

BRENT L. COLEMAN (#10817)
Assistant Attorney General
Counsel for the OFFICE OF CONSUMER SERVICES
JOHN E. SWALLOW (#5802)
Attorney General of Utah
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, UT 84114-0857
Telephone (801) 366-0353
brentcoleman@utah.gov

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

**OFFICE OF CONSUMER SERVICES'
RESPONSE TO ENERGY OF UTAH
LLC'S PETITION FOR REVIEW,
REHEARING AND CLARIFICATION**

COMES NOW THE OFFICE OF CONSUMER SERVICES (“Office”) and hereby submits this Response to Energy of Utah LLC’s (“EOU”) Petition for Review, Rehearing and Clarification (“Petition”) filed September 5, 2013, with the Utah Public Service Commission (“Commission”).

As an initial point, the Office submits EOU’s Petition should be denied for failing to comply with Utah law. Section 63G-4-301, Utah Code Annotated, establishes the criteria for a written request for the review of an agency order and requires that the petitioning party “shall...state the grounds for review and the relief requested.” *See* Utah Code Ann. § 63G-4-301(1)(b) (2012). EOU’s Petition fails to refer to any grounds for the Commission to review the Order issued August 16, 2013, in Docket No. 12-035-100 (“August 2013 Order”). Further, the

Petition fails to identify the relief sought by EOU. Specifically, the Petition closes by stating “We respectfully ask the Commission to consider the completion of contracts negotiations and the committed funds in our effort to complete the development of South Mountain. We believe our significant commitment and the satisfaction of our obligations in the PPA negotiation warrant consideration.” Petition, pp. 3-4. This statement does not request relief that can be granted by the Commission. EOU fails to request the Commission conduct further hearings regarding the August 2013 Order. The Petition does not request specific modification to the August 2013 Order, and fails to enunciate the scope and breadth of any clarification relief requested by EOU other than requesting “consideration” of the efforts undertaken by EOU regarding contract negotiations. The Petition fails to request relief from the Commission as required by Utah Code Ann. § 63G-4-301 (2012), and accordingly should be denied.

I. THE AUGUST 2013 ORDER, READ IN CONTEXT OF THE COMMISSION’S ACTIONS IN THE PRESENT DOCKET, IS CLEAR AND DOES NOT REQUIRE CLARIFICATION

If the Commission determines that EOU has adequately requested review and relief, and reviews the merits of EOU’s Petition, the Commission should deny the Petition. The August 2013 Order, read in context and in conjunction with the December 20, 2012 Order in Docket 12-035-100 (“December 2012 Order”) does not require clarification. As discussed above, the Office submits the Petition fails to adequately announce the relief from the August 2013 Order presently requested by EOU. Even the most generous reading of the Petition does not identify that EOU seeks a rehearing on, or reconsideration of, the substance of the August 2013 Order.

Accordingly, at best, the Petition appears to seek clarification of the application threshold for the Proxy/PDDRR method for determining avoided cost pricing for large wind qualifying facilities.

Specifically, while the Office is unclear as to the precise nature of the requested relief, the Petition appears to seek continued application of the Market Proxy method for calculating avoided costs¹; a method disallowed by the Commission pursuant to the August 2013 Order. EOU claims it has “complete[d] contracts negotiations and...committed funds in [its] effort to complete the development of” a qualifying facility wind project. Petition, p. 3. EOU appears to contend these efforts warrant the application of the Market Proxy calculation method to a yet-to-be-executed power purchase agreement (“PPA”), based upon apparent ambiguity in the August 2013 Order. The Office believes no ambiguity exists which would justify deviation from the presently approved avoided cost calculation method.

1. The Market Proxy Method is No Longer Approved

The August 2013 Order clearly establishes that the Commission “discontinue[d] the use of the Market Proxy method for determining indicative prices for Schedule 38 wind going forward....” August 2013 Order, p. 18. EOU seeks to introduce ambiguity into the August 2013 Order by asserting its reliance on indicative pricing estimates provided by Rocky Mountain Power (“RMP”) in April and August 2013, prior to issuance of the August 2013 Order. EOU apparently claims that, as the August 2013 Order may be read to apply the newly approved method to only QFs seeking indicative pricing “going forward”, and EOU was in possession of indicative pricing estimates predating the method change, EOU should be able to rely upon those pre-existing estimates in future contract negotiations. The Office believes this argument under-

¹ As EOU has failed to articulate its requested relief, the Office has sought to interpret the Petition based upon the whole of the record in this Docket. The Office reserves the right to respond in full to any amended or supplemental filings provided by EOU, or any clarification of EOU’s actual and full concerns. The Office has provided this response in an attempt to respect the need for judicial efficiency before the Commission.

represents the scope of the Commission's efforts in this Docket by failing to include the context provided by the December 2012 Order.

In denying RMP's Motion to Stay the continued application of the Market Proxy calculation method pending the complete resolution of Docket No. 12-035-100, the Commission "acknowledge[ed] the possibility the outcome of the Phase Two hearings and the interests of ratepayers may require the application of new avoided cost calculations for all large wind QF projects *not in possession of executed power purchase agreements when the Phase Two order is issued.*" December 2012 Order, pp. 17-18. (emphasis added). Further, the Commission stated its expectation to "issue a new order on large wind QF project avoided cost methodology by mid-summer, 2013 [and] [i]f the evidence [of the Phase II proceedings] shows changes in the methodology are warranted, we will have the opportunity to implement them for use in the calculation of indicative pricing *at that time.*" Id at 17.² (emphasis added). A complete reading of the Commission's findings in this Docket indicates the Commission's expectation that any modifications to the avoided cost calculation, including a possible repeal of the authorization of the Market Proxy method as applied to on-going contractual negotiations, would be effective mid-summer 2013. This modification became effective under the August 2013 Order.

The Office asserts that, read as a whole, the December 2012 and August 2013 Orders provide unambiguous language that approval for use of the Market Proxy calculation method was repealed for projects not in possession of an executed power purchase agreement upon issuance of the August 2013 Order. No clarification of the Commission's efforts in this Docket is required and EOU's Petition should be denied.

² The Office notes that EOU has actively participated in the present Docket since at least November 29, 2012, and was served with the Commission's December 2012 Order. See Order on Motion to Stay Agency Action, December 20, 2012. Accordingly, EOU was on notice of the Commission's schedule for Phase II of this Docket, as well as the potential immediate effects of the issuance of the August 2013 Order on the avoided cost calculation method.

2. Proxy/PDDRR Method is the Only Approved Calculation Method of Avoided Costs for QF PPAs not Executed Prior to August 16, 2013

Similar to the discussion above regarding the effective date of the repeal of authority for use of the Market Proxy method in calculating the avoided cost rate, a comprehensive reading of the Commission's efforts in this Docket provide unambiguous language that the Proxy/PDDRR Method is the only authorized calculation method for avoided costs related to qualifying facility contracts not executed prior to August 16, 2013. The Office submits EOU's attempt to read the August 2013 Order in a vacuum, omitting the Commission's efforts presented in the December 2012 Order, improperly manufactures ambiguity where none exists.

Section 54-12-2, Utah Code Ann. (2012) states "[t]he commission shall establish reasonable rates, terms and conditions for the purchase or sale of electricity or electrical generating capacity...between a purchasing utility and a qualifying power producer." In establishing these rates and conditions, the Commission is authorized to establish a competitive bid procedure "or devise [a] method which considers the purchasing utility's avoided costs." Utah Code Ann. § 54-12-2(2) (2012).

Through the course of Phase II of the present Docket, the Commission has accomplished the second option, establishing the method of avoided costs as contemplated by Utah Code Ann. § 54-2-1(1) (2012). Indeed, after issuing the December 2012 Order, denying RMP's Motion to Stay further application of the Market Proxy method and placing parties on notice of the potential for modification to the avoided cost calculation methods, the Commission received pre-filed testimony from at least 10 individuals on behalf of at least 7 different parties; numerous comments from members of the public, municipalities and elected officials; and extensive post-

hearing briefing regarding competing calculation methods. *See generally* Docket No. 12-035-100. Based upon this evidence, the Commission determined the Market Proxy indicative pricing method “[ran] the risk of becoming out of date.” August 2013 Order, p. 18. As such, the Commission authorized “the application of the Proxy/PDDRR method to include wind QF’s seeking indicative pricing” as the sole method for determining the avoided cost variable in wind power PPAs. *Id.* Importantly, the triggering threshold for the application of this new calculation, pursuant to the notice provided by the December 2012 Order, was the issuance of the August 2013 Order. *See* December 2012 Order, pp. 17-18.

The Office submits that the clear language of the Commission’s Orders in this Docket establishes that the only authorized method for calculating the avoided costs associated with wind powered QF facilities seeking to execute a PPA after August 16, 2013, is the Proxy/PDDRR method as outlined in the August 2013, Order. No clarification is necessary when the Commission’s efforts and Orders are properly integrated. EOU’s Petition should be denied.

II. THE CLARIFICATION APPARENTLY SOUGHT BY EOU TO REQUIRE APPLICATION OF THE MARKET PROXY METHOD TO PROJECTS WITHOUT AN EXECUTED PPA IS NOT IN THE PUBLIC INTEREST

The Office has consistently asserted throughout proceedings in this Docket that the Market Proxy method produces a pricing result that is not just and reasonable for RMP’s residential and small business customers. *See* Direct Testimony of Bela Vastag, November 30, 2012, ll. 71-79; Rebuttal Testimony of Bela Vastag, December 12, 2012, ll. 121-128; Direct Testimony of Randall Falkenberg, March 29, 2013, ll. 183-187. This position aligns with the federal regulations regarding QF power purchases, which require that “rates for purchases shall

be just and reasonable to the electric consumer of the electric utility and in the public interest” and the requirements of Utah law. *See* 18 C.F.R. § 292.304(a)(1); *see also* Utah Code Ann. § 54-12-2(2) (2012).

Based upon the totality of evidence submitted in this Docket, the Commission determined the Market Proxy method was at “risk of becoming out of date” and discontinued authorization of its use. August 2013 Order, p. 18. Moreover, the Commission found that use of the Proxy/PDDRR method for calculating indicative pricing would “ensure future indicative prices, and therefore QF energy and capacity payments will reflect appropriately the costs reasonably expected to be avoided or deferred over the term of the contract.” *Id.* In essence, the Commission determined the Proxy/PDDRR method provided more accurate data for calculating the actual avoided costs related to QF facilities, producing a more reliable value and ensuring accurate payments for energy consumed by, among others, residential and small business customers.

EOU now, apparently, requests the Commission to act against its finding that employing the Market Proxy method is not in the public interest and require RMP to incorporate this unauthorized pricing variable in a yet-to-be-executed PPA. However, doing so would contravene federal and state law, and offend the public interest. Having determined that the Market Proxy method does not protect the public interest, as evidenced by August 2013 Order, the Market Proxy in a future PPA would violate state and federal law. *See* Utah Code Ann. § 54-12-2(2) (2012); 16 U.S.C.A. § 824a-3(b)(1). *See also* 18 C.F.R. § 292.304(a)(1). The Office opposes any further application of the Market Proxy method in QF PPA terms and conditions, and requests, to maintain compliance with federal and state laws and regulations, EOU’s Petition be denied.

For the foregoing reasons, the Office requests the Commission deny EOU's Petition in its entirety.

Submitted this 18th day of September, 2013.

/s/ Brent Coleman

Brent Coleman

Assistant Attorney General
Attorney General of Utah
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, UT 84114-0857
Telephone (801) 366-0353
brentcoleman@utah.gov