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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 **BRIEF OF THE RENEWABLE ENERGY COALITION**

I. INTRODUCTION

Pursuant to Utah Admin. Code R746-100-10 and the Utah Public Service Commission (the "**Commission**" or "**UPSC**") instructions at the November 12, 2015 hearing, Renewable Energy Coalition (the "**Coalition**" or "**REC**") respectfully submits this legal brief regarding the legality of shortening the contract for qualifying facilities ("**QFs**") under the Public Utility Regulatory Policies Act ("**PURPA**"). Rocky Mountain Power's proposal for maximum contract terms of only three years violates the Federal Energy Regulatory Commission's ("**FERC**") requirements that QFs: 1) be provided fixed-price rates for energy and capacity in a long-term contract; and 2) be paid for the capacity

they provide utilities. The Commission recently eliminated capacity payments during Rocky Mountain Power's sufficiency period, and the practical result of adopting the company's proposal would mean that QFs are never paid for capacity. If the Commission shortens contract terms, however, then it should ensure that all existing QFs are paid for capacity during the years of contract renewals, similar to how the Idaho Public Utilities Commission (the "**Idaho Commission**") resolved this issue.

II. RENEWABLE ENERGY COALITION

REC represents the interests of non-intermittent QFs in Oregon, Idaho, Washington, Utah, and Wyoming in regulatory and contractual matters. REC participates in utility rate proceedings and investigations regarding PURPA contract terms and conditions, avoided cost rates, integrated resource plans ("**IRPs**"), interconnections, and matters important to QFs and non-utility owned electric generators. REC also monitors and lobbies legislatures on energy policy matters, and provides consulting services to individual members on contractual, operational, interconnection, and other matters.

REC has over thirty members who own and operate nearly fifty QFs that have power purchase agreements with utilities, including Rocky Mountain Power. REC's members include Draper Irrigation Company, Hydro Plus – S&R Kaster, Wasatch Integrated Waste Management District ("**Wasatch**"), and BMB Enterprises. The projects provide significant benefits to their local communities and economy. For example, Wasatch is a Special Service District that provides solid waste management services for local municipalities, and all its power sales revenues are reinvested into the community or

used to lower customers' rates.[1] Wasatch is planning on constructing a new QF project, which it would not be able to finance under three-year or other short-term contracts.[2]

III. ARGUMENT

1. QFs Must Be Compensated for the Capacity Value They Provide

PURPA was passed because utilities did not (and often still do not) want to purchase power from QFs. The law was (and still is) required because "traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities."[3] The goal of PURPA was to address discrimination by electric utilities in the availability and price of power that they sell to and buy from QFs.[4]

PURPA requires electric utilities to purchase power from QFs at the utilities' avoided costs, which must also be just and reasonable for both QFs and ratepayers.[5] FERC policy also requires utilities to purchase electricity from QFs based on the utilities' full avoided costs.[6] Avoided costs should be based on a utility's incremental costs that, but for the purchase from the QFs, the utility would incur to generate power or purchase power from another source.[7]

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1 See Nathan Rich Rebuttal Testimony at 6.
2 Id. at 9.
3 Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 750 (1982); Environmental Action, Inc. v. Fed. Energy Regulatory Comm'n, 939 F.2d 1057, 1062 (D.C. Cir 1991).
4 Industrial Cogenerators v. Fed. Energy Regulatory Comm'n, 47 F.3d 1231, 1232 (D.C. Cir 1995).
5 16 U.S.C. § 824a-3(b)(1).
6 American Paper Institute, Inc. v. Am. Elec. Power Serv. Ass'n, 461 U.S. 402, 406, 412-17 (1983).
7 16 U.S.C. § 824a-3(d).

Avoided cost rates must compensate QFs for both the energy and capacity that the utility would have generated or purchased for itself.[8] FERC recently explained that when a utility has a demand for capacity, then the rates must include the capacity costs.[9] In other words, "when the demand for capacity is zero, the cost for capacity may also be zero[;]" but when the demand for capacity is not zero, the cost for capacity may not be zero.[10] A limitation on capacity payments that does not have a "clear relationship" to the utility's actual capacity needs will fail to implement FERC's "regulations requiring an electric utility to purchase any capacity which is made available from a QF."[11] As explained below, Rocky Mountain Power has a capacity deficit, and QFs will not be paid for capacity if the Commission adopts the company's proposed maximum three-year contract terms.

2. Rocky Mountain Power's Proposal Violates PURPA

FERC has consistently interpreted its own rules to entitle QFs to long-term contracts containing fixed prices for energy and capacity based on a forecast of the utility's avoided costs. Rocky Mountain Power's proposal must be rejected because it is inconsistent with FERC's rules, which state that:

> Each qualifying facility shall have the option . . . (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility,… be based on . . . (ii) The avoided costs calculated at the time the obligation is incurred.[12]

The option to sell energy and capacity over a "specified term" means that a QF has the choice to determine the length of the term.[13]

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8 18 C.F.R. §§ 292.101(b)(6), 292.304; Am. Paper Institute, Inc., 461 U.S. at 406.
9 Hydrodynamics Inc., 146 FERC ¶ 61,193 at P. 35 (2014).
10 Id.
11 Id.
12 18 C.F.R. § 292.304(d)(2)(ii) (emphasis added).
13 18 C.F.R. § 292.304(d)(2)(ii).

The history and purpose of the regulation support a conclusion that QFs are entitled to long-term, fixed-price contracts or other legally enforceable obligations. As explained by FERC, the rule "is intended to prevent a utility from circumventing the requirement that provides capacity credit to the qualifying facility merely by refusing to enter into a contract with the qualifying facility."[14] FERC further explained that the rule "enables a qualifying facility to establish a fixed contract price for its energy and capacity at the outset of its obligation . . . ."[15] Long-term commitments are necessary because QFs have a "need for certainty with regard to return on investment in new technologies".[16]

FERC has consistently relied upon its statements in its Order No. 69.[17] FERC concluded that a state commission violated its rules where the PURPA implementation "offers the competitive solicitation process as the only means by which a QF greater than 10 MW can obtain long-term avoided cost rates."[18] FERC additionally found that a 50-MW cap for purchases from certain QFs illegally prohibited QFs from obtaining "forecasted avoided cost rates."[19] The Commission cannot violate FERC precedent and prevent QFs from entering into to long-term contracts to sell energy and capacity based on forecasting the purchasing utility's avoided costs at the time the obligation is incurred.

3. Three-Year Contract Terms Mean QFs Will Likely Never Be Paid For Capacity

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14 Order No. 69, 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980).

15 Id. (emphasis added).

16 Id.

17 See Virginia Electric and Power Co., 151 FERC ¶ 61,038, P. 24 (2015); Hydrodynamics Inc., 146 FERC ¶ 61,193, P. 31; Cedar Creek Wind, LLC, 137 FERC ¶ 61,006, P 32 (2011); New York State Electric & Gas Corp., 71 FERC ¶ 61,027, 61,115-61,116 (1995).

18 Hydrodynamics Inc., 146 FERC ¶ 61,193 at P. 33 (emphasis added).

19 Id. at P. 34.

Rocky Mountain Power's apparent goal is to ensure that Utah QFs are no longer compensated for the capacity value they provide to the company throughout the project's entire life cycle. The Commission has already eliminated capacity payments during Rocky Mountain Power's resource sufficiency period.[20] The combination of removing capacity payments during the company's alleged resource "sufficiency" period, Rocky Mountain Power's current and historic "sufficiency" periods, and three-year contracts mean that QFs will be paid market prices, regardless of the amount of capacity resources they provide to the company or cause the company to avoid. This will likely prevent QFs from ever being paid for capacity and violate FERC's rules that QFs must be paid for the capacity value they provide to the utilities.

Rocky Mountain Power needs both energy and capacity that can be avoided by QF purchases. For example, Rocky Mountain Power's 2015 IRP states that the company will meet its resource needs over its twenty-year planning horizon with short-term market purchases, demand side management, coal plant conversions, conservation and energy efficiency, significant investments in its existing coal fleet to retain these resources, and almost 3,000 MWs of new natural gas facilities. QFs that sell power to Rocky Mountain Power will help avoid the need for all of these resources. The economic life of QFs, especially baseload resources, typically lasts for decades. For example, the Wasatch QF came on line in 1987, and has been selling power to Rocky Mountain Power for more than twenty years.[21] Assuming fair and accurate avoided cost rates, there is no reason that hydro,

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20 The Application of Rocky Mountain Power's Proposed Revisions to Elec. Serv. Schedule No. 37, Avoided Cost Purchases from QFs, Docket No. 15-035-T06 (Sept. 18, 2015).

21 Nathan Rich Rebuttal Testimony at 6.

biomass, methane and other baseload QFs cannot sell power over the twenty-year planning horizon. In fact, Rocky Mountain Power assumes that all small QFs like Wastach renew their contracts and sell power over the planning horizon.[22]

With three-year contract terms, QFs will no longer receive capacity payments as long as they enter into a contract when the next planned thermal resource acquisition is longer than the contract term. [23] Since Rocky Mountain Power almost always has sufficiency periods longer than three years, QFs will likely never be paid for capacity.

For example, assume that Rocky Mountain Power is planning its next thermal resource acquisition in only a few years, or 2019. A QF that enters into a new three-year contract in 2016 will not be paid for capacity during the entire contract term. In 2019, Rocky Mountain Power will have a new IRP, which will likely not plan on acquiring a new thermal resource for more than three years, and the company's 2019 avoided cost rates would not have any capacity payments. If the QF renews its contract and enters into a new thee-year contract in 2019, then the QF will again not be paid for capacity. The QF could continue entering into renewal contracts for the rest of its useful life and Rocky Mountain Power could build a new thermal resource every few years, but the QFs would still not be paid capacity. Under either the very long current sufficiency periods, or the shorter historic periods, QFs will never be paid for capacity.

4. The Commission Could Adopt the Idaho Commission's Policy of Paying Existing QFs for Capacity During the Sufficiency Period

The Idaho Commission has shortened the contract term to two years similar to what Rocky Mountain Power is requesting in this proceeding. The Idaho Commission also

22 John Lowe Testimony at 11.

23 Id. at 10-14.

ensured that new QFs that subsequently renew their contracts are generally paid capacity during the resource sufficiency period. This is a continuation of the Idaho Commission's policy that long existing QFs are to be paid for capacity during the full term of any contract renewals. The Idaho Commission merely extended this policy to all QFs that enter into follow on contracts to ensure that short contract terms do not prevent those QFs that are able to be constructed to be paid capacity.

Similar to Utah's recently-changed avoided cost rate methodology, the Idaho Commission's avoided cost rates include resource sufficiency and deficiency periods.[24] For new QFs in Idaho, and all Utah QFs that sign their first or a new contract, the initial years result in a resource sufficiency period in which the rates do not include capacity payments. This is because the QF is only paid for capacity "at such time that the utility becomes capacity deficient", which almost never includes the early contract years.[25]

The Idaho Commission and UPSC's policies significantly diverge in terms of existing projects being paid for capacity when they renew their contracts. The Idaho Commission recognizes the fact that all, or nearly all, existing QFs renew their contracts, which reduces the utility's need to purchase new capacity resources, and explained:

> By including a capacity payment only when the utility becomes capacity deficient, the utilities are paying rates that are a more accurate reflection of a true avoided cost for the QF power. However, we find merit in the argument made by the Canal Companies that contract extensions and/or renewals present an exception to the capacity deficit rule that we adopt today. It is logical that, if a QF project is being paid for capacity at the end of the contract term and the parties are seeking renewal/extension of the

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24 John Lowe Testimony at 15-16; Re Idaho Power Company's Petition to Modify Terms and Conditions of PURPA Purchase Agreements, IPUC Case Nos. IPC-E-15-01, AVU-E-15-01, PAC-E-15-03, Order No. 33357 at 3, 21 (Aug. 20, 2015).

25 See Re the Commission's Review of PURPA QF Contract Provisions, IPUC Case No. GNR-E-11-03, Order No. 32697 at 21-22 (Dec. 18, 2012) clarified in Order No. 32871 (Aug. 9, 2013).

> contract, the renewal/extension would include immediate payment of capacity. An existing QF's capacity would have already been included in the utility's load and resource balance and could not be considered surplus power. Therefore, we find it reasonable to allow QFs entering into contract extensions or renewals to be paid capacity for the full term of the extension or renewal.[26]

The Idaho Commission specifically reaffirmed that policy when it lowered the contract term.[27] The Idaho Commission continued its policy that existing QFs that renew their contracts would be paid capacity during the sufficiency period, and clarified that new QFs that renew their contracts should generally be paid capacity in renewal contracts. The Idaho Commission explained that:

> We recognize that a new two-year contract would be unlikely to reach a capacity deficiency date. Therefore, we find it reasonable for utilities to establish capacity deficiency at the time the initial IRP-based contract is signed. As long as the QF renews its contract and continuously sells power to the utility, the QF is entitled to capacity based on the capacity deficiency date established at the time of its initial contract. For example, if the QF comes on-line in 2017 and the utility is capacity deficient in 2020, the QF would be eligible for capacity payments in the second year of its second contract and thereafter if in continuous operation. This adjustment recognizes that in ensuing contract periods, the QF is considered part of the utility's resource stack and will be contributing to reducing the utility's need for capacity. This mitigates the concern that short-term contracts will not contribute to the avoidance of utility capacity/generation.[28]

If the UPSC shortens the contract terms in this proceeding, then it should adopt the Idaho Commission's policy on this matter and ensure that existing QFs are paid for capacity when they renew their contracts. This is consistent with how utilities plan their operations and the benefits that existing QFs provide to the utilities. Any QF entering into a follow-on contract should be provided avoided costs prices that include capacity

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26 Re the Commission's Review of PURPA QF Contract Provisions, Order No. 32697 at 21-22.

27 Re Idaho Power Company's Petition to Modify Terms and Conditions of PURPA Purchase Agreements, Order No. 33357 at 25-26.

28 Id.

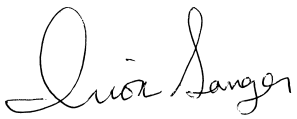
payments. This approach will not remedy the problem associated with short contract terms preventing QFs from obtaining financing, but could result in those QFs that are able to be constructed to at least be paid for capacity during contract renewals.

IV. CONCLUSION

REC recommends that the Commission reject Rocky Mountain Power's three-year contract terms because they would illegally violate FERC policy by preventing QFs from obtaining financing or ever being paid for capacity. If the Commission elects to shorten contract terms, then it should adopt the Idaho Commission's policy of paying capacity during any contract renewals.

Dated this 9th day of December 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on this 9th day of December, 2015 upon the following as indicated below:

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