Gary A. Dodge, #0897
HATCH, JAMES & DODGE
10 West Broadway, Suite 400
Salt Lake City, UT 84101
Telephone: 801-363-6363
Facsimile: 801-363-6666
Email: gdodge@hjdlaw.com
Attorneys for SunEdison and First Wind

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

| | |
|---|---|
| **In the Matter of Rocky Mountain Power's Proposed Revisions to Electric Service Schedule No. 37, Avoided Cost Purchases from Qualifying Facilities** | **Docket No. 14-035-T04**<br><br>**REPLY COMMENTS OF SUNEDISON AND FIRST WIND REGARDING 25 MW "CAP" LANGUAGE IN SCHEDULE 37** |

SunEdison, LLC and First Wind (the "Commenting Parties") hereby reply to the initial comments filed by other parties in this docket regarding the 25 MW "cap'" of Schedule 37. The Division of Public Utilities ("Division"), the Office of Consumer Services ("Office") and Rocky Mountain Power ("RMP") (collectively, the "Objecting Parties") all filed comments opposing "resetting" the 25 MW "cap" before new avoided cost prices have been determined by the Commission later this year. The initial comments of the Objecting Parties mischaracterize the issue properly before the Commission and misapprehend the application of PURPA's "ratepayer neutrality" standard.

The Objecting Parties mischaracterize the issue properly before the Commission as a question of whether or not a 25 MW "cap" should be "reset" before RMP's proposed new pricing

method and resulting rates can be considered or approved. As explained in detail in the Initial Comments of the Commenting Parties and Utah Clean Energy, however, the Division's recommendations for a Schedule 37 "cap" and the Commission's orders implementing the same, as well as the only lawful and proper interpretation of such a "cap," confirm that the proper interpretation of the Schedule 37 "cap" language is to trigger a new pricing investigation, after which new prices can be approved prospectively, if appropriate. The "cap" cannot lawfully or fairly be applied as a barrier to a small QF's right to sell power to RMP at Commission-approved prices. That right is guaranteed by both federal and state laws and cannot be defeated through improper application of a "cap" on availability of QF contracts.

The Objecting Parties offer no lawful or reasonable options for a small power producer to sell QF power to RMP once the Schedule 37 "cap" (as they envision it) has been reached. RMP suggests that Schedule 37 customers should apply under Schedule 38. That approach is neither feasible nor lawful. By its express terms, Schedule 38 is available only to "QFs with a design capacity greater than … 3.000 kW for a Small Power Production facility." Neither the Commenting Parties nor RMP is free to simply ignore the express language or limitations of the tariff. Moreover, the Schedule 38 process is prohibitively expensive and burdensome for small QF projects. As acknowledged by the Division, Schedule 37 was developed for "administrative simplicity" because the Schedule 38 process is "prohibitively expensive" for a small project (*Division Comments* at 3). Schedule 38 is not a reasonable or available option for small QF developers.

While recognizing the impracticability of Schedule 38 for small QFs, the Division suggests that QF developers should be willing to bear a "short delay" (*id*.), claiming that PURPA does not create a right to published rates. To the contrary, 18 CFR §292.304(c) requires RMP to

publish Commission-approved "standard rates" for small QFs. RMP and the Commission complied with this legal requirement through Schedule 37, and extended its scope, as expressly permitted by federal law, to small power production facilities up to 3 MW. RMP cannot simply suspend or withhold its published standard rates. Nor can the Schedule 37 or Schedule 38 tariffs be amended without following proper procedures. In any event, it is neither reasonable nor fair to withhold standard published rates to small QFs while parties litigate over proposals to change those prices in the future.

All of the Objecting Parties rely upon various iterations of PURPA's "ratepayer neutrality" or "ratepayer harm" standard. The Objecting Parties misapprehend the proper intent and application of that standard. "Ratepayer neutrality" is an important PURPA concept that must be considered by the Commission when it sets avoided cost rates. However, it is not a relevant legal standard or requirement in approving QF contracts, so long as they reflect Commission-approved pricing and methods. The overriding mistake made by the Commenting Parties -- both here and in mistakenly supporting a Schedule 38 pricing "stay" in UPSC Docket 12-035-100 -- is their failure to recognize that the "ratepayer neutrality" standard is properly considered in ***setting*** avoided cost prices and pricing methods, but not in ***signing*** or ***approving*** QF contracts that reflect Commission-approved methods and prices.

PURPA requires that the Commission approve avoided cost methods and rates that are just, reasonable, and non-discriminatory.[1] The Commission followed these requirements when it approved the current Schedule 37 tariff and prices last July in Docket 13-035-T09. If the Objecting Parties had reason to believe that the current Schedule 37 rates were not just or reasonable, it was

[1] Public Utilities Regulatory Policies Act, 16 U.S.C. § 824, *et seq*.; Small Power Production and Cogeneration, Utah Code Ann. §§ 54-12-1, *et seq.* (collectively, "PURPA").

incumbent upon them to raise those concerns in that docket. Having failed to do so, they cannot now properly oppose QF contracts based on the approved prices. They can, of course, properly raise any such objections in the current docket, but only as to new avoided cost methods and prices to be applied on a prospective basis. They cannot properly apply their objections retroactively through an unlawful application of a "cap" on the availability of standard price contracts for small QFs.

Properly focused, the "ratepayer harm" objections of the Objecting Parties are both premature and improper. Indeed, these very same parties made these very same claims (albeit much higher in magnitude[2]) in supporting a stay of Schedule 38 pricing for large QFs in Docket 12-035-100. There, as here, the Objecting Parties put the cart before the horse in attempting to estimate alleged "harm," to RMP or its ratepayers when the reality, scope or responsibility for any such "harm" had not yet been demonstrated or established through Commission proceedings. There, as here, the Objecting Parties failed to consider the reasonable rights and expectations of innocent parties attempting to develop clean energy projects in Utah. There, as here, the Objecting Parties ignored the strongly worded legislative intent and admonition that Utah policy is to promote and encourage development of clean energy projects. There, as here, the Objecting Parties failed to give proper credence to the "filed rate doctrine."[3] There, the Commission rejected

[2] In contract to 370 MW of potential Schedule 38 projects of which the Objecting Parties complained in Docket 12-035-100 -- with a claimed potential "harm" to RMP or its ratepayers of more than $186 million (*see, e.g.*, Direct Testimony of Paul H. Clements, November 16, 2012, UPSC Docket 12-035-100, lines 128-168) -- RMP's comments in this docket identify about 46 MW of Schedule 37 projects that may request contracts, and, based on history, it seems highly unlikely that all of the potential projects would be completed in any event.

[3] Under the filed rate doctrine, Commission-approved rates are presumptively just and reasonable and in the public interest, unless and until they are changed on a prospective basis following proper procedures and observing due process rights of all parties. Approved rates do not automatically become unjust or unreasonable, even if subsequent analysis shows that the rates should be adjusted

the premature, misplaced and unsupported "ratepayer harm" arguments. Here, the Commission should do the same and should direct RMP to continue offering Schedule 37 contracts.

The Commenting Parties respectfully submit that the Schedule 37 "cap" must properly be interpreted as a trigger for a new pricing review, that it cannot properly be used to deny, delay or withhold small QF contracts, and that RMP should be instructed to offer and sign Commission-approved QF contracts at Commission-approved standard rates until a new tariff has been approved on a prospective basis.

DATED this 19th day of June, 2014.

HATCH, JAMES & DODGE

/s/ _____
Gary A. Dodge
Attorneys for SunEdison and First Wind

(or even should have previously been adjusted) to properly reflect then-current conditions. Rather, approved rates remain the *only* lawful rates until the Commission issues an order with prospective adjustments. *See, e.g.*, Utah Code § 54-4-4 (3)(a)-(c); *MCI Telecommunications Corp. v. Public Service Commission*, 840 P.2d 765, 770-773 (Utah 1992); *Utah Department of Business Regulation v. Public Service Commission*, 720 P.2d 420, 420-424 (Utah 1986); *Valdez v. New Mexico*, 54 P.3d 71 (NM 2002) ("[T]he heart of the filed rate doctrine is not . . . that the rate is reasonable or thoroughly researched, it is that the filed rate is the only *legal* rate." *Id*. at 75 (*quoting Daleure v. Kentucky*, 110 F. Supp. 2d 683, 689 (W.D. Ky. 2000)) (emphasis in original)).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 19th day of June, 2014, on the following:

Rocky Mountain Power:

| | |
|---|---|
| Jeff Richards | jeff.richards@pacificorp.com |
| Yvonne Hogle | yvonne.hogle@pacificorp.com |
| Dan Solander | dan.solander@pacificorp.com |
| Jeff Larsen | jeff.larsen@pacificorp.com |
| Dave Taylor | dave.taylor@pacificorp.com |

Division of Public Utilities:

| | |
|---|---|
| Patricia Schmid | pschmid@utah.gov |
| Justin Jetter | jjetter@utah.gov |
| Chris Parker | chrisparker@utah.gov |
| Artie Powell | wpowell@utah.gov |
| Abdinasir Abdulle | aabdulle@utah.gov |
| Charles Peterson | chpeterson@utah.gov |
| Dennis Miller | dmiller@utah.gov |

Office of Consumer Services:

| | |
|---|---|
| Brent Coleman | brentcoleman@utah.gov |
| Michele Beck | mbeck@utah.gov |
| Cheryl Murray | cmurray@utah. |

Utah Clean Energy:

| | |
|---|---|
| Sophie Hayes | sophie@utahcleanenergy.org |
| Sarah Wright | swright@utahcleanenergy.org |

/s/ _____