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BEFORE THE
PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the PacifiCorp's Revisions to Schedule 135, Net Metering Service and Proposal for New Schedule 135A, Net Metering-Transition Service	**Docket No. 16-035-T14** **MOTION TO DISMISS OR, IN THE ALTERNATIVE, SUSPEND ROCKY MOUNTAIN POWER'S ADVICE NO. 16-13, FILED BY SUNRUN AND ENERGY FREEDOM COALITION OF AMERICA**

Pursuant to Utah Administrative Rule § R746-100-3J, Sunrun and the Energy Freedom Coalition of America ("EFCA") (collectively "Movants") respectfully move the Public Service Commission ("Commission") to dismiss Rocky Mountain Power's ("Company's") Advice No. 16-13 filing with prejudice. In the alternative, Movants request that the Commission to suspend Advice No. 16-13 subject to revisions to the effective date, to be determined by the Commission in a separate, related proceeding.

Advice No. 16-13 should be dismissed because it: (1) seeks the unprecedented and extraordinary relief of creating a transitional tariff without a legal or regulatory basis; (2) violates regulatory and legal norms and standards of ratemaking, including the filed-rate doctrine; and (3) threatens, without due process, to undermine the rights of current and prospective net metering customers and to create substantial uncertainty for the solar industry in Utah. These grounds present sufficient cause to dismiss Advice No. 16-13 with prejudice.

Alternatively, in the event the Commission chooses not to dismiss Advice No. 16-13, Movants request that the Commission suspend the filing and the effective date of modifications to Schedule 135 (and related forms) until, at a minimum, such time as the Commission makes a determination on the Compliance Filing in Docket No. 14-035-114. Any Commission determination delineating and differentiating the rights of current and prospective net metering customers should be based upon a complete factual record of costs and benefits of the net metering program and a determination on the current justness and reasonableness of rates and conditions applicable to those customers. To the extent that this basis cannot (or should not) be provided in Docket No. 14-035-114—because it inappropriately seeks to change rates outside of a general rate proceeding—Movants request that a decision on the effective date of the tariff and standard form changes sought by Advice No. 16-13 be withheld until such time as the Commission can satisfy the substantial evidence standard in Utah Code Ann. § 54-15-105.1 that any new rate structures for net metering customers are just and reasonable in light of the costs and benefits of the net metering program.

Given the time constraints for making a decision on Advice No. 16-13, Movants respectfully request that the Commission shorten the period for responses to this motion to coincide with the November 29 deadline for filing reply comments in this proceeding.

For the reasons stated above and in the attached memorandum, Movants respectfully request that the Commission move expeditiously to dismiss Advice No. 16-13 with prejudice or, in the alternative, suspend the filing and the effective dates of the proposed tariffs and standard forms until such time as the Commission determines in a separate, related proceeding that such relief can be granted.

Respectfully submitted this 22nd day of November, 2016.

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	)	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, SUSPEND ROCKY MOUNTAIN POWER'S ADVICE NO. 16-13, FILED BY SUNRUN AND ENERGY FREEDOM COALITION OF AMERICA**

Sunrun and the Energy Freedom Coalition of America ("Movants") respectfully submit this memorandum in support of its requested relief in its *Motion to Dismiss or, in the Alternative, Suspend Rocky Mountain Power's Advice No. 16-13.*

I. INTRODUCTION

On November 9, 2016, Rocky Mountain Power ("Company") submitted Advice No. 16-13 seeking changes to tariffs and standard forms associated with its net metering program. The Company seeks to close its currently effective net metering service tariff, Schedule 135, and replace that service with a new "transitional" tariff, Schedule 135-A, which would only apply to customers that apply to engage in net metering after December 9, 2016. The Schedule 135 and 135-A tariffs will be nearly identical, with the exception that the transitional tariff will include specific notice language to indicate a distinction that customers under Schedule 135-A could be imminently placed on new rates while legacy customers on the closed Schedule 135 would continue on the same rate structure for some undetermined amount of time. The notice provision provides as follows:

> "Customers will be subject to all changes to net metering service including changes to credits, charges or rate structures offered herein and in related tariffs resulting from the final determination under Utah Code Ann. § 54-15-105.1 which may include, without limitation, transfer from this tariff to all new applicable service schedules approved by the Commission."[1]

The Company's "Compliance Filing" in Docket No. 14-035-114 seeks approval of specific changes to the rate structures and credit rates for certain net metering customers. The Company seeks approval of Advice No. 16-13 as an integral element of its pursuit of rate changes for net metering customers through its Compliance Filing.

II. ARGUMENT

A. The Company's Advice Filing Seeks the Unprecedented and Extraordinary Relief of Creating a Transitional Tariff Without a Legal or Regulatory Basis.

The Company's Advice filing seeks extraordinary relief, but fails to produce even a minimal justification to sustain the request. The Company, through the inappropriate use of a tariff filing, proposes to create a new classification of service within the existing Commission-approved net metering service. Though the Company claims that no substantive change to rates is affected,[2] the sole purpose of modifying the tariffs and interconnection agreements at this time is to include a notice provision that applies only to customers applying for net metering service after December 9, 2016 ("prospective customers"). Notwithstanding the Company's claim to the contrary, the proposed inclusion of the notice provision is significant: The provision takes the extraordinary step of differentiating the relative rights of customers based on when they applied for service without any legal basis for doing so.

[1] Advice No. 16-13 at pp. 1-2.
[2] *Id.* at p. 2.

Any potential ratemaking distinction between existing and prospective net metering customers in the Company's proposal is contrary to law. When a utility seeks a tariff change that results in "lesser service or more restrictive conditions at the same rate or charge," Commission regulations require a prior determination that the specific change is justified.[3] In this case, the Company clearly and explicitly intends to create a limitation in rights for customers applying for net metering service on or after December 10th, as compared to the rights enjoyed by a customer applying on December 9th. Moreover, the Company's proposed action limits the rights of all non-participating customers that could one day participate in net metering. The Commission has made no prior determination that such a restriction on net metering service is justified. In fact, the Commission lacks a record for doing so in this or any other proceeding before December 9th. Thus, the Company's proposal violates Commission regulations[4] by seeking to restrict the rights of net metering customers that apply after December 9, 2016 without the legal basis of a prior Commission order finding that such a distinction is justified.

The cases the Company cites as precedent for such a tariff filing are completely inapposite. They all involve telecommunications services, where service offerings change in response to competitive conditions and technological advances. None of the cases involves anything approaching the circumstances present here, where the suggestion in and of itself that "grandfathering" is necessary has created a cloud of uncertainty over the distributed solar industry that threatens to cause harm to customers and industry participants. The *Bear Lake*

[3] Commission Rule R746-405-2(E) ("Utility tariffs may not increase rates, charges or conditions, change classifications which result in increases in rates and charges or make changes which result in lesser service or more restrictive conditions at the same rate or charge, unless a showing has been made before and a finding has been made by the Commission that the increases or changes are justified.").
[4] *Id.*

Communications case, for example, involves the phasing out of "emergency line service" and the cited order merely provides that the service cannot be discontinued without notice from the utility and proper Commission oversight. The *US WEST Communications* decision involved a request by the utility to be able to continue to provide "Centrex Plus" service for three years to the customers using that service—principally "large government and eleemosynary institutions [with] long budget and planning cycles"—to enable them to migrate in an orderly fashion to "Centrex Prime," which was the replacement service offered by US WEST ***that had already been approved by the Commission*** (unlike the current case, where grandfathering is being proposed in circumstances that presume the Commission is going to make a change to net metering rates despite the lack of a finding by the Commission that such rates should in fact change). Finally, the *US WEST Paging* decision involved the phasing out of a service where only 9 remaining customers were taking the service and those customers were found to have available alternatives.

The only element these Commission decisions have in common is that they refer to the term "grandfathering." The circumstances are entirely different from the situation in the present case. In fact, until the Commission makes a change in the net metering terms and conditions, the concept of "grandfathering" is inapplicable. As discussed below, until the Company sustains its burden of proof to demonstrate the existing rates are unjust and unreasonable, the filed-rate doctrine precludes the relief sought. Although the Company claims that these cases stand for the proposition that "[t]he Commission has regularly approved closing service to existing customers under similar circumstances,"[5] none of the cases cited by the Company as precedent bear on the

[5] Advice No. 16-13 at p. 4.

issue of adopting grandfathering provisions ***in the absence of a Commission decision changing terms and conditions for the underlying service***.

Moreover, the notice provision functions to cast the presumptive cloud that currently effective rate structures will be modified and applied only to these prospective customers.[6] The notice itself declares that customers on Schedule 135-A will be subject "to all changes to net metering service including changes to credits, charges or rate structures…." This suggests not only that changes are likely to occur; it rushes to that conclusion ***on the front end*** of a regulatory process through which the Commission will carefully consider the evidence to determine if ***any*** change is warranted. The Commission's previous characterizations on proposed changes to net metering have been careful to avoid the implicit messaging that change is inevitable or imminent, as the requisite determination to support any change is yet to occur.[7]

With no support in law or Commission precedent, the relief sought is *ultra vires* and must be denied. The Company has no unilateral authority to modify its net metering service and has no existing legal or regulatory obligation to modify the tariff in the manner sought. Just as the "Compliance Filing" in Docket No. 14-035-114 was undertaken voluntarily—and not as a condition of compliance with a prior order—the instant Advice filing is purely voluntary and does not spring from any regulatory or legal requirement. Indeed, the Commission has made no

[6] See https://www.rockymountainpower.net/netmetering (last visited Nov. 20, 2016).
[7] *See, e.g.*, Docket No. 14-035-114: *Order re: Conclusions of Law on Statutory Interpretation and Order Denying Motion to Strike* (July 1, 2015) at p. 11 ("The Commission's Statutory Obligation under Step One to Conduct a Cost-Benefit Analysis of Net Metering is Separate from and Preliminary to Its Obligation to Establish a "Just and Reasonable" Rate under Step Two."); *Order* (November 10, 2015) at p. 8 ("[T]he parties are correct to emphasize that, ultimately, the results of Subsection One analysis will be used to design rates. The results of the Subsection One analysis must leave us well poised to determine a just and reasonable charge, credit, or ratemaking structure under Subsection Two.")

prior determination that would justify this substantive tariff change. Advice No. 16-13 is contrary to law and cannot be approved at this time.

B. Advice No. 16-13 Violates Fundamental Regulatory and Legal Principles of Ratemaking.

The Notice provision in Advice No. 16-13 casts doubt on the current validity of rates, violating the fundamental regulatory and legal tenet that approved rates are presumed to be valid until set aside. The purpose of the "filed-rate doctrine" "is to ensure that filed rates are the exclusive source of the terms and conditions by which the [utility] provides to its customers the services covered by the tariff." *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998). Under the filed-rate doctrine, the existing rates approved by the Commission are deemed to be just and reasonable and the utility has no independent authority to charge anything other than the filed rates. If a utility wants to change rates, it must first successfully demonstrate that the filed rates are no longer just and reasonable and the Commission must issue an order approving those changes.

There is no prior determination from the Commission that the rates charged to net metering customers are unjust and unreasonable. On the contrary, the Commission has held that the testimony and comments provided in a recent Rocky Mountain Power rate case fell short of providing the substantial evidence necessary to make net metering rate change determinations pursuant to Utah Code Ann. § 54-15- 105.1(1).[8] Crucially, the Commission noted that the Company's burden was not met because its testimony and evidence contained no discussion at all of net metering program benefits; yet any such benefits are an integral part of the analysis

[8] *Report and Order*, Docket No. 13-035-184, at pp. 58–9.

required by the statue.[9] While the Company has made a "Compliance Filing" in which it alleges to make this showing, it is legally suspect that the Company can satisfy that showing as it applies to existing and prospective customers relying on stale data that is not commensurate with the test year in the Company's next general rate case.[10] As noted above, there is a high likelihood that the Commission will be called upon to make a threshold determination in Docket No. 14-035-114 on the legality of imposing a new rate classification and new rate outside of a general rate case proceeding.

The presumption exists, and has not been upset or set aside, that the existing rates and schedules are valid and just and reasonable. Accordingly, Schedule 135, which does not distinguish between existing and prospective customers, is presumptively just and reasonable at present. An act to close Schedule 135 and create a new classification of net metering customers (i.e., prospective customers) presumes that there is some basis to conclude that rates remain just and reasonable for Schedule 135 customers but not for Schedule 135-A prospective customers. There is no prior factual determination to support that factual allegation to affect a valid change in the tariff. Accordingly, the modification of Schedule 135 violates the filed-rate doctrine, the Commission regulations governing tariff modifications,[11] and Utah Code § 54-15-105.1 (establishing that net metering rates must be just and reasonable in light of the costs and benefits of the program).

Any rate distinction between net metering customers, or the distinct rate treatment of all net metering customers, must be based upon a full record of the costs and benefits of the net metering program, according to Utah Code Ann. § 54-15-105.1. Only after a consideration of the

[9] *Id.*
[10] *Order*, Docket No. 14-035-114, Ordering Paragraph No. 4 (November 10, 2015).
[11] *See* footnote 3, *supra*.

costs and benefits of net metering can the Commission conclude that a net metering rate proposal is just and reasonable and, by extension, that the existing rate schedule is no longer just and reasonable. In the event the Commission ever makes such a determination and orders new rates for net metering customers, it will be appropriate to consider a variety of factors in determining the scope of applicability of those rates to ensure that they are just and reasonable. These factors include the equitable considerations of customers that previously invested in onsite solar using their private funds and whether the administrative burdens and costs of migrating to a new approach are proportional to the net cost or net benefit of the program.

C. The Company's Representation to the Public that It Will Distinguish Between Current and Prospective Net Metering Customers Can Be Reasonably Expected to Chill Prospective Customer Interest in Net Metering, Violates Due Process Rights, and Constitutes Anticompetitive Behavior.

Whatever the intent of the Company's desired relief, the Company is intent on representing to the public that existing net metering customers will not be subject to the rates proposed in the Compliance Filing. The Company's public website prominently states that its proposed rates will not apply to existing net metering customers:

> Rocky Mountain Power is proposing new rates for Utah net metering customers. The proposed rates would apply only to customers who request a net metering connection after December 9, 2016.[12]

As discussed in Section A, the Company has no legal basis to conclude that it may segregate existing customers from prospective customers. In this way, the Company, in its public messaging, is presumptuously providing assurances to the considerable constituency of existing net metering customers that they will be grandfathered and protected from imminent rate changes. In the absence of any Commission action to authorize any movement or changes in

[12] *See* footnote 7, supra.

regard to net metering rates, however, there is no need for such assurances. The messaging has a clear impact on prospective customers, however, and amounts to anticompetitive behavior by the Company.[13]

The Company's explicit attempt to use its public messaging to assuage the concerns of *existing customers*—who want assurance that their investment expectations are being respected— begs the question of what impact its "notice" will have on ***prospective customers***. While existing net metering customers may be wary of the Company, in light of its moves in recent years to add new surcharges or seek changes in rate structure, these customers have had some measure of comfort that the safeguards of the regulatory process have worked as designed to ensure that their investments would not be disrupted on incomplete information and without adequate process.[14] Prospective net metering customers are entitled to the same opportunity to install and enjoy onsite generation[15] as existing customers and should similarly have comfort that the protections afforded by law are fully accounted for and observed by the Commission.

Indeed, the rights of all customers currently eligible to participate in net metering would be substantively limited and deprived by the Company's proposal, without due process. The limited scope and duration of this docket does not provide adequate notice to the public that the

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[13] *See* http://Utahsolarworks.com/net-metering/ ("Won't this change kill solar in Utah?"). In the same breath that the Company defends reducing the attractiveness of net metering to prospective customers, it promotes its own products and use of solar resources. A screenshot is included in Sunrun and EFCA's concurrently filed comments at p. 5.

[14] *Report and Order*, Docket No. 13-035-184 (August 29, 2014), at pp. 58-9 (noting that testimony and comments fell short of providing the Commission the substantial evidence necessary to make the determinations required under Utah Code Ann. § 54-15-105.1(1)).

[15] *See* Jon Wellinghoff and Steven Weissman, *The Right to Self-Generate as a Grid-Connected Customer*, Energy Bar Association©, (November 16, 2015) (discussing the sources in common law and state and federal statutory law providing a right to self-generate), *available at* http://www.felj.org/sites/default/files/docs/elj362/23-305-326-Wellinghoff_FINAL%20%5B11.10%5D.pdf

right of the general body of ratepayers to engage in net metering—and to potentially enjoy some measure of grandfathering rights—are being determined in this truncated manner. The vehicle used to request the Company's requested relief (tariff modification) short circuits the usual, robust regulatory process associated with net metering[16] and, in turn, cast a pall over the prospects of customers that are considering installing solar. The general public does not have adequate notice that the rights of all customers to engage in net metering are being restricted. Due process requires a more thorough opportunity for the affected persons to weigh in on a decision of such consequence to currently enjoyed rights.

An official notice that rates may change, in the context of an immediate closing of the existing tariff, would understandably create the impression that a change in net metering is imminent and that departure from the status quo is preordained. The public has seen the Company propose rate changes to net metering customers twice now—in Docket No. 13-035-184 (January 3, 2014 rate case application and testimony proposing a net metering facilities charge) and in Phase 1 of Docket No. 14-035-114 (July 30, 2015 testimony prospectively proposed a three-part residential rate design)—and have relied on the integrity of statutory protections and the Commission process to support reasonable confidence in the continuing validity of rates and vitality of the net metering program. Against the backdrop of this recent regulatory history, a Commission-sanctioned notice creates the ominous implication that rate changes are likely and imminent.

While it is appropriate for the Company to give public notice when it seeks to change rates via a general rate case—and, in fact, it is a legal requirement to do so—the manner of the notice is critical. A notice of proposed rate changes ***cannot*** presumptuously imply that changes

[16] *See, e.g.*, Docket Nos. 08-035-78, 13-035-184, 14-035-114.

are a foregone conclusion. In this case, there is no guarantee that the Company's current rate proposal in Docket No. 14-035-114 will survive inevitable threshold legal challenges, as it is taking the unusual step of attempting to establish a new rate structure and new rate class outside of a general rate case proceeding. If that Company proposal fails, it is unclear how long the Company may wait to pursue the same changes as part of a general rate case, as that is entirely within the control of the Company. The drastic act of summarily closing the existing tariff and adopting a modified transitional tariff would understandably create confusion and uncertainty in the mind of a reasonable observer that an undesirable rate change is imminent. Just as it is inappropriate for the Company to create an impression of imminent change prior to Commission approval, it is inappropriate to ask the Commission to place the full weight and respect of its seal on a premature message that could disrupt the solar industry in Utah.

Customers of Rocky Mountain Power and the solar companies that serve them have a right to the legal processes afforded to them by Utah Code Ann. § 54-15-105.1, as considered within the context of a full rate case proceeding. It is only within the context of this proper legal procedure that a final determination on the rights of the general body of ratepayers is appropriate.

III. CONCLUSION

For the reasons stated herein, the Company's Advice No. 16-13 fulfills no current regulatory or legal obligation and inappropriately and illegally seeks to undermine the presumption of validity surrounding current rate structures and tariffs. In acting without a legal basis or valid regulatory purpose, the Company inappropriately seeks the Commission's *post hoc* approval for its public messaging regarding the relative rights of existing and prospective net metering customers. This public messaging can be reasonably expected to have a substantial

chilling effect on the rate of interest among prospective customers, and the Company's anticompetitive behavior cannot be endorsed. Accordingly, there is cause to grant the motion of Sunrun and EFCA to dismiss the Company's filing with prejudice and to refrain from issuing any pronouncement prejudging the outcome of Docket No. 14-035-114 or any future proceeding.

Respectfully submitted this 22nd day of November, 2016.

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