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** **COMMENTS OF SUNEDISON AND FIRST WIND REGARDING 25 MW "CAP" LANGUAGE IN SCHEDULE 37**

In response to the Commission's scheduling order dated June 5, 2014 in this docket, SunEdison, LLC and First Wind submit these initial comments regarding the 25 MW "cap'" language contained in Schedule 37.

RMP is required by federal and state laws to purchase ***all*** power and energy produced by qualifying facilities ("QFs") at "avoided cost rates" approved by the Commission.[1] Schedule 37

[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").

is the one and only RMP tariff option available to QF projects with a design capacity of less than 3 MW for small power production facilities, or less than 1 MW for cogeneration facilities.[2]

Schedule 37 implements PURPA's legislative policy "that encourages the development of small power production facilities and seeks to eliminate unnecessary barriers" to small QF development. *See, e.g., Order on Reconsideration*, UPSC Docket 03-035-T10, July 20, 2004, at 3. Unlike Schedule 38, which establishes a somewhat-complicated process for determining prices and negotiating contracts for larger QF projects, Schedule 37 includes standard, published prices and a pro forma contract in order to reduce burdensome and expensive procedures and delays that would likely otherwise make small QF projects uneconomical.

Schedule 37 also satisfies a mandate of PURPA that public utilities must publish "standard rates" for QFs with a design capacity of 100 kW or less, which standard rates may also be extended to small QFs with a larger design capacity. 18 CFR §292.304(c). This requirement of federal law was implemented and satisfied for RMP in Utah through Commission approval of Schedule 37, which publishes standard rates for small power production QFs of up to 3 MW.

Both the language and the purposes of PURPA require that published standard rates for small QFs must be available **at all times**. A "cap" cannot properly be used to withhold or delay QF contracts or to deny access to published standard rates for small QFs. Rather, a "cap" can legally and properly be used only to trigger a prospective review of small QF pricing.

---

[2] The "Application" of Schedule 38 is expressly limited by its terms to small power projection facilities with a design capacity in excess of 3 MW.

The purpose of the "cap" language in Schedule 37, as explained in Commission orders, is consistent with the only lawful or proper use of such a "cap" -- to trigger prospective review of prices and pricing methods. Schedule 37 was approved in 1995,[3] but the "cap" language was not added until 2004, based on a recommendation of the Division. As explained by the Commission: "After 25 megawatts, the Division recommends *an update of Schedule No. 37 rates* for consistency with the method used to develop the rates which is currently based on 10 megawatts of QF capacity." *Order*, UPSC Docket 03-035-T10, issued June 1, 2004, at 11 (emphasis added). In that docket, the Commission "accept[ed] the notion of a cap," which was initially set at 10 MW because Schedule 37 rates were "based on a 10 megawatt decrement during the period of sufficiency and therefore 10 megawatts serves as a reasonable cap." *Id.* at 12. Neither the Division's recommendation nor the Commission's approval of the "cap" language stated that Schedule 37 contracts and pricing should be withheld from small QFs if the "cap" is reached; nor did anyone attempt to explain how such an interpretation would square with the requirements of federal and state laws. The only plausible and lawful interpretation of the "cap" language is to trigger a review of Schedule 37 pricing, which can properly be implemented only on a prospective basis.

Several parties to the 2003 Schedule 37 docket requested reconsideration of the 10 MW "cap." The Commission's order on rehearing confirms that the cap was intended to trigger a pricing review: "The 10 megawatt cap is the cumulative capacity of actual QF projects allowed *before an update of the avoided cost payment tariff would be required*." *Order on Reconsideration*, UPSC Docket 03-035-T10, issued July 20, 2004, at 2 (emphasis added). On reconsideration, the

[3] *Order Confirming Bench Decision*, UPSC Docket 94-2035-03, issued July 5, 1995.

Commission increased the "cap" to 25 MW, in order to help "reduce barriers to small QF development" and to further the legislative policy expressed in Utah Code § 54-12 to "encourage[] the development of small power production facilities and . . . to eliminate unnecessary barriers." *Order on Reconsideration*, UPSC Docket 03-035-T10, issued July 20, 2004, at 3.

Consistent with the proper purpose of the Schedule 37 "cap" language to trigger periodic pricing review, the Commission required RMP to update key pricing inputs and to publish new Schedule 37 tariffs on a periodic basis whether of not the "cap" had been reached. In 2006, for example, the Commission required RMP to update its definition of on-peak hours, fuel prices and fuel contracts before approving a new tariff. *Order*, UPSC Docket 06-035-T06, issued September 12, 2006, at 8. The "cap" language was retained in each subsequent Schedule 37 tariff in order to trigger pricing review by the Commission at periodic intervals.

In 2009, the Commission decided to tie net-metering payments to the published Schedule 37 rates, and directed RMP for the first time to "update the avoided cost pricing in Schedule No. 37 annually." *Report and Order Directing Tariff Modifications*, UPSC Docket 08-035-78, issued February 12, 2009, at 24. As directed, RMP filed annual Schedule 37 updates thereafter, followed by Commission approval of new tariffs each year,[4] each of which retained the 25 MW "cap" language.

The 25 MW "cap" added by the Commission in 2004 can best be seen -- and can only be properly used -- as a trigger-point requirement for RMP to make a new filing with the Commission with updated pricing information so that the Commission can properly and timely determine

[4] In some years, the Commission required additional information and/or changes to the tariff rates as initially proposed. E.g., UPSC Docket 09-035-T14.

whether to approve a new Schedule 37 tariff with different published standard rates on a prospective basis. The "cap" cannot properly be used to deny small QF projects access (as guaranteed by federal and state laws and RMP tariffs) to QF contracts or approved QF rates. Rather, RMP must offer QF contracts with approved standard prices to small QF projects unless and until the Commission approves a new Schedule 37 tariff on a prospective basis.

The "cap" in Schedule 37 is not an "annual" cap. Rather it is a total, cumulative cap on the design quantity of small QF projects to receive QF contracts under the approved tariff before RMP is required to file updated cost information so that the Commission can determine whether to change the published standard prices in a new tariff on a prospective basis. Thus, the "cap" might trigger a new filing requirement within a few months after a new Schedule 37 tariff has been approved, or it might not trigger one for several years.[5]

Prior to RMP's 2013 Schedule 37 update, no RMP filings had asserted or suggested that RMP might use the 25 MW "cap" to deny a contract to a small QF project at published standard rates approved by the Commission. It is clear now, however, that RMP is using the Schedule 37 "cap" language, not to trigger a filing requirement by the utility as intended, but rather to delay or thwart small QFs projects and to withhold QF contacts at Commission-approved standard rates. There is no way to square such a misuse of the Schedule 37 "cap" with the legal requirements or purposes of federal and state laws and policies.

[5] As of 2009, the Commission began requiring updates to be filed at least annually. However, the same "cap" language was retained, so if the "cap" is met in less than twelve months, another filing requirement is triggered to permit a new review of pricing inputs and methods.

It is beyond dispute that one of the goals of the Schedule 37 "cap" language is ratepayer protection -- ensuring that standard prices available to small QF projects are periodically updated so that RMP will not pay more than it should for QF power.[6] However, that legitimate goal cannot trump federal and state rights and requirements, nor be used to thwart the intent of PURPA to promote and encourage clean energy development and remove barriers to QF development. Depriving small QF developers of their right to sell QF power at approved and published avoided cost prices is directly inconsistent with the policies underlying PURPA.

This Commission's 2012 ruling denying RMP's motion for a stay of Schedule 38 prices illustrates that the laudable goal of protecting ratepayers cannot trump other requirements of federal or state law, nor justify withholding QF contracts or prices while new pricing methods are being evaluated. In a motion for a stay in the 2012 Schedule 38 docket, RMP argued that the methods used to set Schedule 38 prices were outdated, that they no longer produced reasonable results, and that a stay should be issued until new pricing methods could be approved several months later.[7] The Commission rejected RMP's request for a stay and left the Commission-approved pricing methods in place until after the parties had conducted discovery and submitted evidence, and the Commission had evaluated the evidence in a deliberative fashion and had entered

[6] Of course, there has been no showing or finding in this docket that current Schedule 37 rates are in fact too high or are otherwise inappropriate. Such a determination can be made only after the evidence submitted by all interested parties has been carefully evaluated and a reasoned Commission order has been issued.

[7] Ultimately, of course, it is RMP that has both the opportunity and the obligation to make timely Commission filings and to provide timely updates so that the Commission can act in a timely and proper manner to avoid harm or prejudice to both ratepayers and QF developers.

an order to apply on a prospective basis. *Order on Motion to Stay Agency Action*, UPSC Docket 12-035-100, issued December 20, 2012. Similarly, here, the standard rates published in RMP's tariff for small QF projects bear the Commission-approved stamp of "just and reasonable" and should -- indeed, must -- remain in place and available to small QF developers unless and until the Commission approves a new tariff to apply on a prospective basis after considering all relevant factors.

In conclusion, the "cap" language included in the Schedule 37 tariff cannot properly be used to withhold QF contracts or deny Commission-approved standard prices to small QF projects pending Commission consideration and approval of a new tariff. Indeed, any such misuse of the tariff language violates both the letter and the spirit of federal and state laws and tariffs, and thwarts the very purposes for which those laws and tariffs were adopted. SunEdison, LLC and First Wind respectfully request that the Commission direct RMP to continue to offer and sign QF contracts at the currently approved and published standard rates for small QF projects that otherwise qualify under Schedule 37, unless and until the Commission approves a new tariff to apply on a prospective basis.

DATED this 12th day of June, 2014.

HATCH, JAMES & DODGE

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 12th day of June, 2014, on the following:

Rocky Mountain Power:

Jeff Richards	jeff.richards@pacificorp.com
Yvonne R. Hogle	yvonne.hogle@pacificom.com
Jeffrey Larson	jeff.larsonr@pacificorp.com
Paul Clements	paul.clements@pacificorp.com

Division of Public Utilities:

Chris Parker	chrisparker@utah.gov
William Powell	wpowell@utah.gov
Abdinasir Abdulle	aabdulle@utah.gov
Charles Peterson	chpeterson@utah.gov
Patricia Schmid	pschmid@utah.gov
Justin Jetter	jjetter@utah.gov

Office of Consumer Services:

Michele Beck	mbeck@utah.gov
Cheryl Murray	cmurray@utah.gov
Brent Coleman	bcoleman@utah.gov

/s/ _____