA's plain language prohibits rules that would provide for a rate exceeding the avoided cost rate. Similarly, Utah's implementation of PURPA requires that

⁸ Request for Reconsideration at 17 (“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”).

⁹ 16 U.S. Code § 824a-3 (d).

such contracts be completed under Schedule 38, which includes the use of current avoided cost pricing.¹⁰

In support of the higher pricing, MWF asserts that it was a “valid and freely-negotiated” contract rate. This claim is inconsistent with much of MWF’s own Petition and nearly all of its past claims regarding its interactions with RMP. For example, in the Petition, MWF asserts that “[MWF] specifically request 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 [MWF] to accept a lower avoided cost rate and/or to avoid its legally enforceable obligation to purchase from [MWF].”¹¹ Then, MWF even goes so far as to claim that the Commission’s “failure to consider [MWF’s] claims of undue discrimination... is arbitrary, capricious, and inconsistent with reasoned decisionmaking (sic).”¹² It’s unclear how MWF can assert that a PPA entered into as a result of federal and state requirements could be freely-negotiated or how MWF can assert that it was discriminated against in those circumstances. The PPA was not freely-negotiated between the parties and it is not appropriate for summary approval as a general energy resource decision.

Additionally, the Application is incomplete if approval is sought other than as a Schedule 38 PPA. Outside of the QF context, pre-approval of PPAs less than 100MW are voluntary.¹³ In order to seek approval as a general resource decision, RMP must do so pursuant to Utah Code Ann § 54-17-402 and Utah Admin Code R.746-440. For example, Rule 746-440-1(2) requires various notice requirements prior to filing a request. And 746-440-1(e) requires a complete filing for such an approval include “[d]escriptions and comparisons of other resources or alternatives

¹⁰ Schedule 38.3 (applies to “owners of existing or proposed QFs...”).

¹¹ Request for Reconsideration at p. 35.

¹² *Id.* at p. 37.

¹³ Utah Code Ann. §54-17-401 *et seq.*

evaluated or considered by the Energy utility, in lieu of the proposed Resource decision...”

RMP’s Application in this docket is incomplete to support a voluntary request for approval of a resource decision and RMP has not asked for approval under that statute.

D. MWF’s Claims of a Legally Enforceable Obligation Should be Adjudicated in a Proper Proceeding.

In its May 7th order, the Commission said that “we find the record in this docket is simply insufficient to make a determination as to whether MWF can establish a LEO....if MWF wishes to file such a request, it may do so through a request for agency action.” Because MWF did not do this, issues concerning the existence of a LEO cannot be adjudicated in this docket.

(Continued next page)

E. MWF's Must File a Complaint to Seek Adjudication of Claims of Discrimination by RMP.

Schedule 38's terms establish a procedure regarding contract related complaints. MWF did not follow this procedure. In pertinent part, Schedule 38 states:

III. Process for Filing a Complaint with the Commission on Contract Terms

The Commission has both informal and formal dispute resolution processes which can be reviewed on the Commission website at the following address: <http://www.psc.utah.gov/complaints/index.html>. These processes are available for any matter as to which the Commission has jurisdiction, which may include (i) QF PPA contracts, (ii) small QF interconnection agreements (less than 20 MW), and (iii) large QF interconnection agreements (more than 20 MW), so long as all of the QF output is sold exclusively to the Company. To the extent any portion of the QF output is sold to anyone other than the Company, a QF generation interconnection may be subject to FERC jurisdiction. Nothing in this Schedule will affect the jurisdiction of the Commission or FERC, and all parties will retain any and all rights they may have under any applicable state or federal statutes or regulations.¹⁴

Accordingly, the Petition should be denied because MWF failed to follow the ordered and approved complaint process as set forth in Schedule 38.

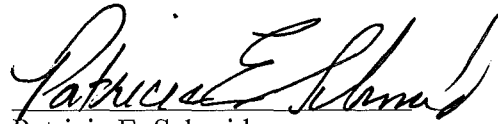
CONCLUSION

MWF's request for reconsideration and rehearing should be denied. Nothing in MWF's Petition presents new information or new issues that support reconsideration or rehearing. MWF's primary requests are truly untimely requests for summary disposition. MWF's alternative arguments in favor of reconsideration depend upon either the existence of a legally enforceable obligation ("LEO") or existence of discrimination by RMP. The Commission has already addressed the procedure that it deems appropriate if MWF or RMP seeks a ruling on whether a LEO exists and what the terms of would be. Schedule 38 requires MWF to file a

¹⁴ Schedule 38, part III.

Complaint if it wishes to bring claims of discrimination or disparate treatment against RMP. The Commission should deny the Petition.

RESPECTFULLY SUBMITTED this 21st day of June 2018.

A handwritten signature in black ink, appearing to read "Patricia E. Schmid". The signature is written in a cursive style with a horizontal line underneath the name.

Patricia E. Schmid
Attorney for the Division
of Public Utilities