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Via electronic filing and UPS

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Re: Renewable Energy Coalition's Comments on Legally Enforceable Obligation Rulemaking Docket No. N2018.3.15

The Renewable Energy Coalition ("REC") appreciates the opportunity to comment on Montana Public Service Commission's ("Montana Commission") proposed rules regarding legally enforceable obligations ("LEO"). REC proposes that the Montana Commission look to the intent of the QF and determine that a LEO may be formed when the QF establishes a commitment by signing a PPA, filing a complaint, or another clear indication of its commitment with specific beginning and ending dates and have undertaken work towards interconnection and control of the site. However, REC opposes the proposed rule as written because it allows a utility to impose unreasonable restrictions and hurdles that will effectively prevent many QFs from being able to form LEOs when they have committed to sell their net output to their utility. Specifically, REC opposes the requirement that an executed PPA always be tendered and the specific interconnection and regulatory approval requirements. QFs should be able to establish LEOs without having followed these potentially rigid and unnecessary steps that may have nothing to do with a QF's commitment to sell its net output and will make it difficult for QFs to obtain financing. The specific interconnection and regulatory approval requirements in the draft rules should take place after a QF has entered into a contract at set prices, which will allow the QF to obtain the financing that is often necessary to incur the significant expenses associated with the construction and interconnection process.

1. The Renewable Energy Coalition Represents the Interests QFs

REC was established in 2009 and is comprised of over 30 members who own and operate over 50 mostly small renewable energy generation qualifying facilities in Oregon, Idaho, Montana, Washington, Utah, and Wyoming. Several types of entities are members of the Coalition, including irrigation districts, waste management districts, water districts, electric cooperatives, corporations, and individuals. Most are small hydroelectric projects, but the membership includes biomass, geothermal, solid waste, and solar projects. REC's membership includes non-utility generation owners with projects in, and who intend to locate projects, in Montana.

Because of its regional focus, REC provides a unique perspective for the Montana Commission to consider. REC has participated in regulatory proceedings regarding LEO

issues and its members have litigated LEO issues throughout the West. REC's goals are to have clear policies that provide QFs with a meaningful opportunity to enter into contracts without having to resort to litigation. The issue of properly setting the parameters for forming a LEO is not unique to Montana. Oregon recently established a LEO standard,[1] Washington is in the process of establishing new PURPA rules that could determine when a LEO is formed,[2] and other states like Idaho and Utah have recently issued orders interpreting their LEO policies. Montana should take advantage of this wealth of case law, as well as direction from FERC, to establish meaningful policies that balance the diverse interests of QFs and utilities, and ultimately benefit ratepayers.

2. The Purpose of Legally Enforceable Obligation Is to Protect QFs and Allow Them to Lock in Rates Based on Their Own Commitment to Sell to the Utility

The concept of a LEO is unique but essentially allows a QF to secure the rights to sell power to a utility at a defined price regardless of whether the QF has been unable to finalize a contract with the utility. FERC has established that a LEO is broader than a simple contract between a utility and a QF, and may exist without a written contract.[3] Utilities are not permitted to unreasonably delay the PURPA contract negotiation process or refuse to sign a PPA because QFs have the right to make a legally binding commitment to sell their power to a utility pursuant to either a contract or a LEO.[4] To establish a LEO, a QF must generally commit itself, or otherwise be ready to sell its power.[5]

The LEO concept was established to protect QFs from utility misbehavior, but misbehavior is not a prerequisite to LEO formation. The LEO is designed to "prevent an electric utility from avoiding its PURPA obligations by . . . delaying the signing of a contract, so that a later and lower avoided cost is applicable."[6] But rather than requiring litigation of fact-specific disputes regarding utility misbehavior in every case, FERC elected to address this potential problem by giving QFs complete control over when a LEO is formed. LEO cases can also occur when the utilities have agreed to prices, provided final draft PPAs or even signed PPAs to QFs in the past, only to challenge the contracts after avoided cost rates

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1 Re Investigation into Qualifying Facility Contracting and Pricing, Oregon Public Utility Commission ("OPUC") Docket No. UM 1610, Order No. 16-174 (May 13, 2016) (available at: http://apps.puc.state.or.us/orders/2016ords/16-174.pdf).

2 Re Rulemaking for Integrated Resource Planning, Washington Utilities and Transportation Commission ("WUTC") Docket No. U-161024, Notice of Workshop and Notice of Opportunity to File Written Comments at 4 (Sept. 6, 2016).

3 FLS Energy, Inc., 157 FERC ¶ 61,211 at P 24 (2016); Murphy Flat Power, LLC, 141 FERC ¶ 61,145 at P 24 (2012); Grouse Creek Wind Park, LLC, 142 FERC ¶ 61,187 at P 38 (2013).

4 18 CFR § 292.304(d); FERC Order No. 69 at 12,224; Cedar Creek Wind, LLC, 137 FERC ¶ 61,006 at PP 32, 36 (2011).

5 Cedar Creek, 137 FERC ¶ 61,006 at PP 36, 39; Snow Mountain Pine Co. v. Maudlin, 734 P.2d 1366, 1371, 84 Or. App. 590 (1987).

6 Id. at P 36; see also FERC Order No. 69 at 12,224.

dropped or other policy changes were made.[7] Thus, the LEO can counter the almost infinite array of options utilities have employed to stonewall contract negotiations or to otherwise prevent or delay a QF from entering into a contract at rates they are legally entitled to.[8] One important aspect of the LEO, is that it provides a mechanism for QFs to "lock-in" current avoided cost rates so that utilities cannot manipulate PPA pricing.

Historically QFs have faced unforeseen hurdles and roadblocks throughout their negotiations and rely upon the LEO to keep negotiations moving.[9] For example, a QF may think it is more than half-way done with their negotiations when a new requirement arises. Utilities may also impose obstacles to contract execution that are either impossible to meet, or

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[7] E.g., Re Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Thayn Hydro, LLC, Utah Public Service Commission ("UPSC") Docket No. 16-035-04, Final Order (Mar. 4, 2016) (PacifiCorp refused to finalize a PPA until after prices dropped); Grouse Creek, 142 FERC ¶ 61,187 at P 6 (Idaho Power Company argued that a fully executed PPA no longer qualified for a standard contract based on a change in Idaho state PURPA policy that occurred months after execution); Murphy Flat, 141 FERC ¶ 61,145 PP 6, 18 (Idaho Power Company argued that a fully executed PPA no longer qualified for a standard contract based on a change in Idaho state PURPA policy that occurred after execution); Rainbow Ranch Wind, LLC, 139 FERC ¶ 61,077 at PP 6, 16 (2012) (Idaho Power Company argued that a fully executed PPA no longer qualified for a standard contract based on a change in Idaho state PURPA policy that occurred after execution); Cedar Creek, 137 FERC ¶ 61,006 at PP 5, 20 (Rocky Mountain Power/PacifiCorp argued that it should not be bound by PPAs that it delayed executing until after an Idaho state PURPA policy change); Re Farmers Irrigation District v. PacifiCorp, dba Pacific Power, OPUC Docket No. UM 1441, Order No. 10-493 at 2 (Dec. 27, 2010) (PacifiCorp raised a concern regarding a QF's continued eligibility, refused to sign a new or renewed PPA until after its prices changed, and then offered only the lower rates); Re Swalley Irrigation District v. PacifiCorp, dba Pacific Power, OPUC Docket No. 1438, Order No. 09-451 at 1 (Nov. 9, 2009) (QF had taken steps to establish a small power production facility, but PacifiCorp refused to execute a completed PPA unless the agreement included new, lower rates); Re International Paper Co. v. PacifiCorp, dba Pacific Power, OPUC Docket No. UM 1449, Order No. 09-439 at 6-7 (Nov. 4, 2009) (PacifiCorp refused to execute a PPA during a pending avoided cost rate change and then argued after the rate change that the lower rates should apply); Snow Mountain, 734 P.2d at 1370 (CP National would not execute a PPA prior to an avoided cost rate change and argued that the applicable avoided cost rates should be the avoided cost rates in effect after the rate reduction); Re Petition of Wheelabrator Environmental Systems, Inc. for a Declaratory Ruling and Complaint, Docket No. U-89-3043-F, 1989 WL 1786664 at *7 (Sept. 28, 1989) (citing Empire Lumber Co. v. Washington Water Power Co., Idaho Public Utility Commission ("IPUC") Case No. U-1008-241, Order No. 20281 (Mar. 4, 1986).

[8] Cedar Creek, 137 FERC ¶ 61,006 at P 36 (holding a utility cannot refuse to sign a contract simply "so that a later and lower avoided cost is applicable").

[9] Id.; Grouse Creek, 142 FERC ¶ 61,187 at P 40.

that the utility itself has complete control over.[10] QFs in these positions can spend years trying to get their negotiations completed while rates drop, costs and risks mount, and financing dries up. Thus, a LEO empowers the QF, rather than the utility, to determine the date for which avoided costs are calculated by obligating itself to provide power.[11]

Utilities also use declining rates as leverage to force QFs into accepting new and less favorable contract provisions or milestones to force the QF to end their negotiations before a looming rate decrease goes into effect.[12] QFs facing such a rate decrease are particularly vulnerable and often face stalled negotiations from utilities until new rates go into effect. Thus, litigation over a PPA dispute must not be allowed to delay the establishment of a LEO. Likewise, QFs must be entitled to the avoided cost rates in effect when a LEO is incurred rather than when contracts are finally executed or when a complaint is filed.[13]

Given these potential obstacles, FERC has determined that QFs should be able to trigger a LEO at any time during their negotiations with a utility. For example, a recent Utah LEO case involved a situation where a small hydroelectric project was renewing its PPA while its utility's rates were decreasing. The parties agreed that all material terms were agreed to, but for an insurance requirement. PacifiCorp delayed signing the contract until after the rate change, and then refused to give the QF a contract under the older and higher rates.[14] Ultimately, the Utah Commission determined a LEO had been formed, but the QF had to go through the process of filing a complaint and reached a settlement with PacifiCorp. This is the classic LEO situation that many commission policies are based upon.

3. The Montana Commission's Proposed Rules Will Prevent QFs from Forming LEOs, Even After They Have Unequivocally Committed Themselves to Sell their Net Output

The proposed Montana LEO rule would require that:

1) the QF tender an executed power purchase agreement within 14 days of the date it is tendered and contain beginning and ending dates and a price term consistent with the utility's avoided costs;
2) the QF have submitted an interconnection request, paid its deposit, provided

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[10] E.g., FLS Energy, 157 FERC ¶ 61,211 at P 23 ("requiring a QF to tender an executed interconnection agreement is … inconsistent with PURPA and our regulations").

[11] See Re Investigation into Qualifying Facility Contracting and Pricing, OPUC Docket No. UM 1610, Order No. 16-174 at 24 (May 13, 2016) (citing Snow Mountain, 84 Or App at 598).

[12] Cypress Creek Renewables, LLC v. PacifiCorp, OPUC Docket No. UM 1799, Order No. 16-378, (Oct. 12, 2016).

[13] Grouse Creek, 142 FERC ¶ 61,187 at P 40 (it is unreasonable for a state commission to require a QF to file a complaint to establish a LEO).

[14] Re Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Thayn Hydro, LLC, UPSC Docket No. 16-035-04, Final Order at 7 (Mar. 4, 2016).

information sufficient to demonstrate compliance with the OATT deadlines (or other agreed-to deadlines if waived), and information sufficient to demonstrate that no deadlines waived; and

3) the QF have site control and permission to construct including a legally recognized interest in the real property, all required government land use approvals, and all environmental permits.

The proposed LEO rule fails to allow QF to commit to provide energy or capacity as required by PURPA because it requires the QF to execute and tender a PPA. It is a QF's commitment to sell power that is the ultimate deciding factor for when a LEO is formed. As detailed above, a QF should not need to tender a PPA in order to form a LEO. Specifically, in the Grouse Creek case, neither the QF nor the utility had executed a contract prior to a regulatory change. FERC brought a regulatory enforcement action in that matter, and the state was forced to agree in a stipulation "that a legally enforceable obligation may be incurred prior to the formal memorialization of a contract to writing."[15] Likewise, in Virginia Electric and Power Co., FERC found that several QFs created LEOs by obtaining state certificates of public convenience and necessity and expressing commitment to sell under the applicable state tariff *in letters* sent on October 28, 2014.[16] Finally, in Thayn Hydro, the Utah Public Service Commission found that a LEO existed when a small QF sent an email to its PURPA contact committing itself.[17] Having any arbitrary requirement like tendering a PPA will mean that small QFs like Thayn will get tripped up.

REC therefore supports a requirement that sending an executed PPA demonstrates the formation of a LEO; however, other forms of commitment should also be sufficient. Power generation is the secondary business for many QF developers like irrigation districts, water treatment facilities, biomass generators, municipal waste management, etc. In addition, even sophisticated developers may not perfectly follow all proscribed processes. Form should not trump substance when looking to determine if a LEO has been created.

Furthermore, the proposed rule requires that the QF know the rates at the time the LEO is created, but this may not necessarily be permitted under PURPA. In Snow Mountain Pine, Oregon's seminal LEO case, a LEO existed as of the QF's tender of a proposed agreement on July 6, 1983, *even though that proposed agreement contained the incorrect rates and the final rate was still unknown at the time of the appellate court's decision years later in 1987*.[18] The Oregon court reasoned that "the obligation to purchase power is imposed by law on a utility; it is not voluntarily assumed."[19] "[A] qualifying facility's self-imposed obligation *to deliver*

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15 See FERC v. Idaho PUC, Case No. 1:13-cv-141, Memorandum of Agreement Between FERC and the Idaho PUC (D. Id., Dec. 24, 2013) (copy available at: https://www.ferc.gov/legal/mou/mou-idaho-12-2013.pdf)

16 151 FERC ¶ 61,038, PP 9-10, 27 (2015).

17 E.g., Re Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Thayn Hydro, LLC, UPSC Docket No. 16-035-04, Final Order at 15 (Mar. 4, 2016).

18 734 P.2d 1366 at 1371.

19 Id. at 1370.

energy triggers a utility's obligation *to purchase energy*."[20] Accordingly, "[t]he date on which the qualifying facility obligates itself to deliver energy fixes the date on which the 'avoided costs' are determined[,]" and "the fact that the price is not agreed upon when the qualifying facility obligates itself to provide power does not change the date on which the obligation is incurred or affect the date used for determining the price."[21] The court directed the Commissioner to recalculate the avoided costs as of the date the QF tendered the agreement, not the date of the Commissioner's final order establishing rates.[22] Thus, even if the rates are not known at the time the QF commits to sell energy, the commission has an independent obligation to itself identify the correct rates.

Additionally, the interconnection milestones in the proposed rule may end up having the same issues addressed by FERC in the FLS Energy case. FERC's ruling in FLS Energy relied upon a finding that "such a requirement allows the utility to control whether and when a legally enforceable obligation exists."[23] Therefore, no rigid policies that can be controlled by the utility should be allowed to prevent a QF from committing to sell its net output. A QF should only need to show that they are pursuing the interconnection process. For example, see PacifiCorp's Oregon Standard QF Tariff that just requires a QF to specify the "status of interconnection or transmission arrangements."[24] In addition, the draft rules do not adequately address the issues related to existing and operating QFs, which have different interconnection needs than new QFs.

Last, it is not unreasonable to ask the QF to provide some initial evidence of the ability to gain regulatory approval. But requiring a QF to obtain "all required government land use approvals" and "all necessary environmental permits to build the facility" imposes an unrealistic burden upon the QF. These are factors often outside the control of the QF and can sometimes take months if not years to obtain.

The Montana Commission's proposed specific requirements regarding interconnections and regulatory approval fundamentally are not related to whether the QF is committing itself to sell its net output. A QF can make a commitment to sell its power before completing any specific interconnection or site control steps. Any seller of good or services can enter into a contract prior to completing all the necessary steps that will be required to eventually fulfill their contractual responsibilities.

The proposed rules are also not practical. Imposing too significant or costly burdens prior to the formation of a LEO or contract is particularly harmful for new QFs because they

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[20] Id. at 1371.

[21] Id.

[22] Id. at 1372.

[23] FLS Energy at P. 23.

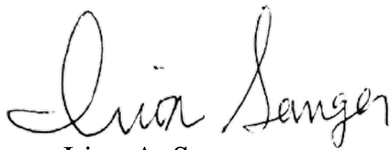
[24] Pacific Power, Oregon Standard Avoided Cost Rates effective on and after August 24, 2016, at 10 (available at: https://www.pacificpower.net/content/dam/pacific_power/doc/About_Us/Rates_Regulation/Oregon/Approved_Tariffs/PURPA_Power_Source_Agreement/Standard_Avoided_Cost_Rates_Avoided_Cost_Purchases_From_Eligible_Qualifying_Facilities.pdf).

need a commitment by a utility to purchase their power at a set price often before incurring significant costs related to interconnections and site control. The Montana Commission's proposed LEO rule would effectively prevent many developers from being able to obtain financing and construct facilities because they would need to spend potentially prohibited amounts of money without knowing how much they will be able to sell their power for.

4. Conclusion

REC appreciates the Montana Commission's efforts to clarify its LEO policies, and generally believes that they capture, from a high level, the right approach. The draft rules focus on a QF's commitment (by requiring an executed PPA) and look to establish whether the QF has taken at least initial steps to become commercially operational (by requiring some interconnection and site control to have been undertaken). However, the Montana Commission, has proposed too onerous requirements which will require QFs to jump through unnecessary and unfairly burdensome procedural hurdles in order to form a LEO. These steps are inconsistent with best practices in other states and are in violation of PURPA, including FERC's rules and policies.

Sincerely,



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cc: John Lowe
Renewable Energy Coalition
Founder & Executive Director