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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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| In the Matter of the Request of Rocky Mountain Power for Waiver of Solicitation Process and for Approval of Significant Energy Resource Decision | Docket No. 08-035-35 UTAH COMMITTEE OF CONSUMER SERVICES' RESPONSE TO ROCKY MOUNTAIN POWER'S REQUEST FOR APPROVAL OF SIGNIFICANT ENERGY RESOURCE DECISION |
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The Utah Committee of Consumer Services respectfully submits this response to Rocky Mountain Power's request under Utah Code §54-17-302 that the Commission approve the utility's decision to acquire a significant energy resource by a waiver of the solicitation process mandated by the Energy Resource Procurement Act, Title 54, Chapter 17, Part 2. The Committee requests that the Commission find that the proposed acquisition for which a waiver is granted, is subject to Utah Code §54-17-501(10); that the cost recovery mechanism provided by Utah Code 54-17-303 is inapplicable to the proposed acquisition; and, that the character or classification, and amount of costs

incurred in acquiring the energy resource are subject to a future prudence review and rate determination in accordance with Utah Code §54-4-4.

The Act mandates that an electric utility acquire or construct significant energy resources through public, competitive procurement process utilizing carefully defined solicitation processes and bid evaluation models and methods. The Commission and Commission appointed experts oversee the entire process. If the Commission approves, the resource decision resulting from the competitive process is granted a certificate of convenience and necessity, is deemed to have been prudent, and the costs are included in the utility's retail rates. These benefits are afforded the utility prior to the acquisition or construction of the resource.

Title 54, Chapter 17, Part 5 of the Act allows for a waiver of either or both the solicitation and resource decision process, but only in very limited circumstances. Those circumstances are ones that justify allowing the utility to acquire or construct significant energy resources without conducting the full and fair competitive bidding and evaluation process that is an absolute condition precedent to the prudence review and assured cost recovery that is afforded a resource decision that comes from the competitive bidding that is overseen by the regulatory authority. The intent for and express language in Part 5 is that the cost to acquire or construct a significant energy resource for which compliance with any part of the Act is waived, shall be included in the utility's retail electric rates when and to the extent that the Commission determines under Utah's public utility law without regard to Title 54, Chapter 17. Waiving either the solicitation process or the

process to approve the selected bid, excludes the resource acquired or constructed from the benefits of the Act.

Interpreting and applying to the utility's request for a waiver, key provisions of the Act using unquestioned principles of statutory construction¹ leads to the conclusion that cost recovery under the Act is not available to the utility when compliance with the Act in whole or in part, is waived. Utah Code §54-17-501(10) states:

(10) If an affected electrical utility is granted *a waiver to acquire or construct a significant energy resource* in accordance with this section:

(a) the provisions of Sections 54-17-303 and 54-17-304 do not apply to the significant energy resource decision;

(b) any cost recovery that an affected electrical utility seeks in connection with that significant energy resource is subject to a future prudence review by the commission under Subsection 54-4-4(4); and

(c) the waiver grant does not create any presumption that the affected electrical utility's action in acquiring or constructing a significant energy resource was prudent.

Utah Code 54-17-303(1) states:

(1) (a) 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

¹Unquestioned principles of statutory construction govern the interpretation and application of the Procurement Act. 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.]

commission proceeding, 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 Act deliberately uses the phrase “acquire or construct a significant energy resource” when describing the entire of the solicitation and approval process that is presumptively mandatory to acquire or construct a significant energy resource. Utah Code §§54-17-201(1)(a), (2)(a); Utah Code §54-17-102(5). The Act also purposely identifies two specific procedures that are conditions precedent to an order permitting the acquisition or construction of the resource. These procedures are described as the Solicitation Process, Title 54, Chapter 17, Part 2, and the Resource Plans and Significant Energy Resource Approval, Title 54, Chapter 17, Part 3.

A waiver of compliance with either condition precedent is referenced in Utah Code §54-17-501(1) as a waiver of the requirement to conduct a solicitation process under Part 2 of the Act, or a waiver of the requirement to obtain approval of a significant energy resource decision under Part 3 of the Act. Utah Code §54-17-302(1) and Utah Code §54-17-501(1) refer to the fact that a utility may obtain a waiver of the solicitation requirement without also obtaining a waiver of the approval requirement. However, when describing the meaning of the waiver to the Act as a whole, in Utah Code §54-17-501(10), the Act plainly disqualifies the resource decision based upon a waiver of either

condition precedent from the pre-approved cost recovery mechanism that is afforded to only those resource decision that strictly comply with the Act.

Utah Code §54-17-303, which describes the Act's cost recovery mechanism, does not refer to cost recovery for any resource decision other than one that fully complies with the Act. Unlike §302, it does not reference the possibility that a waiver of any one of the Act's requirements has been granted. And in Part 5 of the Act, allowing for a waiver of energy resource procurement requirements, Utah Code §54-17-501(10)(a) definitely excludes application of the §303 cost recovery mechanism to a resource decision for which a waiver, any waiver, has been granted. The Legislature's use in §54-17-501(10)(a) of the comprehensive phrase "to acquire or construct a significant energy resource", rather than language such as in §§54-17-302(1) and (7), or §54-17-501(1) referring to a waiver of only the solicitation requirement, must be considered as an intentional use of terms to distinguish the availability of §303 to a compliant competitive procurement process, from one for which a waiver is granted.

With respect to this application, Docket No. 08-035-35, the prudence of acquiring the proposed significant energy resource, and the inclusion of Utah's share of the costs incurred in constructing or acquiring the resource, are to be determined outside of the Energy Resource Procurement Act. If the Commission waives the requirements for a solicitation process described in Title 54, Chapter 17, Part 2, whether or not the approval process described in Title 54, Chapter 17, Part 3 is also waived, the cost recovery allowed for the acquisition of a significant energy resource under the Act, explicitly does not

apply. The prudence of the acquisition is to be considered and the cost of the resource is to be included in the utility's retail electric rates only when and to the extent that the Commission makes the determination under Utah Code §54-4-4, without regard to Title 54 Chapter 17.

RESPECTFULLY SUBMITTED this 23rd day of April 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April 2008, I caused to be e-mailed, a true and correct copy of the foregoing Response to:

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