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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power for Approval of Power Purchase Agreement between PacifiCorp and Monticello Wind Farm, L.L.C.	Docket No. 17-035-68 Response to Petition of Monticello Wind Farm LLC for Reconsideration and Rehearing

Pursuant to Utah Code §§ 54-7-15, 54-10a-301 and Utah Admin. Code r. 746-1, the Office of Consumers Services ("Office") files this Response to Monticello Wind Farm, LLC's ("MWF") Petition for Reconsideration and Rehearing of the Commission's May 7, 2018 Order ("May 7th Order") denying Rocky Mountain Power's ("RMP") Application for Approval of a Power Purchase Agreement ("PPA") between RMP and MWP. ("MWF Petition"). In its Petition, MWF advances an argument that conflates two contrary legal concepts: (1) that on June 25, 2013, MWF obtained a price for the purchase of its electricity pursuant to a legally enforceable obligation ("LEO") under 18 C.F.R. § 292.304(d) of the regulations promulgated under Public Utility Regulations Policy Act of 1978 ("PURPA") and (2) that on December 13, 2017, MWF entered into a freely negotiated PPA outside the mandatory purchase obligation of PURPA enabling the contract price to be above avoided cost and requiring that review of the contract price to be governed by the *Mobile-Sierra* doctrine. MWF Petition at pg. 2, 15-20. As these two contentions are mutually exclusive, MWF's primary argument is nonsensical.

Even if we disambiguate this self-conflicting contention into two alternative arguments, that MWF obtained a LEO in 2013 and, if not, it is entitled to have the Public Service Commission ("Commission") review the PPA as though it was a freely negotiated contract executed in 2017—these contentions nevertheless fail as a matter of law and fact. Similarly, MWF's two secondary arguments, (1) that there are no facts in the record that support the contention that the price contained in the PPA is not at RMP's avoided costs, and (2) that the prohibition on retroactive ratemaking prevents the application of the 2015 version of Schedule 38 to MWF, also fail as a matter of fact and law. MWF Petition at 17, 29-31. Accordingly, this Commission must deny MWF's Petition for Reconsideration and Rehearing.

I. MWF IS NOT ENTITLED TO A RULING THAT IT OBTAINED A LEO ON JUNE 25, 2013.

In the challenged May 7th Order, this Commission in addressing MWF's contention that it obtained a LEO in 2012, ruled "the record in this docket is simply insufficient to make a determination as to whether MWF can establish a LEO" and if MWF wants to argue it obtained a LEO "it may do so through a request for agency action." May 7th Order at pg. 13-14. In MWF's Petition, it argues that on the instant record the Commission can rule that it obtained a LEO, this time not in 2012 but on June 25, 2013, and that if not, the Commission can adjudicate the LEO issue in this docket and MWF should be allowed to introduce evidence of undue discrimination on the part of RMP in negotiating the PPA. MWF Petition at 32-34, 36-37. These contentions are unsupported by law, both procedural and substantive, and fact.

A. This docket is not the proper forum to adjudicate MWF's LEO claim.

The scope of a proceeding to approve a PPA is limited to ensuring that the PPA's rates are in the "public interest," which in turn is limited to determining whether the rates are at the utility's "avoided costs." *Ellis-Hall Consultants LLC v. Pub. Serv. Comm'n of Utah,* 2014 UT

52, ¶¶ 20-25, 342 P.3d 256 (citing 18 C.F.R. § 292.304(a)(2), (b)(2)-(3) (2014); Utah Code § 54-12-2(2) ("*Ellis-Hall I*"). In *Ellis-Hall I*, MWF's parent company Ellis-Hall Consultants LLC ("Ellis-Hall"), intervened in a proceeding to approve two competitors' PPAs and sought to raise the same wide-ranging claims of discrimination based on the same allegations as the claims of discrimination asserted in this docket. *Id.* at ¶¶ 1, 7. This Commission ruled that such concerns were outside scope of a docket to approve PPAs and, on appeal, the Utah Supreme Court agreed, holding:

> In considering the parties' power purchase agreements for approval, the PSC is tasked with a narrow, specific inquiry—to approve the agreed-upon power purchase agreement *rates* as consistent with the "public interest." That inquiry does not impact the broader discrimination concerns identified by Ellis-Hall, and we affirm on that basis, . . .

Id. at ¶ 20. Accordingly, once the Commission concludes whether the rates are in the "public interest," i.e., the rates are at the utility's "avoided costs," the Commission's inquiry ends. *Id.* at ¶¶ 23-25.

"Whether a LEO exists is a fact-specific inquiry that is highly contingent on the specific events that have transpired between a utility and QF." May 7th Order at pg. 13 (citing *In the Matter of the Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Thayn Hydro. L.L.C.,* Docket No. 16-035-04, Order (Utah P.S.C. July 29, 2016) ("*Thayn Hydro")*. In this case, the facts surrounding the negotiations between Ellis-Hall/MWF and RMP are in dispute. *See*, Rocky Mountain Power's April 5, 2018 Response to Memorandums in Opposition to Motion for Summary Judgment, at ¶¶ 4-5.

It would be a different matter if the existence of a LEO was raised with the application so that the parties could properly address the issue from the beginning of the proceeding, as opposed to being "raised haphazardly only in opposition to motion for summary judgment on a

facially defective Application." May 7th Order at pg. 14. However, to interject wide ranging factual disputes at this late date are clearly outside the scope of a proceeding to approve a PPA.

Here, this Commission has fulfilled its responsibilities in this docket by ruling that RMP's Application "does not contain rates reflective on RMP's avoided costs." May 7th Order at pg. 1, 10. Moreover, the issue of the scope of a proceeding to approve a PPA has been established by the Utah Supreme Court and this Commission is not at liberty to expand the scope of this docket even if it was inclined to do so. Accordingly, MWF's claim that this docket is the proper docket to investigate its LEO arguments—which includes arguments based on the same facts of discrimination as alleged in *Ellis-Hall I*—fails. This Commission is correct in ruling that if MWF wants to argue that it is entitled to a LEO, it must pursue this claim in a separate docket.[1]

B. MWF is not Entitled to a Ruling that It Obtained a LEO on June 25, 2013.

In arguing that this Commission should adjudicate its LEO claim in this docket, MWF presents the new argument that this Commission can rule, as a matter of law, that it obtained a LEO on June 25, 2013. In addition to the reasons rejecting this contention outlined above, MWF's argument must also be rejected because MWF raises the argument for the first time in a Petition for Reconsideration., confuses the standard for summary judgment, misstates the law, and is not supported by the factual allegations contained in the Petition.

[1] By asserting that any LEO argument be made in a separate proceeding, the Office does not waive any defense arising from the lapse of time before MWF asserted a LEO based on facts occurring in 2013. *See e.g.,* Restatement (Third) of Restitution § 70, Limitation of Actions; Latches (2018).

(1) MWF's LEO argument is inappropriately raised in a Petition for Reconsideration.

MWF did not raise the issue of a LEO arising on June 25, 2013 until its Petition for Reconsideration.[2] This fact alone is sufficient justification for denying the instant Petition. *See In the Matter of the Application of Carbon/Emery Telcom, Inc. for an Increase in Utah Universal Service Fund Support,* Order on Petition for Review, at pg. 13 (Utah P.S.C. May 19, 2016) (rejecting an argument in a Petition for Review, in part, because it was raised for the first time in a Petition for Reconsideration). While it may not be necessary for every issue to be addressed prior to a Petition for Reconsideration, in this case the untimeliness of the argument is particularly prejudicial. As noted above, the facts surrounding Ellis-Hall/MWF negotiations with RMP are in dispute. *See*, Rocky Mountain Power's April 5, 2018, Response to Memorandums in Opposition to Motion for Summary Judgment, at ¶¶ 4-5. If MWF's LEO argument was properly raised, in a separate proceeding or alternatively at the beginning of this proceeding as part of its application, the parties would have had the opportunity to explore the factual controversy before the Commission's Order. *See* Utah R. Civ. P. 56(d) (allowing time for nonmoving party to take discovery). By waiting until a Petition for Reconsideration to raise the factually intensive contention that it obtained a LEO on June 25, 2013, MWF deprived opposing parties of this opportunity.

(2) MWF bears the burden of establishing a LEO.

Although MWF did not file a cross motion for summary judgment, it now argues that it is entitled as a matter of law to a ruling that it obtained a LEO on June 25, 2013 and that the Office and the Division of Public Utilities ("Division") as movants in the Motion for Summary

[2] MWF did raise some vague arguments that it obtained a LEO some time in 2012. May 7th Order, pg. 13 & n. 14. However, this Commission found that the only specific fact MWF alleged in support of its LEO claim, that it acquired development rights to land some time in 2012, is insufficient to establish a LEO but allowed MWF to pursue their claim in a future docket. May 7th Order, pg. 13-14.

Judgment bear the burden of establishing that it did not do so. MWF Petition at pg. 13-16. Because MWF did not file a cross motion for summary judgment, this Commission is not required to rule on MWF's contention that it is entitled to a judgment in its favor. *See Sohappy v. Hodel,* 911 F.2d 1312, 1320 (9th Cir. 1990) (when no cross motion is filed, court need not decide non-movant's claim that it is entitled to a judgment as a matter of law); *Salo v. Tyler,* 2018 UT 7, ¶ 2, 417 P.2d 581 (Utah applies the same standard for Summary Judgment as federal courts). However, if this Commission determines to entertain this claim, MWF is taking the position of a movant for summary judgment by arguing that it is entitled to a judgment as a matter of law. The "moving party always bears the burden of establishing the lack of genuine material fact . . . ." *Salo,* 2018 UT 7, ¶ 2; Utah R. Civ. P. 56(a). MWF cannot escape this burden because it did not comply with the governing rules of procedure. Accordingly, in reviewing MWF's contention that it is entitled to a judgment as a matter of law, the facts and all reasonable inferences must be viewed in a light most favorable to the parties opposing MWF's claim. Utah R. Civ. P. 56(a); *Fire Insurance Exchange v. Oltmanns*, 2018 UT 10, ¶ 7, 416 P.3d 1148.

In sum, MWF's new argument is procedurally deficient in numerous ways: it is made in the wrong proceeding, it was raised for the first time in a Petition for Review, and it improperly attempts to shift the burden of a party moving for summary judgment to the nonmoving party. Any one of these deficiencies is sufficient to justify this Commission's denial of the Petition, together these deficiencies compel a ruling rejecting the Petition for Reconsideration.

(3) The facts alleged in the Petition do not establish a LEO existed on June 25, 2013.

Even assuming MWF's LEO argument was procedurally appropriate—which it is not—the facts alleged in the Petition do not establish a LEO existed as of June 25, 2013. The LEO doctrine stems from 18 C.F.R. § 292.304(d), which provides that Qualifying Facilities under

PURPA ("QFs") have the option to sell their electricity and/or capacity either on an "as available" basis or "pursuant to a legally enforceable obligation." *Id.* If a QF elects to sell pursuant to a legally enforceable obligation, it has the option of rates being based on the "avoided costs calculated at the time the obligation is incurred." *Id.* The term "legally enforceable obligation" is broader than a simple contract between the utility and a QF and "the phrase is used to prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract." *Cedar Creek Wind LLC,* 137 FERC ¶ 61,006 at P. 36 (2011), *see also* Order No. 69, FERC Stats. & Regs. ¶ 30,128, at P. 30,880. In addition, the doctrine is also based on the unilateral nature of PURPA's mandatory purchase requirement. *See* 18 C.F.F. § 292.303(a) (2013). That is, "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF . . . . " *Cedar Creek Wind. LLC,* 137 FERC ¶ 61,006 at P. 32 (2011).

While the FERC's regulations and decisions set out the general parameters of the LEO doctrine, the determination of when the precise date that a LEO arises is left to state law. *West Penn,* 71 FERC ¶ 61,153 at P. 61495 (1995). However, the deference given to the states in determining the date of a LEO "is subject to the terms of the [FERC's] regulations. *West Penn* does not . . . give states the unlimited discretion to limit the ways a legally enforceable obligation is incurred." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 P. 35 (2011).

This Commission has yet to articulate a test for a LEO that can be applied in all factual circumstances. *See Thayn Hydro.* at 13. However, under the facts of *Thayn Hydro*, this Commission employed what it termed the "but for" standard. "As we understand and employ it, the 'but for' standard implies and requires a finding that the utility acted in a manner inconsistent with the standard customs and practices attendant to the negotiation and execution of QF PPAs and that 'but for' such actions the parties would have entered a contract." *Id.* at 12. However,

this Commission reserved "judgment as to whether a LEO might be shown to exist under other circumstances wherein a QF presents evidence that it 'committed itself' to provide energy or capacity but cannot show, for whatever reason, a contract would have existed 'but for' the utility's actions." *Id.* at 13.[3]

Decisions from other states place the time that a LEO occurs on different points of a continuum of the PPA negotiating process. However, there is apparent consensus that for a LEO to arise the QF project must be sufficiently developed to demonstrate its viability. *See e.g., Whitehall Wind LLC v. Mountain Pub. Serv. Comm'n,* 347 P.3d 1273, 1276-77 (Mont. 2015) (QF "was merely seeking information from which it could make a decision whether or not to proceed"); *South River Power Partners v. Penn. Pub. Utility Comm'n,* 696 A.2d 926, 930 (Penn. 1997) (nonviable QF could not establish a LEO). Moreover, states that focus on the FERC's language that a LEO may exists when a QF commits itself to sale energy or capacity to utility have stressed that this commitment must be unequivocal. *Whitehall Winds LLC*, 347 P.3d at 1275-76 ("[T]he touchstone of a legally enforceable obligation . . . is an absolute commitment to deliver energy or capacity at a future date. Any commitment that is conditional fails to establish a [LEO]"); *Armco Advance Materials Corp. v. Pa. Pub. Serv. Comm'n,* 579 A.2d 1337, 1347 (Pa. 1990) (the QF "has done everything within its power to create such an obligation . . . only the act of acceptance by the utility or an act of approval by the PUC remains to establish the existence of a contract").

[3] This Commission did note that "our findings here should not be interpreted to suggest the Commission will find a LEO exists whenever RMP fails to respond to an email form a QF developer purporting to 'commit itself' to provide energy or capacity at a specific price." *Id.* at 15. Moreover, "evidence showing RMP had any reason to doubt . . . [a] QF's ability or willingness to perform . . ." is relevant to the existence of a LEO. *Id.* at 15.

This background establishes that the allegations in MWF's Petition, even if they were properly presented, do not rise to the level of a LEO. MWF argues that by complying with a Schedule 38 checklist to obtain a pro forma PPA, MWF establishes "that as of June 25, 2013, [Ellis-Hall/MWF] had done everything in its power to commit itself to sell to RMP and only the act of acceptance by RMP remained." MWF Petition at 12. The difficulty with this argument is twofold, (1) it does not establish MWF's viability and (2) the contention not only conflicts with other facts in the record, it conflicts with other facts alleged in the Petition.

First, MWF claims that after June 25, 2013 the project "remained viable" because MWF "has dutifully obtained (and maintained) land rights, required permits, development contract and interconnection position." MWF Petition at 28. However, MWF provides no evidence in support of these allegations and therefore these allegations are insufficient to support summary judgment. Utah R. Civ. P. 56(c); *Jones v. Trevor Marketing, Inc. v. Lowry*, 2010 UT App. 113, ¶ 9, 233 P.3d 538. Moreover, without the opportunity to view the evidence it is not possible to determine whether it would demonstrate MWF's viability. Accordingly, MWF fails to establish viability at the time it claims to have obtained a LEO.

Second, rather than demonstrate that as of June 25, 2013, Ellis-Hall/MWF had unconditionally committed itself to provide energy and capacity to RMP, the facts alleged in the Petition demonstrate as of June 25, 2013 substantial negotiations were ongoing. For example, when RMP provided Ellis-Hall/MWF a draft PPA on June 25, 2013 in electronic form, RMP stated "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." MWF Petition at 12 (emphasis added). MWF also states that following "issuance of the decision in *Ellis-Hall II*, RMP resumed arms-length negotiations with the developer of Monticello . . ." *Id.* at 2, 9.

However, it took an additional seventeen months of negotiations from the issuance of *Ellis-Hall II* to arrive at a signed contract. Clearly, the facts alleged in the Petition, viewed in a light most favorable to the non-moving party, establish that substantial negotiations were ongoing after June 25, 2013. Moreover, while MWF makes several vague claims concerning RMP's discrimination against Ellis-Hall/MWF, the Petition does not identify any action taken by RMP after June 25, 2013, that is inconsistent with the standard customs and practices involving QF PPA negotiations, that prevented the signing of the contract.[4]

While the law on the precise tests for determining a LEO is still unsettled in Utah, under any test articulated by the various courts that have addressed the issue, no LEO arises where: (1) the QF cannot demonstrate its viability, (2) substantial negotiations continued long after the alleged date of the LEO, and (3) the QF cannot point to any specific conduct on behalf of the utility that is inconsistent with standard customs and practices of PPA negotiation that prevented the signing of a contract. *See Thayn Hydro.* at 13-15; *Whitehall Wind LLC,* 347 P.3d at 1276-77; *South River Power Partners,* 696 A.2d at 930; *Armco Advance Materials Corp.,* 579 A.2d at 1347. Therefore, MWF's Petition does not establish, as a matter of law, that it obtained a LEO on June 25, 2013, when it completed the Schedule 38 check list and received a draft PPA.

II. THE CONTRACT PRESENTED IN THE APPLICATION IS NOT A CONTRACT THAT WAS FREELY NEGOTIATED OUTSIDE THE CONFINES OF PURPA.

In a confused argument, again raised for the first time in a Petition for Reconsideration, MWF asserts that it received avoided cost pricing at the time it obtained a LEO, pursuant to regulations promulgated under PURPA, and that this Commission should review this contract

[4] Indeed, a contract was eventually signed and as MWF notes once "a PPA is executed between a purchasing utility and a developer, the issue of when/how the legally enforceable obligation was established becomes moot." MWF Petition at 33.

price as though it was a freely negotiated contract outside of PURPA, under the *Mobile-Sierra* doctrine. MWF at 16-22. This contention is a legal, logical and semantic impossibility. Even if MWF's "freely negotiated" argument is viewed in isolation, it fails not only because it conflicts with a portion of the record, but also because it conflicts with the entirety of the record.

The application in this docket provides: "As a 'purchasing utility,' as that term is used in Utah Code Ann. § 54-12-2, PacifiCorp is obligated to purchase power from qualifying facilities pursuant to the Public Utilities Regulatory Policies Act of 1978, Utah Code Ann. § 54-12-1, *et seq.,* and the Commission's orders. Under the Agreement, Monticello represents itself to be a qualifying facility ("QF"), and agrees to provide PacifiCorp, upon request, with evidence to show its qualifying facility status." Application at pg. 1. The written contract at issue in the application provides: "Seller intends to operate the Facility as a Qualifying Facility ("QF"). . . . The rates, terms, and conditions in this Agreement are in accordance with the rates, terms and conditions approved by this Commission in Docket No. 03-035-14 for purchases from Qualifying Facilities." Application at Exhibit "A" at pg. 2.

Thus, the Application initiating this docket and the written contract to be approved in this docket both expressly and unambiguously provide that the MWF is asserting its rights as a QF under PURPA and the contract is accordingly governed by the PURPA. Importantly, the Application expressly provides that RMP as a "purchasing utility" under PURPA is "obligated to purchase power from qualifying facilities pursuant to the Public Utilities Regulatory Policies Act of 1978." This language confounds any contention that RMP "freely negotiated" the contract.

Moreover, MWF's contention that it obtained a LEO forecloses any assertion that the contract was negotiated outside of PURPA. As discussed above, the LEO doctrine is derived from regulations promulgated under PURPA to prevent utilities from escaping the mandatory

purchase requirements of PURPA. 18 C.F.R. § 292.304(d); *Cedar Creek Wind LLC,* 137 FERC ¶ 61,006 at P. 36 (2011), *see also* Order No. 69, FERC Stats. & Regs. ¶ 30,128, at P. 30,880. The LEO doctrine is a regulatory concept separate and distinguishable from common law contract principles and has no application outside PURPA. *Cedar Creek Wind LLC,* 137 FERC ¶ 61,006 at P. 36 (2011). Thus, the contention that MWF obtained a LEO as it was freely negotiating a contract is a non-sequitur.

Because the Application and the contract provide that RMP executed the contract pursuant to the mandatory purchasing requirement of PURPA, a review of the price under the contract is governed by the requirements of PURPA, i.e., whether rates for the purchase of a QF's energy and capacity are in the "public interest," i.e., the rates cannot exceed the utility's "avoided costs." *Ellis-Hall Consultants,* 2014 UT 52, ¶¶ 23-25; 16 U.S.C. § 824a-3(b)(1)-(2) (rates cannot "exceed[] the incremental cost to the electric utility of alternative electric energy"); 18 C.F.R. § 292.304(a)(2), (b)(2)-(3) (term "avoided costs" use in regulations is the equivalent to the term "incremental cost" used in section 824a-3(b)(10-(2)). MWF's contrary argument, that the price in the contract should be reviewed, not under the PURPA standard, but under the *Mobile-Sierra* standard is misplaced. The *Mobile-Sierra* doctrine concerns the Federal Energy Regulatory Commission ("FERC") review of contracts and tariffs governed by the Federal Power Act, an issue outside of this Commission's jurisdiction. 16 U.S.C. § 824(a)-(c); *NRG Power Marketing LLC v. Main Pub. Utilities Comm'n*, 558 U.S. 165, 167 (2010). The doctrine has no application to the review of the avoided cost pricing in a contract executed pursuant to PURPA's must purchase obligation by a state commission.[5]

[5] The fact that the contract contains a clause referencing the *Mobile-Sierra* doctrine does not affect this analysis. The clause in question deals with petitions to the FERC not a state commission. MWF Petition at 18-19. Moreover, regardless of why RMP placed the clause in the contract, the contract cannot change substantive law. Prices for QF contracts cannot be above avoided cost and this Commission has no

It is true that under PURPA a QF and utility can contract for a price below avoided costs. *American Paper Institute Inc. v. American Elec. Power Serv. Corp.,* 461 U.S. 402, 416 (1983) (citing 18 C.F.R. 202.301(b)(1) (1982)). However, this is not what MWF is arguing. Rather, MWF is contending it can obtain a price above avoided costs and this price is subject to review under the *Mobile-Sierra* doctrine. MWF's Petition at 15-21. Although the Petition is far from clear on this point, because MWF argues that it is entitled to a price above avoided costs reviewed under the *Mobile-Sierra* doctrine, MWF cannot find support for its position under *American Paper*. Rather, MWF's argument must be viewed as the contention that the Commission review the contract price under the Federal Power Act not under PURPA. Accordingly, MWF's freely negotiated contract argument fails.

Therefore, MWF's argument that it obtained a LEO, pursuant to PURPA's regulations, and that this Commission should nevertheless review the price established by a LEO as though it was freely negotiated under the Federal Power Act must be rejected.

III. THE RECORD CONTAINS AMPLE EVIDENCE TO SUPPORT THIS COMMISSION'S DETERMINATION THAT THE PRICE CONTAINED IN THE PPA IS ABOVE RMP'S AVOIDED COSTS.

MWF argues that "the record is devoid of factual evidence that the contract rate is different from RMP's full avoided costs, . . ." MWF Petition at 17. However, the record is replete with evidence that the PPA price is more than four and a half years old, and MWF does not dispute this fact. May 7th Order at 10. Moreover, as all parties before this Commission know, avoided cost pricing changes over time, primarily decreasing in recent years. The Commission does not need to pretend it is blind to this fact but can take administrative notice of the adjudicative facts contained in the records of these proceedings, facts that establish what this

jurisdiction to review a contract price for the wholesale purchase of electricity outside of PURPA. 16 U.S.C. § 824(a)-(c); 16 U.S.C. § 824a-3(b)(1)-(2).

Commission and all parties to this proceeding know to be true—avoided cost for wind projects have generally decreased over time. Utah R. Evid. 201(c); *State, In the Interest of A.S.*, 2014 UT App. 226, ¶ 8, 336 P.3d 582 (notice can be taken of "prior adjudicative facts" in same proceeding).

Here, there is ample evidence in these long proceedings that avoided cost rates change over time, primarily decreasing in recent years. In fact, this proposition is at the heart of these proceedings. In *Ellis-Hall Consultants v. Pub. Serv. Comm'n,* 2016 UT 34, ¶ 9, 379 P.3d 1270 ("*Ellis-Hall II*"). The Supreme Court noted that RMP requested a change in the methodology for wind resources because "the costs of producing wind energy had decreased." The Court went on to note that it is undisputed that the price for wind energy is reduced under the new methodology and "Ellis-Hall asserts that it is no longer economically feasible for it to proceed under the new methodology." *Id.* at ¶ 12 & n. 2. Indeed, the only purpose for Ellis-Hall to pursue the appeal in *Ellis-Hall II* and to argue a LEO occurred in 2013 in this docket is to prevail itself of older higher avoided cost pricing.

In addition, both in the appeal and in this docket, the parties presented numerous arguments regarding two versions of RMP's tariff Electric Service Schedule 38, Schedule 38 as promulgated in 2003 and Schedule 38 a promulgated in 2015. *Id.* at ¶¶ 4-7, 13-14, 31; May 7th Order at 3-4, 11-12. Both versions of Schedule 38 contain provisions for the periodic updating of avoided costs. Specifically, the 2003 version of Schedule 38 provides that RMP "will update its pricing proposals at appropriate intervals to accommodate any changes to [its] avoided price calculations . . . ." May 7th Order at 4 (quoting MWF's Response to DPU Motion at Ex. 10, Sheet No. 38.5) (brackets in original). The 2015 version of Schedule 38 provides for a six-month period from the time a QF obtains indicative pricing to complete the contracting process,

or the avoided cost pricing will be updated. May 7th Order at 11. These provisions clearly indicate that avoided costs are subject to regular change over time.

In ruling on the instant Petition for Reconsideration, this Commission can obviously take notice of the facts alleged in MWF's Petition. MWF's Petition contains a whole section describing "complaints from this time period alleging that RMP was intentionally delaying the signing of QF contracts, *with the effect that a later and lower avoided cost is then claimed to be applicable.*" MWF Petition at 34-36 (emphasis added). MWF should not be allowed to argue two conflicting factual contentions in the same Petition, i.e., that there is no evidence that a four and a-half year time lapse will result in different avoided cost pricing and that RMP intentionally delayed the signing of QF PPAs to take advantage of the downward trajectory of avoided cost pricing.

Accordingly, the record sufficiently reflects that rates computed more than four and a-half years ago do not reflect RMP's avoided costs.

IV. THE PROHIBITION ON RETROACTIVE RATEMAKING DOES NOT PREVENT THE APPLICATION OF THE 2015 VERSION OF SCHEDULE 38 TO MWF

MWF argues, again for the first time in a Petition for Reconsideration, that the prohibition against retroactive ratemaking bars the application of the 2015 version of Schedule 38's application to the indicative pricing it obtained in 2012. MWF Petition at 29, 31. However, the prohibition against retroactive ratemaking only concerns retail rates a utility charges its customers for its services—as determined in a general rate case. *Dep't of Bus. Regulations v. Pub. Serv. Comm'n,* 720 P.2d 420, 420-21 (Utah 1986). In a general rate case utility rates are fixed prospectively. *Id.* at 420. "To provide utilities with some incentive to operate efficiently, they are generally not permitted to adjust their rates retroactively to compensate for

unanticipated costs or unrealized revenues." *Id.* This puts both the utility and customers at equal risk for missteps in the ratemaking process. *Id.* at 421. This doctrine has no application to avoided cost pricing in contracts for the wholesale purchase of energy and/or capacity from a QF under the must purchase obligation of PRUPA. Accordingly, MWF's retroactive ratemaking argument is misplaced.

This Commission is unquestionably correct in ruling that there "is nothing retroactive about applying tariff provisions that have been effective since 2015 to a PPA executed in December 2017." May 7th Order at pg. 11. Indeed, as established in the Division's filings, in 2014 the Commission opened a docket to investigate amending Schedule 38, Docket 14-035-140. Division's Motion for Summary Judgment at 4. ("Division Motion"). Ellis-Hall intervened and filed a Motion to Stay and a Petition for Reconsideration. *Id.* at 4-5. The docket was resolved with this Commission's Order approving a settlement in the docket, with modifications, on June 9, 2015. *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 (Utah P.S.C. June 9, 2015). The Settlement Agreement provides that all QFs currently in the QF pricing queue are subject to the milestones and timing of the new Schedule 38. Division Motion at 7. The new version of Schedule 38 provides the new Schedule applies to "owners of existing or proposed QFs . . . who desire to make sales to the Company . . ." Rocky Mountain Power Electric Service Schedule No. 38, Effective August 6, 2015. On August 6, 2015, Ellis-Hall was in the QF queue. Pursuant to the plain language of the Settlement Agreement and Schedule 38, the new Schedule 38 applies to MWF.

There is nothing retroactive about this conclusion. When MWF failed to meet the milestones in the new Schedule 38, any right to indicative pricing Ellis-Hall obtained pursuant to

Ellis-Hall II lapsed and became invalid. Therefore, this Commission properly denied the application for approval of the 2017 PPA because it was based on outdated and voided avoided cost pricing.

CONCLUSION

MWF's arguments are self-contradicting, procedurally flawed, based on misunderstanding of principles of utility law and conflict with the facts alleged in the Petition. Therefore, this Commission should deny MWF Petition for Rehearing.

Respectfully submitted, June 22, 2018.

__/s/_ *Robert J. Moore*_____
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