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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of an Investigation Regarding Third-Party Arrangements for Renewable Energy Generation	Docket No. 09-999-12 BRIEF OF ROCKY MOUNTAIN POWER REGARDING WHETHER CERTAIN THIRD PARTY ARRANGEMENTS FOR RENEWABLE ENERGY GENERATION ARE SUBJECT TO COMMISSION JURISDICTION
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Pursuant to the Public Service Commission (the “Commission”) of Utah’s Notice of Investigation and Procedural Order, dated October 12, 2009 (“Notice and Order”), Rocky Mountain Power (“Company” or Rocky Mountain Power”) hereby responds to the Commission’s Notice and Order as follows:

BACKGROUND

1. On October 12, 2009, the Commission issued a Notice of Investigation and Procedural Order in this proceeding to investigate whether, and the extent to which, certain third-party arrangements for renewable energy generation are subject to the Commission’s jurisdiction.
2. The Commission identified a number of issues to be considered and answered by

the parties to assist the Commission in its investigation.

ISSUES PRESENTED

Issue 1: Whether the Third-Party is a Public Utility Under Utah Law.

The Company's position is that current Utah law governing whether a third party is a public utility is clear. Utah Code § 54-2-1(7), with certain exceptions, classifies a third party that owns, controls, or operates electric plant as a public utility. The exceptions set forth in Utah Code § 54-2-1(16)(d) exempt a third party that qualifies as an independent energy producer from the Commission's jurisdiction if: (i) the commodity is produced or delivered for use of state-owned facilities; (ii) if the electricity is sold to an electrical corporation or wholesale purchaser; or (iii) if the electricity is delivered to an entity affiliated with independent energy producer. Other exemptions for independent energy producers include if the independent energy producer leases its ownership interest to a public utility or other exempt entity (§54-2-1(16)(f)) or a limited exemption under §54-2-1(16)(g) if an entity acts only provides financing for the electric facility. Accordingly, unless one of these exemptions is met, a third party selling energy, regardless of the source, is subject to the Commission's jurisdiction.

Issue 2: Whether the third party is a public utility under Utah law when arrangements are entered into primarily as a financing mechanism for distributed renewable energy.

The Company's position is that financing arrangements do not change the underlying principles set forth in § 54-2-1. The statute is clear that if the independent energy producer sells electricity, and unless one of the exemptions set forth in §54-2-1(16) is met, then the independent energy producer would be subject to the jurisdiction of and regulation by the Commission. The Company's position is that, while it might be possible to structure a lease to avoid Commission jurisdiction, in situations where the remuneration is based on the number of kilowatt hours

consumed, the Commission's jurisdiction is triggered.

Issue 3: Whether the third party is a public utility under Utah law when (i) there is a single relationship between the third-party owner of the generation and a customer or (ii) there are multiple customers taking power from the same third party.

In circumstances where a third party that is not otherwise engaged primarily in business as a public utility owns generation equipment for renewable energy generation that is installed on a single utility customer's premises to provide electricity to that single customer with sales of electricity in excess of the customer's needs to an electrical corporation, the third party is subject to the jurisdiction and regulation of the Commission under Utah law.

Section 54-2-1(16)(d) provides:

An independent energy producer is exempt from the jurisdiction and regulations of the commission with respect to an independent power production facility if it meets the requirements of Subsection (16)(d)(i), (ii), or (iii), or any combination of these:

(i) the commodity or service is produced or delivered, or both, by an independent energy producer solely for the uses exempted in Subsection (7) of for the use of state-owned facilities;

(ii) the commodity or service is sold by an independent energy producer to an electrical corporation or other wholesale purchaser; or

(iii) (A) the commodity or service delivered by the independent energy producer is delivered to an entity which controls, is controlled by, or affiliated with the independent energy producer or to a user located on real property managed by the independent energy producer; and

(B) the real property on which the service or commodity is used is contiguous to real property which is owned or controlled by the independent energy producer. Parcels of real property separated solely by public roads or easements for public roads shall be considered as contiguous for purposes of this Subsection (16).

Subsection (7) excepts from the definition of electrical corporations which are public utilities:

independent energy producers, and except where electricity is generated on or distributed by the producer solely for the producer's own use, or the use of the producer's tenants, or for the use of members of an associated of unit owners formed under Title 57, Chapter 8, Condominium Ownership Act, and not for sale to the public generally.

An independent energy producer is defined as a person "that own[s], operate[s], control[s], or manage[s] an independent power production or cogeneration facility. Utah Code Ann. § 54-2-1(13). An independent power production facility "means a facility that:

(a) produces energy solely by the use, as a primary energy source, of biomass, waste, a renewable resource, a geothermal resource, or any combination of the preceding sources; or

(b) is a qualifying power production facility. *Id.* § 54-2-1(14).

A third party that owns and operates a renewable generation resource for the sale of electricity to a single customer of a public utility is an independent energy producer. An independent energy producer is only exempt from regulation by the Commission if it sells power *solely* to the customer or *solely* to an electrical corporation. Because the electricity may be sold to both, solely does not apply in either circumstance and the third party generator is not exempt from the jurisdiction or regulation of the Commission. Furthermore, the exception in Subsection (16)(d)(iii) does not apply even if the electricity is produced for a customer on property owned by the third party, which would not normally be the case, all of the electricity is not delivered to the customer.

There is an exception to this rule. If all of the electricity produced by the third party is consumed by the customer, the third party is likely exempt from regulation by the Commission.

Issue 4: Whether the third party is a public utility under Utah law when arrangements involve the leasing of distributed generation equipment from non-utility lessors to lessees that are also retail customers of utilities.

The distinction between this scenario and the foregoing one involves a circumstance where the customer leases the renewable generation equipment from the third party. In this case,

the third party is a lessor and the customer is a lessee of the generation equipment. The third party is still the owner of the generation equipment. In this circumstance, Subsection 54-2-1(16)(f) comes into play. That subsection provides:

(f) (i) “Public utility” does not include any person that is otherwise considered a public utility under this Subsection (16) solely because of that person’s ownership of an interest in an electric plant, cogeneration facility, or small power production facility in this state if all of the following conditions are met:

(A) the ownership interest in the electric plant, cogeneration facility, of small power production facility is leased to:

(I) a public utility, and that lease has been approved by the commission;

(II) a person or government entity that is exempt from commission regulation as a public utility; or

(III) a combination of Subsections (16)(f)(i)(A)(I) and (II);

(B) the lessor of the ownership interest identified in Subsection (16)(f)(i)(A) is:

(I) primarily engaged in a business other than the business of a public utility; or

(II) a person whose total equity or beneficial ownership is held directly or indirectly by another person engaged in a business other than the business of a public utility; and

(C) the rent reserved under the lease does not include any amount based on or determined by revenues or income of the lessee.

If the third party leases the renewable generation equipment to a customer that would not otherwise be a public utility, the third party is not primarily engaged in the business of a public utility and the rent under the lease is not based on the revenues or income of the customers, the third party is not a public utility. However, if any of these conditions are not satisfied, the third party likely is a public utility.

CONCLUSION

Based on the foregoing, the Company's position is that, unless one of the exemptions under Section 54-2-1 (16)(d) is met, a third party selling renewable energy is subject to the Commission's jurisdiction. In circumstances where a third party that is not otherwise engaged primarily in business as a public utility owns generation equipment for renewable energy generation that is installed on a single utility customer's premises to provide electricity to that single customer with sales of electricity excess to the customer's needs to an electrical corporation, the third party is subject to the jurisdiction and regulation of the Commission under Utah law.

Respectfully submitted this 16th day of November, 2009.

ROCKY MOUNTAIN POWER

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Rocky Mountain Power Regarding Whether Certain Third Party Arrangement for Renewable Energy Generation Are Subject to Commission Jurisdiction to be served upon the following by electronic mail to the addresses shown below on November 16, 2009:

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