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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 <b>REPLY IN SUPPORT OF MOTION TO SUSPEND 2008 RFP AND REQUEST FOR ISSUANCE OF ORDER</b>
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Rocky Mountain Power, a division of PacifiCorp (“Rocky Mountain Power” or “Company”), hereby replies to the “Response of the Division of Public Utilities to the Motion to Suspend the Request for Proposals” (“Division Response”) filed March 5, 2009, the “Utah Committee of Consumer Services’ Response to Rocky Mountain Power’s . . . Motion to Suspend Request for Proposals, Docket No. 07-035-94 (February 26, 2009)” (“Committee Response”)<sup>1</sup> filed March 9, 2009, and the “Comments of LS Power Associates, L.P. on PacifiCorp’s Motion to Suspend Its Request for Proposals” (“LS Power Comments”) filed March 10, 2009. In addition, based upon the lack of opposition to the Company’s Motion, Rocky Mountain Power

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<sup>1</sup> The Committee Response also contains comments and recommendations on other matters in other dockets. This reply will be limited to the portion of the Committee Response applicable to the Company’s “Motion to Suspend 2008 RFP” (“Motion”) in this docket.

requests that the Commission issue an order in the form attached hereto as Appendix 1 approving suspension of the All Source Request for Proposals (“2008 RFP”).

## I. INTRODUCTION

Rocky Mountain Power initiated this matter by filing an Application on December 21, 2007. The Division of Public Utilities (“Division”) and Committee of Consumer Services (“Committee”) have participated as parties throughout this docket. In addition, Western Resource Advocates (“WRA”) petitioned the Commission for leave to intervene and filed comments on the proposed 2008 RFP. The Utah Association of Energy Users (“UAE”), LS Power Associates, L.P. (“LS Power”), the Utah Chapter Sierra Club, Utah Physicians for a Healthy Environment, Utah Clean Energy and Merrimack Energy Group, Inc., the Independent Evaluator (“IE”) appointed by the Commission, have participated and filed comments at various stages of this proceeding. Following several filings, meetings, a hearing and revisions to the proposed 2008 RFP and further filings, the Commission approved the 2008 RFP with modifications on September 25, 2008. Rocky Mountain Power issued the 2008 RFP, modified as directed by the Commission, on October 2, 2008. Bids were received by December 16, 2008, and the Company, under the oversight of the IE, reviewed all bids received.

Rocky Mountain Power filed the Motion on February 26, 2009, requesting that the Commission approve suspension of the 2008 RFP “[g]iven the dramatic global economic downturn in late 2008 and the resulting reduction of customer loads, reduction in price of commodities, potential reduction of future construction costs and other changes in economic and market conditions.” The Motion further stated that “the Company has determined that it is not in the best interests of its customers to proceed with the 2008 RFP at this time. The Company believes that there is a reasonable possibility that more favorable bids may be received in the future as economic and market conditions continue to change.” Therefore, the Company

proposed that the 2008 RFP be suspended while the Company monitored the market over the next six to eight months with the intention that the Company would lift the suspension, issue an amended RFP and request refreshed or new bids from bidders and refresh its benchmark proposals. The Motion also requested that the Commission consider the Motion on an expedited basis to allow the Company to provide notice of suspension to bidders as soon as possible.

Since filing the Motion, Rocky Mountain Power has contacted all persons on the service list in this matter regarding the Motion. Discussions took place between the Company and the Division and Committee during the period from March 2-4, 2009. On March 4, 2009, the Company sent an email to everyone on the service list requesting that they notify it immediately if they intended to oppose the Motion.

The Division, Committee and LS Power have filed responses to and comments on the Motion. The Division and Committee do not oppose the Motion, but request that the Commission include certain conditions in its order granting the Motion. LS Power, which is not a party but has participated in this docket, likewise does not oppose the Motion, but recommends that the Commission consider imposing conditions on granting the Motion. UAE, which is not a party but has participated, notified the Company that it does not oppose the Motion, but agrees with the conditions recommended by the Division. No other party or participant has responded to the Company's email or filed a response to the Motion.

## **II. REPLY TO DIVISION**

In its Response to the Motion, the Division states that it does not oppose the Motion. However, the Division makes observations and recommendations regarding the Motion and the termination of the contract to construct Lake Side 2, which had been pending in Docket No. 08-035-95. In summary, the Division states that it is conducting discovery in this docket and the Lake Side 2 docket to attempt to address uncertainties regarding the Company's decisions to

terminate Lake Side 2 and to suspend the 2008 RFP.<sup>2</sup> Given these uncertainties, the Division recommends that (1) the suspension be for a time certain such as four to six months, (2) the Company refine the RFP, including refreshing benchmarks at the conclusion of the suspension and inform bidders of any changes, (3) bidders that do not withdraw now would refresh their bids, (4) the Company would seek approval of a further suspension or cancellation of the 2008 RFP based on then-current information if the Company determines to take either of those steps following review of refreshed bids, (5) the Company should refund all bidder fees if it decides to cancel the 2008 RFP after reviewing refreshed bids, and (6) any order approving suspension of the 2008 RFP should clearly state that it is not an order addressing the reasonableness of the Company's decision to suspend the 2008 RFP.

The Company generally has no objection to these recommendations subject to the following clarifications and refinements: In order to avoid unnecessary actions by the Commission and the parties, the Company recommends that the time certain be not more than six months from the date the Commission issues its order approving suspension. If the Company decides to proceed with the RFP prior to six months, it should be allowed to do so. However, not later than six months after the date of the Commission's order approving suspension, the Company should be required to notify the Commission that it will: (a) proceed with the RFP, (b) request further suspension, or (c) request cancellation of the RFP. If the Company determines to proceed with the RFP, it should provide notice to bidders of any refinements to the RFP based on then-current information and should refresh its benchmarks based on that information. The notice should also indicate whether new bids will be considered. If the

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<sup>2</sup> Rocky Mountain Power has informed the Division and Committee that it will provide responses to their joint discovery requests sent following the February 19, 2009 hearing in Docket No. 08-035-05, regardless of whether that docket is closed. Rocky Mountain Power will also provide a response to the Division's data request in this docket regardless of the granting of the Motion.

Company elects to request further suspension of the RFP or to cancel the RFP either before or after reviewing refreshed or new bids, the Company should refund bid fees to bidders withdrawing at that time if the RFP is further suspended or to all remaining bidders if the RFP is cancelled. The refund should be of the bid fee paid by a bidder less a pro rata share of fees incurred by the Company to the IE during the process.<sup>3</sup>

### **III. REPLY TO COMMITTEE**

In its Response to the Motion, the Committee accepts that the Company, in its discretion, may suspend the 2008 RFP and urges the Commission to grant the Motion so as to “not delay the notification to bidders as Rocky Mountain Power proposes.” Committee Response at 4. Notwithstanding this position, the Committee makes comments on suspension of the 2008 RFP.<sup>4</sup> In addition, the Committee makes three recommendations or requests: (1) the Commission should require the Company to obtain approval of any material modifications to the 2008 RFP that may be proposed in the future, (2) the Commission should schedule regular reports on market assessments, load forecasts, response of bidders, development of new or refreshed benchmarks and other matters during the suspension, and (3) the Commission should strike the fourth paragraph of the proposed notice to bidders.

Although it is premature, the Company has no objection to the first recommendation of the Committee. If any refinement to the 2008 RFP is material, the Company will seek approval of it prior to providing notice to bidders.

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<sup>3</sup> Incidentally, this last clarification regarding refund of bid fees less a pro rata share of fees incurred by the Company to the IE during the process is what the Company intended with respect to bidders that elect to withdraw following approval of the Motion. The notice to bidders as modified (with changes shown in track changes mode) to make this intent clear, and to make other clarifications consistent with this Reply, is attached as Appendix 2.

<sup>4</sup> Like much of the rest of the Committee Response, most of these comments have an intemperate and inappropriate tone that is unjustified.

The Company objects to the second and third conditions recommended by the Committee. The Committee justifies its second recommendation that the Company be required to provide regular reports during the suspension on the basis of a claim that the Company has made representations to the Commission in the Lake Side 2 docket that are “inconsistent” with representations made to the Washington Utilities and Transportation Commission (“WUTC”) regarding its anticipated loads and that this indicates a “casual approach” to the issue of resource needs. Committee Response at 5-7. In fact, Mr. Duvall’s WUTC testimony quoted by the Committee is virtually identical to testimony he filed in the Lake Side 2 docket. *See* Confidential Testimony of Gregory N. Duvall, Docket No. 08-035-95 (December 3, 2008) at lines 56-70. As the Company has recently informed the Committee in response to a data request in that docket, the November 21, 2008 load forecast referenced in both testimonies was the latest forecast upon which the Company relied in making its decision to terminate the Master Development, Engineering, Procurement and Construction Agreement (“Agreement”) for Lake Side 2. However, at the time the decisions to terminate the Agreement and to seek to suspend the 2008 RFP were made, the Company was aware that changing economic and market conditions indicated further declines in customer loads. As stated in Mr. Duvall’s testimony, “economic conditions are currently unusually volatile and unstable, which will require the Company to update its load and energy forecasts frequently to assess resource needs in the future.” *Id.* at lines 74-76. The Company does not take a casual approach to integrated resource planning and such an unfounded allegation is no justification for the onerous, burdensome and unnecessary condition recommended by the Committee.<sup>5</sup>

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<sup>5</sup> The fact that a load forecast update was in progress at the time the decision was made and continued to be in progress during the February 19, 2009 hearing in the Lake Side 2 docket prevented the Company representative from providing a more definitive response to questions about current load forecasts, another source of Committee complaint. *See, e.g.* Committee Response at 2 (n.1), 6. The

Equally importantly, the Committee's second recommendation invites the Commission, with the assistance of the Committee and Division, to manage the Company. The Supreme Courts of the United States and Utah have both held for many years that this is not the proper role of the Commission. *See, e.g. Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm'n*, 262 U.S. 276, 289 (1923) (“The Commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation . . . .”); *Utah Dept. of Admin. Services v. Public Service Comm'n*, 658 P.2d 601, 618 (Utah 1983) (“the Commission is normally forbidden from intruding into the management of a utility”) (quoting *Logan City v. Public Utilities Comm'n*, 296 P. 1006, 1008 (Utah 1931)). In addition, none of the reports recommended by the Committee are required under the Energy Resource Procurement Act (“Act”).

The Committee requests that the fourth paragraph of the proposed notice to bidders be stricken because it indicates that the Company intends the IE to participate in updating the 2008 RFP process and modifying the 2008 RFP. Committee Response at 7. The fourth paragraph of the proposed notice states:

Information regarding the RFP will be updated over the next six months on the Company website and on Merrimack Energy Group's, the independent evaluator's, website. The website addresses are: <http://www.pacificorp.com/Article/Article81264.html> and <http://www.merrimackenergy.com/PacifiCorp2008RFP/>.

This paragraph is consistent with the Commission's rules prohibiting the Company from having any communications with potential or actual bidders outside of the presence of the IE. Rule R746-420-6(3)(a) provides:

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Company representative provided general information about anticipated declines in loads, but refrained from speculating about precise load forecasts that were in process precisely because the Company does not take a casual approach to these important matters.

Communications between a Soliciting Utility and potential or actual bidders shall be conducted only through or in the presence of the Independent Evaluator. Bidder questions and Soliciting Utility or Independent Evaluator responses shall be posted on an appropriate website.

Furthermore, the Act and the Commission's rules anticipate that the IE will monitor, observe and offer feedback to the Company on all of aspects of the solicitation process. *See, e.g.* Utah Code Ann. § 54-71-203(3)(b)(iv); Utah Admin. Code R746-420-6(2)(h). Ironically, the participation by the IE, to which the Committee objects in its third recommendation, will enable the IE to provide any report to the Commission it deems necessary which would more appropriately fulfill the Committee's second recommendation.

#### **IV. RESPONSE TO LS POWER**

The LS Power Comments recommend the following conditions to approval of the Motion: (1) the Company should refund all bid fees and allow bidders who wish to refresh their bids to re-submit the fees when and if the 2008 RFP resumes, (2) the Company should clarify whether new bidders will be allowed to submit bids when the 2008 RFP resumes, (3) the Company should be required to resume or cancel the 2008 RFP within six months, (4) the Company should be required to propose a procedure to assure that the Company's benchmark proposals will not be unfairly advantaged by continuing to develop the benchmark during the suspension, (5) the Company should inform bidders if they were on the short list developed before the suspension occurred, and (6) the Company should refrain from acquiring any resource during the period of the 2008 RFP and for a reasonable time afterward.

A few of these conditions overlap with the recommendations of the Division. The Company believes that bidders should be allowed to remain in the process at this time and that allowing them to do so will result in a more competitive process in the interests of customers. Requiring such bidders to leave their bid fee (\$10,000) in place is an indication of their



commitment and allows them to provide an update of their proposal instead of a full bid package. The Company's proposed conditions assure that all bid fees, less IE costs, will be refunded if the 2008 RFP does not proceed. The Company is proposing that it must determine to proceed with the 2008 RFP, request a further suspension or terminate the RFP within six months. Given the uncertainty regarding future conditions, the addition of the opportunity to request a further suspension, which is the only difference between the LS Power recommendation and the Company's proposal, is reasonable.

With regard to new bids, the Company believes it is in the public interest for new bids to be accepted when the 2008 RFP resumes. Allowing new bids will assure that potential bidders are not barred from participation and will provide the most competitive process in the interest of customers obtaining power at the lowest reasonable cost.

It is premature to propose a procedure to assure that the Company benchmarks do not obtain any undue advantage as a result of the suspension. However, as part of the IE's role, the Company assumes that the IE will review and address this issue in connection with its oversight of the process and will provide a report and recommendation to the Commission and the parties if deemed necessary. There is no need to attempt to come up with an anticipatory condition at this time.

Contrary to LS Power's assumption, the short list was not compiled before the Company determined to suspend the 2008 RFP. Had the Company found any bid attractive, it would have put that bid on a short list and would not have moved to suspend the 2008 RFP at this time.

The Company opposes LS Power's final condition because it is contrary to the interests of customers. If an attractively-priced, available resource comes to the Company's attention, it should be allowed to seek a waiver of the solicitation process and request approval of the

resource as contemplated in the Act. This would have been possible even if the 2008 RFP were proceeding; it should not be foreclosed because the 2008 RFP is suspended.

Some of LS Power's issues may be appropriately addressed following the granting of the Motion. The notice to bidders informs bidders of where they may direct questions and also states that "PacifiCorp will host a teleconference to discuss the process going forward and respond to any questions from bidders." The teleconference will be scheduled shortly after the Commission issues its order granting the Motion. Bidders will not be required to decide whether to withdraw their bids or leave them in place prior to this opportunity to ask questions and receive answers.

#### **V. REQUEST FOR ISSUANCE OF ORDER**

No party or interested person opposes the Motion. The Division has made recommendations regarding conditions to be included in the Commission's order granting the Motion. As discussed above, the Company generally has no objection to the Division's conditions as clarified and refined.

The Committee and LS Power have also made recommendations regarding conditions, some of which overlap with those of the Division. As discussed above, Rocky Mountain Power believes the conditions, other than those that overlap with the Division's, are premature, inapplicable or are not beneficial or necessary. Nonetheless, the Company has no objection to the Committee's first condition and has clarified its position on two issues raised by LS Power. In addition, bidders will have an opportunity to ask questions and get answers before making any decision about whether they wish to withdraw their bids or remain in the 2008 RFP.

Based on the foregoing, Rocky Mountain Power believes all legitimate concerns and questions regarding the Motion have been resolved and that the Commission should proceed to issue an order granting the Motion.

## VI. CONCLUSION

No party has objected to the Motion so long as the order granting it contains certain conditions. Rocky Mountain Power has accepted, with refinements and clarifications, the conditions proposed by the Division and one of the conditions proposed by the Committee. The Company has also clarified its position on two issues raised by LS Power. The additional conditions recommended by the Committee and LS Power are premature, inapplicable, or are not beneficial or necessary. Therefore, Rocky Mountain Power respectfully requests that the Commission issue an order in the form attached as Appendix 1 granting the Motion so that it may proceed to promptly provide notice to bidders of suspension of the 2008 RFP in the form of Appendix 2 and to schedule a teleconference to respond to questions from bidders.

DATED: March 12, 2009.

Respectfully submitted,

ROCKY MOUNTAIN POWER

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## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO SUSPEND 2008 RFP AND REQUEST FOR ISSUANCE OF ORDER** to be served upon the following by electronic mail to the addresses shown below on March 12, 2009:

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