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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

<p>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 Decision</p> <p>In the Matter of the Application of Rocky Mountain Power for Approval of a Significant Energy Resource Decision Resulting from the All Source Request for Proposals</p>	<p>Docket No. 07-035-94</p> <p>Docket No. 10-035-126</p> <p><b>THE DIVISION OF PUBLIC UTILITIES' REQUEST FOR REVIEW OR REHEARING</b></p>
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Pursuant to Utah Administrative Code R746-100-11(F), the Utah Division of Public Utilities (Division) files this Request for Review or Rehearing of the Utah Public Service Commission's (Commission) order issued April 20, 2011(Order) in the above-referenced dockets insofar as the Order states the Commission "make[s] no findings in this docket related to the Apex project."<sup>1</sup> The Division requests that the Commission

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<sup>1</sup> Order at p. 22.

grant review or rehearing and determine (1) that this docket is the best place to make findings related to the prudence and appropriateness of the Company's decision to terminate negotiations regarding possible acquisition of the Apex project; (2) that the Company's actions regarding terminating the Apex negotiations were inconsistent with the Energy Resource Procurement Act, (Procurement Act), imprudent, and inappropriate; (3) in either this docket or another docket opened specifically for that purpose, the cost to ratepayers from the Company's Apex decision; (4) in the Company's pending rate case in Docket No. 10-035-124, or other appropriate case, that the Commission will apply its decision regarding the cost to the ratepayers associated with the Company's Apex decision to the Company's requested revenue requirement amount; the cost to the ratepayers would be treated as an adjustment to the Company's requested revenue requirement, reducing the amount recoverable;<sup>2</sup> and (5) that the Company will be ordered to retain all documents and any and all other information pertaining to Apex until the Commission issues an order to the contrary.

## ARGUMENT

### The Prudence and Appropriateness of the Company's Decision Regarding the Termination of the Apex Negotiations Should Be Determined in This Docket which was Opened Pursuant to the Energy Resource Procurement Act

This docket opened under the Procurement Act is the best vehicle available to the Commission to use in deciding the prudence and appropriateness of the Company's actions regarding its decision to abandon Apex negotiations. This docket specifically

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<sup>2</sup> In Docket No. 10-035-124, the Company's current general rate case, the Division may propose an adjustment, based upon the Company's actions regarding Apex, reducing the revenue requirement of the Company. The basis for the adjustment and support therefore are found in this Lake Side docket, particularly in the testimony of Division witnesses Mr. Charles Peterson and Mr. Dick Hahn and of the Independent Evaluator. The method used to calculate the amount of the reduction that should be applied to the revenue requirement is not specified in this Lake Side docket and will be presented by Mr. Peterson in the rate case docket.

pertains to the solicitation and procurement process through which Lake Side 2 was ultimately selected, and Apex was abandoned.

The Procurement Act identifies the process that the electric utility must utilize, and the information it must provide to the Commission during the solicitation process.<sup>3</sup>

The Procurement Act also sets forth the standard to be applied in evaluating the solicitation process to determine if it was in the public interest. The statute states:

- (ii) is in the public interest taking into consideration:
  - (A) whether 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;
  - (B) long-term and short-term impacts;
  - (C) risk;
  - (D) reliability;
  - (E) financial impacts on the affected electrical utility; and
  - (F) other factors determined by the commission to be relevant.<sup>4</sup>

Importantly, the Procurement Act requires the Company to look at the long-run impacts of its decisions, such as long term losses, not just short-term impacts.

The solicitation sections of the statute mandate the use of an independent evaluator to render an opinion as to whether:

- (A) the solicitation process is:
  - (I) fair; and
  - (II) in compliance with this part; and
- (B) any modeling used by the affected electrical utility to evaluate bids is sufficient.<sup>5</sup>

Also, the independent evaluator is required by statute to testify in matters pertaining to the approval of a significant energy resource decision, and thus the independent evaluator was available to testify at the hearing.<sup>6</sup>

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<sup>3</sup> See Utah Code Ann. § 54-17-201.

<sup>4</sup> Utah Code Ann. § 54-17-201(2)(c)(ii).

<sup>5</sup> Utah Code Ann. § 54-17-203(3)(b)(5).

With regard to the procurement process, the criteria set forth in Utah Code Ann § 54-17-301 et seq. have been applied in this docket to the resource selection of the Company. The public interest standard for the procurement section of the statute is identical to the public interest standard for the solicitation process.

The Procurement Act uses the prudence standard set forth in Utah Code Ann. § 54-5-4(4). In determining whether a decision was prudent, the Commission is charged to, inter alia, "determine whether a reasonable utility, knowing what the utility knew or reasonably should have known at the time of the action, would reasonably have incurred all or some portion of the expense, in taking the same or some other prudent action."<sup>7</sup>

Because the applicable standard is what the Company knew or should have known at the time it made its decision regarding Apex it seems likely that the pertinent information should already be in existence. In this docket the Division, its consultant, and the Company have asked and answered data requests, and have filed testimony pertaining to the prudence and appropriateness of the Apex decision and comments regarding cost to the ratepayers. The Independent Evaluator has also filed testimony regarding the Apex negotiation process. The Company also filed testimony regarding the process.

The evidence in this docket, particularly that of the Division witnesses Mr. Charles Peterson and Mr. Dick Hahn and that of the Independent Evaluator, and that filed by the Company, supports a finding that the Company's actions regarding terminating the Apex negotiations was imprudent and inappropriate. A timeline of the

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<sup>6</sup> Utah Code Ann. § 54-17-203(3)(b)(vi).

<sup>7</sup> Utah Code Ann. § 54-4-4(4)(a)(iii).

Company's actions, presented as Confidential Exhibit 1.2 to Mr. Peterson's direct testimony speaks volumes about the Company's choices.

Thus, an examination shows that this docket, generated by PacifiCorp's actions pursuant to the Procurement Act, is the best docket in which to make a decision concerning the prudence and appropriateness of the opportunity lost to ratepayers because of the Company's actions involving Apex. The evidence presented in this docket supports a finding that the Company's actions regarding Apex were inconsistent with the Procurement Act, imprudent, and inappropriate

The Cost of the Harm Done to Ratepayers by the Company's Decision to Terminate Apex Negotiations Prematurely Should Be Determined in This Docket or Another Docket Opened Specifically for Valuation Purposes

After the Commission has found that the Company's actions regarding the Apex negotiations have resulted in a cost to the ratepayers, that cost should be determined in this docket or in a separate docket opened expressly for valuation purposes. In many respects, the interests of judicial economy and expedience would be best served by determining the cost to ratepayers of the lost Apex opportunity in this docket, not in another docket.

The Cost to the Ratepayers of the Company's Decision Regarding Apex Should Be Applied as an Adjustment to the Company's Revenue Requirement Request in the Next Rate Case

The Procurement Act specifically contemplates applying determinations pertaining to resource procurement to the Company's next rate case.<sup>8</sup>

Except as otherwise provided in this section, if the commission approves a significant energy resource decision under [Section 54-17-302](#), the commission shall, in a general rate case or other appropriate commission proceeding,

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<sup>8</sup> Utah Code Ann. § 54-17-303(a).

include in the affected electrical utility's retail electric rates the state's share of costs:

- (i) relevant to the proceeding;
- (ii) incurred by the affected electrical utility in constructing or acquiring the approved significant energy resource; and
- (iii) up to the projected costs specified in the commission's order issued under [Section 54-17-302](#).

The Commission using that cost to make an adjustment to the Company's revenue requirement request would reaffirm the link between what a company must do, and the consequences of its selected actions.

#### The Company Should Be Ordered to Retain All Apex Related Information

The Division is aware that many companies, including the Company, have document retention and destruction policies. Because the issues involving Apex are complex, and it is not yet certain how and where such issues will be addressed and resolved, the Division requests that the Commission specifically require the Company to maintain all records, documents, materials, and other information pertaining to Apex until the Commission issues an order to the contrary.

#### Conclusion

For the reasons expressed above, the Division urges the Commission to grant review or rehearing and make a decision (1) in this docket regarding the prudence and appropriateness of the Company's actions regarding Apex, (2) in this docket or another docket opened expressly for that purpose, determining the cost to ratepayers caused by the Company abandoning Apex negotiations; (3) determining that the Company's actions regarding the Apex negotiations were inconsistent with the Procurement Act, imprudent, and inappropriate; (4) applying that cost as an adjustment against the

Company's revenue requirement request in the next rate case; and (5) ordering the Company to retain records, documents and any and all other materials related to Apex until the Commission issues an order to the contrary.

Respectfully submitted this \_\_\_\_\_ day of May, 2011.

NEED SERVICE LIST

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## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **THE DIVISION OF PUBLIC UTILITIES' REQUEST FOR REVIEW OR REHEARING** to be served upon the following by electronic mail to the addresses shown below on this \_\_\_\_ day of May, 2011.

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