ROBERT J. MOORE (#5764)
Special Assistant Utah Attorney General
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone: (801) 366-0353
rmoore@utah.gov
Attorney for Utah Office of Consumer Services

Before the Public Service Commission of Utah

In the Matter of: The Application of Rocky Mountain Power for Modification of Contract Term of PURPA Power Purchase Agreements with Qualifying Facilities	Docket No. 15-035-53 Office of Consumer Services' Legal Brief

Pursuant to this Commission's November 12, 2015 Oral Order, the Office of Consumer Services ("Office") submits this Legal Brief.

INTRODUCTION

The Federal Energy Regulatory Commission ("FERC") has announced that it is its policy that Power Purchase Agreements ("PPAs") entered into between utilities and qualifying facilities ("QF") under the mandatory purchasing provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA") must be structured in a way that allows "an investor . . . to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility." Order 69, FERC Stats. & Regs. ¶ 30,128 at 30,868. Rocky Mountain Power's ("the Company") and the Division of Public Utilities' ("Division") proposal to reduce the term of PURPA PPAs to three and five years respectively violates this policy and therefore must be rejected.

ARGUMENT

The positions of the Company and the Division suffer from two fundamental flaws. First, the contention that the ratepayer indifference doctrine is not a precise corollary to the doctrine that QF pricing must be based on the utilities' avoided costs but rather is a vague and unquantifiable policy doctrine applicable to all aspects of the QF-utility economic relationship. (Clements Dir. at ln. 117-119; Peterson Dir. ln 178-179.) Second, that the FERC has not announced a policy that PURPA PPA's must be structured in a way that provides QFs with a practical framework for obtaining financing. (Clements Sur. at ln. 53-55; Peterson Dir. at ln.199-217.) These flaws doom the Company and Division's arguments.

A. RATEPAYER INDIFFERENCE DOCTRINE

The Company and Division argue that the ratepayer indifference doctrine applies to all aspects of QF PPAs. Therefore, the ratepayers must be indifferent to any risks associated with the term of a contract. (Clements Dir. at ln. 117-119; Peterson Dir. ln 178-179.) However, neither this Commission, any decision from the FERC or any other Commission known to the Office has ever applied the doctrine outside the context of avoided cost pricing. To do so inevitably leads to this Commission substituting its policy decisions for those of the Congress in enacting PURPA and the FERC in implementing the statute. This is because if the standard of ratepayer indifference permeates every aspect of the QF-utility relationship, it is necessary to balance the perceived policy underlying the doctrine against other requirements and underlying policies of PURPA. Such an approach does not comport with the law.

The Company's witness Mr. Clements filed written testimony asserting that a thirty-year old Utah case, Docket No. 80-999-06, Report and Order (March 14, 1985), stands for the proposition that the ratepayer indifference doctrine applies to all aspects of a PPA's terms. (Clements Dir. at ln. 117-119 & n. 10; ln. 175-177 & n. 20.) However, nowhere in the 66 pages of this Order does the term "ratepayer indifference" or "ratepayer neutrality" appear. Moreover, the case provides that, in some circumstances, QFs should receive a subsidy from ratepayers by placing prices above avoided costs in order to insure that QFs can obtain financing. Docket No. 80-999-06, Report and Order, pg. 40-41 (March 1985).[1] The fact that the Company, with all its resources, could find no better case to support its position demonstrates the lack of support for the proposition. [2]

The doctrine of ratepayer indifference is simply a corollary to the familiar principle that the price paid for a QF's energy and capacity cannot exceed the utilities' avoided costs. That is, a ratepayer will be indifferent to the price a QF receives for its energy and capacity if it is equal to the cost the utility would have incurred if it produced the energy itself or acquired it from another source. 16 U.S.C. § 824a-3(d). The doctrine has no application outside the precise context of avoid cost pricing. It does not invoke a balancing test where one policy is weighed against another. If an assertion violates the ratepayer indifference standard, it is in error and must be rejected without consideration of countervailing arguments. 18 C.F.R. §§ 292.101(b)(6); 292.304(a)(2).

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[1] This case must be distinguished from Docket No. 80-999-06, Report and Order (**April 3, 1987**) (bold added), which Mr. Clements also cites at lines 104 -100 of his direct testimony, which does mention ratepayer neutrality, but in the context of avoided cost pricing.

[2]At the hearing, Mr. Clements also stated that the doctrine of ratepayer indifference was invoked outside the context of avoided cost pricing in the recent case from the Idaho Commissions and in this Commission's in dockets, 15-035-140 and 14-035-100. (Clements Tes. Pg. 37 ln. 22-38 ln. 1; pg. 39 Ln 18-23.) However, a review of these dockets shows that Mr. Clements was mistaken.

This does not mean that risk cannot be taken into account in fixing the length of the PPA. This Commission has considerable discretion in implementing PURPA. *See* 16 U.S.C. §§ 824a-3(a)-(b). However, this discretion must be exercised within the confines of PURPA and the FERC's regulations. *See Southern Cal. Edison Co.,* 70 FERC 61215, 61676 (1995); 16 U.S.C. §§ 824a-3(a)-(b). As discussed below, in promulgating its regulations the FERC has been guided by a policy that PPAs must be structured in a way to insure investor certainty. Order 69, FERC Stats. & Regs. ¶ 30,128 at 30,868. This Commission's discretion in setting PPA terms to reduce risk must be exercised within the confines of this FERC policy

PURPA's policy of encouraging the development of alternative energy is mitigated only by the counter policy that the price for a QF's energy and capacity must be based on the utilities' avoided costs. 18 C.F.R. §§ 292.101(b)(6); 292.304(a)(2). Accordingly, if an alternative energy project cannot be built at the prevailing avoided cost prices, it is the policy of PURPA that the project not be built. However, this is a different paradigm than the one urged on this Commission by the Company and the Division.

In morphing the ratepayer indifference standard into a vague policy doctrine that exists outside the context of avoided cost pricing, the Company and Division seek to have this Commission substitute its policy opinions for those of the Congress and the FERC. In fact, the Division in attempting to balance policy considerations under the guise of a ratepayer indifference standard that is untethered from its statutory and regulatory moorings, proposes a PPA with a term too short to encourage alternative energy development but with a capacity payment that, the Division admits, could result in payments to QFs above avoided costs. (Peterson Sur. at ln.31-39.) This proposition conflicts with every decision of this Commission regarding PURPA pricing.

B. REQUIREMENT OF INVESTOR CERTAINTY

It cannot be disputed that a major policy considerations underling PURPA is the encouragement of alternative energy development. 16 U.S.C. § 824a-3; *FERC v. Mississippi*, 456 U.S. 742, 750 (1982). In furtherance of the policy, the FERC promulgated Rule 18 C.F.R. § 292.304(d)(2)(1), which provides that QFs have the option to enter into PPAs pursuant to a long term agreement at "avoided costs calculated at the time the obligation is incurred." *Id.* The purpose behind fixing the avoided cost at the time of the agreement is to provide "an investor . . . [the ability] to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility." Order 69, FERC Stats. & Regs. ¶ 30,128 at 30,868. The FERC's authority to issue this regulation has been confirmed by the U.S. Supreme Court. *American Paper Institute, Inc. v. American Electric Power Serv. Corp.*, 461 U.S. 402, 415 (1982).

It is axiomatic that if QFs must have the option to set avoided cost pricing at the time the agreement is reached to insure investor certainty, the PPA's term must be long enough to insure investor certainty. Accordingly, in promulgating its regulations and orders, the FERC has spoken to and resolved a major issue before this Commission—the term of a PPA must be of sufficient length to insure the QF a reasonable opportunity to recover its investment in the construction of the generation facility.

This conclusion also comports with Utah State Law. Utah Code Ann. § 54-12-1, announces a strong state policy in favor of developing alternative energy production through PURPA. Obviously, the Commission cannot encourage the development of alternative energy and at the same time set a contract length that discourages the investment in QF projects. This state policy is in accordance with, but is also separate from, federal law. Therefore, even if an argument can be made under federal law that PURPA does not require contracts of a length that provides investor certainty, the state law would still be binding on this Commission.

C. CONTRACT LENGTH

The fact that QFs are entitled to the option of a PPA of sufficient length to provide a reasonable opportunity to ensure investor certainty, within the appropriate avoided cost pricing regime, does not mean that QFs are necessarily entitled to 20 year contracts. A shorter term may suffice. However, the Company and Division analyzed this case under the wrong legal rubric and substituted their own policy judgments for those contained in PURPA and the regulations and orders of the FERC. Therefore, this Commission may feel that the factual record is not developed enough to fix a contract term that reduces risk but still provides a reasonable opportunity to attract investors. However, the Company and the Division are free to file a new application arguing the length of the contract should be reduced under the appropriate legal paradigm.

D. CONTRARY RULINGS

Adjudications regarding the proper length of PURPA contract terms and related issues are presently in flux. Some jurisdictions have reached conclusions contrary to the Office's position. Two merit comment, the Firth Circuit decision in *Exelon Wind v. Nelson*, 766 F.3d 380 (5th Cir. 2014) and the Idaho Commission decision in *In the Matter of Idaho Power Co. Petition to Modify Terms and Conditions of PURPA Purchase Agreements*, Case No. IPC-E-15-01, Order No. 33419 (August 20, 2015).

(1) *Exelon Wind v. Nelson*

In *Exelon Wind v. Nelson*, 766 F.3d 380 (5th Cir. 2014), the Fifth Circuit reversed the decision of a Texas District Court issuing injunctions enforcing the FERC's Declaratory Order in *JD Wind 1*, 129 FERC 61,148 (Nov. 19, 2009). *Exelon Wind*, 766 F.3d at 400. In so doing, the Fifth Circuit held that the FERC's interpretation of its own regulations is entitled to no deference and the Texas Public Utilities Commission's interpretation of the FERC's regulations is entitled to great deference. *Id.* at 385, 399. Accordingly, the court upheld a rule of the Texas Commission that provides only QFs that provide "firm power" can form long-term contracts, as opposed to wind and solar QFs that can only provide power intermittently. *Id.*

While this decision obviously supports the instant positions of the Company and the Division, it must be totally disregarded. The decision violently conflicts with controlling case law from the U.S. Supreme Court. Other circuits have held that the FERC is entitled to significant discretion in interpreting its own regulations and decisions of the Fifth Circuit are not binding on this Commission.

Initially, if a party petitions the FERC challenging an Order from this Commission, under PURPA's enforcement regime the resulting Order would be brought to a Utah Federal District Court to obtain an injunction enforcing the FERC Order. 16 U.S.C. § 824a-3(h)(2)(A) & (B). The District Court's decision would then be reviewed by the Tenth Circuit, not the Fifth. As discussed below, the Tenth Circuit would be compelled to follow the controlling precedent from the U.S. Supreme Court and follow the other Circuit Court's decisions granting deference to the FERC. Therefore, the Fifth Circuit decision is not binding on this Commission.

Moreover, the Fifth Circuit clearly erred in holding that the FERC is entitled to no deference in interpreting its own regulations. *Auer v. Robbins*, 519 U.S. 452 (1997), provides that an agency's interpretation of its own regulations will be granted the highest standard of deference and will be upheld unless "plainly erroneous." *Id.* at 461. However, in *Exelon Wind*, the court astoundingly held that FERC Orders are not entitled to *Auer* deference because they are analogous to informal "opinion letters—like manuals and enforcement guidelines." *Exelon Wind*, 766 F.3d at 392. In support of this assertion the court cited *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). However, *Christensen* provides that agency's interpretations of its regulations in administrative adjudications are entitled to *Auer* deference and the decision in *JD Wind* resulted from an administrative adjudication. *Id.* at 587; *INS v. Aguirre – Aguirre*, 529 U.S. 415, 425 (1999)(administrative adjudication granted *Auer* deference); *see also*, *American Paper Institute, Inc.*, 461 U.S. at 415 (FERC has authority to promulgate the precise rule at issue in *Exelon Wind.*)

Moreover, the U.S. Supreme Court has extended *Auer* deference to interpretation of regulations in situations far less formal and rigorous than the administrative proceedings resulting in FERC Orders, including interpretations raised for the first time in an amicus brief,[3] letters of the Comptroller of the Currency,[4] decision of Pension Benefit Guaranty Corp.,[5] and no-action notices published in the Federal Register.[6] Accordingly, other federal courts have held that FERC Orders issued under PURPA are entitled to *Auer* deference. *See, e.g.*, *Southern California Edison Co. v. FERC*, 195 F.3d

[3] *Decker v. Nw. Envtl. Def. Ctr.*, 133 S.Ct. 1326, 1336-37 (2013).
[4] *NationsBank of NC, NA v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995).
[5] *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 647-468 (1990).
[6] *Young v. Community Nutrition Institute*, 476 U.S. 974, 978-979 (1986).

17, 28 (D.C. Cir 1999); *Winding Solar LLC v. Peevey,* 2015 WL 675388 (D.C. Cal. 2015)(discretion to interpret enabling statute). Thus, the Fifth Circuit's startling conclusion that FERC Orders are not entitled to deference must be disregarded.[7]

Moreover, this Commission has always worked under the correct assumption that the FERC has authority in interpreting and implementing PURPA. Adopting the reasoning of *Exelon Wind* could potentially invalidate the building blocks of this Commission's PURPA jurisprudence. Happily, this flawed opinion is not binding on this Commission. Rather, this Commission, as well as the Tenth Circuit, must follow the controlling opinions of the U.S. Supreme Court and the other federal courts that grant deference to the FERC in its statutory role of implementing PURPA.

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[7] Alternatively, relying on Fifth Circuit precedent that is also not binding on this Commission, the majority in *Exelon Wind* argues that even if a FERC Order is entitled to deference under *Auer,* the regulation at issue unambiguously provides that state commissions have the authority to limit the types of QFs entitled to enter long-term contracts. *Exelon Wind,* 766 F.3d at 399-400. However, the dissent in *Exelon Wind* decimates this argument.

> FERC mandated that "[e]ach qualifying facility shall have the option . . . to provide energy or capacity pursuant to a legally enforceable obligation." 18 C.F.R. § 292.304(d)(2). The Public Utility Commission of Texas . . . implemented [a] regulation . . . permitting only *some* qualifying facilities to enter into a legally enforceable obligation. . . . The option belongs to *each* qualifying facility, which means that it belongs to "every" qualifying facility. *See Sierra Club v. EPA,* 536 F.3d 673, 678 (D.C. Cir. 2008)("`Each' means `[e]very one of a group considered individually.'" (quoting *American Heritage Dictionary* 269 (4th ed, 2001))).

Id. at 401, 403 (dissent)(emphasis in original). Accordingly, the regulation at issue is unambiguous, but not in the way the majority reads it. Moreover, even if the dissent's argument does nothing more then raise an ambiguity concerning the proper interpretation of 18 C.F.R. § 292.304(d)(2), under *Auer* the FREC has the authority to resolve this ambiguity. *Auer,* 519 U.S. at 457.

The majority's final justification for disregarding the FREC's Order, is that counsel for Exelon conceded at oral argument that the FERC is not entitled to deference in interpreting its own regulations. *Exelon Wind,* 766 F.3d at 397. However, a mistake of counsel does not change the law and in this case the Office makes no such concession.

(2) Idaho Commission Decision

The Idaho decision involved many of the same arguments, and the same players, as the instant case. However, there is an important distinction in the rational of the Idaho decision. The Idaho Commission based its Order largely on the contention that "avoided cost rates for [QFs] projects are declining and will continue to decline . . . . result[ing] in avoided costs rates which exceed or `overestimate' avoided costs rates in the future." *Id.* at pg. 6.

The prospect of certain overpayment was never at issue in the Utah case. To the contrary, the Company and Division argued that future estimates of avoided costs amounted to pure speculation. (Clements Reb. at ln. 177-181; Peterson Reb. at ln. 90-93). Given the central importance of the notion of certain overpayment to the Idaho decision, the case is not significantly analogous to the instant docket. In any event, neither the Idaho nor the Fifth Circuit decisions are binding on this Commission. Rather, this Commission should be guided by its knowledge of PURPA and its familiar regulatory scheme.

CONCLUSION

For the forgoing reasons, this Commission must deny the instant application.

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Robert J. Moore
Attorney for the Office of Consumer Services