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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power for Approval of Changes to Renewable Avoided Cost Methodology for Qualifying Facilities Projects Larger than Three Megawatts	)))))))	DOCKET NO. 12-035-100 SCATEC SOLAR NORTH AMERICA, INC.'S POST HEARING BRIEF

Scatec Solar North America, Inc. ("Scatec") files this Brief pursuant to the directive of the Hearing Officer (H. Tr. at p. 116) at the hearing convened on June 6, 2013.

This proceeding was initiated at the Public Service Commission of Utah ("Commission") by the filing of Pacificorp, dba Rocky Mountain Power ("PacifiCorp" or the "Company"), to change the existing methodology of calculating the "avoided cost" that must be paid to a qualifying facility ("QF") under the Public Utility Regulatory Policy Act ("PURPA"). As described at p. 2 of the direct testimony of Mr. Luigi Resta, its Chief Executive Officer, Scatec is a wholly owned subsidiary of Scatec Solar AS, which is headquartered in Oslo, Norway, and is an established global developer of ground-mount and commercial rooftop photovoltaic ("PV") solar energy solutions. Scatec has been developing a utility-scale solar PV project in Iron County, Utah and, therefore, the determination of the avoided cost methodology in this proceeding may have a critical impact on the project's economics.

I. EXECUTIVE SUMMARY

Both federal and Utah law have established policies encouraging the development of renewable energy, including solar, through PURPA.[1] Although many solar facilities greater than 3 MW are already operating in Southwestern states – including Arizona (624 MW total), California (1,196 MW total), Colorado (100 MW total), Nevada (152 MW total), and New Mexico (331 MW total) – no such facilities have been built in Utah.[2] The record contains undisputed evidence that Southern Utah provides potential solar operating conditions that are just as good – if not better – than the rest of the Southwest.[3] The primary impediment to getting such resources developed, therefore, has been policy implementation.

PacifiCorp's methodology for determining avoided costs under its Schedule 38 has not advanced these federal and state policy goals effectively. As Ms. Wright's unrefuted testimony explained, "There have been no renewable QF's developed using the Proxy/PDDRR method"

[1] *See, e.g.*, UTAH CODE ANN. § 54-12-1.

[2] *See* Public Witness Document 1 (Solar Energy Industries Association, Utility Scale Solar Projects in the United States Operating, Under Construction, or Under Development, Updated May 9, 2013).

[3] Resta Direct Testimony at p. 11, lines 10-12; Kelly Stowell's Public Witness Testimony, June 13, 2013.

under Schedule 38.[4] The fact that the cost to construct large-scale solar is at an all-time low and is price-competitive with other energy sources[5] further highlights the need for the Commission to adjust PacifiCorp's avoided cost methodology to help increase the likelihood that ratepayers can benefit from cost-effective, clean, large-scale solar.

Time is of the essence. The federal income tax credit for solar is set to expire December 31, 2016.[6] Furthermore, the cost for capital remains at historic lows, commodity prices are low, and wages remain stable. Without quick action, solar developers – and ratepayers – may lose the opportunity to benefit from these favorable circumstances.

As explained below, to increase the likelihood of Utah developing a reasonable amount of cost-effective large scale solar, the Commission should consider establishing a solar market proxy methodology, tied to a requirement that PacifiCorp include a reasonable amount of this resource type in its portfolio. To the extent that the Commission continues to order the use of the Proxy/PDDRR methodology for solar QFs under Schedule 38, the Commission should find that PacifiCorp's reliance on forward price curves to establish its avoided capacity cost is inappropriate, based on speculative market prices, and inconsistent with guidance from the Federal Energy Regulatory Commission ("FERC"). The Commission instead should require a capacity payment each year based on a combined-cycle combustion turbine ("CCCT"). The Commission should reject the methodology PacifiCorp created for valuing solar capacity, and instead utilize the effective load carrying capability method ("ELCC") or the capacity factor approximation method ("CFAM"), which are more commonly used in the industry. The

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[4] Wright Direct Testimony at p. 19, lines 342-343.

[5] *See, e.g.*, Resta Direct Testimony at p. 11, lines 24-25.

[6] *See*, *e.g.*, H. Tr. at p. 227, lines 23-25; Wright Direct Testimony at p. 16, n.20.

Commission also should recognize that PacifiCorp's increased and heavy reliance on front office transactions ("FOTs") creates significant risks and, to the extent used to set avoided cost rates, exacerbates the resulting inaccuracies. In addition:

- The Commission should prohibit PacifiCorp from imposing a solar integration at this time, due to a lack of sufficient evidence supporting a specific rate.
- The Commission should provide clear guidance QF queue practices and when a QF should be removed from the queue.
- The Commission should deny PacifiCorp's request to require all QFs to transfer their renewable energy credits ("RECs") to the utility through a Schedule 38 contract; doing so would conflict with FERC precedent and state and federal policy goals of encouraging renewable energy development.

II. ARGUMENT

A. To Increase the Likelihood of Utah Developing Cost-Effective Large Scale Solar, the Commission Should Consider Establishing a Solar Market Proxy Methodology.

As discussed in Mr. Resta's direct testimony,[7] Scatec supports the Commission applying a market proxy methodology that is specific to solar, coupled with a requirement that PacifiCorp include in its integrated resource plan (IRP) (or otherwise) *a specific amount or percentage of large-scale solar capacity within its capacity resource mix*. To address any concerns that a market proxy methodology tied directly to the cost of solar might require PacifiCorp to enter into market proxy-based solar contracts before such capacity is called for in the IRP, Scatec would not oppose the Commission placing timing or additional capacity constraints on when a market proxy-based contract for solar could commence (*e.g.*, not allow a market proxy contract to start until the year the solar capacity is called for in the IRP or as ordered by the Commission). This approach would avoid the potential problem PacifiCorp seeks to address with the current application of the market proxy for wind.

[7] Resta Direct Testimony at pp. 8-12.

B. When Using the Proxy/PDDRR Methodology, Large-Scale Solar Deserves a Capacity Payment Every Year Based on a Methodology That Places a Reasonable Value on the Benefits It Brings to the Grid.

Regarding the Proxy/PDDRR methodology, PacifiCorp's proposed methodology for valuing capacity under Schedule 38 – particularly for solar – is flawed, based on speculative market prices, and inconsistent with FERC guidance. As explained below, PacifiCorp is capacity deficient every year. "Access" to the market is not a committed resource, and reliance on speculative forward price curves does not provide an accurate measure of the capacity costs PacifiCorp actually avoids by obtaining a long-term contract with a QF. Furthermore, PacifiCorp's recommended capacity "contribution" valuation for solar is seriously flawed and is substantially lower than the more reasonable methodologies recommended by other parties in this proceeding. The Commission, therefore, should adopt either the effective load carrying capability method ("ELCC") or the capacity factor approximation method ("CFAM").

1. PacifiCorp Is Capacity Deficient Every Year, and a QF Is Therefore Entitled to a Reasonably Calculated Capacity Payment Each Year.

PacifiCorp "is in a constant period of resource deficiency,"[8] as reflected in its 2013 Integrated Resource Plan ("2013 IRP"). This deficiency starts at 824 MW for the current year and climbs to 2,308 MW for year 2022.[9] Even Company witness Duvall acknowledged that PacifiCorp is resource deficient, and that not yet executed FOTs (*i.e.*, "firm" power purchase contracts entered into for a year in duration each year) will avoid the need to build new generating capacity (until 2024).[10] Under such circumstances, FERC requires a utility to pay a QF both for energy *and capacity*. Pursuant to FERC Order No. 69, "If a qualifying facility offers

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[8] Wright Sur-Rebuttal Testimony at lines 221-222.

[9] Resta Sur-Rebuttal Testimony at p. 3, lines 63-69 (citing and discussing 2013 IRP).

[10] H. Tr. at p. 67, lines 12-16 (admitting that, but for the fact that PacifiCorp will enter into FOTs in the future, it will have insufficient capacity).

energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to . . . reduce firm power purchases from another utility, then rates for such purchase will be based on the avoided capacity and energy costs."[11] FERC explains further that "an avoided cost rate need not include capacity *unless the QF purchase will permit the purchasing utility to avoid* building or *buying future capacity*."[12]

PacifiCorp fails to comply with this directive when treating future, hypothetical FOTs as the deferred resource establishing its avoided cost, because this approach fails to provide a separate capacity payment based on an actual cost avoided from having to obtain additional capacity. Furthermore, assuming arguendo that setting avoided cost at an FOT actually included a capacity component, the method by which PacifiCorp estimates its costs for FOTs for capacity purposes is too speculative to provide an accurate capacity valuation. PacifiCorp's self-generated forward price curve represents neither the price PacifiCorp actual paid for a firm power purchase of the length in question, nor *bona fide* offers from sellers to enter such agreements. Absent from the record is evidence of sellers in the market submitting *bona fide* offers that resemble PacifiCorp's price curve – that is, someone willing to sell firm power to the Company for the amount of capacity it needs for a term that covers the full time period in question (*i.e.,* when new plant construction becomes the deferred resource). In fact, PacifiCorp witness Duvall admitted he does not know if the Company could in fact find a seller willing to enter into a long-term contract for firm power at its forward price curve rate for the applicable

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[11] *Small Power Production and Cogeneration Facilities: Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. Regulations Preambles 1977-1981 ¶ 30,128 at ¶ 30,865 (1980) ("Order No. 69").

[12] *City of Ketchikan*, *Alaska*, 94 FERC ¶ 61,293, at p. 62,062 (2001) (emphasis added).

length of time.[13] The price curve is merely a prediction of what the price *might* be for PacifiCorp to enter into annual firm power purchases each year.[14]

The problem stems (in part) from PacifiCorp confusing market access with actual or committed capacity. PacifiCorp witness Duvall (despite admitting that the Company is resource deficient[15]) characterizes the Company as experiencing a "sufficiency period"[16] because it has *access* to firm energy in the wholesale electricity markets.[17] Market "access," however, does not constitute committed capacity. Until PacifiCorp enters into or receives a *bona fide* offer to enter into a power purchase agreement with a specific price, plus terms and conditions that can evidence the firmness and other characteristics of the product, the Company does not have a valid basis for its avoided cost calculation. Tellingly, Mr. Duvall refused to take a position on whether there is value in locking in a long-term contract with a QF to reduce future price risks because he asserts that it depends on "the commercial terms that went along with that price."[18] The Company cannot simultaneously claim that forward price curve estimates (which do not represent *bona fide* offers) are sufficiently firm and measureable to value and serve as the basis

[13] H. Tr. at p. 50, lines 22-25 (admitting he did not know if the Company could find a producer willing to commit to a long-term contract at PacifiCorp's forward price curve estimate).

[14] Although the first six years of PacifiCorp's forward price curve considers market data (i.e., "based on broker close or market prices" actually available to PacifiCorp), H. Tr. at p. 51, lines 10-12, it does not represent a *bona fide* offer from a seller that PacifiCorp could accept and execute today to fulfill its entire FOT needs for that time period. Duvall admitted that the forward price curve merely represents a composite of market quotes of various types and lengths that do not represent an actual market offer. H. Tr. at 52, lines 1-6.

[15] H. Tr. at p. 67, lines 12-16.

[16] *See, e.g.*, H. Tr. at p. 21, lines 4-13; p. 68, lines 20-24.

[17] H. Tr. at p. 67, lines 19-23.

[18] H. Tr. at pp. 60-61, lines 25-1.

for its avoided cost calculation, yet a long-term power purchase agreement with QF – an agreement drafted by the Company – is not.

PacifiCorp's approach to basing avoided capacity costs on a speculative forward price curve for energy, in fact, is inconsistent with FERC guidance. Although the FERC definition for avoided cost includes consideration of purchases from "another source,"[19] the measurement of that other source must not be speculative. FERC's Order No. 69 explains that "[t]he rate for such a purchase should thus be based on the price at which such power is purchased, or can be expected to be purchased, *based upon bona fide offers from another utility*."[20] The forward price curve relied on by PacifiCorp does not constitute a *bona fide* offer under Utah law. Under Utah state law,

> A bona fide offer is one made in good faith which, on acceptance, would be a valid and binding contract. *See Jones v. Riley*, 471 S.W.2d 650, 659 (Tex.App.1971). For an offer to be one that would create a valid and binding contract, its terms must be definite and unambiguous. *See Kipnis v. Mandel Metals, Inc.*, 318 Ill.App.3d 498, 251 Ill.Dec. 855, 741 N.E.2d 1033, 1037 (2000).[21]

PacifiCorp's forward price curves do not represent an offer (or offers) available for PacifiCorp to accept to become a valid and binding contract, starting today, to fill the Company's needs for the extent of its so-called "sufficiency" period.

Other state commissions have rejected the use forward wholesale market price estimates to measure avoided costs. The Oklahoma Corporation Commission explained:

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[19] 18 C.F.R. § 292.101(b)(6) (2012) (defining "avoided cost" as "the incremental cost to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source").

[20] Order No. 69 at ¶ 30,884 (emphasis added).

[21] *DCM Invest. Corp. v. Pinecrest Invest. Co*., 34 P.3d 785, 788 (Utah 2001).

> The Commission further finds that there is no evidence any firm market purchases or bona fide offers were in place on [the date the QF established a legally enforceable obligation under PURPA]. The Commission further finds that, even had "offers" existed on [the date the QF established a legally enforceable obligation under PURPA], the "offers" [the utility] relies on as a basis for its avoided costs are mere price quotations or invitations to entertain an offer and, even if accepted by [the utility], would not be binding on the seller and, therefore, these offers do not satisfy PURPA's requirement that offers be bona fide.[22]

The North Carolina[23] and Oregon[24] commissions reached similar conclusions.

2. The Commission Should Reject PacifiCorp's Flawed Methodology for Valuing Solar Capacity and Instead Adopt the ELCC or CFAM Methodology.

Regarding how to calculate solar's capacity value, the Commission should reject PacifiCorp's approach, and instead adopt the effective load carrying capability method ("ELCC") or the capacity factor approximation method ("CFAM").

As Duvall explained in his Direct Testimony, the Commission has not previously addressed the proper methodology for determining solar's capacity value.[25] Here, PacifiCorp

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[22] *Application of Lawton Cogeneration, L.L.C. for Establishment of Purchased Power Rates and a Purchase Power Contract with AEP-Public Service Company of Oklahoma Pursuant to PURPA*, Oklahoma Corporation Commission, Order No. 483091 in Cause No. PUD 200200038 (November 26, 2003), at 13, available at: http://imaging.occeweb.com/AP/Orders/000F91D3.pdf ("*Lawton Order*"), *aff'd sub nom., Public Service Co. of Okla. v. State. ex rel. Okla. Corp. Comm'n*, 115 P.3d 861 (Okla. 2005); *see also id.* ("To qualify as a basis for determining a utility's avoided costs, power purchases must be firm power purchases or bona fide offers and must be included in a utility's expansion plans.").

[23] *In the Matter of Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities – 2004*, 2005 N.C. PUC LEXIS 1370, at *71 (North Carolina Utilities Commission 2005) ("Duke's proposal to use market data to calculate avoided capacity costs should be rejected and that all avoided capacity costs should continue to be based on actual investment costs that would be avoided because of the existence of a QF.").

[24] *Staffs Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, 2005 Ore. PUC LEXIS 242, at *68 (2005) (ordering the utility "to discontinue using the market-based methodology" and noting that "at some point the increase in demand warrants the utility making plans to build or acquire long-term generation resources").

recommended valuing solar capacity by measuring the level of power achieved or exceeded by solar resources in 90 percent of the largest 100 summer peak load hours for the years 2007-2011.[26] Because PacifiCorp has limited historical data for solar, it relied on simulated hourly solar profile data developed by the National Renewable Energy Laboratory ("NREL"). The results of this study (11.5 percent for energy-oriented facilities and 25.9 percent for peak-oriented and tracking facilities), however, are seriously flawed and do not accurately measure the capacity value Scatec's Iron County solar project is likely to provide, and therefore should be rejected.

PacifiCorp's solar study – unlike its wind study – does not rely on actual data or actual solar projects as they performed in the PacifiCorp system. Instead, PacifiCorp based its study "on a simulated class of solar resources representative of locations throughout the PacifiCorp's service territory."[27] PacifiCorp selected the following five locations: Pocatello, ID; Yakima, WA; Pendleton, OR; Lander, WY; and Salt Lake City, UT.[28] However, as Mr. Resta testified – and not a single witness refuted – PacifiCorp's approach underestimates the capacity value for a solar project in Southern Utah.[29]

On cross-examination, PacifiCorp witness Duvall made several admissions acknowledging a multitude of unfair aspects of its hypothetical aggregation study results. For instance, Duvall admitted that the five locations PacifiCorp selected for its study had no bearing

(...continued)

[25] Duvall Direct Testimony at p. 16, lines 338-339.

[26] Duvall Direct Testimony, Exhibit A (Historic Capacity Contribution of Wind and Solar Resources).

[27] *Id.* at p. 5.

[28] *Id.*

[29] Resta Direct Testimony at p. 10, lines 21-23.

on where people planned to develop large-scale solar projects.[30] Duvall also admitted that PacifiCorp would use the study results and ignore the actual capacity value a project (such as Scatec's) would provide based on its specific location, even though PacifiCorp could have picked data from locations that match up to those for specific project locations (such as Iron County for Scatec).[31] Mr. Duvall even admitted on cross-examination that the Company's proposed aggregation methodology would lead to unfair results for higher-performing solar facilities by punishing a QF that in fact provides a higher capacity value than the hypothetical aggregation used in the study.[32]

Scatec supports the recommendation in Ms. Wright's sur-rebuttal testimony for Utah Clean Energy ("UCE") that the Commission adopt either the ELCC, or the CFAM approach as a reasonable approximation method.[33] In contrast to PacifiCorp's proposal to utilize the highest 100 load hours per year for five years in its study, Ms. Wright's proposal that the Company perform the CFAM analysis using its top 10% load hours, as recommended in the NREL study, would provide a more accurate and appropriate valuation of the capacity solar contributes.[34]

To the extent the Commission believes adopting an interim approach is appropriate, Scatec supports the Division of Public Utilities' proposal to use interim capacity values for solar between 68% (fixed axis) and 84% (tracking) using data estimates specific to Salt Lake City. Although it would be better to use data based on the specific location for a solar QF applicant, on

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[30] H. Tr. at p. 72, lines 20-24.

[31] H. Tr. at p. 75-76, lines 19 -15.

[32] *Id*.

[33] Wright Sur-Rebuttal Testimony, lines 170-177.

[34] Wright Rebuttal Testimony, lines 179-182.

an interim basis, these percentages provide a more accurate measurement than PacifiCorp's methodology.

C. PacifiCorp's Overreliance on FOTs Places Significant Risks and Uncertainties on Ratepayers.

PacifiCorp's newly increased reliance on FOTs for both capacity needs and establishing the avoided cost rate creates significant risks. PacifiCorp's decision to push back the date when the deferred resource involves actually placing steel in the ground increases the speculative nature of PacifiCorp's forward price curves and further dampens the avoided cost capacity rate below more realistic estimates. This approach robs ratepayers of the opportunity to secure stable sources of reasonably priced renewable energy.

PacifiCorp's heavy reliance upon future power purchases increases market risks for ratepayers and represents a reversal of Company policy. As a Commission order explained in PacifiCorp's 2008 Integrated Resource Plan ("2008 IRP") proceeding, "the Company states one of its corporate goals is to reduce" reliance on FOTs.[35] The Commission, nevertheless, was "concerned with the Company's stated confidence in managing the risk associated with reliance on the market for a significant portion of its customers' power requirements."[36] That IRP increased reliance on FOTs only up to 7.7 percent by 2018.[37] In contrast, the 2013 IRP well exceeds percentage levels that made the Commission "concerned," starting at 7.9 percent reliance for 2013, and rising to 11.7 percent by 2022.[38]

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[35] *In the Matter of the Acknowledgment of PacifiCorp's Integrated Resource Plan*, 2010 Utah PUC LEXIS 78, at *38-*39 (2010).

[36] *Id.* at *46.

[37] *Id.* at *43.

[38] Resta Sur-Rebuttal Testimony at lines 92-98; *see also* Resta Exh. A, 2013 IRP, p. 229.

The Commission's concern is certainly warranted, based on prior experience. During the period April through June 2001, PacifiCorp entered into twelve power purchase agreements with prices between $126 per MW/h and $262 per MW/h (weighted average price of $181 per MW/h, in 2001 dollars).[39] Once market prices dropped, PacifiCorp filed a complaint against the sellers asking FERC to retroactively reduce the rates. FERC denied PacifiCorp's complaint. The presiding administrative law judge did not mince words:

> PacifiCorp was a large and knowing player in this business, and it understood what it was getting into when it purchased power in the then-prevailing forward markets. Having voluntarily strolled into the jungle, it cannot be heard to complain that it found tigers there.[40]

PacifiCorp's increased reliance on FOTs to set avoided cost capacity rates represents a decision to stroll even deeper into the jungle. Applying a reasonable avoided cost methodology that results in additional QF committed capacity will reduce this risk.

D. The Record Contains Insufficient Evidence to Support a Solar Integration Charge.

The Commission should reject PacifiCorp's request to impose a solar integration charge because the record fails to contain sufficient evidence to support one at this time. Although the Company conducted a study based upon its experience with wind integration, neither the Company nor any other party conducted a similar study for solar or provided substantial evidence demonstrating what that cost might be.[41]

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[39] *PacifiCorp v. Reliant Energy Services, Inc.*, 102 FERC ¶ 63,030, *order on initial decision*, 103 FERC ¶ 61,355, 105 FERC ¶ 61,184 (2003), *aff'd sub nom. PacifiCorp v. FERC*, 143 Fed. Appx. 785 (9th Cir. 2005).

[40] *PacifiCorp*, 102 FERC ¶ 63,030, at P 89.

[41] *See, e.g.*, Wright Rebuttal Testimony at p.17, lines 355-358; Abdulle Direct Testimony at p. 13, lines 243-255.

Furthermore, PacifiCorp's wind-based integration study failed to take into account large savings PacifiCorp expects to achieve for integrating renewables by joining an energy imbalance market ("EIM") to be operated by the California Independent System Operator.[42] PacifiCorp recently explained to FERC that an "EIM in the West has the potential to produce benefits for PacifiCorp's customers" and "more economically serving the load of all EIM participants."[43] These economic efficiencies in particular, according to PacifiCorp, will reduce the cost for integrating variable energy resources like solar.[44]

Although Dr. Abdulle's solar integration charge proposal is more reasonable than PacifiCorp's because it attempts to take into account solar's less variable nature than wind, the more appropriate approach at this time would be to prohibit PacifiCorp from imposing a solar integration charge until it has some actual experience with large-scale solar on its system that takes into account the expected savings from the proposed EIM. PacifiCorp's own witness explained (in response to a question from the Chairman) that, "as long as it had no precedential value carrying on to IRP or any other forums, then *it would be less of a concern to the Company if we were to just wait*" to establish a solar integration charge.[45]

Given the lack of evidence demonstrating an appropriate solar integration charge at this time, and PacifiCorp's own admission that waiting before establishing a solar integration charge is "less of a concern," the Commission should not impose a solar integration charge at this time.

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[42] H. Tr. at p. 82, lines 16-21.

[43] Motion to Intervene of PacifiCorp and Comments in Support, FERC Docket No. ER13-1372-000, at 4 (filed May 21, 2013).

[44] *Id.* at 5 (explaining how "[t]he EIM will improve the ability to integrate and manage variable energy resource deviations and smooth power flows so that variable energy is effectively integrated into PacifiCorp's balancing authority areas").

[45] H. Tr. at p. 108, lines 5-8 (emphasis added).

E. The Commission Should Develop New Rules Governing QF Queue Management to Limit PacifiCorp's Unfettered Discretion.

The current rules governing PacifiCorp's management of the QF queue are ambiguous, lack transparency, and provide the Company an unreasonable amount of discretion that can be applied in a discriminatory manner. The Commission should require PacifiCorp to amend Schedule 38 to provide additional details governing the queue management process or hold a technical conference to develop such rules. In particular, the Commission should help craft objective and transparent rules that dictate when PacifiCorp should remove a QF from the queue such that it does not artificially decrease the avoided cost rate offered to lower-positioned QFs.

QF queue position can significantly impact the avoided cost rate PacifiCorp calculates for a particular applicant. As Company witness Clements explained, "Since avoided costs are based on marginal costs, the resource that is at the top of the queue will avoid the highest cost resource. And then as you move down the queue, you get to lower and lower cost resources." [46] Mr. Clements also recognized that queue position can have "a significant impact" on a QF's capacity payments.[47]

According to PacifiCorp witness Clements, the Company will remove a QF from the queue if it "deem[s] that the QF is no longer actively negotiating power purchase agreements or actively moving forward in the QF process."[48] Schedule 38 does not spell out this standard in an objective or measurable manner. PacifiCorp, therefore, has the discretion to determine what constitutes "actively negotiating." A liberal view of "actively negotiating" could lead to PacifiCorp keeping several QFs in the queue for a longer amount of time than appropriate, and

[46] H. Tr. at p. 133, lines 4-7.

[47] H. Tr. at p. 133, lines 21-23.

[48] H. Tr. at p. 134, lines 2-4.

that are unlikely to obtain a Schedule 38 contract in the near future, thereby pushing capacity prices down for the QFs lower in the queue. This scenario could result in a QF with a lower position obtaining an avoided cost rate that is lower than what it deserves or – even worse – making the project not viable. Ms. Wright accurately described the problem in her testimony.[49]

F. The Commission Should Continue Its Current Policy That RECs Are Owned by the QF Absent a Negotiated Contract Provision to the Contrary.

The Commission should maintain its current policy that a QF retains the RECs, absent a *negotiated* contract providing otherwise. This policy is consistent with FERC's interpretation of PURPA, the Utah Code, and the rulings of this Commission respecting REC ownership.

PURPA and FERC orders interpreting that statute provide that REC ownership properly lies with the QF where, as here, the state has unbundled RECs from the sale of power. In *American Ref-Fuel Co.*, 105 FERC ¶ 61,004 (2003), *order denying reh'g,* 107 FERC ¶ 61,016 (2004), FERC explained that states "have the power to determine who owns the REC in the initial instance, and how they may be sold or traded," yet PURPA "determine[s] the rate which electric utilities must offer to purchase electric energy from QFs." FERC's regulations at 18 C.F.R. § 292.304(e) set forth the factors to be considered to calculate PURPA's avoided cost rate, and they do not include environmental attributes. As FERC recently ruled, "a state may take action under PURPA only to the extent that the action is in accordance with…[FERC's] regulations."[50]

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[49] Wright Rebuttal Testimony, p. 7, lines 121-128 ("Many QFs never get built; therefore, QFs that are farther down in the queue—that do get contracted and built—may be given an artificially lower price if QF projects higher in the queue are not built. If my understanding is correct, this practice is potentially discriminatory to QF projects.").

[50] *Grouse Creek Wind Park, LLC*, 142 FERC 61,187 at P 33 (March 15, 2013).

Governing the issue here, FERC recognized that state law that allows for RECs to be unbundled and traded demonstrates that the avoided cost rate does not include payment for the environmental attributes:

> The very fact that RECs may be unbundled and may be traded under State law indicates that the environmental attributes do not inherently convey pursuant to an avoided cost contract to the purchasing utility.[51]

In contrast, the positions of PacifiCorp and the Office directly violate FERC precedent. For instance, Mr. Clements stated at the hearing that the REC is "an attribute that comes with the purchase of capacity and energy,"[52] indicating that PacifiCorp should receive the REC simply because it purchases the energy. Similarly, Mr. Vastag for the Office claims that the utility should receive the RECs because the QF is provided "sufficient compensation" for the REC because of the utility's "obligation to purchase the power, to be their customer."[53] Notably, however, he did not know whether the policy he is advocating is consistent with Commission decisions.[54] These positions, in fact, conflict with *American Ref-Fuel* and FERC's insistence that PURPA does *not* allow a state to assign ownership of RECs "on the grounds that the avoided

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[51] *American Ref-Fuel Co*., 107 FERC ¶ 61,016 at P 16 (emphasis added).

[52] H. Tr. at p. 165, lines 23-24.

[53] H. Tr. at p. 207, lines 15-19; H. Tr. at p. 208, lines 11-20.

[54] H. Tr. at p. 204, lines 21-23. While the Office supports Pacificorp now, it may find that the ultimate consumer in Utah may not see the purported benefit of this position at all, or at least not until the distant future. The Washington Utilities and Transportation Commission recently ruled that "the evidence produced in this docket *demonstrates that PacifiCorp has concealed or vastly underestimated the amount of its REC sale proceeds and seeks to profit from that conduct by retaining millions of dollars that rightfully belong, and have always belonged, to its ratepayers." Washington Utilities and Transportation Commission v. Pacificorp d/b/a Pacific Power & Light Co.,* Docket UE-100749, Order 11, at p. 11 (Nov. 30, 2012)(emphasis added), available at http://www.wutc.wa.gov/rms2.nsf/vwDktShFormChange/64E3E6D6366F043D88257AC6007A17EF.

cost rates in their PURPA PPAs compensate the QF's for RECs in addition to energy and capacity."[55]

Mr. Vastag's suggestion that contract law principles require that the utility receive "consideration" in the form of RECs, in return for its obligation to purchase from the QF, simply ignores the fact that Congress stepped in through PURPA and mandated that the utility purchase from the QF. In *Morgantown Energy Associates*, 139 FERC ¶ 61,066 at P 47 (2012) ("*Morgantown I*"), for instance, FERC invalidated a state commission's attempts to transfer RECs to the utility based upon claims essentially identical to that made by Mr. Vastag, rejecting the position "that avoided cost rate contracts under PURPA provide a substantial consideration to the QF sufficient to compensate not only for the energy and capacity contemplated in those contracts, but also for the RECs produced by the QFs."[56]

In his sur-rebuttal testimony (pp. 11-12), Mr. Resta demonstrated that Utah's legislature unbundled RECs from the underlying energy and that, as this Commission ruled in *Cottonwood*, that statutory action fully supports the RECs remaining with the QF. For instance, UTAH CODE ANN. § 54-17-602 (4)(c) provides that, in meeting its renewable energy goals, an electric utility can rely upon a "bundled or unbundled renewable energy certificate." As the Commission held in *Cottonwood*, that provision of the Utah code supported the conclusion there that RECs are owned by the QF, since "[t]hat statute permits unbundled RECs to be used for compliance with Utah's carbon emission reduction requirements."[57]

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[55] *Morgantown Energy Assoc's*, 140 FERC ¶ 61,223 at P 24 (2012) (*Morgantown II*).

[56] *Morgantown I*, 139 FERC ¶ 61,066 at P 47, n.68 (citing underlying West Virginia order).

[57] Docket No. 10-035-15, *"In the Matter of the Complaint of Cottonwood Hydro, LLC vs. Rocky Mountain Power"* (May 27, 2010) ("*Cottonwood*"), at p. 10.

Although Mr. Clements conceded on cross-examination that the Utah statute recognizes the unbundling of RECs from power,[58] he nevertheless claimed that the statute does not prevent the REC from being rebundled, that is, "[i]t doesn't prohibit it from coming with the energy."[59] His argument, however, contravenes FERC's insistence in *Morgantown II* that PURPA does not allow a state to assign ownership of RECs "on the grounds that the avoided cost rates in their PURPA PPAs compensate the QF's for RECs in addition to energy and capacity."[60]

Allowing QFs to retaining REC ownership is also fully consistent with the purpose of the Utah statutory provisions addressing small power production, while mandating that the utility owns them would contravene such legislative goals. Section § 54-12-1(2) of the Utah Code (Small Power Production and Cogeneration) establishes a clear policy to encourage the development of QFs (*i.e.*, small power production facilities, which are certain renewable projects, and cogeneration facilities):

> It is the policy of this state to encourage the development of independent and qualifying power production and cogeneration facilities, to promote a diverse array of economical and permanently sustainable energy resources in an environmentally acceptable manner, and to conserve our finite and expensive energy resources and provide for their most efficient and economic utilization.

Similarly, UTAH CODE ANN. § 54-12-2(4) imposes the goal that "[t]he commission may adopt further rules which encourage the development of small power production and cogeneration facilities." Forcing QFs to transfer their RECs to the utility contravenes these state statutory goals.

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[58]H. Tr. at p. 130, lines 6-10.

[59] H. Tr. at p. 166, lines 4-5.

[60] *Morgantown II*, 140 FERC ¶ 61,223 at P 24.

III. CONCLUSION

Scatec respectfully requests that the Commission grant the relief requested herein, including the following:

- Adopt a market proxy methodology for solar, coupled with a minimum requirement of large-scale solar in PacifiCorp's resource portfolio.
- For the Proxy/PDDRR methodology, require PacifiCorp to provide a capacity payment each year it is capacity deficient (which is every year), based on a CCCT instead of the speculative forward price curves, utilizing the ELCC or CFAM method to calculate solar's capacity value.
- Prohibit PacifiCorp from imposing a solar integration charge at this time.
- Develop objective rules to govern when PacifiCorp should remove a QF from the queue to ensure that a stale project does not artificially depress the avoided cost rates for QFs with a lower position.
- Maintain the Commission's policy of allowing a QF to retain the RECs.

Respectfully submitted,

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