BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF ITS 2016 ELECTRIC RESOURCE PLAN	**) PROCEEDING NO. 16A-0396E**

RESPONSE OF PUBLIC SERVICE COMPANY OF COLORADO TO MOTION OF SUSTAINABLE POWER GROUP, LLC FOR WAIVER OF COMMISSION RULE 3902(c)

I. <u>INTRODUCTION AND SUMMARY OF ARGUMENT</u>

Pursuant to Commission Rule 1400(b) and Decision No. C16-1019-I (as modified by Decision No. C16-1036-I), Public Service Company of Colorado ("Public Service" or "Company") hereby responds to the Motion of Sustainable Power Group, LLC ("sPower") for Waiver of Commission Rule 3902(c), which was filed on October 14, 2016 ("Motion"). Through its Motion, sPower effectively seeks to have the Commission require Public Service to buy 880 MW of solar capacity and energy, specifically from eleven 80 MW solar facilities that, according to sPower, will be built at some time in the future and will be certified as qualifying facilities ("QF") within the meaning of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). To effectuate this sale, sPower through its Motion requests that the Commission:

(1) find that the Colorado rules implementing PURPA are inconsistent with the Federal Energy Regulatory Commission's ("FERC") PURPA rules and immediately waive Rule 3902(c), which requires that large QFs win a competitive bid before being able to sell capacity or energy to a utility such as Public Service; and,

(2) require that Public Service begin purchasing QF capacity and energy at an administratively determined avoided cost rate, using a

> methodology sPower proposes, prior to filling its resource need through the Phase II competitive solicitation in this Electric Resource Plan ("ERP") proceeding.

For reasons explained below, the Commission should deny sPower's Motion.

Initially, sPower is wrong in suggesting that PURPA gives QFs some sort of absolute preference over other resources, including non-QF independent power producers ("IPP"). It is a bedrock principle of PURPA that a utility's customers should be indifferent to the utility's purchase of capacity and energy from a QF. This principle is reflected in PURPA's avoided cost pricing standard, which, generally stated, requires that a utility is to pay a QF no more than the incremental costs the utility would otherwise incur if it did not purchase from that QF. In order to determine an appropriate avoided cost rate, a state Commission and a utility must take into account all available alternative resources. This requirement ensures that QFs are not given a preference in making a sale that would displace lower-priced resources to the detriment of a utility's customers.

sPower would have the Commission require Public Service develop an administratively determined avoided cost rate. However, the administrative determination of avoided costs under PURPA has proven difficult, which is the primary reason that FERC itself proposed the use of competitive bidding for the establishment of avoided cost rates and the selection of QFs. All-source competitive bidding allows for a utility purchaser to take all relevant facts and circumstances into account in selecting all available optimal resources. To require that Public Service buy sPower's 880 MW of solar capacity at an administratively determined rate in advance of the ERP Phase II competitive solicitation, thereby replacing other potential resources, would not leave customers — indifferent to QF development in Colorado.[1] Further, this result would prejudice non-QF IPPs given that sPower would likely fill a significant portion of the resource need identified in this ERP proceeding.

sPower's arguments largely rely on two recent FERC declaratory orders that found competitive bidding schemes in Montana and Connecticut did not satisfy the requirements of PURPA: *Hydrodynamics Inc.,* 146 FERC ¶ 61,193 (2014) ("*Hydrodynamics")* and *Windham Solar LLC,* 156 FERC ¶ 61,042 (2016) ("*Windham*"). First, it is important to understand that unlike, for example, a district court declaratory order, FERC's declaratory rulings are not binding FERC decisions. Rather, these rulings are merely advisory guidance based on specific facts and circumstances. There are important differences between those cases and the PURPA implementation in Colorado. Under the Montana scheme addressed in *Hydrodynamics* and the Connecticut scheme addressed in *Windham,* QFs were effectively denied the ability to offer to sell power to utilities. Further, competitive bidding for resources had not occurred for over ten years in Montana. In contrast, application of the Commission's ERP Rules in Colorado has resulted in a high level of purchased power and the development of renewable energy resources, even if not QFs, that has been acquired at periodic intervals, including through a 2013 competitive solicitation and, ironically, the planned 2017 competitive solicitation to be held in Phase II of this proceeding that sPower is free to participate in – and that sPower effectively seeks to halt. In *Hydrodynamics* and *Windham*, the essence of the QFs' arguments was that the design

[1] These proposed QFs are identified in a letter dated July 18, 2016 from sPower to Public Service, which was attached to sPower's Motion. An additional issue with the proposed QFs is that six of them (totaling 480 MWs) are proposed to be located in the San Luis Valley, a transmission-constrained area. sPower does not explain what steps it has taken to develop these QFs, although it submitted interconnection requests.

or implementation of the applicable state bidding schemes foreclosed their ability to participate. Here, Public Service will embark on its sixth competitive solicitation open to QFs in the past ten years. In short, we disagree that FERC would view the Colorado scheme as ineffective, and even if it did, believe a federal district court would find Colorado in full compliance with its responsibilities under PURPA. The effect of sPower's requested relief is to upend Public Service's planned solicitation – a result that is neither legally required nor consistent with good policy.

sPower has also overlooked that the FERC has encouraged the use of competitive bidding to establish avoided cost rates. It further suggests that the implementation of competitive bidding for the determination of avoided costs and QF selection in Colorado was some kind of hasty, ill-considered decision by the Commission in 2005. sPower ignores that the rules implementing PURPA and their development have been the subject of numerous Commission proceedings dating back to the 1980s, when QFs were putting more capacity and energy to the Public System at the then administratively determined avoided cost rate than Public Service could readily absorb. This history shows that the Commission carefully implemented PURPA in Colorado, and the upcoming solicitation to be held in conformance with the Commission's rules, which sPower effectively seeks to prohibit, is the best means of assuring that QFs are considered along with all other potential resources.

Nonetheless, if the Commission were to conclude that competitive bidding cannot be used for PURPA implementation in Colorado on an exclusive basis for larger QFs, then it will be necessary to determine how avoided costs are to be determined. This is a complicated issue that would require lengthy evidentiary hearings. There are a number of factors that go into determining appropriate avoided cost rates, and not all QFs qualify for the same rate. Illustrating the complexity of this process, the proceeding to determine Public Service's administratively determined avoided cost rate in the 1980s took approximately four years and was highly contested. In fact, the problems associated with administrative determinations of avoided costs are what led the FERC to propose to states the use of competitive bidding as the means for avoided cost determinations and QF selection almost thirty years ago.

Further, there are significant other PURPA implementation issues that the Commission would need to address and resolve if it no longer relied on Rule 3902(c) for avoided cost determinations and the selection of large QFs. These include the following:

(1) What is the appropriate length for a contract between the utility and a QF? This is an issue FERC is presently addressing in an ongoing notice of inquiry docket.[2]

(2) What stage of development must a QF reach before it is entitled to form a legally enforceable obligation ("LEO")? sPower, which provides no information about the present stage of development of its projects, assumes it should be entitled to a LEO at this time, but other states that have addressed this issue have required that a QF be at an advanced stage of development before it may obtain a LEO.[3] To give a LEO to a proposed QF project that may never be actually developed simply gives a QF developer a free option, which it may or may not exercise, to the detriment of the utility and its customers.

(3) Are the QFs that sPower is proposing, which will only provide energy on an intermittent basis, even entitled to a LEO with pricing set at projected avoided costs?

(4) Would it be fair to other renewable generators and IPPs to grant sPower's preferential request for relief in this case? If the Commission wishes to modify its QF rules, other developers may wish to make proposals, and they may be more advantageous than

[2] Federal Energy Regulatory Comm'n, *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Docket No. AD16-16-000.
[3] *E.g., Power Resource Grp. v. Public Utility Comm'n of Texas*, 422 F.3d 231, 237-238 (5th Cir. 2005).

> what sPower is offering to the Company. PURPA does not require that a utility purchase capacity from a QF that it does not need. If Public Service is effectively going to be required to give QFs a first call to provide its needed capacity, then other QFs, as well as sPower, should have the opportunity to make proposals.

In summary, the use of competitive bidding to implement and administer PURPA has worked well in Colorado for nearly three decades consistent with the underlying purpose of PURPA, to promote non-traditional generation and renewables. Moreover, the use of bidding is consistent with the FERC's past pronouncements on the issue. The two recent declaratory rulings upon which sPower relies, aside from being non-binding, address facts that are clearly distinguishable.

II. BACKGROUND ON PURPA AND ITS IMPLEMENTATION

sPower's motion generally describes PURPA, and provides a succinct and accurate overview of certain relevant provisions. The discussion below briefly summarizes key provisions of PURPA and the discretion afforded states in implementing the law.

A. PURPA

Congress enacted PURPA in 1978 during the energy crisis that was occurring at that time. The statute had many goals, among which was to encourage more competitive generation markets and further development of cogenerators and non-fossil fuel resources (small power producers) limited in size to 80 MWs or less – QFs under PURPA. As explained in Decision No. R03-0687, pursuant to Section 210:

> PURPA aimed to encourage the development of QFs by, among other things, requiring electric utilities to purchase electric energy from QFs. PURPA directed FERC to promulgate regulations on a number of topics, including the price to be paid by public utilities for their purchases of electric energy from QFs. The statute contains three limitations on the rates for such purchases: a rate must be just and reasonable to the

> electric utility's consumers and must be in the public interest; a rate cannot discriminate against qualifying small power producers or qualifying cogenerators; and a rate cannot 'exceed' the incremental cost to the electric utility of alternative electric energy.

The third limitation is commonly referred to as the "avoided cost" standard. It is a bedrock principle of PURPA that is intended to keep a utility's customers indifferent as to whether capacity and energy is obtained from a utility's facilities or acquired from a QF.[4] Accordingly, an underlying issue in this proceeding is how avoided costs of sPower's QF facilities are to be determined.

The PURPA implementation scheme is somewhat unusual. Section 210(f)(1) of PURPA requires state regulatory commissions to implement the FERC QF Rules with regard to jurisdictional electric utilities. In 1980, FERC promulgated final rules to implement PURPA.[5] In 1982, this Commission promulgated its original QF rules. This Commission's implementation of PURPA is more fully discussed below.

B. State Discretion under PURPA and FERC Rules

Both FERC and the federal courts have stated on numerous occasions that state regulatory commissions enjoy a significant amount of discretion in terms of how they implement PURPA.[6] In *Power Resource Grp.*, for example, a QF complained that the Texas commission had failed to implement PURPA and FERC rules properly because a

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[4] *See* Order No. 69, 45 Fed. Reg. 12214, 12219 (Feb. 25, 1980) ("Under the definition of 'avoided costs' in this section, the purchasing utility must be in the same financial position it would have been had it not purchased the qualifying facility's output."); *see also Southern California Edison Company*, 71 FERC ¶ 61,269, 62,080 (1995) (stating that the "intention [of PURPA] was to make ratepayers indifferent as to whether the utility used more traditional sources of power or the newly encouraged alternatives").

[5] Federal Energy Regulatory Comm'n, *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. 12214 (Feb. 25, 1980).

[6] *E.g., Power Resource Grp. v. Public Utility Comm'n of Tex.*, 422 F.3d 231, 238 (5th Cir. 2005) (stating that "the FERC regulations grant the states discretion in setting specific parameters for LEOs"); *West Penn Power Co.*, 71 FERC ¶ 61,153, 61,495 (May 8, 1995) ("It is up to the States, not [FERC], to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law.").

Texas rule required QFs to provide power within 90 days in order to be eligible to form a LEO. According to the QF, that rule prevented QFs from obtaining financing because they needed the LEOs to get financing, and the generating facilities could not be constructed within 90 days after receiving financing. The Fifth Circuit concluded that FERC had conferred discretion on the Texas commission to impose such a requirement, even though it might not be as advantageous as QFs would have liked: "If FERC had determined it necessary to set more specific guidelines concerning LEOs, it could have done so. . . . [D]efining the parameters for creating a LEO is left to the states and their regulatory agencies."[7] Similarly, in *Exelon Wind 1, LLC v. Nelson*, the Fifth Circuit rejected a claim that the Texas commission had violated PURPA and FERC regulations by requiring that a QF be able to provide firm power in order to form a LEO. Relying on the *Power Resource Grp.* case, the Fifth Circuit rejected the QF's argument and reiterated that state commissions, not FERC, define the parameters for when a QF may form a LEO.[8] As explained below, sPower does not properly give effect to this Commission's discretion in implementing PURPA in Colorado.

III. DISCUSSION

sPower's waiver request should not be granted by the Commission. The Commission should deny sPower's requested relief because its reliance on *Hydrodynamics* and *Windham* is misplaced by failing to recognize that Colorado's PURPA implementation scheme, as reflected in part in Rule 3902(c), is distinguishable from these declaratory orders, which are non-appealable and non-binding. Further, sPower fails to account for the FERC's historic support for competitive bidding as a

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[7] *Power Resource Grp.*, 422 F.3d at 239.
[8] *Exelon Wind 1, LLC v. Nelson,* 766 F.3d 380, 396 (5th Cir. 2014).

means of implementing PURPA and, more specifically, setting avoided cost rates. And finally, sPower overlooks thirty years of history before this Commission where bidding was carefully and deliberately adopted as the means of implementing PURPA in Colorado. We further address the regulatory complexities associated with sPower's request for relief and the numerous issues the Commission would need to consider if it were to depart from competitive bidding as the means of implementing PURPA.

A. Request for Immediate Waiver of Rule 3902(c)

1. sPower's reliance on the Hydrodynamics and Windham cases is misplaced

The heart of sPower's argument is that the Rule 3902(c) requirement that QFs win a competitive solicitation to receive an avoided cost capacity or energy payment is inconsistent with the FERC's findings in the *Hydrodynamics* and *Windham* cases. According to sPower, these two FERC declaratory rulings establish that requiring sPower to participate in a competitive solicitation conducted pursuant to an ERP "imposes an unreasonable obstacle to sPower obtaining a legally enforceable obligation" and therefore contravenes PURPA. Although the FERC declared in both of those cases that the implemented state bidding approaches did not give QFs a reasonable opportunity to enter into long-term contracts with host utilities, those competitive bidding processes are distinguishable from the implementation of competitive bidding in Colorado through the ERP Rules. Thus, the *Hydrodynamics* and *Windham* cases have little or no application here.

Initially, sPower does not address the nature of FERC's declaratory orders under PURPA, and thereby suggests that they are binding orders on this Commission. They are not. The FERC's declaratory orders under PURPA are non-appealable, non-binding statements of the law. In both the *Hydrodynamics* and *Windham* cases, FERC was requested to initiate an enforcement action under Section 210(h)(2)(A) of PURPA but declined to do so. Instead, the petitioners had to seek an enforcement action against the respective state commissions in the appropriate court. In those district court actions FERC's interpretation of PURPA and the FERC rules is "legally ineffectual" apart from its ability to present a cogent argument that might help persuade the federal district court to adopt the same view. *See Industrial Cogenerators v. Federal Energy Regulatory Comm'n*, 47 F.3d 1231, 1235 (D.C. Cir. 1995) (stating that a declaratory order issued by FERC under PURPA "merely advise[s] the parties of the [FERC's] position" and is "much like a memorandum of law prepared by the FERC staff in anticipation of a possible enforcement action"); *see also Niagara Mohawk Power Corp. v. Federal Energy Regulatory Comm'n*, 117 F.3d 1485, 1488 (D.C. Cir. 1997) ("An order that does no more than announce [FERC's] interpretation of the PURPA or one of the agency's implementing regulations is of no legal moment unless and until a district court adopts that interpretation when called upon to enforce the PURPA.") As the United States Court of Appeals for the Fifth Circuit has noted, "[w]hile this FERC-issued document is rather impressively called a Declaratory Order, it is actually akin to an informal guidance letter." *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 391 (5th Cir. 2014).

Further, the FERC's declaratory orders provide guidance that is limited to the specific facts and circumstances presented, and the FERC does not issue generally applicable declaratory orders to resolve broad policy issues. *See Puget Sound Energy*, Inc., 139 FERC ¶ 61,241, 62,742 (2012); *ITC Grid Development, LLC*, 154 FERC ¶

61,206, ¶ 45 (2016). In this regard, the two decisions address fact situations that are quite different than those presented in Colorado. Like the Colorado process, the Montana process addressed in *Hydrodynamics* required the use of competitive bidding to establish avoided costs, which in theory gave QFs an opportunity to sell power to the host utility under contract on a long-term basis. However, in practice, the petitioning QFs in Montana were not given a reasonable opportunity to enter into contracts with the host utility because only one all-source competitive solicitation had occurred in eleven years, and there was no rule prescribing that such solicitations must occur at any particular interval. Moreover, the Montana Public Service Commission, by a separate order, had allowed the host utility to establish a cumulative installed capacity limit of 50 MW in its tariff for wind QFs that are larger than 100 kW but equal to or below 10 MW. The QF petitioners also complained that the host utility "routinely acquires generation outside of all-source competitive solicitations." *Hydrodynamics*, 146 FERC ¶ 61,193, 61,841. In contrast, the Colorado rule requires utilities to engage in competitive solicitations on a regular basis.[9] The Montana scheme is therefore distinguishable from the Colorado scheme.

Similarly, the *Windham* case involved a Connecticut competitive bidding scheme that was not conducted with any regularity. The petitioners in that case explained that the bidding process enabling QFs to obtain contracts "has not been conducted for more than 10 years."[10] The state regulator administering that bidding process acknowledged

[9] To be sure, Colorado law allows for the acquisition of generation resources outside of competitive bidding processes in specific circumstances. *See, e.g.,* § 40-2-124(1)(f)(I), C.R.S. However, the Commission's ERP Rules ensure that competitive solicitations occur on at least a quadrennial basis.
[10] *See* Petition for Enforcement Under the Public Utility Regulatory Policies Act of 1978 of Windham Solar LLC et al. at 13, Docket No. EL16-69 (May 19, 2016).

that the competitive bidding process was no longer used.[11] Thus, similar to *Hydrodynamics*, the petitioners in *Windham* were protesting an infrequent competitive bidding process that provided QFs with only scarce opportunities to sell to host utilities.

But at its core, the *Windham* case addressed another barrier to QF participation in the bidding scheme. Under Connecticut's regulations, bidders seeking to obtain a longer-term contract, including QFs, are required to offer a "bundled" electricity product (i.e., including renewable energy credits or "RECs"). Otherwise, only short-term contracts of one year or less were permitted, providing for energy only rates based on locational marginal prices.[12] The petitioning QFs argued that Connecticut's regulations prevent QFs from obtaining a long-term contract, except through the procurement process, and that QFs that have sold RECs cannot participate in the procurement process. They further argued that the other two available options for QF sales only provide for short-term contracts and do not provide payments for capacity.

Thus, in both the *Hydrodynamics* and *Windham* cases, the QF petitioners were able to establish that they were effectively foreclosed from participating in state bidding schemes, due to the infrequency of, and preconditions to, the competitive solicitations in Montana and Connecticut, respectively. Therefore, the QF petitioners in those cases

[11] *See* Protest of the Connecticut Public Utilities Regulatory Authority at 14, Docket No. EL16-69 (June 15, 2016).

[12] The Windham decision is very brief, and in setting out the facts of the Connecticut bidding process, only noted that the fact that Connecticut required any energy sales to be bundled with RECs. That aspect of the Connecticut bidding process appears to be the primary focus of that decision. *See* Windham, 156 FERC at ¶ 4 ("Moreover, while the Commission has made clear that states have the authority to regulate RECs, states cannot impede a QF's ability to sell its output to an electric utility pursuant to PURPA. Thus, regardless of whether a QF has previously sold its RECs under a separate contract, that QF has the right to sell its output pursuant to a legally enforceable obligation.") The information regarding the bidding process noted above was obtained by reviewing the petition to the FERC. *See* Petition for Enforcement Under the Public Utility Regulatory Policies Act of 1978 of Windham Solar LLC et al. at 14, Docket No. EL16-69 (May 19, 2016).

successfully argued that they did not have an opportunity to enter into long-term contracts with the host utility.

In contrast, in Colorado the Commission Rules provide for and, more importantly, the utilities actually conduct, competitive solicitations during each ERP cycle. That point is obvious from the circumstances of this proceeding. The Company has shown in its filed ERP that it has a present need for resources, and assuming approval of the resource need in Phase I of this proceeding, Public Service will conduct a solicitation to acquire resources to meet that need. Public Service welcomes the participation of sPower, other QFs, and non-QF IPPs, in the forthcoming competitive solicitation. sPower, however, is seeking to upend that solicitation process by seeking to put its 880 MW of solar resources to Public Service in advance of any Phase II solicitation.

sPower cannot legitimately claim that it has not had a reasonable opportunity in the past to sell the output of its planned QFs to Public Service. In the past decade, Public Service has conducted two all-source solicitations, one wind-specific solicitation, and two solar-specific solicitations pursuant to the Commission's ERP and Renewable Energy Standard ("RES") rules. These solicitations have been open to both QF and non-QF bidders alike. The following table summarizes the amount of resources acquired.

Public Service Resource Solicitations and Acquisitions: 2006-2016*

Solicitation	**Number of IPP Selected Projects**	**Total MWs Acquired**	**Number of Renewable Providers**	**Total Renewable MWs Acquired**
2006 Solar RFP	1	7	1	7
2007 CRP; 2008 Wind RFP	1	152	1	152
2007 CRP; 2009 All-Source RFP	5	1,680	5	760
2008 RES; 2008 Solar RFP	1	18	1	18

2011 ERP; 2013 All-Source RFP and Early Wind RFP	6	950	4	620

*Note: this table does not account for the 2016 ERP Phase II solicitation that will be conducted in this proceeding.

The ERP process conducted in accordance with Commission Rules has plainly given ample opportunity for large QFs to bid and obtain long-term contracts with Public Service. That will continue going forward with the Phase II solicitation that we expect to hold after the Commission's approval of our resource need in Phase I.[13]

In summary, the circumstances in Colorado are substantially different than those confronting the FERC in its review of the implementation of PURPA through bidding in Montana and Connecticut in the *Hydrodynamics* and *Windham* cases. Colorado has historically had and continues to have a robust ERP process, and Public Service has acquired resources pursuant to a Phase II solicitation process, with regularity. sPower cannot legitimately claim on the eve of a planned Phase II competitive bid that competitive bidding does not give it an opportunity to sell power to Public Service.

2. The FERC has historically supported bidding

Public Service also believes it is important to read *Hydrodynamics* and *Windham* in the context of its prior PURPA-related cases and its past promotion of bidding as a mechanism to simultaneously: (i) set avoided cost rates and (ii) meet utility resource needs with both QF and non-QF resources. While the FERC in *Hydrodynamics* noted that it had declined to adopt its *Bidding NOPR*, the FERC failed to acknowledge why it declined to do so and has never disclaimed its past underlying analysis of both law and policy supporting bidding.

[13] As further proof of a QF's opportunity to enter into contracts with the Company under the existing PURPA implementation scheme, Attachment C to the sPower Motion shows Public Service has negotiated contracts with a number of smaller QFs outside of competitive bidding.

To elaborate, in the late 1980s, the FERC recognized that there were implementation issues with PURPA that it needed to address, the most significant of which were problems with the administrative determination of avoided costs by various state commissions in their implementation of PURPA. To address these issues, the FERC issued four notices of proposed rulemaking, including the *Bidding NOPR* and a separate NOPR addressing how avoided cost rates are to be administratively determined – the *ADFAC NOPR.*[14] Although the recognized problem the FERC was trying to address was improperly administratively determined avoided cost rates and the attendant difficulties that presented, the FERC noted that bidding was an alternative means that could efficiently set avoided cost rates.

The FERC in the *Bidding NOPR* not only set out proposed rules, which were intended to be minimum guidelines that state commissions wishing to use competitive bidding for PURPA implementation would implement, but also: (1) provided extensive discussion regarding the logic and purpose of the proposed rule; (2) provided a legal analysis as to how the use of bidding comported with the requirements of PURPA and its own implementing regulations under 18 C.F.R. Part 292; and (3) explained the bases of specific elements of its proposal. As envisioned by the FERC in 1988 when it issued the NOPRs:

> [B]idding has the potential for eliminating the seemingly endless debates over what alternative sources of supply are truly avoided by the purchasing utility. Avoided cost need not be an administratively determined number, argued over by experts. Instead, avoided cost could be derived simply and directly from the prices offered by competing suppliers in the bidding process. Because bidding provides a systematic mechanism for identifying potential suppliers, it increases the chances that

[14] *Administrative Determination of Full Avoided costs, Sales to Qualifying Facilities, and Interconnection Facilities*, 53 FR 9331 (1988), *See FERC Statutes and Regulations* ¶ 32,457 (1988).

> the purchasing utility's capacity needs will be supplied from the more efficient sources.

FERC Statues and Regulations ¶ 32,021, 32,025 (footnote omitted).

Specifically with regard to the legality of bidding, the FERC stated that it viewed bidding as consistent with PURPA's avoided cost standard. *See Id.* at 32,026. ("To the extent bidding successfully identifies a utility's lowest cost alternative supply option, bidding cannot, by definition, depart from the full avoided cost standard. By simulating the outcome of a competitive and unregulated market, bidding would satisfy the original purpose of the avoided cost rule.") The FERC recognized that bidding might result in a lower level of QF development, but concluded that result was not inconsistent with PURPA. *See id.* ("Although one of the primary purposes of PURPA is to encourage cogeneration renewable energy technologies, Congress made it clear that it did not intend for utility ratepayers to subsidize such power producers." (footnote omitted)).

The FERC emphasized that PURPA did not guarantee that QFs could make sales of capacity to utilities. Indeed, under PURPA a utility was only required to offer to purchase from QFs, a standard the FERC viewed bidding as satisfying. *See id.* at 32,028 ("To comply with PURPA, all that is required is for the purchasing utility to offer to purchase power from QFs at rates that do not discriminate against QFs.") *See also id.* 32,027 ("Provided QFs are given an equal opportunity to compete for capacity in a bidding process, QFs are not discriminated against as a class.") In light of this conclusion, the FERC did not believe that a purchasing utility had any obligation to pay a capacity payment to a QF that lost a bid. *Id.* at 32,025. Nor did FERC propose requiring that a losing QF have an opportunity to match a winning bid since that would undermine the integrity of the bidding process. *Id.* at 32,028 ("[P]roviding QFs with an opportunity for a ‘second bite’ is likely to discourage other potential power suppliers from participating in the bid.”)

Finally, FERC emphasized that a competitive bid used to set avoided costs for QFs must be for all sources, including “the purchasing utility’s own capacity expansion program as well as those wholesale sources that the utility would have purchased from absent the QF purchase, such as other QFs, IPPs and other utilities.” *Id.* at 32,031. As FERC explained,

> The reason for taking all sources into account is simple. Unless it is done, there is no assurance that a QF will receive a price that is less than or equal to the purchasing utility’s real avoided cost. . . . A bidding system that produces this outcome violates the PURPA standard that QFs be paid no more than the cost of alternative supplies. It is also inconsistent with the PURPA goal of leaving consumers indifferent as to the source of supply.

Id. at 32,031-32 (footnote omitted).

FERC cases following the issuance of the *Bidding NOPR* and the *ADFAC NOPR* were consistent with the view that an all-source competitive solicitation is an effective method to determine avoided costs. For example, in 1995 in *Southern California Edison Co.*,[15] the FERC reviewed the use of a competitive solicitation to award QF contracts. The competitive bidding program in that case permitted QFs to bid against a benchmark price for the acquisition of capacity that was determined by the California Public Utilities Commission. The results of the bidding program were used to determine the utility’s avoided costs and to award QFs contracts with California utilities. Although FERC ruled that the program violated PURPA, it did so because the competitive solicitation failed to consider output from other non-QF sources:

[15] 70 FERC ¶ 61,215 (1995), *order on reconsideration*, 71 FERC ¶ 61,269 (1995).

> [U]nder PURPA an avoided cost (incremental cost) determination must permit QFs to participate in a non-discriminatory fashion and, at the same time, assure that the purchasing utility pays no more than the cost it otherwise would incur to generate the capacity (or energy) itself "or purchase from another source" (the language of section 210 of PURPA, emphasis added). Congress in this language did not in any way limit the sources to be considered. The consequence is that regardless of whether the State regulatory authority determines avoided cost administratively, through competitive solicitation (bidding), or some combination thereof, it must in its process reflect prices available from all sources able to sell to the utility whose avoided cost is being determined. If the state is determining avoided cost by relying on a combination of benchmark and bidding procedures, as here, this means that the bidding cannot be limited to certain sellers (QFs); rather, it must be all-source bidding.[16]

That same year in *North Little Rock Cogeneration, L.P.*,[17] FERC highlighted the importance of accurately establishing a utility's avoided cost when it rejected a QF's challenge to the results of a competitive solicitation that the QF did not win:

> Avoided costs are determined, in the first instance, by all alternatives available to the purchasing utility. Those alternatives, as we have explained in a number of recent orders, include *all* supply alternatives. . . . If the QF proposed by Petitioners could not match the rate offered by a competing supplier of power to the City, regardless of whether the competitor was or was not a QF, then the QF demonstrably was not offering a rate at the City's avoided cost—and the City had no obligation under PURPA to purchase power offered at a higher price than the lowest bid.[18]

Southern California Edison Co. and *North Little Rock* demonstrate that the FERC viewed all-source competitive solicitations as an effective method to establish avoided cost and secure opportunities for QFs to sell their output to utilities. While the FERC ultimately terminated the *Bidding NOPR*, it did so not on the basis of a legal error or policy misstep, but because of a proliferation of competitive bidding programs. Specifically, the FERC acknowledged that over 30 states had developed bidding

[16] 70 FERC ¶ 61,215, 61,677 (1995).
[17] 72 FERC ¶ 61,263 (1995)
[18] *Id.* at 62,173.

mechanisms for procurement of QF energy and capacity. The FERC then closed the *Bidding NOPR* and *ADFAC NOPR* dockets because the prevalence of bidding procedures among the states eliminated the need for FERC guidance on how to manage RFP processes:

> In addition to the Commission's case-by-case experience regarding regulation of non-traditional power producers, including IPPs, substantial experience has been gained by state regulatory commissions and utilities themselves regarding non-traditional power producers and competitive bidding. At the time of the *Bidding NOPR* only a few states had taken steps to allow competitive bidding. Now 30 states use competitive bidding (i.e., either the state has adopted provisions for utilities to use bidding or the state at least permits utilities to use bidding). *Compare Bidding NOPR*, *FERC Statutes and Regulations* at p. 32,025 *with* 4 Robertson's Current Competition No. 3 at p. 16 (August 1993). Thus, both state regulatory commissions and utilities appear to be making substantial progress without the need for additional Commission guidance.

64 FERC ¶ 61,364 (1993).

Five years later, the FERC terminated the *ADFAC NOPR* based on similar reasoning:

> In addition, as stated above, the *ADFAC NOPR* acknowledged the difficulty of administratively setting avoided cost rates, and particularly recognized that competitive bidding was a viable alternative to determining avoided cost. Since 1988, in fact, substantial experience has been gained by state commissions, electric utilities and QFs themselves regarding competitive bidding. While few states allowed competitive bidding at the time of the ADFAC NOPR, well over half the states now use competitive bidding to one degree or another in setting avoided cost rates. Indeed, in a number of cases the Commission itself has considered rates resulting from competitive bidding and negotiation in which QFs were active participants. Accordingly, the industry itself appears to have made substantial progress regarding the determination of avoided cost and the setting of avoided cost rates.

84 FERC ¶ 61,265 (footnotes omitted).

Although not noted by the FERC in terminating the NOPRs, but nonetheless germane, use of competitive bidding is consistent with PURPA itself, as amended by the Energy Policy Act of 1992, which requires that states consider the use of integrated resource planning to evaluate "the full range of alternatives." 16 U.S.C. § 2602(19).

Thus, while the FERC noted in the *Hydrodynamics* proceeding that it never finalized the *Bidding NOPR,* the context of that decision and the FERC's subsequent PURPA cases are illustrative. For nearly three decades, it was a settled issue that properly constituted bidding could be a means of procuring from QFs and setting avoided cost rates for those sales. Accordingly, FERC did not eliminate competitive bidding in cases like *Southern California Edison Co.* or *North Little Rock Cogeneration*. Moreover, the FERC has refused to permit a QF to displace the efficient allocation of resources selected in a competitive RFP to meet a utility's needs, which is precisely what sPower requests the Commission do here.[19] For those reasons, Public Service believes that the well-supported reasoning reflected in the *Bidding NOPR* remains valid, and that a properly implemented bidding scheme, as we have in Colorado, is a valid and efficient way to determine avoided cost rates.

3. <u>Colorado has used bidding to implement PURPA for decades</u>

sPower suggests that the Commission adopted its current bidding rule in 2005 with little input from anyone other than Public Service.[20] sPower asserts that the Commission failed to consider "whether requiring a QF to win a bidding process would comply with PURPA's must buy requirement." *Id.* at 14. sPower overlooks the context of the Commission's 2005 decision. Bidding has been in place in Colorado in some form for almost thirty years, and has been well vetted by the Commission with the input of

[19] *See City of Ketchikan, Alaska, et al.*, 94 FERC ¶ 61,293 (2001) (finding that PURPA does not require a utility to pay for capacity that would displace its existing capacity arrangements).
[20] sPower Motion, at 13 ("The current language of Rule 3902(c) was added by the Commission with little discussion at the suggestion of Public Service.")

many stakeholders including QF developers, other IPPs, environmental interests, industrial and commercial customers, utilities, Commission Staff, and the Colorado Office of Consumer Counsel, among others. What happened in Colorado paralleled what happened nationally – an influx of QF development beyond what could be absorbed, due in part to administratively determined avoided cost rates that were too high. The Commission's solution to this problem was the adoption of competitive bidding for setting avoided costs and selecting QFs.

To elaborate, Public Service proposed tariffs to determine its avoided costs in I&S Docket No. 1603, and the Commission established, among other things, "the method and in-puts to be used to determine PSCo's avoided costs" and by extension the rates to be paid to QFs. Decision No. R03-0687, at ¶ 34 (mailed June 18, 2003) (citing Decision No. C84-67). These methodologies were subsequently modified over the course of several decisions in 1984. Decision No. R03-0687, at ¶¶ 36-38 (mailed June 18, 2003). The establishment of Public Service's administratively determined avoided cost rate was heavily litigated, and a central point of contention was the need to take into account the different dispatchability levels of different QFs.

On April 23, 1985, I&S Docket No. 1603 was reopened by the Commission "due to concerns that use of the Commission-approved avoided cost method might result in capacity payments to Category 3 and Category 4 QFs providing only peak power that did not reflect the correct avoided capacity cost." Decision No. R03-0687, at ¶ 39 (mailed June 18, 2003) (citing Decision No. C85-585). Public Service sought a moratorium on contracting with affected QFs pending the conclusion of the reopened docket, and the Commission agreed and imposed the requested moratorium. *See*

Decision No. C86-149 (mailed Feb. 6, 1986). The Commission concluded its inquiry in reopened I&S Docket No. 1603 in January 1987, and the moratorium was lifted. Decision No. R03-0687, at ¶ 39 (mailed June 18, 2003) (citing Decisions No. C87-10 and No. C87-10-E, as amended by Decision No. C87-147 *nunc pro tunc*).

On November 4, 1987, Public Service sought another moratorium after receiving QF offers that were far in excess of system needs. Specifically, Public Service was expecting to add approximately 490 MW of QF capacity from 1987 to 1995, but received information from QFs in the first half of 1987 that over 1,100 MW of capacity could come online by 1991 absent a moratorium. Decision No. C87-1690, at ¶¶ 11-12 (mailed Dec. 16, 1987). The Commission agreed with Public Service's request and instituted a second moratorium, but exempted QF projects under 25 MW and grandfathered certain Category 4 QFs – specifically those that had initiated negotiations with Public Service prior to the moratorium. These Category 4 QFs were permitted to contract with Public Service at the avoided costs rates derived from the QF tariffs effective in 1988, consistent with the findings in I&S Docket No. 1603. *See* Decision No. C87-1690 (mailed Dec. 16, 1987); Decision No. C88-140 (mailed Feb. 10, 1988).

In June 1988, the Commission, in an emergency rulemaking requested by Pubic Service, approved a change in the method used to establish avoided costs for capacity payments to QFs, and decided "as part of its continuing duty to implement PURPA" that Public Service should use "use a biennial bidding procedure to establish its avoided costs." In Decision No. C88-726, the Commission stated that "a bidding procedure is necessary to ensure both the reliability and adequacy of Public Service's system and that the customers of Public Service will not over- or under-pay for QF power.

Moreover, a bidding procedure will enable Public Service to obtain the lowest-priced QF power available which will enure to the benefit of its customers."

The Commission adopted integrated resource planning ("IRP") rules in December 1992. The IRP Rules retained biennial QF bidding as a stand-alone process; however, the results of QF bidding were reflected in the IRP. Decision No. R03-0687, at ¶ 50 (mailed June 18, 2003) (citing Decision No. C92-1646). The Commission revisited the IRP Rules in 1996 in Docket No. 95R-071E. Its effort at this time "was sparked by the nexus of several interrelated factors," including the Commission's efforts to implement PURPA and the "increasing competitiveness of the wholesale power markets given the evolution of federal regulatory policy." Decision No. C95-1264, at p. 5 (mailed Dec. 15, 1995). A primary goal was developing a competitive resource acquisition process that, among other things, would "[a]llow the Commission to comply with its continuing responsibility to implement PURPA." *Id.* at p. 6 (mailed Dec. 15, 1995). Issues were raised in the docket regarding whether recent FERC decisions preempted the proposed revisions to the IRP Rules. The Commission rejected these arguments and held as follows:

> We note that the SCE 1 and SCE 2 cases interpret PURPA requirements as related to QF purchases only; the cases do not apply to other electric resources obtained by utilities. As such the holdings in those decisions are limited. In addition, we understand these cases, generally, to stand for two propositions: First, in setting avoided costs for QF purchases, the state process must reflect prices available from all sources, and if avoided costs are established through bidding, the bidding cannot be limited to Q[F]s. All potential sellers must be permitted to bid. Second, a purchasing utility cannot be required to pay a QF more than its avoided costs. The rules adopted in this decision do utilize bidding to establish avoided costs. However, the rules do not limit any bidding, including under the segmented approach, to any particular supplier (e.g., Q[F]s). Instead, all potential sellers will be permitted to bid. We also note that the rules will not compel utilities to pay QFs more than avoided costs. Therefore, the

> planning and resource acquisition process approved in the adopted rules are not inconsistent with PURPA, as interpreted by FERC in the SCE 1 and SCE 2 decisions. We conclude that PURPA does not preempt any of the adopted rules.

Decision No. C95-1264, at pp. 13-14 (mailed Dec. 15, 1995).[21] The IRP Rules with one bidding procedure therefore superseded the biennial QF bidding process previously in place.[22]

These IRP Rules remained in effect through the end of 2002. In 2002, the Commission revisited the IRP Rules and made certain amendments to the competitive bidding rules. The Commission stated in pertinent part as follows in approving the amended IRP Rules: "Rule 3610(b) will allow a utility to propose a method, other than competitive bidding, to acquire resources. In order to use such an alternative, the utility must receive Commission approval of the alternative method. To justify such an alternative, the utility must provide a cost/benefit analysis, and, in addition, must explain how the alternative to bidding complies with PURPA. We believe that these provisions are consistent with PURPA requirements. At this time, we do not believe that we must modify our PURPA rules, either in the current form or as proposed in the electric rulemaking proceeding, Docket No. 02R-279E, in order to accommodate the exemption

[21] SCE 1 and SCE 2 refer respectively, to *Southern California Edison Company,* 70 FERC ¶ 61,215 (1995), *order on requests for reconsideration,* 71 FERC ¶ 61,269 (1995). In SCE 1, the FERC stated that:

> As the electric utility industry becomes increasingly competitive, the need to ensure that the States are using procedures which ensure that QF rates do not exceed avided cost becomes more critical. This is because QF rates that exceed avoided cost will, by definition, give QFs an unfair advantage over other market particpants (non-QFs). This in turn, will hinder the development of competitive markets and hurt ratepayers, a result clearly at odds with ensuring the just and reasonable rates required by PURPA section 210(b).

70 FERC at 61,675-76 (footnotes omitted).

[22] Also in the mid-1990s timeframe, the Commission as part of its PURPA implementation examined a number of QF jurisdictional issues in response to concerns regarding the avoided cost prices that QFs were being paid. A number of parties participated in this proceeding. It resulted in the issuance of Decision No. C95-1209 (mailed December 5, 1995).

contained in Rule 3610(b)." Accordingly, competitive bidding remained central to the Colorado PURPA compliance scheme.

All of this occurred prior to the rulemaking referenced by sPower in 2005. The notion that the current rule was adopted without Commission deliberation based on a mere "suggestion of Public Service" is unfounded and inaccurate. It ignores that this Commission has previously grappled with situations where QFs were seeking to put more power to Public Service at the then effective administratively determined avoided cost rate than it could easily absorb on its system. And it further ignores thirty years of history before this Commission and the fact that bidding was carefully and deliberately adopted to effectuate PURPA compliance for the state of Colorado by this Commission.

B. sPower's Requested PURPA Put prior to the Phase II Solicitation and Associated Regulatory Complexities

In addition to requesting that the Commission waive Rule 3902(c), sPower "recommends" that the Commission require that Public Service purchase power from QFs at an administratively determined avoided cost rate to be determined during Phase I of this proceeding. sPower further requests that Public Service be required to make these purchases prior to conducting any solicitation in Phase II of this ERP process. Given the magnitude of sPower's requested put of power to Public Service, the effect may be to completely eliminate the need for the Phase II solicitation in this proceeding.

This result would not be beneficial to Public Service's customers and, for reasons stated above, there is no reason for the Commission to require it. Further, there are a number of significant issues that the Commission would then need to consider and decide before modifying its PURPA rules to rely on administratively determined avoided costs instead of competitive bidding to determine applicable avoided cost rates.

1. *Key regulatory considerations in any move to administratively determined avoided costs*

Initially, if the Commission were to to retain the use of bidding in part to satisfy the must offer requirement of PURPA, it would have to evaluate the interplay between the bidding process and any alternative approach for purchasing from QFs. In this connection, the FERC in the *Bidding NOPR* indicated that a utility could meet its purchase obligation to a QF that was not selected to provide capacity through a bid by purchasing energy. [23] While Rule 3902(c) contemplates that a QF must win a bid to supply capacity or energy, one approach the Commission might consider would be to require that a QF wanting to sell capacity and energy win a bid, but modify the rule so that a QF could enter into an energy-only sale between ERP Phase II solicitations.

As another significant issue, the Commission would need to determine the appropriate methodology for setting an administratively determined avoided cost rate. Several factors must be taken into account in setting an appropriate rate, including the ability of a utility to dispatch a QF and expected or demonstrated reliability of the QFs. *See* 18 C.F.R. § 292.304(e) (listing the factors that, to the extent practicable, must be considered in determining avoided costs). As noted above, some of the key factors that led to the contentiousness of the I&S Docket No. 1603 proceeding were the disagreements regarding what level of dispatchability a QF should have to receive the highest avoided cost capacity rate. Many of the proposed sPower units, for example, will be located in transmission-constrained areas of the Public Service system (i.e., the San Luis Valley), making it difficult or even impossible to use electricity generated by those units to serve Public Service's primary load centers on the Front Range. Part of

[23] *FERC Statutes and Regulations* ¶ 32,455, 32,021 (1988).

the process of setting an administratively determined avoided cost rate will be to determine how to take such locational issues into account.

While sPower proposes that Public Service use the differential revenue requirement method of determining avoided costs, the Commission should be cautious about approving any single administrative method absent a thorough review of the advantages and disadvantages of different methods of administratively determining avoided costs. sPower appears to request that the Commission order a specific approach without such a review. The differential revenue requirement methodology that sPower advocates is only one of several recognized approaches and is one that is data-intensive and requires many assumptions and careful modeling. In addition, the differential approach can produce avoided cost estimates for small projects that diverge significantly from avoided cost estimates for similar projects that are an order of magnitude larger. Instead, a proxy plant method or other simplified method may be preferable, should the Commission decide to explore administrative methodologies for setting QF prices. For example, the Commission has recently approved methods for determining rates for small QFs and the avoided costs of Renewable*Connect facilities that do not utilize a full-blown differential revenue requirements method. If the Commission were to depart from its present reliance on bidding to establish avoided cost pricing and select QFs, it would thoroughly need to review and consider alternative methods for determining avoided costs carefully.

2. *Additional issues with sPower's requested relief*

If the Commission does decide to allow for QFs to put power to utilities such as Public Service at administratively determined avoided cost rates, there are at least two important issues that it will need to address. First, it will need to decide the length of the contract a QF can request. The FERC regulations do not require that any particular length contract be required. [24] Second and very significantly, the Commission would have to determine at what point a QF developer would be entitled to a LEO. sPower seems to assume that it is entitled to a LEO at this point in time,[25] but as Public Service indicated in its letter in response to sPower's letter requesting a LEO, it is for the states to determine when a LEO may be formed. Motion Attachment B. This issue is not presently addressed in Commission Rules because the use of competitive bidding makes it unnecessary. However, where a QF may establish a LEO by seeking to put power at an administratively determined avoided cost rate, it is necessary to determine at what stage of development it should be entitled to a LEO. A LEO is not supposed to be binding simply on a utility, but also on the QF. For that reason, many state commissions require that QFs be at an advanced stage of development before they may establish a LEO in order to provide some assurance that they will actually be able to deliver energy from their facility at the requested avoided cost rate. *See e.g., Whitehall Wind, LLC. V. the Montana Public Service Commission,* 347 P.3d 1273, 1276 (Mont. 2015). As Public Service has noted, sPower has not indicated at what stage of development its projects are in, and for that reason, sPower is not in a position to assume that it is entitled to a LEO. There are sound policy reasons why this Commission should not allow a LEO until it is apparent that a QF will in fact be able to develop and deliver power to a utility. To allow otherwise would enable a QF to demand

[24] Public Service notes that, among other things, the minimum length of a PURPA contract has been raised in ongoing FERC Docket No. AD16-16-000, but FERC has not yet made, and may not make in the future, any determination as to that issue.
[25] sPower Motion at 12, n. 34.

binding assurances from a utility, while at the same time permitting the QF to subsequently decide to abandon its project without any consequences.

Relatedly, the Commision would also have to decide whether QFs, such as those proposed by sPower that provide energy on an intermittent basis, are even entitled to a LEO with pricing set at projected avoided costs. As noted above, in *Exelon Wind 1, LLC v. Nelson*, it was determined that a state commission properly concluded that a QF must be able to provide firm power in order to form a LEO.

3. *<u>Fairness issues with sPower's requested relief</u>*

Finally, sPower's Motion and requested relief raises fundamental questions of fairness. As detailed above, Colorado has provided for the use of competitive bidding in some form to set avoided cost rates since 1988, most recently through Rule 3902(c), which has been in effect since 2005. If the Commission wishes to modify its rules to effectively permit another form of selecting QFs, it should do so through a rulemaking, which will give sufficient time for all developers to plan and propose projects accordingly.

However, ongoing developments surrounding PURPA implementation at the national level counsel against the Commission conducting any kind of extensive examination of these issues at this time. First, the FERC is presently considering a number of PURPA implementation issues in *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Docket No. AD16-16-000, where it has invited post-technical conference comments. Second, the National Association of Regulatory Utility Commissioners ("NARUC") has just passed a resolution that underscores the need to give states continuing deference to implement PURPA (included as Attachment

A), particularly in light of the significant growth of renewable generation. Accordingly, PURPA is receiving an increasing amount of attention at the FERC and in the regulatory policy community, and it would be appropriate to wait to see how some issues play out at the FERC before expending limited resources in Colorado addressing them.

IV. CONCLUSION

In summary, the essence of sPower's argument is that it should be given a preference over any other potential supplier prior to the Phase II solicitation to be conducted in this proceeding after the determination of resource need. It recommends that the Commission use Phase I of this ERP case to determine a methodology to establish an administratively set avoided cost rate pursuant to which it would sell to Public Service. At that point, and in advance of any Phase II bid, sPower proposes that it should be allowed to put power to Public Service under PURPA. Again, this would occur outside of and in advance of the planned Phase II resource solicitation.

sPower has not made any representation that it cannot participate in that solicitation and have its proposed 880 MW of solar capacity compete on an even footing with other potential projects. Accordingly, it appears that sPower's request for relief is motivated by the fact that it simply does not want to take a risk that it may not be selected in the solicitation. As explained herein, PURPA does not require that sPower be given such a preference to make a sale to Public Service on that basis, and such a result is inconsistent with the Colorado QF implementation rules.

Dated this 18th day of November, 2016.

Respectfully submitted,

By: */s/ William M. Dudley*

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