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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of Rocky Mountain Power's	)	Docket No. 14-035-T02
Proposed Electric Service Schedule No. 32,	)	
Service from Renewable Energy Facilities	)	ONI EXHIBIT 2.0

3 **ERRATA AND SUPPLEMENTAL COMMENTS OF ORMAT NEVADA, INC.**

4 Ormat Nevada Inc. ("Ormat") was granted intervenor status in this docket on June
5 9, 2014, and has participated in the proceedings in this Docket. Pursuant to the Utah Public
6 Service Commission's ("Commission") request at the recent December 9, 2014 hearing,
7 Ormat submitted a brief regarding its legal comments and concerns in this matter on
8 January 16, 2015, and hereby submits the following errata and supplemental comments to
9 address the recently amended statutory language in Utah Code § 54-17-801(4)(a).

10 It has come to Ormat's attention that our prior pleading overlooked the most recent
11 amendment to Utah Code §§ 54-17-801(4)(a). *See* S.B. 166, 60th Leg. (2014) ("SB 166").
12 Ormat regrets this oversight. However, Ormat believes it is necessary to express its
13 concerns regarding the legality of the 2014 amendments to Utah Code §§ 54-17-801(4)(a),
14 and the resulting language in Rocky Mountain Power's proposed Schedule No. 32
15 ("Schedule 32"). Ormat understands that this is a late filed errata, but this issue must be
16 raised because, as currently written, Rocky Mountain Power's Schedule 32 creates an
17 unconstitutional violation of the Dormant Commerce Clause.[1]

[1] In short, the Dormant Commerce Clause prohibits all states from enacting legislation that restricts or places undue burdens on out-of-state businesses in favor of in-state business.

18 **I. The 2014 amendment to Utah Code §§ 54-17-801(4)(a) is an unconstitutional**
19 **violation of the Dormant Commerce Clause.**
20
21 The Dormant Commerce Clause arises from the fact that Article 1 Section 8 of the
22 Federal Constitution grants exclusive power over the regulation of interstate commerce to
23 the federal government. Under the Dormant Commerce Clause, "states are prevented from
24 enacting legislation designed to favor in-state economic activity while burdening out-of-
25 state economic activity." *Kleinsmith v. Shurtleff*, 2007 WL 541808, at *6 (D. Utah Feb.
26 16, 2007) *aff'd*, 571 F.3d 1033 (10th Cir. 2009). Discriminatory laws are those that
27 "mandate differential treatment of in-state and out-of-state economic interests that benefits
28 the former and burdens the latter." *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040 (10th Cir.
29 2009) (quoting *Granholm v. Heald,* 544 U.S. 460, 472 (2005)).

30 To determine whether a statute violates the Dormant Commerce Clause, "we first
31 ask whether it discriminates on its face against interstate commerce." *United Haulers*
32 *Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). A
33 law that is facially discriminatory against out-of-state actors is presumed to be
34 unconstitutional. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008) ("A
35 discriminatory law is 'virtually *per se* invalid'").

36 In order to overcome this presumption, a state must demonstrate that the law is
37 necessary to serve a compelling state objective, and that there are no other
38 nondiscriminatory alternatives adequate to achieve the state's "compelling" objective. *See*
39 *Hughes v. Oklahoma*, 441 U.S. 322, 336-37 (1979) ("At a minimum such facial
40 discrimination invokes the strictest scrutiny of any purported legitimate local purpose and
41 of the absence of nondiscriminatory alternatives"); *see also Hunt v. Washington State*
42 *Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977) ("Commerce Clause of itself imposes no

43 limitations on state action . . . save for the rare instance where a state artlessly discloses an

44 avowed purpose to discriminate against interstate goods") (quoting *Dean Milk Co. v.*

45 *Madison*, 340 U.S. 349, 354 (1951)); *City of Philadelphia v. New Jersey*, 437 U.S. 617,

46 624 (1978) ("The clearest example of such [a violation] is a law that overtly blocks the

47 flow of interstate commerce at a State's borders.").

48 Here, it is clear that Utah Code § 54-17-801(4)(a), as it now reads, facially

49 discriminates against all out-of-state energy producers who seek to sell electricity in the

50 State of Utah under a Renewable Energy Contract.[2] Accordingly, the Commission should

51 decline to enforce the most recent 2014 SB 166 amendment, and should allow out-of-state

52 geothermal facilities to participate in Utah's Renewable Energy Contracts, especially those

53 out-of-state facilities that fall within the previous definition under Utah Code § 54-17-

54 601(10).[3]

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[2] Ormat has seen no valid (let alone a compelling/narrowly tailored) reason for this in state limitation other than protecting in state entities by keeping out of state facilities from competing in the Renewable Energy Contract system. *See* Senate Floor Debate on S.B. 166, 60th. Sess. (February, 10, 2014) (statement of Sen. Mark B. Madsen) ("If a project wants to participate, if you want to have a generation project built, a solar panel farm or a windmill farm, it needs to be in this state. We want the economic development here, we want the transmission to occur within the lines, within the State."). Additionally, the SB 166 amendment restricting the definition to only "in state" facilities in entirely inconsistent with Utah's general renewable energy source definition. *See* Utah Code § 54-17-601(10).

[3] Ironically, the Nevada Legislature in 2009 amended its definition of a "renewable energy system" in its renewable portfolio standard. This amendment was enacted under pressure from out-of-state renewable energy developers in order to avoid a similar Dormant Commerce Clause issue. The change eliminated statutory restrictions on out-of-state energy providers, allowing PacifiCorp's various affiliates to bid projects in Nevada. *See* S.B. 358, 75th Leg. (Nev. 2009); NRS 704.7815; *see also* Attachment 1, testimony of Philip Williamson provided in Nevada Public Utilities Commission Docket No. 11-03003 (summarizing PacifiCorp's various regional projects, many of which are located in Utah, that are sold across state lines into Nevada). These PacifiCorp facilities that sell electricity into Nevada have accounted for over 3 million MWh of generation, with total retail sales of approximately $200 million from 2010 through 2013. *See* Attachment 2, Table 24 from Nevada Power Company's Portfolio Standard Compliance Report for Compliance Year 2010, Nevada Public Utilities Commission Docket No. 11-04001.

55 **II. The Commission should decline to enforce an unconstitutional statutory**
56 **provision at this time**
57
58 In light of the U.S. Constitution's supremacy over all federal and state statutory
59 law, the executive branch in all forms of American government has often declined to
60 enforce clearly unconstitutional statutes. *See Freytag v. Commissioner,* 501 U.S. 868, 906
61 (1991) (Scalia, J., concurring) (the executive branch has "the power to veto encroaching
62 laws . . . or even to disregard them when they are unconstitutional."); *Myers v. United*
63 *States*, 272 U.S. 52 (1926) (acknowledging the U.S. President's refusal to abide by a statute
64 he deemed unconstitutional without suggesting that the President had acted improperly in
65 refusing to abide by the statute); *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) (noting that
66 Presidents often sign legislation containing unconstitutional clauses, while stating that they
67 will not comply with the unconstitutional provisions); *see also* Saikrishna Prakash, The
68 Executive's Duty to Disregard Unconstitutional Laws, 96 GEORGETOWN LAW JOURNAL
69 1613 (2008).[4]

70 In other words, if a statutory provision is clearly unconstitutional, the executive
71 branch, whether in the form of a President, Governor, or agency, does not need to wait for
72 a court to declare it unconstitutional. If a statute is unconstitutional, it is unconstitutional
73 from the day it is enacted (or amended), and the Commission may decline to apply its
74 unconstitutional provision.

75 **III. Schedule 32 should be amended by severing the unconstitutional restriction on**
76 **interstate commerce, and should reflect Utah Code § 54-17-601(10)(a)(v).**
77

[4] This is especially true when the statute at issue is similar to other statutes that have already been declared unconstitutional by a court. In this case, Utah Code § 54-17-801(4)(a)'s new exclusionary language is very similar to other unconstitutional state statutes that facially forbade out of state businesses from importing goods into the State.

As noted above, Utah Code § 54-17-801(4)(a), as amended by SB 166, operates as an unconstitutional restriction of interstate commerce. As a result, any requirement that a Renewable Energy Facility be physically located in Utah should be stricken or modified from the proposed language in Schedule 32.

First, in the "Application" section on page 32.1, the first sentence states: "This Schedule is for Customers who would otherwise qualify for Schedules 6, 8 or 9 that desire to receive all or part of their electricity from a Renewable Energy Facility *located in the state of Utah*." (Emphasis added). Ormat respectfully submits that this provision should be amended to remove the requirement that the Renewable Energy Facility be located in Utah. Specifically, Ormat submits that the first sentence should be amended to state: "This Schedule is for Customers who would otherwise qualify for Schedules 6, 8 or 9 that desire to receive all or part of their electricity from a Renewable Energy Facility ~~located in the state of Utah~~, as defined in Utah Code § 54-17-601(10)." Alternatively, the Company could list the allowable renewable energy sources; however, in the interest of brevity given the long definition of renewable energy source in section 54-17-601(10), a direct reference to Subsection 601(10) should be sufficient.

Similarly, on page 32.4, the Company defines Renewable Energy Facility as "[a] generation facility that delivers its energy from a renewable energy source defined in Utah Code Section 54-17-601(1)(b) *and located in the state of Utah* . . ." (Emphasis added). As a preliminary matter, Ormat submits that the statutory reference in this section should reference Utah Code § 54-17-601(10), not Utah Code § 54-17-601(1)(b). Subsection 601(1)(b) relates to the proper calculation of adjusted retail electric sales—not the definition of a "renewable energy source" or "renewable energy facility." Second, this

101 definition again contains a requirement that the facility be located in Utah, in violation of

102 the Dormant Commerce Clause.

103 Ormat submits that the first sentence of this definition should be amended as

104 follows: "**Renewable Energy Facility**: A generation facility that delivers its energy from

105 a renewable energy source, as defined in ~~Utah Code Section 54-17-601(1)(b) and located~~

106 ~~in the state of Utah~~ Code § 54-17-601(10)." Again, a more extensive listing of all allowable

107 renewable energy sources under 54-17-601(10) is also a viable alternative.[5]

108 **IV. Conclusion**

109 Ormat respectfully submits that the 2014 amendment to Utah Code § 54-17-

110 801(4)(a) is unconstitutional because it violates the Dormant Commerce Clause. As a

111 result, Ormat submits that Schedule 32 should be amended to incorporate the modest

112 changes in language proposed by Ormat above to ensure that the Renewable Energy

113 Contracts are open to all renewable generation facilities listed in Utah Code § 54-17-

114 601(10). If the Commission would like a more detailed legal briefing on this issue, Ormat

115 would be happy to submit additional briefing or argument.

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[5] Ormat also notes that Schedule 32 contains several interconnection requirements, including requirements that a Renewable Energy Facility be designated a Network Resource pursuant to PacifiCorp's Open Access Transmission Tariff, and that it enter into an interconnection agreement with the Company that governs the physical interconnection of the Renewable Energy Facility to the Company's transmission or distribution system.

Ormat does not read these provisions to require a "direct" connection to Rocky Mountain Power's system, but rather to encompass the necessary state-level transmission and distribution agreements that will address transmission interconnection and integration costs, and ensure that there is available transmission capacity to deliver the necessary power and energy across the desired path. Ormat acknowledges that if it were to enter into a Renewable Energy Contract using an out-of-state geothermal facility located outside Rocky Mountain Power's service territory, it would be required to obtain the necessary transmission capacity to deliver the geothermal energy to Rocky Mountain Power's system.

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118 DATED this twenty-eighth day of January, 2015.

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122 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2015, I placed a true and correct copy of the above and foregoing **POST HEARING ERRATA AND SUPPLEMENTAL COMMENTS OF ORMAT TECHNOLOGIES, INC.** was served upon the following as indicated below:

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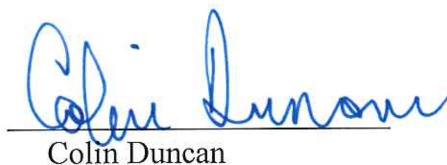

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