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2021 MAY 25 PM 2:43
IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Fall River Rural Electric Cooperative, Inc.

BEFORE THE

IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF PACIFICORP FOR APPROVAL OR REJECTION OF THE PURCHASE POWER AGREEMENT WITH CHESTER DIVERSION HYDRO PROJECT)	CASE NO. PAC-E-21-06 REPLY COMMENTS OF FALL RIVER RURAL ELECTRIC COOPERATIVE, INC.

INTRODUCTION AND SUMMARY

Pursuant to Order No. 34976 issued by the Idaho Public Utilities Commission ("Commission") on March 25, 2021, Fall River Rural Electric Cooperative, Inc. ("Fall River") hereby submits its reply comments.

As explained below, Fall River agrees with the first two of Staff's proposed amendments to the power purchase agreement ("PPA"), which recommend correcting typographical errors with respect to the amounts of generation estimates in Section 4.9, Exhibit A, and page 3 of the PPA, and the units for the Maximum Delivery Rate in Exhibit A.

However, as discussed further below, Fall River disagrees with Staff's third proposal that the avoided cost rates should reflect the first deficit date of July 2029. Rather, the PPA filed for approval properly contains the avoided cost rates with the first deficit date of 2028 because those

are the rates that were in effect when Fall River committed itself to sell the energy and capacity of the Chester Diversion Project. The PPA itself was executed in the days after the Commission's order updating the first deficit date only because PacifiCorp, dba Rocky Mountain Power, ("PacifiCorp") did not supply the executable PPA until after such order was issued. Fall River had expressed its commitment to the final PPA on January 5, 2021. Additionally, from the start of the PPA discussion process, PacifiCorp was delayed on numerous occasions in its response to the request for the PPA and requested edits to drafts, and therefore it would be unjust to penalize Fall River for such delays with the lower avoided cost rates in 2028, as recommended by Staff. Accordingly, Fall River respectfully requests that the Commission approve the PPA containing the rates agreed to by the parties and filed for approval by PacifiCorp.

BACKGROUND

This proceeding regards the approval of a PPA for the Chester Diversion Project. Fall River owns and operates the Chester Diversion Project hydropower facility, which is already constructed and operating. *Declaration of Bryan Case*, at ¶¶ 3-4.[1] The Chester Diversion Project is a small hydropower facility utilizing water power of the head of a pre-existing Chester Diversion Dam (a.k.a. the Cross Cut Diversion dam) on the Henry's Fork of the Snake River in Fremont County, Idaho, and it is self-certified with the Federal Energy Regulatory Commission ("FERC") as a qualifying facility ("QF") under Section 201 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). *See* FERC Docket No. QF10-337. As a QF with a maximum capacity of only 2.0 megawatts ("MW"), the facility is eligible for PacifiCorp's published avoided cost rates approved by the Commission for non-seasonal hydropower facilities.

[1] The facts set forth in these reply comments are supported by the Declaration and Exhibits of Bryan Case filed concurrently herewith.

Fall River decided to sell the energy and capacity of the facility to PacifiCorp as a QF, and Fall River first contacted PacifiCorp to request a PPA for such sales with a written request providing all of the information listed in PacifiCorp's Schedule 38 on September 12, 2019. *Declaration of Bryan Case*, at ¶ 5. Fall River had hoped to begin such sales to PacifiCorp as soon as possible, but it took much longer than expected to finalize a PPA with PacifiCorp. *Id.* at ¶ 6. In total, it took over one year and five months to get the PPA finalized and fully executed for the Chester Diversion Project – from September 12, 2019, until February 26, 2021. *Id.* During this time period, Fall River experienced delays in PacifiCorp's responses to requests for a draft PPA and in responses to edits to the draft PPAs supplied by PacifiCorp. *Id.* at ¶¶ 6 & 50-58. Additionally, even though Fall River had committed to the final PPA on January 5, 2021, PacifiCorp did not indicate its preferred process for execution of the document until February 11, 2021. *Id.* at ¶¶ 56-57. Fall River executed the PPA on that same date, on February 11, 2021, and PacifiCorp executed it on February 26, 2021. *Id.* at ¶ 58.

As Staff recites in its comments, the Commission issued Order No. 34918 that changed PacifiCorp's avoided cost rates on February 9, 2021. *Staff's Comments* at 4. The effect of that order was to change PacifiCorp's approved rates with respect to only 2028, due to a change in the first capacity deficit year, which reduced the rates for 2028 by approximately $30 per MWh. *Id.* at 5 (noting the reduction from $67.85 per MWh to $37.65 per MWh). PacifiCorp explained in its Application, however, that: "The Agreement was negotiated during 2020 and was subject to Commission Order No. 33917 that established the Company's first capacity deficit period for use in the SAR-based avoided cost calculations as July 2028." *Application* at 4. Accordingly, those are the rates that the parties intentionally included in the PPA they executed and submitted for approval. However, Staff asserts that the Commission should modify the PPA to include the

updated rates for 2028, as approved in Order No. 34918, because the PPA was not fully executed until February 26, 2021. *Staff's Comments* at 4-5. Fall River respectfully disagrees with Staff's recommendation on that point, which does not address or consider that the final PPA would have been executed before issuance of Order No. 34918 but for PacifiCorp's delays in the PPA contracting process.

ARGUMENT

The Commission should find that Fall River perfected entitlement to avoided cost rates in the PPA submitted for approval. It would be unjust and unreasonable to deny Fall River's right to those rates, which became unavailable before the PPA was executed due to delays in the contracting process by PacifiCorp. For the reasons explained below, the Commission should not adopt Staff's proposal to update the rates applicable to 2028.

A. A Legally Enforceable Obligation Can Entitle a QF to Rates that Were in Effect Prior to the Date the Written Agreement is Formally Executed

Under FERC's regulations which this Commission implements, a QF is entitled to form a legally enforceable obligation (or "LEO") to the rates and terms and conditions in effect at the time that it commits itself to sell power to the utility. *See* 18 C.F.R. § 292.304(d). FERC has explained that each QF "has the right to choose to sell pursuant to a legally enforceable obligation, and, in turn, has the right to choose to have rates calculated at avoided costs calculated at the time that obligation is incurred." *JD Wind 1, LLC*, 129 FERC ¶ 61,148, at P 29 (2009). Under the LEO rule, "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations." *Virginia Electric and Power Co.*, 151 FERC ¶ 61,038, P 25 (2015).

Thus, the date on which a vintage of rates is locked in by the QF can predate the execution of the written contract, and the subsequent execution of a written contract does not nullify the right to such vintage of rates locked in through the LEO rule. The rules use the "terms 'contract' and 'legally enforceable obligation' in the disjunctive to demonstrate that a legally enforceable obligation includes, but is not limited to, a contract." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at P 35 (2011).

This Commission has approved many QF contracts that were executed after the date that the vintage of avoided cost rates contained therein became unavailable in recognition of the right under the LEO rule to lock in avoided cost rates before a final written agreement is executed. For example, in the case of the Cargill agreement, Idaho Power represented that "approximately 10 days prior to March 16, 2010[, the date of the rate change,] Idaho Power's management started the process of reviewing the agreed-upon draft for final approval and execution." Case No. IPC-E-10-15, Order No. 32024 at 3. Even though no complaint was filed or adjudicated, the Commission approved the subsequently executed agreement with the previously effective rates, stating as follows:

> On the May 4, 2010 date of contract signing the higher contract rates of Order No. 30744 had been replaced by the lower rates of Order No. 30125 (Case No. GNR-10-01) approved by the Commission on March 16, 2010. We find that the Company has fairly represented our past grandfathering criteria requirements. We further find the Company's approach in this case regarding contract rates to be in concert with the spirit of those prior grandfathering cases. *See A. W Brown v. Idaho Power*, 121 Idaho 812, 828 P.2d 841 (1992); Order No. 29872, Case No. IPC- 05-22.
>
> In this case, Idaho Power and Staff believe that Cargill is entitled to grandfathering and the rates of Order No. 30744. Idaho Power represents that all outstanding contract issues had been resolved prior to March 16, 2010, and that but for the internal review process of the Company a contract would have been signed prior to March 16. Based on the record established in this case, we find that Cargill is entitled to the grandfathered rates of Order No. 30744.

Id. at 4.[2]

A LEO will frequently arise in a case where the purchasing utility's delays in the contracting process deprive the QF of the ability to achieve a fully executed contract before its preferred vintage of rates become superseded by subsequently approved rates. As this Commission recently explained, the Idaho Supreme Court "upheld the IPUC's determination that the QF had established a LEO" in *Rosebud Enterprises, Inc. v. Idaho Public Utilities Comm'n*, 128 Idaho 609, 917 P.2d 766 (1996). Case No. IPC-E-20-17, Order No. 34957 at 5 (Black Mesa Energy Storage). In *Rosebud Enterprises*, the Court found:

> The IPUC recognized that [the QF] was delayed in its efforts to determine project viability by [the utility]. The IPUC's effort to correct the effect of this delay is within its authority. The IPUC decision is not a final determination of avoided costs, but puts [the QF] in the position of determining the viability of its project using rates that reflect the time frame [the QF] should have been able to proceed but for the delays caused by [the utility].

Order No. 34957 at 5 (quoting *Rosebud Enterprises*, 128 Idaho at 624). The QF was awarded "a starting point for negotiations based upon the superseded avoided costs" because it was not entitled to published avoided cost rates; the final rates were thus subject to further refinement based on the previously effective vintage of rates. *Rosebud Enterprises*, 128 Idaho at 623.

In affirming the Commission, the Court specifically invoked the LEO rule. It explained, "The governing principle in this case is similar to that of recent FERC cases wherein FERC held

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[2] Similar treatment occurred in numerous other Commission orders. *See* Case No. IPC-E-10-16, Order No. 32025 at pp. 2-4 (same for Rock Creek Dairy); IPC-E-10-17, Order No. 32026, at 2-4 (same for Swagger Farms Dairy); IPC-E-10-18, Order No. 32027 at 2-4 (same for Double B Dairy); IPC-E-10-19, Order No. 32068 at 1-6 (same for Grand View PV One Solar); IPC-E-10-26, Order No. 32138 at 2-3 (same for AgPower Jerome); IPC-E-10-22, Order No. 32104 at 2-12 (same for Yellowstone Power, where no written documentation demonstrated that contract terms were complete before date of rate change).

that contract rates maintain their validity regardless of subsequent price changes." *Id.* (citing *West Penn Power Co.,* Docket No. EL95-30-000; 18 C.F.R. § 292.304(b)(5)).[3]

This application of the LEO rule remains well supported in the law. FERC has stressed that "the phrase legally enforceable obligation is broader than simply a contract between an electric utility and a QF and that the phrase is used to prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract, or as here, delaying the signing of a contract, so that a later and lower avoided cost is applicable." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at P 36. FERC has explained:

> In order to protect the rights of a QF, once a QF makes itself available to sell to a utility, a legally enforceable obligation may exist prior to the formation of a contract. A contract serves to limit and/or define bilaterally the specifics of the relationship between the QF and the utility. A contract may also limit and/or define bilaterally the specifics of the legally enforceable obligation at the heart of that relationship. But the obligation can pre-date the signing of the contract.

Grouse Creek Wind Park, LLC, 142 FERC ¶ 61,187, at P 40 (2013) (footnotes omitted).

This Commission has ruled that a QF may form a LEO by filing a meritorious complaint alleging that the project was mature, and that the developer had attempted, and failed, to negotiate a contract with the utility before locking in an avoided cost rate. *A.W. Brown Co., v. Idaho Power Co.*, 121 Idaho 812, 816-18, 828 P.2d 841 (1992). However, while a QF could certainly form a LEO by successfully filing and litigating a complaint against the purchasing utility, it would be unreasonable and thus inconsistent with amicable contract formation under the LEO rule to *require* a QF to file a complaint against the purchasing utility. Requiring the filing of a complaint would

[3] The Commission's decisions have often referred to such treatment as "grandfathering" treatment. However, as the Supreme Court has explained, "[c]onferment of grandfathered status on qualifying facility is essentially an IPUC finding that a legally enforceable obligation to sell power existed by a given date." *Rosebud Enterprises*, 128 Idaho at 624, 917 P.2d at 781. Thus, "grandfathering" cases are application of the LEO rule.

be particularly unreasonable when – as is the case here – the purchasing utility itself acknowledges the QF's right to rates preexisting the execution of the written contract. Such a policy would require the QF owner to forego execution of a mutually agreeable PPA containing the rates to which both parties understood the QF to be entitled and instead litigate against the purchasing utility – wasting Commission and party resources and delaying final resolution of the contracting process. The Commission has approved use of preexisting rates outside the context of a complaint on many occasions. *See supra* note 2.

Furthermore, FERC's recently issued Order No. 872 reaffirmed its prior LEO precedent quoted above and confirmed that a QF may be entitled to previously effective avoided costs before finalization of an executed written contract. *See Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Order No. 872, 172 FERC ¶ 61,041, at P 689 (July 16, 2020), 85 Fed. Reg. 54,638 (Sept. 2, 2020).[4] FERC specifically stated that requiring a fully executed PPA or "requiring that QFs file a formal complaint with the state commission . . . . are not permitted[.]" *Id.*[5]

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[4] FERC's new rules adopted in Order No. 872 became effective December 31, 2020, and therefore its recitation of the LEO rule applies to Fall River's LEO created after that date. Order No. 872, 172 FERC ¶ 61,041, 85 Fed. Reg. 54,638, at preamble & P 753; *see also id.* at P 693 (stating Order No. 872's new rules do not apply to "any executed contract or LEO between a QF developer and utility in place as of the effective date of this final rule").

[5] FERC's Order No. 872 also created a new "commercial viability" requirement to create a LEO, which is intended "to prevent speculative QFs from obtaining LEOs, and the associated burden on purchasing utilities." Order No. 872, 172 FERC ¶ 61,041, 85 Fed. Reg. 54,638, at P 688. But FERC explained that new test does not apply to QFs already in operation, which "have necessarily demonstrated a commitment to construct the project." *Id.* at P 665 n. 995. In any event, Fall River's Chester Diversion Project is not in any way speculative, as it is already operating and is ready to begin delivering to PacifiCorp shortly after approval of the PPA.

B. Fall River Should Be Entitled to the Rates Contained in the Executed PPA Due to Delays in the Contracting Process by PacifiCorp

PacifiCorp's delays in the contracting process warrant use of the avoided cost rates with the 2028 capacity deficit date, which were still in effect at the time Fall River committed to the final PPA. The facts of this case demonstrate that but for delays in PacifiCorp's processing of the PPA request and edits, Fall River would have had a fully executed final PPA before the effective date of the Commission's order on February 9, 2021. Even so, Fall River had committed to the terms and conditions of the final PPA well before that date. Therefore, based on the facts set forth below, the Commission should approve the PPA as filed with the rates in effect prior to February 9, 2021.

Unlike the other regulated utilities in Idaho, PacifiCorp does not have a formal tariff governing timelines for the negotiation process for QFs eligible for published rates. Instead, PacifiCorp only has Schedule 38, which governs the more complex negotiation process and indicative pricing queue for large QFs. As PacifiCorp noted when it filed its Schedule 38: "The PURPA negotiating practices and queue management procedures contained in Schedule 38 include contracting processes and queue management for projects that don't qualify for published rates in Idaho[.]" *PacifiCorp's Application*, Case No. PAC-E-16-01, at 2 (Jan. 13, 2016). Schedule 38 itself states it is applicable to projects above the eligibility threshold for published rates. *See* Schedule 38, at Sheet 38.3 ("APPLICATION"). However, Schedule 38 provides a useful guidepost of the outer bounds of the timelines that PacifiCorp should certainly not exceed in providing a much simpler PPA and published rates for a small QF, such as the Chester Diversion Project. As explained below, PacifiCorp provided delayed responses and documents well past the bounds of the deadlines for a reasonable response period in multiple instances.

First, delays in PacifiCorp's interconnection process caused several months of delay in Fall River's PPA request. *Declaration of Bryan Case* at ¶ 51. Fall River initially intended to interconnect the Chester Diversion Project to a nearby PacifiCorp-owned power line to avoid the complications and cost of transmitting the power to PacifiCorp, and it therefore made an interconnection request on October 4, 2019, shortly after its initial PPA request. *Id.* However, PacifiCorp was unable to supply an interconnection System Impact Study to Fall River. *Id.* at ¶ 51 and Ex. 6 (PacifiCorp's "Notice of Delay"). Then, PacifiCorp's PPA negotiators refused to supply a draft PPA solely because there was no interconnection study. *Id.* at ¶ 51 & Ex. 14. Thus, PacifiCorp used its own failure to provide an interconnection study as the basis to refuse to discuss a PPA. This delayed Fall River for several months until it determined to reconfigure its PPA request into an off-system PPA request that will transmit power over Bonneville Power Administration's ("BPA") system to PacifiCorp – essentially re-casting its initial PPA request seven months later on May 11, 2020. *Id.*

It is worth noting that, as Fall River communicated to PacifiCorp, PacifiCorp's own interconnection delays are not a legitimate basis upon which it may stall creation of a LEO. *See id.* at Ex. 7 (December 10, 2019 letter from Fall River to PacifiCorp). FERC has ruled that it is unlawful to condition the QF's right to commit to a PPA on completing steps in the interconnection process because the purchasing utility controls the interconnection process: "Such a requirement allows the utility to control whether and when a legally enforceable obligation exists – e.g., by delaying the facilities study or by delaying the tendering by the utility to the QF of an executable interconnection agreement." *FLS Energy, Inc.,* 157 FERC ¶ 61,211, P 23 (Dec. 15, 2016). As FERC recently reconfirmed in Order No. 872, the purchasing utility may not require "completion of a system impact study or transmission feasibility study" to form a LEO because "requiring the

completion of a utility-controlled study places too much control over the LEO in the hands of the utility and defeats the purpose of a LEO and is inconsistent with PURPA." Order No. 872, 172 FERC ¶ 61,041, at PP 694-95. Thus, it was inconsistent with the LEO rule for PacifiCorp to withhold a *draft* PPA on the basis that PacifiCorp had failed to supply a System Impact Study, especially after Fall River had both requested and paid for such study. Additionally, PacifiCorp's Schedule 38 states the QF must sign the interconnection System Impact Study Agreement within 120 days of the Commission order approving the PPA, *not* before the draft PPA is even supplied. *See* Schedule 38, at Sheet 38.9, ¶ 11(b). However, Fall River elected to avoid a protracted dispute with PacifiCorp over that issue and revised its PPA request to move forward without further delay.

Second, PacifiCorp was delayed in supplying an initial pro forma PPA for evaluation. The pro forma PPA is supposed to assist the QF in beginning its review and begin preparing comments on the PPA form before PacifiCorp provides a project-specific draft PPA, and PacifiCorp's Schedule 38 states the pro forma PPA will be supplied within seven days of request. *See* Schedule 38, at Sheet 38.4, § B. But PacifiCorp took almost three months to supply Fall River the pro forma PPA, causing additional delays to Fall River's review of the form. *Declaration of Bryan Case* at ¶ 52. That delayed Fall River's ability to begin evaluating and preparing Fall River's comments and edits to the form of PPA PacifiCorp proposed by over two months.

Third, even after Fall River revised its request to an off-system PPA request, PacifiCorp had delayed responses to supplying a project-specific draft PPA. Schedule 38 states the draft PPA should be supplied within 30 days of the request. *See* Schedule 38, at Sheet 38.8. But PacifiCorp took 38 days, until June 18, 2020, to respond to Fall River's revised PPA request for an off-system PPA, which had been sent on May 11, 2020. *Declaration of Bryan Case* at ¶ 53.

Fourth, during the next round of discussions, another lengthy delay occurred. Specifically, PacifiCorp took 58 days, until September 17, 2020, to respond to Fall River's next proposed edits to the PPA and supply of additional PacifiCorp-requested information that Fall River had sent on July 20, 2020. *Id.* at ¶ 54. Again, this 58-day period was well in excess of the 30-day maximum response time contemplated in the large QF tariff. PacifiCorp's lead negotiator, Kyle Moore, acknowledged the delay in an August 26, 2020 email, stating "We apologize for our delay and will make it up in our next response period." *Id.* at ¶ 54 & Ex. 20. However, despite Mr. Moore's suggestion, there was no way to make up for the delays that had occurred by that point; the PPA should have already been fully executed if expected timelines had been followed from the start.

Fifth, and finally, PacifiCorp was quite slow in wrapping up the final items to resolve in the PPA and to get the document executed. *Id.* at ¶¶ 55-58. On a telephone call on October 1, 2020, Fall River and PacifiCorp representatives discussed a limited number of open items in the PPA, including the BPA transmission losses, metering provisions, and an appropriate cure period for any failure by Fall River to begin deliveries by the PPA's First Delivery Date. Fall River's counsel followed up with a confirming email dated October 16, 2020, stating "[w]e had understood we would hear back from PacifiCorp this week regarding a few items in the draft PPA." *Id.* at Ex. 24. That email also reiterated that Fall River agreed to PacifiCorp's proposal for use of the BPA line losses in the PPA, and it reiterated Fall River's request that PacifiCorp to make a reasonable proposal for two outstanding items: (1) any required metering upgrades, and (2) the cure period for a failure to achieve the First Delivery Date. *Id.* The email stated: "Other than these clarifications, Fall River finds the draft PPA acceptable and would like to move forward with execution as soon as possible." *Id.* at Ex. 24.

After further delay, counsel for Fall River sent additional follow-up emails. An email from Fall River's counsel dated November 30, 2020, stated: "It has been several weeks since we have heard from PacifiCorp. We would like to move forward to finalizing the final outstanding issues itemized below, so we can get the agreement executed and submitted for approval at the IPUC." *Id.* at Ex. 25. Likewise, an email from Fall River's counsel dated December 8, 2020, noted that PacifiCorp's metering issue appeared to be resolved and reiterated the request that PacifiCorp provide a proposal for a reasonable cure for a delay in achieving the First Delivery Date, as had been requested on the parties' telephone call on October 1, 2020. *Id.* at Ex. 30. Fall River's email again explained: "As we previously communicated, the rest of the PPA is acceptable to Fall River and we would like to move forward with getting it finalized as soon as possible." *Id.*

Ultimately, PacifiCorp did not provide its proposal for a cure for a delay achieving the First Delivery Date with a revised PPA draft until December 11, 2020, 71 days after the parties' phone call on October 1, 2020, despite repeated requests that PacifiCorp accelerate the process. *Id.* at ¶ 55 & Ex. 32. At this time, PacifiCorp was still verifying that its proposed PPA would not require Fall River to upgrade the metering at the facility, and PacifiCorp did not provide final confirmation on that issue under December 30, 2020. *Id.* at Exs. 32 & 33. The 71-day period to partially respond with an edit to the draft PPA, coupled with a 90-day period to confirm no new metering would be required, were well past the time Fall River expected when it proposed these reasonable clarifications on the parties' telephone call on October 1, 2020. Indeed, yet again during this timeframe, PacifiCorp's representative, Kyle Moore, apologized for PacifiCorp's delay in an email dated December 1, 2020, which responded to one of requests from Fall River for a response. *Id.* at Ex. 26.

Additionally, despite confirming that no new metering would be needed, PacifiCorp's delayed proposal for the cure period for the First Delivery Date was not reasonable or acceptable to Fall River. PacifiCorp's proposal unreasonably put Fall River at risk of having the rates reduced in the PPA if the Commission did not approve it by June 1, 2021, and at risk of having the PPA terminated altogether if the Commission did not approve it by December 31, 2021. *Id.* at Ex. 32, pp. 47-48, §§ 11.1.2(a) & 11.2.4. Thus, Fall River had to make a counter proposal, which it did by email dated January 5, 2021, containing a final PPA with final edits to the First Delivery Date and proposed delay default provisions. *Id.* at Ex. 34. Fall River's proposal reasonably tolled the First Delivery Date and penalties for non-compliance until a reasonable period after the Commission's approval of the PPA, whenever that may occur. *Id.* at Ex. 34, at pp. 49-50, §§ 11.1.2(a) & 11.2.4. In that January 5, 2021 email, Fall River also communicated that with that final edit, the PPA was "acceptable to Fall River and we are prepared to get it executed and filed with the PUC." *Id.* at Ex. 34, at p. 1. That version of the PPA was the final PPA eventually executed by the parties. *Id.* at ¶ 56.

However, PacifiCorp did not communicate its preferred process for execution of the final PPA until an email sent by PacifiCorp's representative, Kyle Moore, on February 11, 2021, which sent the PPA and indicated Fall River should execute it. *Id.* at ¶ 57. This response time was again in excess of the outer bounds of the expectations of 30 days after January 5, 2021. *See also id.* at Exs. 35 & 37 (Fall River follow-up emails dated January 15, 2021, and February 9, 2021, requesting confirmation on PacifiCorp's preferred process for PPA execution). Fall River's general manager, Bryan Case, executed the PPA on that same date PacifiCorp sent the executable document, February 11, 2021. *Id.* at ¶ 58. That PPA sent by PacifiCorp and executed by Fall River on February 11, 2021, contained the avoided cost rates that had been in effect at the time

that Fall River sent and expressed commitment to the final PPA on January 5, 2021. *Id.* PacifiCorp's representative, Bruce Griswold, countersigned the same PPA on February 26, 2021, containing those same rates. *Id.*

As the foregoing recitation of the PPA discussions demonstrates, there were unquestionably delays on PacifiCorp's part in the process that justify honoring Fall River's commitment to the rates in effect prior to February 9, 2021, with the 2028 first deficit date. Fall River executed the final document just two days after the date of the rate change, and there is no question it would have done so before the date of the rate change if PacifiCorp's cumulative delays had not precluded it from doing so. Under the LEO rule and the Commission's precedent set forth above, Fall River is entitled to the rates in effect when it committed to the final PPA provisions despite PacifiCorp's delays prior to, and after, that time. PacifiCorp's own representative even apologized for delays during the PPA discussions. Additionally, PacifiCorp implicitly agreed that Fall River should be entitled the rates included in the PPA because PacifiCorp knowingly executed the PPA with those rates. As PacifiCorp itself explained in its Application, the PPA contains those rates because the PPA was negotiated to fruition while those rates were in effect. *Application* at 4. To deprive Fall River of those rates would be unreasonable. Accordingly, the Commission should approve the PPA containing the rates included by the parties and submitted for approval in this case.

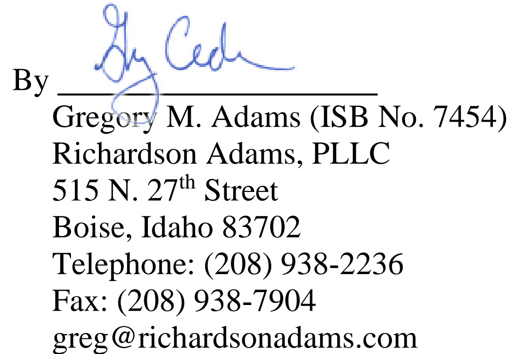
CONCLUSION

For the reasons set forth above, Fall River agrees with the first two of Staff's proposed amendments to the PPA, which recommend correcting typographical errors with respect to the amounts of generation estimates in Section 4.9, Exhibit A, and page 3 of the PPA, and the units for the Maximum Delivery Rate listed in Exhibit A. However, Fall River disagrees with Staff's

proposal that the first deficit date for avoided cost rates should be July 2029, and respectfully requests the Commission approve the PPA containing the rates agreed to by the parties and filed for approval by PacifiCorp with the July 2028 first deficit date.

DATED: May 25, 2021.

RICHARDSON ADAMS, PLLC



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of May, 2021, I delivered true and correct copies of the foregoing Reply Comments to the following parties via electronic mail:

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