Sophie Hayes (12546)
Meghan Dutton (14440)
Utah Clean Energy
1014 2nd Ave.
Salt Lake City, UT 84103
801-363-4046
Attorney for Utah Clean Energy

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Request of Rocky Mountain Power for a Limited Stay of Schedule 38 Qualifying Facility Procedures	**DOCKET NO. 14-035-65** **Response of Utah Clean Energy to Rocky Mountain Power's "Request for Limited Stay"**

Pursuant to Utah Code Ann. Section 63G-4-204 and Utah Admin. Code Section R746-100-3, Utah Clean Energy provides the following response to the Motion of Rocky Mountain Power for a Limited Stay of Schedule 38 Qualifying Facility Procedures. For the following reasons, Utah Clean Energy recommends that the Commission deny Rocky Mountain Power's request for a stay because 1) it is ambiguous, 2) the Company has not demonstrated it is warranted, 3) it violates PURPA, 4) it is not in the public interest and 5) the Company must first make all efforts to strictly comply with its tariff. Utah Clean Energy recommends that the Commission require the Company to provide a plan to secure compliance with Schedule 38 as currently filed, such that the requirements of PURPA may be fulfilled.

BACKGROUND

The Public Utilities Regulatory Policy Act of 1978 ("PURPA") and the regulations implementing PURPA require utilities to purchase electricity from qualifying facilities ("QF") at

a rate equal to the utility's full avoided cost.[1] PURPA recognizes that monopoly utilities generally have an incentive not to contract with independent power producers. Therefore, PURPA regulations and FERC rules take care to protect the interests of small power producers against more powerful monopoly utilities and their nearly unilateral power over power purchase agreements.

In its August 2013 Order in Docket No. 12-035-100, the Utah Public Service Commission (the "Commission") approved an avoided cost method to determine indicative prices for power purchases from certain Qualifying Facilities projects larger than three megawatts.[2] Since this time, Rocky Mountain Power (the "Company") has received requests for indicative prices from more than 25 Utah QF projects totaling over 1700 megawatts of nameplate capacity.[3] On May 22, 2014, the Company filed a motion with the commission for approval of a limited stay of Schedule 38.[4]

DISCUSSION AND RECOMMENDATIONS

1. ***The Company's Motion for a limited stay of Schedule 38 must be denied because it is ambiguous.***

In the Company's Request for Limited Stay, the Company uses inconsistent language when referring to the provisions to which they request the stay apply. In the introductory paragraph on page one, the Company requests that the stay apply to "certain provisions of Schedule 38." In contrast, in paragraph 6, the Company requests that the stay apply to "the requirements of paragraph I.B.3 of Schedule 38." Then, in paragraph 7, the Company requests

[1] 16 U.S.C. § 824a-3 (1978); 18 C.F.R. §§ 292.303-304.
[2] Docket No. 12-035-100*, 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* (Issued August 16, 2013).
[3] *Rocky Mountain Power's Request Limited Stay* (May 22, 2014), Docket No. 14-035-___, page 2.
[4] *Id.* At 1.

"[a] stay of the application of Schedule 38, specifically paragraph I.B.3," and a "limited stay of the requirements of Schedule 38." Finally, in paragraph 8 of its request, the Company asks for a "stay of the 30 day requirement contained in paragraph I.B.3 of Schedule 38." This inconsistent language makes it unclear whether the Company is requesting a stay of only paragraph I.B.3 of Schedule 38, or Schedule 38 in its entirety. Utah Clean Energy (UCE) recommends that the Company be required to clarify the scope of its Request for Limited Stay.

2. ***The Company's Motion for a limited stay of Schedule 38 should be denied because the Company has not demonstrated that a stay is warranted.***

While the Company states in paragraph 7 of its request that, "it has just become impossible to keep up with the current volume of requests for pricing the Company has received over the past several months," the Company has not provided evidence of why it has become "impossible," or the efforts the Company has taken to try to comply with the requirements of Schedule 38. For example, the Company states in paragraph 4 of its request that it currently has eleven outstanding requests for indicative pricing in Utah, and additional requests, totaling about 250 megawatts. However, this does not indicate the actual number of outstanding requests, or the number of GRID runs that must be completed to meet these requests. Additionally, the Company has not provided information regarding when these requests were submitted, how long they have been pending with the Company or how long it takes to perform a GRID run to determine indicative pricing.

This incomplete picture of the Company's position is insufficient to support the extraordinary measure of suspending Schedule 38 (or individual portions of Schedule 38), even on a limited basis. Essentially, the Company has presented inconvenience as a justification for non-compliance with its tariff and with the requirements of PURPA. Additionally, the Company

has not indicated the efforts it has made to comply with its tariff. For example, when the Company first realized that it was falling behind on providing indicative prices, did it allocate more resources to performing indicative pricing analysis in a timely manner? Without this pertinent information, it is impossible to know whether any concessions should be made for the Company's inability to meet its tariff requirements, particularly when weighed against the requirements of PURPA.

3. ***The Company's Motion for a limited stay of Schedule 38 must be denied because even a temporary stay of the Schedule violates PURPA.***

A stay of Schedule 38 violates PURPA because it allows the Company to delay entering into power purchase and interconnection agreements with QFs. PURPA and the regulations implementing PURPA recognize that monopoly utilities generally have an incentive not to contract with independent power producers. Therefore, PURPA regulations and FERC rules take care to protect the interests of small power producers against more powerful monopoly utilities and their nearly unilateral power over power purchase agreements. FERC has concluded that utilities may not circumvent PURPA by delaying entering into PPAs or interconnection agreements. PURPA's requirements provide a counterpoint to monopoly utility reluctance to enter into PPAs with small, independent power producers:

> Each qualifying facility shall have the option either (1) To provide energy as the qualifying facility determines such energy to be available for such purchases . . . or (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term…[5]

In a recent wind QF dispute involving Rocky Mountain Power in Idaho that came before FERC, FERC explained that:

[5] 18 C.F.R. § 292.304(d).

> [T]he phrase legally enforceable obligation is broader simply than 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] from delaying the signing of a contract, so that a later and lower avoided cost is applicable*.[6]

This Commission must take care that its decisions implementing PURPA, including its decision on the Company's motion for a limited stay of Schedule 38, do not allow the utility to avoid its obligations under PURPA. Even a temporary stay of Schedule 38, whether in part or in whole, will prevent QFs from accessing their rights under PURPA, and is therefore inconsistent with PURPA and FERC's interpretations of PURPA regulations.

4. The Company's Motion for a limited Stay of Schedule 38 must be denied because a stay is not in the public interest.

Despite the Company's claim in paragraph 7 of its request that a stay of the requirements of Schedule 38 will not cause harm to the Company's customers, a stay of Schedule 38 is not in the public interest because it indicates that Commission orders and utility tariffs are unstable and need not remain in place and effect when it becomes difficult or inconvenient for the utility to comply. Even a temporary stay of the 30 day deadline in paragraph I.B.3 of Schedule 38 is not in the public interest because it creates enormous market and regulatory uncertainty. Not only will the more than 11 projects that are currently waiting for indicative pricing from the utility be denied their rights under PURPA by the delay if the Company's motion is granted, but future QFs will also be harmed by the signal that developers cannot rely on the requirements of tariffs and rate schedules when planning projects, negotiating with the Company and working to secure project financing.

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[6] *Cedar Creek Wind, LLC*, 137 FERC P 61006, at P 9 (2011) (emphasis added).

Furthermore, power purchase agreements ("PPA") with renewable resources at avoided cost pricing represent significant benefits to Utah ratepayers both in terms of economics and risk mitigation over the long term. A long term, flat rate power purchase agreement with a fuel-free resource, like a solar or wind qualifying facility, insulates ratepayers from risks associated with fuel price volatility and carbon regulation. Fuel-free renewable resources are unique among electricity generation resources in that the utility can lock in long-term rates for 20 years or more. Rates for electricity from renewable QFs, can remain stable and not increase for the next 20 years. In the meantime, gas prices will continue to fluctuate and rise over the same 20-year period. In addition to mitigating fuel price risk, renewable QFs will reduce ratepayers' vulnerabilities to emissions-related regulations and externality costs. Carbon regulation, for example, will likely start impacting Utah's energy resource mix within a few years. Bringing renewable resources online in Utah will reduce the state's exposure to compliance costs associated with new carbon regulations. Renewable QF resources provide ratepayers with an opportunity to diversify their resource mix, lock in prices that are not subject to fluctuation or costly pollution controls and bring jobs and economic benefits to the state.

Even a temporary stay of Schedule 38 may prevent viable solar projects from qualifying for the 30% federal Investment Tax Credit ("ITC"). QF projects developed in the near term (before 2016), pursuant to avoided cost power purchase agreements, qualify for the ITC. Therefore, the requested Stay is not in the public interest because it may prevent Utah ratepayers from acquiring a clean, non-polluting, fixed priced PPA at avoided cost rates, made possible by the 30% ITC.

5. The Company's Motion for a limited stay of Schedule 38 should be denied because the Company must first make all efforts to strictly comply with its tariff.

Strict compliance with Schedule 38 is mandatory under Utah law. Utah public utility regulations state that rate schedules, such as Schedule 38, "constitute part of utility tariffs,"[7] and that "[e]ach utility shall abide by the tariff as filed and approved by the Commission."[8] Additionally, rate schedules, including Schedule 38, are approved by Commission order, and as such, must be obeyed.[9] The Company "*shall* do everything necessary or proper in order to secure compliance with and observance of every [Commission] order, decision, direction, rule or regulation by all of its officers, agents and employees."[10] Finally, Utah case law holds that the Commission should require public utilities to comply *strictly* with their tariffs.[11]

As noted above, Schedule 38 was approved by Commission Order and the language of Schedule No. 38 paragraph I.B.3 is clear: "Within 30 days following receipt of all information required in Paragraph 2, the Company *will* provide the owner with an indicative pricing proposal…" (Emphasis added). The mandatory language used in the sections of Utah Code, the regulations and paragraph I.B.3 of Schedule 38, cited above, provide that the Company *must* comply with the 30 day deadline to provide indicative pricing to QFs. The Company admits in paragraph 5 of its Request that the 30-day deadline required in paragraph I.B.3 of Schedule 38

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[7] R746-310-2.

[8] R746-405-1.

[9] U.C.A. § 54-3-23.

[10] *Id.* Moreover, Utah Code Annotated § 54-7-25 provides:

> (1) Any public utility that violates or fails to comply with this title or any rule or order issued under this title, in a case in which a penalty is not otherwise provided for that public utility, is subject to a penalty of not less than $500 nor more than $2,000 for each offense.
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> (2) Any violation of this title or any rule or order of the commission by any corporation or person is a separate and distinct offense. In the case of a continuing violation, each day's continuance of the violation shall be a separate and distinct offense.

[11] "[Tariffs] are filed by the utilities themselves and thus mainly serve their own interests. They should be construed strictly against the utility; and the utility should be required to strictly comply with them; and they must be fair, reasonable and lawful." *Josephson v. Mountain Bell,* 576 P.2d 850, 852 (Utah 1978).

has already expired for three QF projects. For these projects, whether or not a stay is granted by the Commission, the Company has already failed to comply with its tariff.

If the Company is unable to keep up with the volume of indicative pricing requests, the solution is to allocate more resources in order to comply with the tariff, not to stay the tariff and effectively penalize QFs. If the utility is allowed to stay a tariff every time it is difficult or inconvenient to comply with its requirements the tariff is, in effect, nonbinding.

RECOMMENDATION

Rather than allow the Company to avoid its obligations by granting the requested Stay, the Commission should require the Company to provide a plan to secure compliance with Schedule 38 as filed, such that the requirements of PURPA may be fulfilled.

DATED: June 6, 2014.

RESPECTFULLY SUBMITTED,

Utah Clean Energy

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Meghan Dutton
Attorney for Utah Clean Energy