ROCKY MOUNTAIN POWER
A DIVISION OF PACIFICORP

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April 16, 2019

VIA ELECTRONIC FILING
AND OVERNIGHT DELIVERY

Wyoming Public Service Commission
2515 Warren Avenue, Suite 300
Cheyenne, Wyoming 82002

Attn: Chris Petrie, Chief Counsel

Docket No. 20000-545-ET-18
Record No. 15133

RE: IN THE MATTER OF THE APPLICATION OF ROCKY MOUNTAIN POWER FOR MODIFICATION OF AVOIDED COST METHODOLOGY AND REDUCED CONTRACT TERM OF PURPA POWER PURCHASE AGREEMENTS WITH QUALIFYING FACILITIES – Response to Motion to Compel Discovery Responses

Dear Mr. Petrie:

Enclosed for filing in the above-referenced matter is an original and four (4) copies of Rocky Mountain Power's Response to Wyoming Industrial Energy Consumers and Two Rivers Wind, LLC's Motion to Compel Discovery Responses from Rocky Mountain Power.

All formal correspondence and Staff requests regarding this matter should be addressed to:

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Sincerely,

Joelle R. Steward
Vice President, Regulation

Enclosure

cc: Service List (by email only)

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BEFORE THE WYOMING PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION OF ROCKY MOUNTAIN POWER FOR MODIFICATION OF AVOIDED COST METHODOLOGY AND REDUCED CONTRACT TERM OF PURPA POWER PURCHASE AGREEMENTS WITH QUALIFYING FACILITIES	)))))))	DOCKET NO. 20000-545-ET-18 (Record No. 15133)

ROCKY MOUNTAIN POWER'S RESPONSE TO WYOMING INDUSTRIAL ENERGY CONSUMERS AND TWO RIVERS WIND, LLC'S MOTION TO COMPEL DISCOVERY RESPONSES FROM ROCKY MOUNTAIN POWER

In accordance with the Rules of Practice and Procedure of the Wyoming Public Service Commission (the "Commission") and the Wyoming Rules of Civil Procedure, PacifiCorp d/b/a Rocky Mountain Power ("Rocky Mountain Power" or "Company") submits this memorandum in opposition to Wyoming Industrial Energy Consumers ("WIEC") and Two Rivers Wind, LLC ("Two Rivers Wind") (collectively "WIEC/TRW") Motion to Compel Responses from Rocky Mountain Power ("Motion").

I. INTRODUCTION

The data requests that are the subject of WIEC/TRW's Motion are objectionable on a number of independent grounds, each of which were supplied to WIEC/TRW in writing, with explanations as required by the Wyoming Rules of Civil Procedure. 1) The data requests seek information regarding the Company's interconnection queue, and such information is not within the scope of the Company's testimony or the Company's application before this Commission ("Application"). 2) The analysis required to produce the information requested by WIEC/TRW has never been performed by the Company, and therefore it is not in the Company's possession, custody, or control. 3) Performing the analysis to produce the information responsive to WIEC/TRW's overly broad request would be extremely burdensome to the Company's transmission division ("PacifiCorp Transmission"). 4) WIEC/TRW's requests as modified after the meet and confer with the Company raises an additional objection, because rather than asking for aggregated information it now requests project specific information that is confidential under both the terms of the Company's Open Access Transmission Tariff ("OATT") and its study agreements.

II. ARGUMENT

A. Relevant Law

Wyo. Rules of Civ. Pro. 26(b)(1) of the Wyoming Rules of Civil Procedure provides, in pertinent part, as follows:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter *that is relevant to any party's claim or defense and proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and *whether the burden or expense of the proposed discovery outweighs its likely benefit.*

(Emphasis added). This rule restricts discovery to (i) relevant matters, (ii) information that is proportional to the needs of the case, and (iii) weighs the burden and expense of the discovery against its likely benefit.

Wyo. Rules of Civ. Pro. 26(b)(2)(C)(iii) provides, in pertinent part, as follows:

> (C) When Required. — On motion or on its own, the court *must* limit the frequency or extent of discovery otherwise allowed by these rules or by the court if it determines that:
>
> > (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
> >
> > (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
> >
> > (iii) *the proposed discovery is outside the scope permitted by Rule 26(b)(1).*

(Emphasis added). This rule makes clear that the Commission *must* limit the extent of discovery otherwise allowed under the rules if the proposed discovery is outside the scope permitted by Rule 26(b)(1). Similarly Rule 33(a)(2) provides, in pertinent part, as follows: "(2) Scope. — An interrogatory may relate to any matter *that may be inquired into under Rule 26(b). …*"

(Emphasis added). As discussed below, the information WIEC/TRW seeks in both the initial requests[1] and the revised requests[2] are neither relevant nor within the scope of the Application. The requests are also unduly burdensome given the tangential and tenuous relevance claims raised in the Motion. Furthermore, the Revised Requests also risk putting proprietary third party information into the hands of those third parties' competitors, like Two Rivers Wind. For all of these reasons the burdens and expense of granting the Motion far outweighs the benefits to WIEC/TRW of compelling the Company to produce the requested information.

[1] Motion at Exhibit A (the "Initial Requests").
[2] Motion at Exhibit B (the "Revised Requests").

Wyo. Rules of Civ. Pro., Rule 34(a)(1) provides, in pertinent part, as follows:

> (a) In General. —A party may serve on any other party a request within the scope of Rule 26(b):
>
> > (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items *in the responding party's possession, custody, or control*:
> >
> > > (A) any designated documents or electronically stored information-including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations-stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form;

(Emphasis added). This rule again limits the scope of interrogatories to requests that are within the scope of Rule 26(b), and makes clear that the responding party need only provide information to the extent it is in the responding party's possession, custody, or control. WIEC/TRW's requests, both the Initial Requests and Revised Requests, seek analysis and aggregations of information that the Company has never created, and that it is not obligated to create. The rule does not require responding parties to produce analyses that they do not have. The Commission should not compel the Company to create the analysis or aggregation of information as the Motion requests because that goes beyond what the Wyoming rules require.

B. Interconnection Information is Not Relevant to the Company's Application Regarding Qualifying Facilities ("QF") Power Purchase Agreement ("PPA") Term Length, Avoided Cost Changes, and Clarifying Changes to Schedules 37 and 38.

WIEC/TRW asserts that the Company is somehow alleging an associated magnitude of "risk to ratepayers,"[3] by including in its Application information stating the amount of QF generation seeking pricing in Wyoming and separately from all of the states the Company serves. Yet, WIEC/TRW also states in its Motion that the Company presented that information "without

[3] Motion at p. 2.

any context, and standing alone."[4] While neither assertion is accurate, if WIEC/TRW's second assertion is taken as true, then its first cannot also be. If the Company provided no context to the information, then the Company could not have made any allegation of risk, or any other allegation for that matter. In fact, the Company directly provided context for this information in the title of the section of Mark Tourangeau's testimony where the QF generation totals are stated, which makes clear that these totals were offered to provide the current status of QF generation in PacifiCorp's territory.[5] The tables referenced in the Motion were similarly provided to answer the explicitly stated question regarding the status of QFs in the states served by PacifiCorp.[6]

There is no hidden meaning, this information was included to provide important background information for the Commission as it considers the changes the Company proposed in its Application. None of the changes requested in the Application alter or affect the current QF interconnection process. Indeed, changes to that process would be highly technical, legally complex, and would require additional expert testimony from PacifiCorp Transmission, which the Company has not offered. The body of the Application too would have needed to provide legal context for any proposed changes to Wyoming's Public Utility Regulatory Policies Act of 1978 ("PURPA") interconnection process. The Company provided none of this, because it is not relevant to the changes to Wyoming's PURPA implementation it requests. Allowing intervening parties to take this proceeding in whatever direction they may desire, merely because that direction is also related to PURPA implementation in Wyoming would be improper. Not only would it deprive the Company of a full opportunity to provide information and testimony from its experts

[4] *Id.* at p. 3.
[5] Direct Testimony of Mark Tourangeau at p. 5.
[6] *Id.* at p. 7.

to this Commission, it would also needlessly distract from the important issues raised by the Company in its Application.

The Company applied to this Commission seeking specific relief. Namely it seeks to reduce the maximum term length it must offer to QFs under PURPA, to make clarifying improvements to the language in Schedules 37 and 38, and to modify its avoided cost pricing methodology to ensure that it reflects the Company's avoided costs as accurately as possible. These three requests provide the scope of the Application, and the Commission should not be convinced to expand the scope of its proceeding beyond them. WIEC/TRW states that it only wishes to put the information offered by the Company "into a broader context,"[7] but WIEC/TRW does not explain that the broader context risks expanding the scope of this case to Wyoming's entire PURPA interconnection policy.

The Motion goes on to claim that Schedule 38 is a "process-oriented tariff" and that intervenors should have the opportunity to conduct discovery to assess the impacts of the Company's proposed changes. The Company does not disagree with this claim on its face, but it does not agree that making more explicit its longstanding policy of not executing PPAs for projects with commercial operation dates (or the start of delivery terms for subsequent PPAs for existing QFs) that are more than 30 months from a PPAs execution date. The Company added the explicit language to make its practice clear, based on conflicts and complaints by QFs over the past few years which demonstrated confusion about this policy. The purpose of the policy is consistent with both past Commission guidance, PURPA's customer indifference principle, and basic logic. There must be a future cutoff date to avoid QFs speculatively seeking PPAs for energy they will not be able to deliver until many years into the future. Without the 30-month policy a QF could execute a PPA at current avoided costs for energy it cannot deliver until five or 10 years from the date of

[7] Motion at p. 3.

execution. Existing QFs could similarly seek pricing at any time to effectively extend the terms of their PPAs whenever they determined that the Company's current avoided costs were favorable. The Company has never allowed QFs to contract on this basis, and doing so would be inconsistent with Commission guidance stating a preference that the avoided costs included in PPAs be updated prior to execution to incorporate the most current information available to the Company. This is the reason for the 30-month policy, which has been utilized by the Company for several years now.

The Commission endorsed policies that ensure avoided cost pricing for QFs do not become stale before PPA execution in its December 31, 2018, decision on a complaint by a QF developer, Trireme Energy Development LLC. In that order the Commission noted that, by updating its avoided costs late in the PPA negotiation process, the Company "ensured 'just and reasonable' rates for Wyoming consumers by appropriately considering and applying the updated information it obtained and by adjusting its avoided costs pricing accordingly."[8] The Company's longstanding policy against entering into PPAs with QFs that will not deliver energy until well into future (i.e. more than 30 months from execution) is nothing new and is consistent with this Commission's guidance. It protects Wyoming consumers by ensuring the Company does not enter into a PPA where avoided cost pricing assumptions have drastically changed by the time the energy is delivered. Adding explicit language to Schedule 38 so that QFs can better anticipate this policy is therefore not a change and should not be used as pretext to expand the scope of this case well beyond the Company's Application.

Interconnection policy is an incredibly complex subject, which, in the context of state PURPA implementation, is further complicated by the interplay between the Federal Energy

[8] *In the Matter of the Amended Joint Complaint Filing by Trireme Energy Development II, LLC; Pryor Caves Wind Project LLC; Mud Springs Wind Project LLC; and Horse Thief Wind Project LLC Against Rocky Mountain Power and PacifiCorp Regarding the Avoided Cost Pricing for the Bowler Flats Wind Qualifying Facilities Power Purchase Agreements*, Docket No. 20000-505-EC-16 (Record No. 14579), Commission Order at ¶ 63 (Dec. 31, 2018).

Regulatory Commission's ("FERC") interconnection policies, and those of the states, which have limited jurisdiction over QF interconnections by virtue of FERC's PURPA regulations. The Company is very concerned that intervenors seek to expand the scope of this case well beyond the changes it seeks in its Application. If the Commission grants WIEC/TRW's motion, it risks introducing a complex and highly technical part of PURPA implementation that the Company does not seek to change. Any changes to Wyoming's PURPA interconnection policy, which currently rely on the Company's FERC-approved OATT by reference, would invariably have an impact on non-state jurisdictional FERC regulated interconnections, raising potential preemption issues. Preemption issues arise, in large part, because the FERC and PURPA interconnection queues are currently one and the same; all interconnection requests are managed in serial order, so any change in how it is managed for QFs at the state level will necessarily have impacts on FERC jurisdictional interconnections in the queue. It would be inappropriate to allow discovery into this out-of-scope and irrelevant topic, given that the Company did not propose any modifications to interconnection processes in its Application.

An order from this Commission, issued November 9, 2001, supports limiting the scope of this case to the issues presented in the Application. In the 2001 case, where the Company had applied for a deferred accounting order related to high power costs, one of the joint movants, WIEC, argued that the Company should not be allowed to seek recovery of costs due to the failure of its Hunter Unit No. 1, because it was introduced after its application and was therefore not within the scope of the case.[9] In granting WIEC's motion, the Commission agreed that allowing the Company to introduce new issues related to the generation unit failure would vastly enlarge

[9] *In the Matter of the Application of PacifiCorp for Authority to Defer Excess Net Power Costs Incurred, Commencing November 1, 2000*, Docket No. 20000-EP-01-167 (Record No. 6481), Order Granting Motion to Exclude Hunter Generator-Related Costs from Case at ¶7 (Nov. 9, 2001).

the number and scope of issues to be considered. Here, as in that case, a party seeks to perform discovery and introduce a highly complex and technical issue into the proceeding that would vastly enlarge the number and scope of the issues to be considered, in this case PURPA interconnection policy. The Company has also had no opportunity to present testimony to the Commission to aid its understanding of serious unintended consequences that could result if changes are made to its interconnection policies.

Because this information is so clearly beyond the scope of the Company's Application, not only should WIEC/TRW's Motion be denied, under Wyo. Rules of Civ. Pro. 26(b)(2)(C)(iii) the Commission *must* limit the scope of discovery. Similarly, the Company also contends that intervenor testimony that inappropriately attempts to introduce interconnection policy should be stricken from the record as irrelevant and beyond the scope of the Company's application. While the timing of the Company's response to the Motion may not allow for it, any Commission guidance on such a limitation in advance of intervenor testimony may help avoid the need for later motions to strike from the Company. Such a limitation would not be unprecedented, the Commission has issued orders limiting not only the scope of discovery, but also the scope of the evidence it would receive in public hearings in response to similar discovery motions.[10] Absent the ability to direct the parties to limit the scope of their reply testimony, the Commission should also consider including such a limitation on the scope of the public hearing when it issues its order on WIEC/TRW's Motion here.

[10] *See, In the Matter of the Application of WWC Holding Co., Inc. (Western Wireless) for Authority to be Designated as an Eligible Telecommunications Carrier,* Docket no. 70042-TA-98-1 (Record No. 4432), Procedural Order on Discovery-Related Issues (Jun. 7, 1999) (concluding that certain discovery requests were "not relevant as they are beyond the scope of this proceeding" and ordering that "the scope of the public hearing to be held in this docketed matter will be restricted solely to consideration of Western Wireless's request…").

C. The Company has Never Performed the Analysis Requested by WIEC/TRW, and the Subject Requests are Overly Broad and Unduly Burdensome.

WIEC/TRW requested data on interconnection timeframes that the OATT does not require. The Initial Requests and the Revised Requests require the Company to compile the dates of interconnection feasibility study agreements, the dates of system impact study agreements, and the dates of facilities study agreements. The Initial Requests sought this information in summary form, and the Revised Requests sought it for each individual interconnection request in the Company's interconnection queue, but either require the same data in order to create a document or file responsive to the requests. The Company would have to examine each study agreement for every interconnection request in its queue going back to January 1, 2015, and record the date of that agreement in order to create the analysis WIEC/TRW seeks.

The requests also seek any estimated study completion dates the Company has provided to interconnection requesters when the studies will be delayed beyond the 90 days following execution of a study agreement, which the OATT requires the Company to make reasonable efforts to meet. In order to provide information responsive to this part of WIEC/TRW's requests, the Company would need to examine its files for each email or other communication sent to an interconnection requester that noted a delay and estimated study timing. While WIEC/TRW contends that none of these efforts constitute an analysis, the fact is that the Company has never gathered the requested data together from the disparate agreements and communications because it is not required to under its OATT. The Company is also not required to provide items that are not in its "possession, custody, or control" under Wyo. Rule Civ. Pro. 34(a)(1). Because of this, not only would it be improper for the Commission to grant the Motion, the analysis itself would be a massive undertaking, so it also places an undue burden on the Company.

WIEC/TRW's data requests are overly broad and unduly burdensome. The requests seek information going back to January 1, 2015. Since that date there have been 491 separate interconnection requests to the Company, each request is given a queue position in serial order based upon the date of the initial request.[11] Responding to the requests at issue in the Motion, whether in their initial form or as revised, would require PacifiCorp Transmission employees to examine the study agreements for each of these 491 requests, many of which have facilities study agreements, system impact study agreements, and feasibility study agreements. Examining and recording the dates for all of these agreements, as WIEC/TRW requests, would require a manual review of thousands of documents. In addition, WIEC/TRW seeks the estimated dates provided when studies are delayed beyond 90 days. While it is likely this is a smaller subset of the 491 requests in the queue, in order to assemble the requested information PacifiCorp Transmission would need to perform a manual review of emails and other communications between it and the interconnection requesters.

The Commission should not compel the Company to engage in this burdensome effort, especially given that the information is not relevant or within the scope of the Company's Application, as discussed above. Whether there are delays in interconnection studies has no bearing on whether a shorter term length for QFs is more or less consistent with PURPA's requirements. Similarly any delays have little bearing on whether Wyoming's avoided cost pricing mechanisms can be made more accurate and therefore more consistent with PURPA's customer indifference principle, or whether the unrelated changes proposed to Schedules 37 and 38 are appropriate. In deciding whether to compel the Company to produce the requested information,

[11] *See*, PacifiCorp Transmission Interconnection Queue at https://www.oasis.oati.com/PPW/PPWdocs/pacificorplgiaq.htm (last accessed April 16, 2019).

Wyo. Rule Civ. Pro. 26(b)(1) requires the Commission to determine "whether the burden or expense of the proposed discovery outweighs its likely benefit" and in this case it surely does.

D. The Revised Requests Seek Proprietary Information of Third Parties that are in Direct Competition with Two Rivers Wind.

After conferring with the Company on its objections to the original requests, WIEC/TRW counsel provided the Revised Requests. Unfortunately, as revised, the Revised Requests only served to increase the undue burden that responding would impose on the Company, and broadened the requests rather than narrowing them. Unlike the Initial Requests, which asked for summary data related to interconnection study timeframes, the Revised Requests asked for the timing information individually for each request in the queue going back to January 1, 2015. By modifying its request in this manner WIEC/TRW introduced a new objectionable issue. Under the OATT and also the terms of the interconnection study agreements, specific information on execution dates and other timeframes involved in an individual interconnection request's movement through the study process is confidential and proprietary to the entity making the interconnection request. The information is treated confidentiality because the timeframes of individual projects in the queue could be used by competing project developers, such as Two Rivers Wind, to gain an unfair commercial advantage in a number of situations such as solicitations, or determining what other projects may be good targets for acquisition.

In order to comply with its OATT and the interconnection agreements the Company would also have to provide advanced notice to the 491 affected interconnection requesters if this Commission compels the Company to produce their confidential information.[12] While the

[12] *See e.g.*, OATT Section 48.1.6, "If a court or a Government Authority or entity with the right, power, and apparent authority to do so requests or requires either Party, by subpoena, oral deposition, interrogatories, requests for production of documents, administrative order, or otherwise, to disclose Confidential Information, that Party shall

confidentiality provisions do allow the Company to release this information if the Commission's order directs it to do so without complying with the prior notice requirement, the Commission should not so order. This information is not critical to WIEC/TRW's ability to challenge the Company's application and supporting testimony, and compelling the Company to release it would needlessly harm competition in the development of projects across the Company's territory when the corresponding evidentiary benefits to WIEC/TRW are quite low. In balancing the burden against the benefits, as required by Wyo. Rule Civ. Pro. 26(b)(1), the confidentiality interests of third parties and the potential competitive harms that would result from release of their information should be afforded substantial weight.

The Company has also directed WIEC/TRW to some information responsive to the Revised Request—the Company's publicly available interconnection queue. Using this publicly available information does not expose the proprietary information of individual interconnection requesters, and it can be used to estimate the time from an initial interconnection request to study completion for a number of queue positions since January 1, 2015. While the Company does not waive its objection to the introduction of that interconnection information since it remains outside the scope of the Application, it is easily accessible to WIEC/TRW. This provides an alternative method that WIEC/TRW may use to determine the timing for interconnection requests that does not unduly burden the Company, and does not risk exposing the proprietary information of third parties. Accordingly, even if the Commission were to deem the requests relevant, it should not compel the Company to produce the information, because a less invasive and less burdensome method remains available to WIEC/TRW.

provide the other Party with prompt notice of such request(s) or requirement(s) so that the other Party may seek an appropriate protective order or waive compliance with the terms of the LGIA."

III. CONCLUSION

WIEC/TRW contends that its Initial Requests and its Revised Requests are relevant to the Company's Application based on the fact that the Company mentioned the amount of prospective QFs pursuing pricing with the Company in Wyoming and elsewhere in its territories. It also claims that by adding language to Schedule 38 that makes explicit an existing and longstanding policy of the Company regarding PPA execution timing, it has somehow opened the door to PURPA interconnection policy related discovery and argument. For all of the reasons stated herein, that is not the case. The Wyoming Rules of Civil Procedure and Commission precedent support the Company's valid objections to the relevance of the Initial Requests and Revised Requests, and also support the Commission providing guidance to the parties that PURPA interconnection policy is outside the scope of these proceedings based on the Company's Application. WIEC/TRW's contention that the discovery it seeks does not require analysis by the Company similarly fails, and the Company's objections should be upheld. WIEC/TRW also seeks information covering an overly broad range of years, and would require an extensive manual review that unfairly burdens the Company, and therefore the weight of that burden outweighs any benefit WIEC/TRW may receive should its Motion be granted. Finally, the Revised Request seeks proprietary information of third parties that is confidential per the Company's OATT and its agreements with those entities. Granting the Motion would risk exposing this information to potential competitors of the affected third parties and would cause competitive harm, even though there are less invasive means for WIEC/TRW to get information that would serve to provide evidence to support claims it may wish to raise regarding QF interconnection study timing. For all of, or any one of these reasons, the Commission should deny the Motion.

Respectfully submitted,
ROCKY MOUNTAIN POWER

s/ Jacob A. McDermott

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2019, I caused to be served, via email a true and correct copy of Rocky Mountain Power's **RESPONSE TO WYOMING INDUSTRIAL ENERGY CONSUMERS AND TWO RIVERS WIND, LLC'S MOTION TO COMPEL DISCOVERY RESPONSES FROM ROCKY MOUNTAIN POWER** to the following service list:

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