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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' INITIAL COMMENTS UPON FEBRUARY 15, 2008 DRAFT REQUEST FOR PROPOSALS

I. INTRODUCTION.

Pursuant to Utah Code §§54-10-4 and 5, and the Commission's March 4, 2008 Scheduling Order, the Utah Committee of Consumer Services responds to PacifiCorp's February 15, 2008 Application of Rocky Mountain Power For Approval of a Solicitation Process and for Approval of a Significant Resource Decision. The Utah Energy Resource Procurement Act applies to the filing. The utility requests approval of the solicitation and solicitation process in an All Source Request for Proposals, the utility's 2008 RFP. The

solicitation requests proposals for system-wide, all-source capacity and energy resources to be available in the 2012 to 2016 time period.[1]

The Committee's statutory responsibilities include assessing the impact of utility rate changes and regulatory actions on residential and small commercial customers. *Utah Code §54-10-4(1)*. The rate impact of the utility's proposed 2008 RFP is significant in amount and duration. The 2008 RFP, if approved, will be a substitute for certificate of public convenience and necessity proceedings and will pre-approve inclusion of the selected generation resources into rates. *Utah Code §54-4-25(7), Utah Code §54-17-303.* The Committee must carefully scrutinize all phases and all details of the utility's proposal. Also, the Committee has scrutinized the proposal for strict compliance with the statutory and administrative rules that is prerequisite to a Commission order granting the utility extraordinary relief afforded by the Procurement Act. The Committee concludes that the proposed 2008 RFP does not comply with the Act, legally or substantively.

II. THE 2008 RFP DOES NOT COMPLY WITH THE ENERGY RESOURCE PROCUREMENT ACT BY PROVIDING THAT THE UTILITY MAY BID SELF-BUILD RESOURCE OPTIONS THAT CIRCUMVENT THE ACT AND ADMINISTRATIVE RULES.

The part of the Application and supporting testimony that the Committee contends causes the RFP to not comply with the Act is the following:

> Application and Notice ¶ 12.
>
> R746-420-3 (8)addresses the solicitation process for any RFP involving a Benchmark Option. The 2008 RFP will not have a traditional benchmark

[1] The initial application filed December 21, 2007 anticipated a solicitation for resources for the 2012 to 2017 time period. The February 15, 2008 Notice of Filing pertains to resources needed for calendar years 2012 to 2016.

> option as defined by Utah Code 54-17-102(2). Instead, PacifiCorp has proposed that its generation group will submit "self-build options(s)" as proposals just like any other third-party bidder rather than developing benchmark resources as contemplated by the Guidelines.[2]
>
> Stefan A. Bird Direct Testimony.
>
> Line 116. Q. Does the 2008 RFP include a benchmark option?
> Line 117-121 A. No, the 2008 RFP will not have a traditional benchmark option as defined by Utah Code 54-17-102(2). Instead, PacifiCorp has proposed that its generation group will submit "self-build options(s)" as proposals just like any other third-party bidder rather than developing benchmark resources as contemplated by the Guidelines. PacifiCorp is proposing to treat all proposals submitted in this 2008 RFP the same.

Mr. Bird goes on to state that the rules governing benchmark options is not directly applicable to the 2008 RFP. *Bird Direct, Line 127-128.* In other words, the 2008 RFP is deliberately designed to avoid having to comply with the Procurement Act. At paragraph 11 the February 15 Application and Notice of Filing states: "**In general**, the Company's Solicitation and Solicitation Process in the 2008 RFP was designed to meet the requirements of R746-420-3 (1) and (7) and provide a process that is fair, reasonable and in the public interest." [Emphasis added.]

The Commission may approve a solicitation only if it 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 §§54-17-201, 302, 303.* This standard is not met by selecting the lowest of bids received but is

[2] The fact that PacifiCorp refers to the Procurement Act's provisions as "guidelines" is cause for exceptional scrutiny of its proposal as tested by Utah law. PacifiCorp confuses Utah's legislative mandates with Competitive Bidding Guidelines adopted by the Oregon Public Utility Commission in UM 1182 on August 10, 2006. This confusion appears also in Attachment 4 to the proposed RFP, describing the role and function of the independent evaluators, inaccurately stating the Utah IE's duties and implying that Utah's and Oregon's IE's work together for the utility.

met only by the lowest reasonable cost independently determined. *See Committee of Consumer Services v. Public Service Commission*, 2003 UT 29, ¶15 citing *Utah Dep't of Admin. Servs. v. Pub. Serv. Comm'n*, 658 P.2d 601, 618 (Utah 1983) (stating that a utility's "monopoly position" imposes upon it a "consequent duty to operate in such manner as to give to the consumers the most favorable rate reasonably possible," and that this obligation is reflected in the statutory "just and reasonable" requirement). General compliance does not and cannot meet the standards determined by the Procurement Act.

Unquestioned principles of statutory construction govern the interpretation and application of the Procurement Act and the administrative rules the Commission enacted as the Act requires.[3] When interpreting statutes, the primary goal is to evince the true intent and purpose of the Legislature. To discern the legislature's intent and purpose, the Commission must look first to the "best evidence" of a statute's meaning, the plain language of the Procurement Act. In reading the language of the Procurement Act, the Commission must seek to render all parts relevant and meaningful and presume the legislature used each term advisedly and according to its ordinary meaning. The Commission must avoid interpretations that will render portions of a statute superfluous or inoperative. *State v. Tooele County*, 2002 UT 8, ¶ 10. [Citations omitted.]

Interpreted and applied, as the law requires, the Procurement Act plainly prohibits the self-build options proposed for the 2008 RFP. An affected utility may acquire or

[3] As an administrative body, the Commission may exercise the legislative power of rulemaking if the delegation to do so is "accompanied by a declared policy outlining the field within which such rules and regulations may be adopted." *Robinson v. State*, 2001 UT 21, ¶ 14. Once adopted, administrative rules are to be interpreted and applied according to the same standards as those applied to the authorizing statute.

construct a significant energy resource such as those described in the 2008 RFP, only by complying with the Procurement Act. *Utah Code §54-17-201(1)(a)*. The Act defines "benchmark option" as "an energy resource against which bids in an open bid process may be evaluated that (a) could be constructed or owned by: (i) an affected electrical utility; or (ii) an affiliate of an affected electrical utility." *Utah Code §54-17-102(2)*. The term "self-build or owned option" is used only in conjunction with a benchmark option. *R746-420-3 (4)(a)*. [4] The meaning of the term is drawn from the context in which it is used; another fundamental principle of statutory construction. *State v. Burgess-Beynon*, 2004 UT App 312, ¶ 7. [Citations omitted.] The plain meaning of the Procurement Act and the administrative rules is that any self-build option shall be treated as a benchmark option for all purposes in the solicitation and selection process. Nowhere in the Act is any provision made for the self-build option as the utility has designed and proposed in the 2008 RFP.

If the solicitation includes a benchmark option, the solicitation must include the disclosures required by R746-420-3 (4), in particular (b), (e) and (f). Detailed process requirements are required in a solicitation involving even the possibility of a benchmark option. *R746-420-3 (8).* The 2008 RFP cannot be approved because the affected utility

[4] The Committee's staff and counsel found the term "self-build" appears only once in the Procurement Act and administrative rules. The Commission is aware that how a term is used or whether a term appears at all is an important consideration in statutory interpretation and application. *See Ball v. Public Service Commission*, 2007 UT 79, ¶ 55.

presumptuously creates for itself a bidding opportunity that omits the disclosure and process requirements required by Utah law.[5]

The Procurement Act and the rules make no provision for the affected utility to submit its own competing bid in any form but a benchmark resource that fully complies with all of the statutory and administrative rule requirements. The Act and the rules plainly state that the open bid process that must be used by the affected utility may include projects owned by or affiliated with the affected utility only if the solicitation incorporates the process and disclosure provisions that assure a truly competitive procurement of the lowest reasonable cost generation resource.[6]

III. THE 2008 RFP AS DESIGNED CANNOT RESULT IN A RESOURCE SELECTION THAT MEETS STATUTORY STANDARDS FOR THE PUBLIC INTEREST.

Not only does the utility's abandonment of the use of benchmark resources raise legal questions, it also raises significant analytical problems. Benchmarks are required

[5] The utility intends the Independent Evaluator to "evaluate the unique risks and advantages associated with any Company Self-build bid, including the regulatory treatment of costs or benefits related to actual construction cost and plant operation differing from what was projected for the RFP." RFP Attachment 4: Role and Function of the Independent Evaluators and Communication Protocols, (1)(i). The utility may not use the Independent Evaluator for a purpose not expressly permitted by R746-420-6 or a Commission order and particularly a purpose that is contrary to Utah statute and administrative rule. This use of the IE is particularly offensive when one considers that the IE will be advising the company about the company's bid, while concealing from other bidders, information about what is a benchmark.

[6] See Joskow, P.L., "Expanding competitive Opportunities in Electricity Generation," Regulation, The Cato Review of Business & Government, Vol. 15, No. 1, Winter 1992. Prof. Joskow noted that including projects owned by or affiliated with the purchasing utility as competitors "naturally creates a potential conflict of interest," while also recognizing that there are good reasons not to preclude utilities from owning and operating any additional generating facilities. Prof. Joskow states: "it is essential that there be regulatory procedures to remove incentives utilities might have to favor their own projects or to fail to evaluate carefully the merits of competing supply opportunities." One can easily see in Utah's Energy Resource Procurement Act the regulatory procedures that balance the good reasons to permit utility self built generation resources, by requiring that they be benchmarks accompanied by disclosures and procedural protections. One also can identify in the Act, the legislative response to the unsatisfactory process that PacifiCorp followed in Docket No. 03-035-29 for RFP 2003-A, an RFP that included self-build options not unlike the self-build options that the utility intends for RFP 2008.

by the statutes, and for reasons well based in analytical support. The use of benchmarks is one critical component to achieving an appropriate outcome from an all-source RFP. Absent the use of benchmarks, the 2008 RFP cannot result in a resource selection that can be shown to be lowest reasonable cost, the statutory standard for public interest in this type of proceeding.

The benchmark is necessary to the fundamental analysis and transparency of the process. By providing benchmarks, the RFP signals to the market and the stakeholders the preferred mix of resources against which other bids will be measured. Presumably these benchmarks would be supported by significant analytical evidence, such as IRP modeling, that demonstrate why the chosen benchmarks are the appropriate mix of resources for the system.

Another important purpose of the benchmarks is to signal to the market what types of resources bids would be competing against. Preparation for full participation in an RFP process comes at considerable cost. The Procurement Act requires that bidders be given as much information as possible about the resource needs of the system in order to determine whether it is advantageous for them to participate in the RFP process. In the case where a recent IRP has been acknowledged and provides well-supported information about the upcoming system needs, such results could provide similar market signals to what the benchmarks do. However, multiple flaws in this utility's IRP process were raised by stakeholders and cited by the Commission in its order not to acknowledge PacifiCorp's most recent IRP.

Without benchmarks or a process that ties back to a well executed and acknowledged IRP, the only way that the resource selection could be shown to be lowest reasonable cost is with an incredibly robust response to each category of resources with every possible combination of resources. However, past history has not shown a particularly robust response to PacifiCorp RFPs and without proper signals regarding the type of resource needs, it would be without basis to expect better results in this RFP. Also, the categories for evaluation themselves do not encompass all types of resources. For example, the utility indicates that one category for evaluation is third quarter market products. This disadvantages any bid for a peaking plant. Since peaking plants were inappropriately pre-screened out of the IRP resource choices, there is no analytical evidence to support whether or not a peaking plant should be considered.[7]

Since the necessary robustness of responses cannot be presumed, the resulting situation is one that could easily be manipulated by the utility in its choices of self-build bids. For example, the utility could simply submit bids for the types of resources it prefers to build and own, rather than the types of resource to best meet system needs, and in the absence of adequate market response, perpetuate its planning mistakes into imprudent resource choices, which ultimately translates into higher rates for consumers.

Bids for self-build options are inherently different from third party bids and must be recognized as such. For example, if the self-build bids are going to be rate based

[7] The Committee does not advocate the appropriateness of a peaking plant. There clearly is not enough evidence to do so. Rather, it uses this example to illustrate where the evidence is missing and a flawed assumption carries through from the IRP potentially leading to an incorrect resource choice from the 2008 RFP. The Committee notes, however, that this flawed assumption also continues the Company's unsupported favoring of market purchases over investment in specific generation plant.

plants, it is unclear how those bids could be presented analogously to other bids. These questions are intensified in the case that the self-build bid is part of a short list with which the evaluators start specific negotiations. Clearly, at that point in the process it will become evident that the evaluators are negotiating with another part of their own company. The Committee contends that it is impossible to conduct those negotiations consistent with negotiations with outside bidders. The 2008 RFP makes worse the perception and reality of an evaluation and selection bias favoring the utility. Such a process does not and cannot comply with the Procurement Act.

The Procurement Act acknowledges the reality of utility bidding against true third parties by requiring a transparent process including disclosing the information necessary to preserve a competitive process. It is the benchmark process itself which is designed to remove the bias toward a utility self-build. The 2008 RFP's provision for utility self-build options is inherently flawed and cannot achieve the theoretical benefits of removing bias.

The Committee is also concerned that modeling flaws discovered in the utility's integrated resource plan have been or will be carried through into 2008 RFP, further preventing the demonstration that the outcome of the RFP is in the public interest. In fact, the utility dismisses any relevance of the IRP to the 2008 RFP. Mr. Bird states in his direct testimony at Line 147 to 155:

Q. Does the Commission's Order on February 6, 2008 in Docket 07-2035-01 declining to acknowledge the Company's 2007 IRP impact the 2008 RFP?

A. No. This Order does not directly impact the 2008 RFP because, as the Order states, the "resource solicitation and acquisition decision approval processes are separate from the IRP acknowledgment process." Id. at 6. In any event, the Order does not imply doubt about PacifiCorp's need for the resources sought in the 2008 RFP. Rather the Order suggests the potential need for additional RFPs to meet any resource needs not covered by the 2012 and 2008 RFPs.

Mr. Bird's testimony is inconsistent with if not contradicted by the administrative rule enacted by the Commission to satisfy Utah Code §54-17-301.[8] R746-420-3 (2)(c) Solicitation Process, states:

> In developing the initial screening and evaluation criteria, the Soliciting Utility, in consultation with the Independent Evaluator (if then under contract) and the Division of Public Utilities, shall consider the assumptions included in the Soliciting Utility's most recent Integrated Resource Plan (IRP), any recently filed IRP Update, **any Commission order on the IRP** or IRP Update and in **its Benchmark Option**. [Emphasis added.]

Mr. Bird also misleadingly selects part of a sentence to describe the whole of the Commission's order on the IRP. The Commission's conclusion, in its entirety, is:

> Utah Code §54-17-302 now requires PacifiCorp to obtain Commission approval, after public hearing, of any significant energy resource decision

[8] 54-17-301. Review of integrated resource plan action plans.
(1) An affected electrical utility shall file with the commission any action plan developed as part of the affected electrical utility's integrated resource plan to enable the commission to review and provide guidance to the affected electrical utility.
(2) (a) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the commission shall make rules providing a process for its review of an action plan.
(b) The rules required under Subsection (2)(a) shall provide sufficient flexibility to permit changes in an action plan between the periodic filings of the affected electrical utility's integrated resource plan.

> before it constructs or enters into a binding agreement to acquire the resource. Further, Utah Code §54-17-301 requires the Company to file any action plan developed as part of its IRP to enable the Commission to review and provide guidance to the Company. The resource solicitation and acquisition decision approval processes are separate from the IRP acknowledgment process. Therefore, while we may acknowledge the IRP, and may provide guidance on the IRP action plan, any approval of the solicitation and acquisition of specific resources for the implementation of that action plan will be conducted in separate approval processes required under Utah Code §54-17-201 and §54- 17-302.

The Commission order is that the 2008 RFP comply with the Procurement Act, which includes R746-420-3 (2)(c). The utility must conform to the legal requirements of the Act and consider the implications of the Commission's Order refusing acknowledgement of the IRP because it did not adequately adhere to IRP standards and guidelines. The utility must include in its screening and evaluation criteria, consideration of the errors in the IRP and how they will be addressed or ameliorated in the 2008 RFP.

There are neither benchmarks to signal what the utility finds to be an optimal mix of resources nor an acknowledged IRP from which stakeholders can make analysis of an appropriate mix of new resources. Compounding the problem is a carryover of acknowledged flaws in the assumptions of the models that will be used to evaluate this 2008 RFP. These factors taken together result in an RFP from which it cannot be determined whether resource selection is the lowest reasonable cost and meet the public interest standard.

IV. RELIEF REQUESTED.

The Committee requests that the Commission exercise its discretion authorized by Utah Code §54-17-201(2)(f) by suggesting modifications to the proposed solicitation process as follows:

1. The 2008 RFP should be rewritten to include a benchmark option and provide for the disclosures and process requirements applicable to benchmarks as required by the Procurement Act.

2. The 2008 RFP should be rewritten to include initial screening and evaluation criteria that consider the assumptions included in the utility's most recent integrated resource plan in light of the Commission's February 6, 2008 Order in Docket 07-2035-01.

3. The Commission should provide an opportunity for public comment on the rewritten 2008 RFP. *Utah Code §54-17-201(2)(d)(ii).* The Committee agrees that the time for these comments should be reasonable but may be shorter than the time allowed for the initial comments.

In the event that the utility does not satisfactorily modify the 2008 RFP, the Commission should either reject it or issue an order denying the utility cost recovery provided by the Procurement Act, and denying consolidation of this proceeding with those proceedings required by Utah Code §54-4-25.

DATED this 21st day of March 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March 2008, I caused to be e-mailed, a true and correct copy of the foregoing Comments upon February 15, 2008 Draft RFP to:

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