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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	**RESPONSE OF KENNECOTT AND TESORO TO ROCKY MOUNTAIN POWER'S PETITION FOR REVIEW AND CLARIFICATION** Docket No. 12-035-100

Kennecott Utah Copper, LLC ("Kennecott") and Tesoro Refining and Marketing Company ("Tesoro"), by and through their attorneys, and pursuant to the provisions at Utah Code Ann. §54-7-15 and 63G-4-301, and Utah Admin. Code R746-100-11, hereby submit this Response to the Petition for Review and Clarification filed by Rocky Mountain Power ("RMP" or "Company") in this docket on September 16, 2013.

INTRODUCTION

The Commission's Report and Order in this docket concludes that "unless provided for otherwise in a negotiated contract, RECs are retained by the QF and may be sold and valued separately form the energy produced by the QF." Report and Order, Docket No. 12-035-100

(August 16, 2013) at 10. RMP has requested review of that portion of the Commission's Order based on a hypothetical scenario that the Company presents in its Petition. Petition at 2. The Company's hypothetical relates specifically to the following passage from the Commission's Report and Order:

> When PacifiCorp's planned resources include cost effective renewable resources, "like" resource costs are reasonable to use as the proxy for purposes of avoided cost calculations of QF capacity payments. … For example, thermal QF capacity payments will be based on the capital costs of the next deferrable thermal resource and renewable QF capacity payments will be based on the capital costs of the next like deferrable resource so long as such a cost-effective renewable resource is present in PacifiCorp's planned resources.

Report and Order at 20. RMP claims in its Petition that the foregoing finding presumes that

> … under a scenario where the QF is deferring a renewable resource that the Company would otherwise build and therefore where it would keep the RECs, the QF would be compensated through avoided cost payments for the capital costs of the renewable resource *plus* separately receive the value of the RECs.

Petition at 2. RMP observes, correctly, that if the QF keeps the REC in a sale of QF power, then ratepayers would not receive the value associated with the REC; whereas if the Company were to build the renewable resource, the ratepayers would receive the value of the REC. RMP claims that the Commission must not have intended this result because it "would be in conflict with the ratepayer indifference standard under the Public Utility Regulatory Policy Act of 1978 and the corresponding rules promulgated by the Federal Energy Regulatory Commission." *Id*.

Kennecott and Tesoro agree that, under PURPA and the Federal Energy Regulatory Commission's ["FERC"] implementing regulations, the avoided cost rate is intended to put the utility in the same position when purchasing QF capacity and energy as it would be had the utility generated the energy itself or purchased it from some other source. But, as discussed below, RMP is mistaken in assuming that the ratepayers must be indifferent as to the ownership of RECs. As a creation of state law, the REC acts as a separate incentive to small developers to build generation that the utility would not ordinarily build. The Commission's decision in this case that the REC remains with the QF owner is correct both because it leaves ratepayers neutral by excluding the REC value from the avoided cost calculation, and because it lets the owner of the renewable resource retain the REC as an incentive, as the Utah Legislature intended.

A. The Commission's Decision is Correct because Ratepayers Are "Indifferent" under PURPA's Avoided Cost Calculation, which Must Exclude the Value of RECs.

The "ratepayer indifference standard" is a reflection of the FERC's definition of 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." 18 C.F.R. § 292.101(b)(6). Ratepayers remain neutral if the price the utility pays for a QF owner's power is equivalent to the utility's avoided cost of power from the same kind of resource.

The FERC regulations itemize the factors to be considered in developing an avoided cost rate for QF purchases. 18 C.F.R. § 292.304(e). These factors do not include any kind of environmental attribute. In fact, the FERC has specifically held that PURPA avoided cost rates are not to take into account the value of RECs. *See*, *American Ref-Fuel Co., et al*. 105 FERC ¶ 61,004 (2003) at 15, *Order on Reh'g*, 107 FERC ¶ 61,016, (2004) at 5 ("avoided cost rates are not intended to compensate the QF for more than capacity and energy"); *see also Morgantown Energy Associates and City of New Martinsville, West Va.*, Order on Recons., 140 FERC ¶ 61,223 (2010) at 4 ("[t]o the extent that the West Virginia Order finds that avoided-cost rates under PURPA also compensate for RECs, the West Virginia Order is *inconsistent with PURPA*.") (emphasis added).

FERC regulations also provide that the maximum that a utility can pay for QF power is the avoided cost of *capacity and energy*. 16 U.S.C. § 824a-3(b) ("No such rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.") Thus, because the value of a REC is not among the specified components of avoided cost, because the FERC has ruled that including a REC in the avoided cost is inconsistent with PURPA, because the maximum the utility can pay for QF power is its avoided incremental cost of capacity and energy, and because RECs are neither capacity nor energy, the value of a REC cannot be included in the PURPA avoided cost rate. Ratepayers remain "indifferent" when the utility pays the PURPA avoided cost rate, which must be set *without regard* to who retains the REC.

The Company argues in its Petition that the avoided cost of QF power from a renewable generator would be lower if the Company had the same kind of renewable generator in its IRP, and therefore received RECs for it. RMP states:

> If the Company retains the RECs from a renewable resource acquired through the IRP, which it does, then the Company should retain the RECs from a QF contract <u>that uses the capital cost of an IRP renewable resource to set the avoided costs</u>.

Petition at 4 (emphasis added). The Company's use of the phrase "capital cost … to set avoided costs" in this context suggests that the Company believes that the value of a REC retained by the Company, because it might be counted as a credit against the capital cost,[1] would somehow go to

[1] *See* Petition at 3 ("the capital costs used in the IRP for the renewable resource are inclusive of the Company receiving the RECs").

reduce its avoided cost. Indeed, without that misconception, the Company's Petition fails to raise any issue of ratepayer indifference. But, while the value of a REC might reduce capital costs, it can never go to reduce the PURPA avoided costs, for the reasons discussed above.

The Company also postulates that, under the now-discontinued market proxy method, if the contract price paid for a wind resource procured through competitive bidding includes the REC, and if the avoided cost were set on that contract price, then the Company should receive the REC when paying that avoided cost for QF power. Petition at 4. If that is the case, the Company reasons, then the result should be the same "when using the IRP renewable resource proxy method that was approved in the Order." *Id*. The Company evidently fails to recognize that as long as the contract price includes the value of a REC, the contract price cannot be used to "set the avoided cost" without running afoul of PURPA. Besides, the Commission, under a very similar scenario, has already ruled that the REC must be severed from the rest of the contract, concluding that "if the REC is included in the IRP value in a market based proxy for calculating avoided costs," the QF may buy it back at the IRP value. *In the Matter of the Application of PacifiCorp for Approval of an IRP-based Avoided Costs Methodology for QF Projects Larger than One Megawatt*, Order on Reconsideration and Clarification, Docket No. 03-035-14 (Feb. 2, 2006) at 15. That was the correct decision because, as the Commission observed, avoided cost rates are "*for capacity and energy*" and do not include the REC. *Id*. at 16. (emphasis added).

As long as the REC is not part of the avoided cost calculation, the notion of "ratepayer indifference" is not offended. The Commission's Report and Order, therefore, reached exactly the correct result for the right reasons. *See* Report and Order at 8-12. The REC is a separate incentive, its value is not part of the avoided cost calculation, and it is retained by the QF owner unless the parties voluntarily agree otherwise.

B. <u>The Commission's Decision is Correct because Ratepayers Are not Meant to be "Indifferent" as to the Ownership of RECs.</u>

The Company complains that if it were to build a renewable resource as planned in its IRP, it would retain the REC; whereas, if an independent energy producer were to build the identical plant, the independent energy producer would retain the REC. Petition at 2. The Company apparently finds that result to be unfair because if the REC has any value, ratepayers obviously would be better off if the Company were to build the resource. But, there is no inequity here. For the reasons stated above, ratepayers are only meant to be indifferent as to the avoided cost paid by the utility. The REC, on the other hand, is meant to encourage the development of renewable resources. *See* Utah Code Ann. § 54-12-1. As the Commission's Report and Order stated:

> The statute expresses the state's policy to encourage or incent the development of renewable energy by providing RECs to parties willing to make such investments and engage in activities that produce renewable energy. … [T]he evidence shows that retention of RECs by the QF is critical for encouraging renewable resource development.

Report and Order at 11-12. Whether it is the Company or an independent energy producer that builds the renewable resource, state policy is served when the party that builds it receives the REC.

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Consistent with FERC regulations and rulings, state law, and with the Commission's previous orders,[2] the Commission's Report and Order determined that the REC is separate from the power itself, created under state law and granted to the owner of the plant as an incentive to encourage the development of small renewable generation facilities. Report and Order at 10-11. This conclusion is both equitable and legally sound. The state Legislature created the credit as a reward to developers for risking their credit and capital to construct the resource, not as a windfall for the buyer of the output. Utah Code Ann. § 54-12-1(2). When the developer is the public utility, the REC inures to the benefit of the ratepayers; when it is a private party, it inures to the benefit of the private party.[3] There is nothing in Utah law or policy that would suggest ratepayers must be indifferent between the two.

CONCLUSION

The Company's Petition for Review should be denied because it asks the Commission to misapply both federal and state law. The argument that ratepayers are not indifferent unless the utility retains the REC in a QF sale is based on a misunderstanding of PURPA and the FERC's regulations and orders. Ratepayers must only be indifferent to the avoided cost calculation, which under federal law, must exclude the value of RECs. The Company's proposal to keep the REC in all instances simply because it has a renewable resource in its IRP eviscerates the incentive put in place by the Utah Legislature. The Commission's decision in this case is the

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[2] *See* Report and Order, *In the Matter of the Application of PacifiCorp for Approval of an IPR-Based Avoided Cost Methodology for QF Projects Larger than One Megawatt*, Docket No. 03-035-14 (Oct. 31, 2005) at 15; Order on Reconsideration and Clarification, Docket No. 03-035-14 (Feb. 2, 2006) at 16 (RECs are incentives intended "to offset some of the cost of wind resource development, thus, promoting it relative to other alternatives"); *Cottonwood Hydro, LLC v. Rocky Mountain Power*, Docket No. 10-035-15 (May 27, 2010) at 11.

[3] Compare RMP's proposal, which says to independent developers: If we build renewable generation, we keep the REC; if you build renewable generation, we take your REC because we were planning to build what you built.

correct one, achieving ratepayer indifference under PURPA by setting the avoided cost rate without regard to the value of RECs, and preserving state law incentives by concluding that developers of renewable resources retain the RECs in a QF sale.

DATED this 1st day of October, 2013.

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CERTIFICATE OF SERVICE

(Docket No. 12-035-100)

I hereby certify that on this 1st day of October, 2013, I caused to be e-mailed, a true and correct copy of the foregoing **RESPONSE OF KENNECOTT AND TESORO TO ROCKY MOUNTAIN POWER'S PETITION FOR REVIEW AND CLARIFICATION** to:

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