

BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING

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IN THE MATTER OF THE APPLICATION OF )  
ROCKY MOUNTAIN POWER FOR )  
MODIFICATION OF AVOIDED COST )  
METHODOLOGY AND REDUCED )  
CONTRACT TERM OF PURPA POWER )  
PURCHASE AGREEMENTS WITH )  
QUALIFYING FACILITIES )

DOCKET NO. 20000-545-EA-18

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**Post-Hearing Brief of the Wyoming Office of Consumer Advocate  
August 8, 2019**

**Table of Contents:**

1. Procedural History.....2

2. Introduction.....2

3. Argument.....4

    PURPA QF Contract Length.....5

    10 MW Schedule 37 Cap.....8

    On Peak/Off Peak.....8

    Like-For-Like.....8

    Proforma PPA/LEO Language.....9

    Pricing Update Tariff Language.....9

    30 Day project Security Language.....9

    5 Year Stay Out.....9

    Other Party Issues.....10

4. Conclusion.....11

### **Procedural History:**

On November 2, 2018, Rocky Mountain Power (RMP or “Company”) filed its application to the Wyoming Public Service Commission (Commission) requesting approval of tariff changes modifying avoided cost calculations and reducing PURPA Qualifying Facilities (QF) terms. At the time of its Application, RMP filed the testimony of Mr. MacNeil and Mr. Tourangeau, along with tariffs and other attachments.

The OCA filed its notices of Intervention on November 13, 2018.

Wyoming Industrial Energy Consumers (WIEC), Northern Laramie Range Alliance (NLRA), VK Clean Energy Partners, Two Rivers, Renewable Energy Coalition (REC), and Rocky Mountain Coalition for Renewable Energy (RMCRE) all timely intervened.

On April 19, 2019 the OCA submitted the direct testimony of Dr. Belinda Kolb. Her testimony included extensive analysis of the application, discovery, and other relevant information. His testimony resulted in a recommendation of accepting the application in part and denying the application in part.

On April 19, 2019, each of the intervenors submitted direct testimony.

On May 24, 2019, REC, WIEC, and Two Rivers submitted cross answer testimony.

On May 24, 2019, RMP submitted rebuttal testimony of Mr. MacNeil and Mr. Tourangeau.

The hearing for this matter was heard on July 9, 10, and 11, 2019.

Deliberations have yet to be scheduled at the time of this filing.

### **Introduction:**

On November 2, 2018, Rocky Mountain Power (RMP or “Company”) filed its Applications to the Wyoming Public Service Commission (Commission) requesting approval of tariff changes modifying avoided cost calculations and reducing PURPA Qualifying Facilities (QF) terms. The OCA recommends the Commission approve in part and deny in part this application as filed. The OCA recommendations are found in the remainder of this brief.

Wyo. Stat. § 37-2-119, Wyo. Stat. § 37-2-122(a), Wyo. Stat. § 37-2-120, Wyo. Stat. § 37-2-121, and Wyo. Stat. § 37-2-122(b), when read together, provide the basis for the broad

public interest standard mandated by the Wyoming Supreme Court.<sup>1</sup> The Commission is “granted general and exclusive power to regulate and supervise every public utility within the state...” under Wyo. Stat. § 37-2-112. “The responsibility imposed upon a Public Service Commission of regulating utilities is a continuing one,”<sup>2</sup> and “[t]he PSC is ‘required to give paramount consideration to the public interest in exercising its statutory powers to regulate and supervise public utilities. The desires of the utility are secondary.’”<sup>3</sup> Wyo. Stat. § 37-3-101 states: “All rates shall be just and reasonable, and all unjust and unreasonable rates are prohibited.” Wyo. Stat. § 37-3-112 requires that “[t]he service and facilities of every public utility shall be adequate and safe and every service regulation shall be just and reasonable.”...“It shall be unlawful for any public utility to make or permit to exist any unjust discrimination or undue preference with respect to its service, facilities or service regulations.”

The OCA is responsible for representing all citizens of the state of Wyoming,<sup>4</sup> and has endeavored to craft a position that is just and reasonable to all customers of RMP. Pursuant to statutory law and binding case law, a public utility is required, at minimum, to provide a preponderance of the evidence to have the Commission find their application is in the public interest.<sup>5</sup> Although this application was not filed under Wyo. Stat. § 37-2-121,<sup>6</sup> that statute requires an even higher standard, the substantial evidence standard.<sup>7</sup> Regardless of the evidentiary standard the Commission applies, the OCA’s position is that RMP did not meet even the lower evidentiary standard that this application, as filed, is in the public interest.

The OCA proposal to reject this application as filed, and accept the substantial modifications the OCA is proposing as just, reasonable, and in the public interest. Further, the OCA recommends this Commission order contain an expectation that RMP not return with a QF contract length change for 5 years to attempt to create a long term resolution to these issues, in the best interest of all parties and all citizens of the State of Wyoming.

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<sup>1</sup> Mountain Fuel Supply Co. v. Public Serv. Comm’n, 662 P.2d 878, 1983 Wyo. LEXIS 312 (Wyo. 1983).

<sup>2</sup> Tri-City Elec. Ass’n v. City of Gillette, 584 P.2d 995 (Wyo. 1978) at 1006, discussing Utah Gas Service Company v. Mountain Fuel Supply Company, 1967, 18 Utah 2d 310, 422 P.2d 530.

<sup>3</sup> Gosar’s Unlimited Inc. v. The Wyoming Public Service Comm’n 2013 WY 90 [¶15] quoting Pacificorp v. Public Service Comm’n of Wyo., 2004 WY 164 [¶13], further quoting Tri County Tel. v. Public Service Com’n, 11 P.3d 938, 941 (2000), further quoting Mountain Fuel Supply Co. v. Public Serv. Comm’n, 662 P.2d 878, 1983 Wyo. LEXIS 312 (Wyo. 1983).

<sup>4</sup> Wyo. Stat. § 37-2-401.

<sup>5</sup> Willadsen v. Christopoulos, 1987 WY 5, 731 P.2d 1181, (Wyo. 1987)

<sup>6</sup> RMP Exhibit 1.

<sup>7</sup> Pacificorp v. Public Service Comm’n of Wyo., 2004 WY 164, 103 P.3d 862 (Wyo. 2004).

**Argument:**

It is undisputed amongst the Parties that the economic environment regarding independent power producers has changed since 1978. However, the relevant portions of this federal law have not, and as such, this Commission is bound to follow federal law unless and until that law is changed. The federal Public Utility Regulatory Policy Act (PURPA) was enacted in 1978 to encourage the development of electricity generation by independent energy producers.<sup>8</sup> This Act gave independent power producers a regulatory method to bypass the monopoly utilities' theretofore reluctance to purchase electricity from them and put into place a regulatory framework for independent power producers to utilize. FERC promulgated rules to provide QFs the option to enter into PPAs pursuant to a long-term agreement at "avoided costs calculated at the time the obligation is incurred."<sup>9</sup> These rules provide an avoided cost estimate that gives "an investor... [the ability] to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility."<sup>10</sup>

Under PURPA, the Wyoming Public Service Commission (Commission), along with all other state utility regulatory bodies, is tasked with effectuating this act and creating the rules and regulations necessary to fulfil them. What is best for ratepayers is not a simple determination when considered in the context of both short term and long-term horizons, potential future environmental compliance, instances where a ratepayer may also be a potential QF developer, and the original intent of PURPA to "level the playing field, reduce foreign energy dependence, and enable renewable power development."<sup>11</sup> It is not in the ratepayers' best interest, nor any citizen of the State of Wyoming, for this Commission to disregard the fundamental intent of a federal law, regardless of its age.<sup>12</sup>

The doctrine of ratepayer indifference is defined as the principle that the price paid to a QF for its energy and capacity cannot exceed the utilities' avoided costs.<sup>13</sup> Although RMP requested multiple components for approval in this docket, only when viewed in totality could an application potentially create a system that complies with PURPA and is just and reasonable to ratepayers. There are two main drivers in a QF contract, price and duration. When viewed in isolation, each term could be considered reasonable, but the interplay between price and duration components are where the ultimate determination of reasonableness must be made. "[T]his decisionmaking environment is just replete with estimates and forecasts and sophisticated modeling, change, risk and uncertainty."<sup>14</sup> As

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<sup>8</sup> 16 U.S.C. § 824a-3; *FERC v. Mississippi*, 456 U.S. 742, 750 (1982).

<sup>9</sup> Rule 18 C.F.R. § 292.304(d)(2)(1).

<sup>10</sup> Order 69, FERC Stats. & Regs. ¶ 30,128 at 30,868.

<sup>11</sup> OCA Exhibit 201, Page 6, lines 9-11.

<sup>12</sup> See Transcript Vol. III, Pgs.448-449, lines 23-16 for a concise discussion of the Montana QF situation.

<sup>13</sup> 16 U.S.C. § 824a-3(d).

<sup>14</sup> Transcript Vol. III, Pg. 544, lines 10-12.

such, each component of this brief should not be considered in isolation and must be considered as a total package of recommendations.

### **PURPA QF Contract Length**

This Commission has considerable discretion in implementing PURPA.<sup>15</sup> The OCA believes that the FERC has directed that PURPA QF PPAs must at least be structured in a way to provide a reasonable opportunity to ensure investor certainty.<sup>16</sup> Indeed, it seems that PURPA's policy of encouraging the development of alternative energy is intended to be mitigated *only* by the price based on the utilities' avoided costs.<sup>17</sup>

The OCA recommends a range of ten to fifteen years for consideration by the Commission.<sup>18</sup> The OCA does not believe that the number of QFs in the queue are, in and of themselves, a reason for concern.<sup>19</sup> However, if the Commission does view this as a concern, it is obvious to the OCA that more QF activity will occur with a contract term of fifteen years than a QF contract length of ten years.<sup>20</sup> The OCA also does not consider twenty year QF contract lengths to be unreasonable,<sup>21</sup> but does believe that any QF contract length under ten years is not aligned with the intent of PURPA and is unreasonable.<sup>22</sup> RMP puts forth two rationales for reducing the PURPA QF contract term: first, that in a declining cost market, 20 year QF contracts are *per se* uneconomic, and secondly that the must-take obligation renders economic dispatch impossible.<sup>23</sup> Remarkably, RMP witness Tourangeau, in his very next sentence, admits that mitigating the must-take obligation is outside of the bounds of this Commission.<sup>24</sup>

RMP appears to want QFs to be treated akin to a real time market purchase, without obligation or price certainty. PURPA was created to explicitly disallow utilities from holding this one-sided power purchase market power.<sup>25</sup> RMP has billions of dollars of rate-based investment that may be uneconomic when compared to spot energy prices. If RMP believes that this should be the measuring stick with which we judge PURPA QF generation costs, the OCA hopes that RMP will bring forth a similar proposal for their own

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<sup>15</sup> 16 U.S.C. §§ 824a-3(a)-(b).

<sup>16</sup> FERC Order No. 69, 45 Fed. Reg. 12,214, 12,224 (Feb. 25,1980)

<sup>17</sup> 18 C.F.R. §§ 292.101(b)(6); 292.304(a)(2).

<sup>18</sup> OCA Exhibit 201. Pg. 15, lines 22-24.

<sup>19</sup> OCA Exhibit 201. Pg. 7, lines 12-27.

<sup>20</sup> Transcript Vol. III, Pg. 545, lines 13-15.

<sup>21</sup> Transcript Vol. III, Pg. 545, lines 6-7.

<sup>22</sup> OCA Exhibit 201. Pg. 15, line 12.

<sup>23</sup> Transcript Vol. I. Pg. 43. Lines 9-23.

<sup>24</sup> Transcript Vol. I. Pgs. 43-44. Lines 24-2.

<sup>25</sup> FERC Order No. 69, 45 Fed. Reg. 12,214, 12,224 (Feb. 25,1980)

generation in their next rate case. This unreasonable suggestion illustrates the absurdity of their proposal; RMP utilizes a 20 year planning horizon in their IRP process, with a focus on the first ten years.<sup>26</sup> RMP itself obtains non-QF PPAs on longer term contracts<sup>27</sup> that have no guarantee of being perpetually economic,<sup>28</sup> not to mention the even longer term depreciable lives of RMP owned assets, several of which may be *currently* uneconomic as well.<sup>29</sup> Simply put, this risk is identical for QF and non-QF generation resources,<sup>30</sup> and cannot credibly be used as justification to treat QFs differently.<sup>31</sup>

RMP argues that it is somehow disadvantaged by PURPA QF developers “leverage(ing) the great credit of our customers and our financial prudence, along with these long contract terms, to finance their QFs at attractive rates and are an excellent low-risk returns on their equity investments.”<sup>32</sup> RMP offered no evidence that its access to credit is affected by this “leveraging,” it offered no evidence that this “leverage” negatively impacts customers, and it offered no evidence that this “leverage” affects customer rates in any way. By way of analogy, a defense contractor, after signing a purchase agreement with the Department of Defense (DoD), can obtain additional financing based upon the fact that the buyer is a credit-worthy organization. Is it reasonable for the DoD to penalize a counterparty due to this situation? The OCA hopes that it is obvious that the OCA believes the answer is a resounding no.

RMP makes the hyperbolic claim that PURPA QF developers somehow believe that PURPA guarantees “QFs the most favorable terms possible in the capital markets.”<sup>33</sup> To the OCA’s knowledge, no party has made this claim except RMP, and upon cross-examination by REC’s attorney, RMP witness Tourangeau admitted that he agreed “that PURPA requires there to be a contract term which provides QFs a reasonable opportunity to attract capital from potential investors.”<sup>34</sup> Instead, the financing risk associated with a very short term length was ably represented by RMCRE witness Klein, who succinctly stated, “there’s no way you can assume or the developer can assume that, oh, it’s seven years now and I’m going to have seven years again when my seven-year term ends. It’s just -- it just doesn’t work that way.”<sup>35</sup> In fact, RMP witness Tourangeau admitted as much in response to Commission staff “Would you agree that PURPA will still require the

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<sup>26</sup> OCA Exhibit 201. Pg. 15. Lines 26-29.

<sup>27</sup> Transcript Vol. I, Pgs. 53-54, lines 23-4.

<sup>28</sup> OCA Exhibit 201. Pg. 15. Lines 5-7.

<sup>29</sup> Transcript Vol. I, Pgs. 70-71, lines 24-2.

<sup>30</sup> Transcript Vol. I, Pg. 72, lines 5-11.

<sup>31</sup> Transcript Vol. II, Pg. 304, lines 1-24.

<sup>32</sup> Transcript Vol. I, Pg. 45, lines 2-6.

<sup>33</sup> Transcript Vol. I, Pg. 45, lines 7-8.

<sup>34</sup> Transcript Vol. I, Pg. 99, lines 1-4.

<sup>35</sup> Transcript Vol. III, Pg. 456, lines 16-19.

company to take that qualified facility generation after its contract term is fulfilled?” “If there are no changes to the law between now and that contract expiration, yes.”<sup>36</sup>

The OCA was, however, swayed at hearing that Schedule 37 small hydro projects should likely remain at 20 year contract terms with little, if any harm, to customers.<sup>37</sup> The evidence on the record shows only three Schedule 37 contracts in Wyoming, totaling less than half a megawatt.<sup>38</sup> The OCA is strongly encouraged that RMP and the small hydro developers may be able to work out a negotiated outcome outside of PURPA mandates that may potentially alleviate this issue as well.<sup>39</sup>

The OCA was not swayed by, and the Commission should give no evidentiary weight to, the repeated RMP assertion that QFs are not public utilities.<sup>40</sup> This assertion is a red herring, which has never applied to PURPA QFs, and will not apply to QFs unless federal law is changed. PPAs are contractual obligations, PURPA or otherwise, and regulated utilities are responsible for the safe and reliable provision of service to their ratepayers. If RMP feels that this obligation on them is unfair, the OCA invites them to divest some or all of their service territory in Wyoming through an appropriate filing.

Similarly, RMP dismissed the implications around the years-long Montana PPA legal odyssey with a summary of “the lack of following precedent, the lack of following procedures and an unfortunate hot mike incident.”<sup>41</sup> This is a jaded view of reality. Following precedent and procedures should not be viewed as optional by RMP. The “hot mike incident” was a Commissioner admitting in private that a short term PURPA QF contract length would eliminate QF activity in Montana.<sup>42</sup> RMP should not be so sanguine about an obvious public interest violation by a Montana Commissioner acknowledging the reality of that outcome in private and denying that outcome in his public pronouncements. Compare those procedural and legal machinations with the straightforward Utah Commission process, where the Commission ordered the QF contract length modified from a 20 year term to a 15 year term based upon a more measured and long-term approach.<sup>43</sup> The Utah Commission relied on a gradual change to: shield ratepayers from

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<sup>36</sup> Transcript Vol. I, Pg. 149, lines 16-20.

<sup>37</sup> Transcript Vol. III, Pg. 545, lines 17-23.

<sup>38</sup> Transcript Vol. I, Pgs. 120-121, lines 12-6.

<sup>39</sup> Transcript Vol. III, Pg. 547, lines 1-3.

<sup>40</sup> E.g. Transcript Vol. III, Pg. 459, Lines 2-16; Transcript Vol. II, Pgs. 256-259, lines 16-14; Transcript Vol. II, Pg. 265, lines 18-22; Transcript Vol. II, Pg. 381, lines 12-14.

<sup>41</sup> Transcript Vol. I, Pg. 136, lines 1-3.

<sup>42</sup> RMCRE Exhibit 701.1. Pg. RMCRE00252.

<sup>43</sup> *In the Matter of the Application of Rocky Mountain Power for Modification of Contract Term of PURPA Power Purchase Agreements with Qualifying Facilities*, Public Service Commission of Utah, Docket No. 15-035-53 (January 7, 2016)



unintended consequences, implement the policies underlying PURPA, shield ratepayers from fixed price risk, and appropriately balance the various intervenor concerns.<sup>44</sup>

### **Negotiate Schedule 37 the same as Schedule 38**

The OCA does not philosophically oppose the RMP proposal, but as was highlighted by REC witness Lowe, there are several areas within Schedule 37 and Schedule 38 that are simply incompatible<sup>45</sup> or incongruent.<sup>46</sup> Without adapting this language to the realities of Schedule 37, it creates a system that is likely unworkable for both the PURPA QF developer and for RMP. The OCA believes that this issue can either be put aside for a future case or dealt with in tariff revisions in compliance filings.

### **10 MW Schedule 37 Cap**

The OCA does not oppose the 10MW Schedule 37 cap as proposed by RMP. However, the OCA does not consider the REC suggestion of a larger cap unreasonable. Frankly, the lack of Schedule 37 QF activity in Wyoming up to now, coupled with the required repricing every two years renders this cap, and the concerns on both sides of its inclusion, likely unnecessary.<sup>47</sup>

### **On Peak/Off Peak**

The OCA does not oppose the on-peak and off-peak schedule as proposed by RMP. The OCA also does not philosophically oppose the RMCRE modification suggested to this item;<sup>48</sup> however, the OCA does not believe that there is a material difference between the two options, but the OCA believes the Company position should prevail since it is their ongoing obligation to support the validity of this model.<sup>49</sup>

### **Like-for-like**

The OCA does not oppose the like-for-like capacity measurement as proposed by RMP. However, the OCA does believe the Commission should consider the WIEC/2 Rivers suggestion by Witness Higgins of a waiver if no like resource is displaced in the near term.<sup>50</sup>

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<sup>44</sup> *Id.* at 20.

<sup>45</sup> Transcript Vol. I, Pg. 82, lines 6-12.

<sup>46</sup> Transcript Vol. I, Pg. 83, lines 2-12.

<sup>47</sup> Transcript Vol. III, Pg. 547, lines 4-11.

<sup>48</sup> Transcript Vol. III, Pg. 547, lines 12-23.

<sup>49</sup> Transcript Vol. III, Pgs. 547-548, lines 20-2.

<sup>50</sup> Transcript Vol. III, Pg. 548, lines 3-10.

### **Proforma PPA/LEO language**

The OCA does not oppose including in tariff the language that RMP providing a proforma PPA is not a LEO as proposed by RMP.<sup>51</sup> The OCA believes that this request is consistent with current Commission rulings and provides significant information to potential QF developers in the early stages of their development.

### **Pricing update tariff language**

The OCA does not oppose including in tariff the language that RMP can reprice a proforma PPA any time up until a signed PPA as proposed by RMP.<sup>52</sup> The OCA believes that this request is consistent with current Commission rulings and provides significant protection to ratepayers.

### **30 Day project Security Language**

The OCA does not oppose including in tariff the language that RMP requires project security within 30 days as proposed by RMP.<sup>53</sup> The OCA believes that this request is consistent with current PPA practice.

### **5 Year Stay Out**

The OCA supports and recommends a minimum stay out for PURPA QF contract length and pricing issues. This is based upon the end of the federal production tax credits (PTCs) as well as the drawdown of the investment tax credits (ITCs.) All Parties should have a better understanding of ongoing QF activity in Wyoming after the known effects of these tax changes and other factors.<sup>54</sup>

Additionally, this recommendation is based upon the intractable nature of the PURPA disputes. WIEC witness Higgins effectively compared the prior PURPA QF docket with this case by stating, “essentially it's a very -- you know, in many ways a very similar theme as to the case the company put on four years ago and a very similar ask. Simply, the minimum term is, you know, a little bit higher this time around, seven years relative to three years, but it's in many ways still a similar case. Some of the very specific reasons have been updated.”<sup>55</sup> RMP expended great energy at the hearing excoriating PURPA,<sup>56</sup>

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<sup>51</sup> OCA Exhibit 201. Pg. 14, Lines 7-24.

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> Transcript Vol. III, Pg. 546, lines 6-11.

<sup>55</sup> Transcript Vol. II, Pg. 255, lines 8-14.

<sup>56</sup> E.g. Transcript Vol. III. Pg. 460. Lines 1-14.

but this quixotic endeavor is entirely misplaced and somewhat tiresome to the OCA. Regardless of their opinion on the matter, this is simply not the appropriate venue to change federal law, and their efforts are better placed in the halls of Congress or at the FERC.

RMP's attorney, under friendly cross with NLRA witness Lay, elicited a soliloquy<sup>57</sup> on the potential changes to PURPA through currently proposed federal legislation.<sup>58</sup> The OCA believes, once again, that this emphatically proves the point that only changes to federal law will allow RMP the relief they desire. RMP (and the NLRA), should focus their efforts on these issues within the federal sphere and only focus here on areas that the Wyoming Commission can change, within the bounds of current federal law. If these parties insist on railing against PURPA as outmoded and irrelevant, that is their right, but the Commission should afford this argument zero weight in rendering its decision.

### **Other Party Issues**

The OCA does not take a position on the REC request that all Schedule 37 hydro facilities receive capacity payments. It does not appear to the OCA to be unreasonable due to the highly dispatchable nature of small hydro facilities, nor does it appear to be at any scale to impact customer bills. Having said that, it is important for this, if ordered by the Commission, to be based upon a detailed analysis to not exceed avoided costs.

The OCA does not agree that the REC/RMCRE position to change FOTs to CCT for modeling purposes in the PDDRR methodology should be implemented at this time. Although the future may come to pass as REC/RMCRE suggests, with a large reduction in FOTs available, it does not appear to be borne out with the evidence presented in this docket.

The OCA does not agree that the REC/RMCRE position to allow coal units to cycle in the GRID model used in the PDDRR methodology should be implemented at this time. The OCA believes this modification, if necessary, should be driven by the IRP process, and further the OCA believes the Company position should prevail since it is their ongoing obligation to support the validity of this model.

The OCA does not agree that the REC/RMCRE position to modify coal prices in the GRID model used in the PDDRR methodology should be implemented at this time. The OCA believes this modification, if necessary, should be driven by the IRP process, and further the OCA believes the Company position should prevail since it is their ongoing obligation to support the validity of this model.

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<sup>57</sup> Transcript Vol. III, Pgs. 524-529, lines 8-14.

<sup>58</sup> RMP Exhibit 34.

The OCA does not agree that the REC/RMCRE position to allow sales of trapped energy in the GRID model used in the PDDRR methodology should be implemented at this time. The OCA believes this modification, if necessary, should be driven by the IRP process, and further the OCA believes the Company position should prevail since it is their ongoing obligation to support the validity of this model.

**Conclusion:**

A decision granting the application as filed would violate the Commission's statutory obligation to implement the policy, rules, and regulations of PURPA. Therefore, the OCA recommends this Commission order a resolution consistent with the recommendations made herein, recommendations that are in the best interest of all parties and all citizens of the State of Wyoming and are just, reasonable, and in the public interest.

Respectfully submitted this 8th day of August, 2019.

OFFICE OF CONSUMER ADVOCATE



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I hereby certify that on August 8, 2019, I served the foregoing PPost Hearing Brief, by delivering copies thereof to the individuals/entities below, by email:

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