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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

In the Matter of the Application of PacifiCorp, by and through its Rocky Mountain Power Division, for Approval of a Solicitation Process for a Flexible Resource for the 2012-2017 Time Period, and for Approval of a Significant Energy Resource Decision	Docket No. 07-035-94  UTAH OFFICE OF CONSUMER SERVICES' RESPONSE TO NOTICE OF INTENT TO RESUME ALL SOURCE RFP AND REQUEST FOR APPROVAL
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**ROCKY MOUNTAIN POWER MATERIALLY CHANGES THE ALL SOURCE RFP REQUIRING COMMISSION APPROVAL**

In its April 6, 2009 order approving Rocky Mountain Power's request to suspend the RFP established in this docket, the Commission stated:

The following conditions shall apply to the Company's request as modified in its reply comments: 1) The suspension is granted for a period up to six months beginning with the effective date of this order; 2) prior to providing notice to bidders that it will resume, request approval to further suspend, or request approval to cancel the All Source RFP, the Company shall notify and file the appropriate requests for approval with the Commission; 3) if the Company notifies the Commission of its intention to resume the All Source RFP, it shall include in its notification to the Commission, a request for approval of the new schedule for the All Source RFP and include a request for approval of any material changes to the All Source RFP; 4) the

Company shall refund the bid fee to bidders withdrawing from the All Source RFP at this time; 5) if the All Source RFP is cancelled or further suspended prior to full evaluation of bids, the Company shall refund bid fees to all bidders or to bidders then withdrawing from the All Source RFP respectively; and 6) the Company's notice to bidders of the suspension, attached as Appendix 2 to its reply comments, is approved with the modification that it remove the phrase, "less a pro rata share of independent evaluator fees," from the notice.

Rocky Mountain's October 6, 2009 Notice of its intent to resume the RFP appears to comply with the Order except for requirement 3.; a request for approval of any material changes to the All Source RFP. The company asserts but provides no meaningful evidence or justification that eliminating two of the three benchmarks is not a material change:

2. The Company's benchmark will be limited to a combined cycle natural gas fired plant at Lake Side. This is consistent with the 2008 IRP and also reflects the fact that the Company has acquired rights for the active development permits at the Lake Side site in connection with its termination of the Master Development, Engineering, Procurement and Construction Agreement for the proposed Lake Side 2 plant. *See Docket No. 08-035-95. Notice of Intent to Resume, page 6.*

Benchmark options play an essential role in the procurement process for significant energy resources. *See Utah Code Ann. §54-17-202(1) (2009 Supp.); Utah Admin. Code R 746-420-3(4)(b), (f).* Benchmark options played an essential role in the RFP that the company designed and issued. *See August 5, 2008 PacifiCorp's Request for Proposal, Final, Attachment 1.* Benchmark options played an essential role in the bidding process and in the evaluation of the bids, including the successful bid that was later cancelled. Rocky Mountain Power admits as much when it explains that limiting

the benchmark option to a combined cycle natural gas fired plant at Lake Side “reflects the fact that the Company has acquired rights for the active development permits at the Lake Side site in connection with its termination of the Master Development, Engineering, Procurement and Construction Agreement for the proposed Lake Side 2 plant. *See Docket No. 08-035-95.” Notice of Intent to Resume, page 6.*<sup>1</sup>

In particular, with respect to the purpose of benchmark options, to serve as energy resources against which bids in an open bid process may be evaluated, Utah Code §54-17-102(2) (Supp. 2009), eliminating benchmarks eliminates the opportunity to test the competitiveness of bids for resources other than combined cycle natural gas fired base load plants. The RFP which the company wishes to reissue, solicits bids for system-wide, east and west control area, energy and capacity generation which is capable of delivering energy and capacity in or to the Company’s Network Transmission system, wherein bidders may propose any of seven different resource alternative structures and three exceptions in three separate bid categories of resource requirements: base load, intermediate load and summer peak resources. The RFP calls for bids for all types of resources, including a power purchase agreement, a tolling service agreement, an asset purchase and sale agreement on a Company site, an asset purchase and sale agreements on a bidder site, purchase of an existing facility, purchase of a portion of a facility jointly

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<sup>1</sup> Rocky Mountain asserts that the Lake Side benchmark is consistent with the 2008 IRP, but offers no further information as would be required if the company intended to file an action plan demonstrating the analysis and conclusions by which significant energy resources to be pursued have been identified and selected. *Utah Admin. Code R746-430-1(1)*.

owned and operated by the Company, restructure of an existing power purchase agreement or an exchange agreement or buyback of an existing sales agreement, and resource alternative exceptions.

Given the extensive character of the bids the company will request and evaluate, limiting bid evaluation and comparison to only one benchmark resource, in place of three, is a material change. The bid comparison and evaluation is intended to identify the resource that “will most likely result in the acquisition, production, and delivery of electricity at the lowest reasonable cost to the retail customers of an affected electrical utility located in this state.” *Utah Code Ann. 54-17-302(3)(c)(i) (Supp. 2009)*. The Commission must not accept Rocky Mountain Power’s unsupported conclusion, but must determine for itself, based upon evidence and analysis, the number and character of benchmark options that are required by the Act. *See generally, Utah Energy Resource Procurement Act, Utah Code Ann 54-17-101 et seq. (Supp. 2009); Utah Admin. Code R746-420-3(1)(b)(iii) (Supp. 2009) (a proposed solicitation must be sufficiently flexible to permit the evaluation and selection of those resources or combination of resources determined by the commission to be in the public interest).*

**ROCKY MOUNTAIN POWER’S SCHEDULE FOR REVIEW AND APPROVAL  
TO RESUME THE RFP IS UNREASONABLE**

A proposed solicitation and the solicitation process is to be “commenced sufficiently in advance of the time of the projected resource need to permit and facilitate compliance with the Act and the Commission rules and a reasonable evaluation of

resource options that can be available to fill the projected need and that will satisfy the criteria contained within Section 54-17-302(3)(c).” *Utah Admin. Code R746-420-3(1)(b)(v) (Supp. 2009)*. Rocky Mountain Power’s October 6, 2009 Notice should be subject to this general requirement. The Commission asked the Division of Public Utilities to provide by October 19, 2009, an “explanation and statement of issues to be addressed.” If this request is intended to apply to parties other than the Division, parties who wish to respond must do so in nine working days; seven if a state agency. Only 16 calendar days are available between the filing date and October 22, 2009, the date the company expects Commission approval. Commission rules provide that responsive pleadings to requests for agency action be filed within 30 days after service of the request. *Utah Admin. Code R746-100-4D*.

The Commission’s comments in the December 24, 2008 scheduling order, Docket No. 08-035-95, are to the point. Rocky Mountain Power requested an expedited consideration and approval of its resource selection because of circumstances of the company’s own making.

The Commission finds it unfortunate the Company has not adequately prepared for the vetting of its resource decision as envisioned in Utah Code § 54-17-302. This is the first time the Commission will be reviewing the full process of the Energy Resource Procurement Act, i.e., solicitation process followed by a request for approval of a selected resource, and the Commission is challenged by the indifference given to the public process for review and recommendations regarding the Company’s resource decision. Notwithstanding these challenges, this Commission is reticent to create any regulatory stumbling blocks given that the resource deficit expected in 2012, by all accounts, is substantial. Therefore, the

Commission will not alter the proposed schedule if it can produce an adequate review and analysis of the Company's request. Although the Commission will make a good faith effort to provide a timely order as requested, it cannot commit to a certain date at this point; that, to a great extent, will be dependent on the evidence and analysis presented in this case.

The Office's concern for the process in this docket is a fundamental concern underlying any adjudicative process: fairness to the parties participating in the proceedings. As the Commission stated in its September 23, 2008 order in Docket No. 08-035-38, at page 15:

Utah's statutory provisions regarding administrative adjudications are found in UAPA and provide relatively general guidance. *E.g.*, provision for how adjudicative proceedings are started, *id.*, §63G-4-201; provision for possible responsive pleadings, *id.*, §63G-4-204; provision for discovery and subpoenas, *id.*, §63G-4-205; and the conduct of hearings, *id.*, §63G-4-206. Although general in its tenor, UAPA incorporates concepts of fairness or procedural due process. *E.g.*, hearings are to provide opportunity for "full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions," *id.*, §63G-4-206(1)(a), and judicial relief is available if the agency's adjudicatory proceedings have violated procedural requirements, *id.*, §63G-4-403(4)(e), or trampled indicia associated with due process, *id.*, §63G-4-403(4)(h).

In this docket, the Commission ought not be so accommodating of the utility's choice for when and what notice has been given.<sup>2</sup> Instead, the Commission ought to

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<sup>2</sup> Citing to R746-420-3(1)(b)(v), the Office, then the Committee, requested updates during the suspension period when it responded to the company's request. In the April 6, 2009 order suspending the RFP, the Commission described the Office's position:

Essentially, the Committee argues the Company has, to date, provided insufficient information detailing changed conditions and customer loads to support its decision to suspend the All Source RFP. Therefore, the Committee is concerned lax oversight will result in inadequate vetting of the next resource decision by the Company. To avoid this result, the Committee recommends the Commission

determine a schedule that will permit the Commission the time its needs to perform a review under statutory provisions regarding administrative adjudications meant to assure fairness and due process. The Commission should enforce the public process for review and recommendations regarding the Company's resource decision.

### **RECOMMENDATION**

The Office does not recommend a lengthy rehearing of all that went into the initial design of the RFP. However, the Office does recommend a focused and deliberate review of the changed benchmark options. Because this is a material change, the Commission should make a determination of this issue based upon the evidence. The Office believes that this determination is consistent with a reasonable schedule for resuming the RFP and the timely acquisition of the needed resource. In keeping with this goal, the Commission should consider whether the overall schedule provides sufficient time within which to evaluate the bids, select a short list, and negotiate for the selected resource by January 2011.

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require the Company to file regularly scheduled reports with the Commission, Division and Committee on the status of its market assessments, its customer load forecasts, forecasts or information pertaining to construction costs, the response of bidders to the suspension notice, the development of new or refreshed benchmark resource proposals, and other reports as the Commission may deem necessary to monitor the All Source RFP while it is suspended. Further, the Committee requests the Commission allow discovery upon these reports or other matters deemed appropriate.

The Company believed this request to be onerous, burdensome and unnecessary. The Commission denied the request in order to strike a balance of these positions and to promote both the integrity of the process and the interests of customers in obtaining adequate service at reasonable cost. With seven working days to respond to the Notice filed at the last possible moment, containing very little consequential information, neither the process nor customers are well served.

The Office recommends that the Commission consider whether under the circumstances of the cancellation of the selected resource that resulted from the earlier RFP, Docket No. 08-035-95, and a suspension of an RFP, the Act requires the Commission to issue findings and conclusions that the resumed RFP complies with the Act.

DATED this 19<sup>th</sup> day of October 2009.

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Paul H. Proctor  
Assistant Attorney General  
Utah Office of Consumer Services



## CERTIFICATE OF SERVICE

I hereby certify that on this 19<sup>th</sup> day of October 2009, I caused to be e-mailed, a true and correct copy of the foregoing Response to Notice of Intent to Resume to the following:

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