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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 COMMITTEE OF CONSUMER SERVICES' RESPONSE TO APPLICATION
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Pursuant to Utah Code 54-10-4 and 5, and Administrative Rule R746-100-4D<sup>1</sup>, the Utah Committee of Consumer Services responds to PacifiCorp's Application filed on December 21, 2007 in accordance with the Utah Energy Resource Procurement Act. This initial pleading anticipates developing a new system-wide, all-source incremental request for proposal for significant energy resources to provide energy in the 2012 to 2017 time period. At this time, PacifiCorp requests three Commission decisions:

1. Appoint Merrimack Energy as the independent evaluator in this docket for purposes of the All Source RFP.

<sup>1</sup> As an application for Commission decisions on preliminary procedural matters and not approval of a solicitation process under the Utah Energy Resource Procurement Act, the Committee's response is limited to the procedural requests for relief. The Committee reserves the right to file responses and discovery pertaining to the substantive request for approval of a solicitation process as allowed by and in the time permitted by R746-420-1 (4)(a).

2. Grant expedited review of the All Source RFP pursuant to R746-420-3.
3. Authorize Rocky Mountain Power to immediately begin working with Merrimack Energy on the proposed solicitation for the All Source RFP.

## **COMMITTEE RESPONSE**

### **I. Request for appointment of Independent Evaluator.**

The Committee does not oppose the appointment of Merrimack Energy as the Independent Evaluator for the All Source RFP, subject to the Commission plainly addressing procedural flaws in the 2012 RFP that may have contributed to the deficient initial outcome and necessary changes to that RFP's terms, conditions and process.

A common thread in the facts and circumstances PacifiCorp cited in its Motion to Amend the 2012 RFP, Withdrawal of the Motion to Amend, and in premise for the 2012-2017 RFP, is the insufficiency of information and exclusionary oversight of the solicitation process in the face of indications that compliance with the Act by the 2012 RFP was at risk. Information and actions considered or taken by regulators and interested parties in other jurisdictions that materially impacted the RFP, were known and documented. However, for unexplained reasons, months passed before its substance and significance was distinctly available to the Commission, the utility, and interested parties or regulators.<sup>2</sup>

The Committee believes that there may have been some confusion about the Independent Evaluator's role and responsibilities to the statutory process. Utah Code §54-17-203 and Administrative Rule R746-420-6 correctly allow the IE discretion in the breadth and depth of an

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<sup>2</sup> For example, the Motion to Amend the 2012 RFP requested modified response dates, allowed new as well as refreshed bids, modified the timing of bidder qualification requirements, particularly in the area of financial security, and added new benchmarks replacing ones found to be not viable. While the Motion was withdrawn, the Committee contends that the issues and concerns that prompted the Motion were ones that could and should have been addressed when they first arose.

evaluation of an RFP's substance and process. Both also require that the Commission, the utility, regulatory agencies, and parties have access to all substantive correspondence and communications, which the IE must document. *See R746-420-6 (4)(a) and (e).*

To improve the process in this and following RFPs, the Committee recommends that the Commission require that the IE, or the Division if directed by the Commission to oversee the IE, file within the RFP Docket in a timely manner, all documents produced by the IE or which the IE possesses, so that parties may consider the documents, and in the Committee's case, perform its statutory duties. Certainly, the Commission may classify such documents as proprietary or confidential, but parties are entitled to know of documents and to request access. The Committee recommends that the substance of the procedural order for this or any RFP docket requires all substantive records, work product, reports, opinions, memoranda, or other documents produced by the IE or considered by the IE in performance of assigned duties, to be filed with the Commission, maintained as a part of the Commission's record and available from the Commission's Major Dockets web site. If the Commission classifies a document as other than a public record under the Utah Government Records Access and Management Act, or confidential, proprietary or protected under a Commission protective order, the Commission should disclose the document and its classification so that parties may consider whether to challenge this classification or determine if the party is otherwise entitled to the record.

In addition, the Commission should establish a process by which the Commission will consider and provide direction to the IE, upon being advised of any dispute or other issue or concern that "could affect the integrity or outcome of the Solicitation Process." *R746-420-6*

(2)(k), and See R746-420-6 (2)(l).<sup>3</sup> The success of the RFP process is dependent upon the Commission's active and ongoing oversight of the process. Because the end result of the solicitation and resource selection process is pre-approved cost recovery for an expensive, long-lived, significant energy resource yet to be built, the Act requires strict adherence to provisions for Commission oversight. Also, because the solicitation process portends the specific resource to be approved for acquisition or construction under the Act's Part 3, the Act demands exercise of the Commission's general jurisdiction to supervise "all of the business" of an electric utility. *Utah Code §§54-4-1 and 54-4-25(7), requiring consolidation of an action under the Energy Resource Procurement Act with one to obtain a certificate of public convenience and necessity.*

## **II. Request for expedited review.**

While there may be evidence supporting an expedited review as the utility requests, the Commission must be attentive to the entire administrative rule that allows variance to the statutory schedule. R746-420-3 (1)(b)(v) states, with added emphasis, that a proposed solicitation and solicitation process must:

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). The utility may request an expedited review of the proposed Solicitation and Solicitation Process if changed circumstances or new information require a different acquisition timeline. *The Soliciting Utility must demonstrate to the Commission that the timing of the Solicitation Process will nevertheless satisfy the criteria established in the Act and in Commission rules.*

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<sup>3</sup> Utah Code §54-17-203(3)(b)(ii)(B) permits reports prepared by the IE for the Commission to be provided to others, as directed by the Commission. However, (3)(b)(iii) requires reports addressing the solicitation process and any concerns of the IE related to the process. The availability of these reports is *not* limited to the Commission and others as the Commission directs.

The Committee does not oppose expediting the schedule so long as the Commission's order expressly provides for periodic reviews of the development, distribution, responses and reviews of the RFP and bids received, to assure that the expedited schedule, in all respects, complies with the Act.

**III. Request for Independent Evaluator participation in developing the proposed solicitation.**

At several places within the Application, PacifiCorp states that by working with the Independent Evaluator, a proposed solicitation will be developed. The utility will meet and confer with the IE "to incorporate agreed upon lessons learned from the 2012 RFP into the proposed solicitation process for the All Source RFP." And, PacifiCorp makes a particularly troubling request following this agreement with the IE, that "the issues presented before the Commission with respect to approving the proposed solicitation should be limited, thus enabling the Commission to issue a decision on an expedited basis." *Application Paragraph 17, and See Paragraphs 21 and 22.*

The Committee does not agree that, at this time, the Commission may or should limit the issues to be presented to the Commission as part of the process to approve the proposed solicitation. Only after the proposed solicitation is filed can the Committee or any party scrutinize it for compliance with the Act or R746-420-3. In addition, the fact that the utility intends to cooperate with the IE in designing the solicitation is no assurance that the final product conforms to the Act and rules. The Commission is obligated to critically evaluate the proposed

solicitation including all of the IE's suggestions and analysis, whether the utility agrees with the IE or has incorporated them. *See R746-420-3 (1)(b)(v)*<sup>4</sup>, *R746-420-3 (7)*, *R746-420-6 (2)(k)*.

To provide sufficient evidence upon which the Commission can base its approval or rejection of the solicitation process [Utah Code §54-17-201(2)(f)], or approval, disapproval or conditioned approval of the selected resource [Utah Code §54-17-302(5)], the Act requires the Commission to consider specific information and circumstances that govern whether a request for proposal or the selected resource is in fact in the public interest. This decision is reserved exclusively to the Commission. The Independent Evaluator's authority is to monitor, evaluate and report, and provide input to the utility. The IE's duty is to advise and consult with the Commission. Nothing that the IE does, or the IE's agreement with a utility, can be allowed to limit the Commission or regulatory agencies from performing their statutory duties and complying with the Act.

The Committee is cognizant of the need for timely review of an RFP intended to acquire needed resources, particularly in light of the unexpected outcome from the 2012 RFP. Eliminating unnecessary delay is certainly in all parties' interest. However, the Act does not suspend PacifiCorp's on-going obligation to provide the economic and other information from which the Commission may precisely analyze and determine rates. *See Utah Code §54-3-22 and Utah Department of Business Regulation v. Public Service Commission*, 614 P.2d at 1247. In

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<sup>4</sup> This rule states that a proposed solicitation and the solicitation process must: "(v) 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). The utility may request an expedited review of the proposed Solicitation and Solicitation Process if changed circumstances or new information require a different acquisition timeline. The Soliciting Utility must demonstrate to the Commission that the timing of the Solicitation Process will nevertheless satisfy the criteria established in the Act and in Commission rules."

particular, the Commission must have sufficient and substantial evidence from which to determine whether the solicitation process that the utility will propose, advances the Act's goal to acquire or construct generation resources at the lowest reasonable cost that will meet the utility's load in a reliable manner with due consideration for environmental and economic consequences. *Utah Code §54-17-102(3)*. The Commission may not and cannot make this decision if it peremptorily limits the issues to be considered.

### CONCLUSION

At this point in time, residential and commercial ratepayers' interests are properly served by the immediate appointment of Merrimack Energy as the Independent Evaluator, and expediting the schedule for review of the RFP, accompanied by the process improvements the Committee recommends. The Committee also understands PacifiCorp's rationale for wanting to work with the IE. However, placing limits upon parties' consideration of the solicitation proposal is neither necessary nor appropriate.

DATED this 22<sup>nd</sup> day of January 2008.

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Paul H. Proctor  
Assistant Attorney General  
For Utah Committee of Consumer Services

## CERTIFICATE OF SERVICE

I hereby certify that on this 22<sup>nd</sup> day of January 2008, I caused to be e-mailed, a true and correct copy of the foregoing Response to Application for 2012-2017 RFP, to:

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