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Division of Public Utilities

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Action Request Response

To: Utah Public Service Commission
From: Utah Division of Public Utilities
Chris Parker, Director
Artie Powell, Manager
Charles E. Peterson, Utility Technical Consultant
Date: September 7, 2018
Re: **Rocky Mountain Power's Notification of Contract Extension.** Docket No. 16-035-27.

Recommendation (No Action)

The terms under Section 2.2(b) of the Commission approved contract between PacifiCorp (Utility) and Facebook, Inc., (the Contract and collectively the Parties, respectively) allowed for the Parties to mutually agree to extend the date of the automatic termination of the contract indefinitely. There is a question whether the Parties agreed to amend Section 2.2(b) and extend the contract before the 180 days expired under the original Section 2.2(b) from the date of the Commission's order in this matter. If the 180 day period began with the Commission's bench order in this case, the Parties may not have extended the contract before its expiration. On the other hand, if the 180 day period began with the Commission's written order, the extension appears to have been completed in time.

Issue

On August 8, 2018 PacifiCorp, dba Rocky Mountain Power (Utility) filed a "Notification of Contract Extension" (Notification) with the Commission. On August 8, 2018, the Commission

issued an Action Request to the Division to “review the notice and make recommendations.” The due date of the Action Request is September 7, 2018. This memorandum is the Division’s response to the Commission’s Action Request.

Discussion

The Division had a number of concerns that are detailed below with the Notification the Utility filed with the Commission. The Division met with the Parties to discuss these concerns and issues on September 4, 2018. At the meeting the Parties indicated that they believed they had satisfied the conditions of the Contract.

In August 2016, the Commission approved the Contract between the Utility and Facebook. Subsequently, on August 8, 2018, the Utility filed its Notification stating that it had entered into two contract extensions with Facebook amending Section 2.2(b) of the Contract. As approved by the Commission, the original Section 2.2(b) states the following.

Customer shall have given written notice to Company of its determination, in Customer’s sole discretion, to commit to the development of the Facility in the state of Utah, which notice shall be given by Customer, if at all, within one hundred eighty (180) days following the date of Commission’s order of approval of this Agreement. In the event Customer does not provide written notice of its determination within the specified time period, this Agreement shall automatically terminate unless the Parties agree in writing to extend the period of time for notice.

The Division understands that the Commission approved the Contract in a bench ruling on August 18, 2016. The Division understands that the usual purpose of requests for a bench ruling is to “lock-in” the date of the Commission’s decision at the earliest possible date. On page 2 of the Commission’s subsequent Order Memorializing Bench Ruling Approving Renewable Energy Contract with Facebook, Inc. dated August 29, 2016, the Commission stated “The Commission granted PacifiCorp’s motion and entered a bench ruling approving the Contract. This Order memorializes that ruling.” As discussed herein, there is some question whether the bench ruling is legally binding and whether the Parties properly agreed to an extension under the Contract.

In the Notification of Contract Extension, the Utility included copies of the documents amending the contract. The first contract amendment is dated February 24, 2017; the second amendment is dated February 22, 2018.¹ Of particular interest is the first contract amendment. The attached DPU Exhibit 1 analyzes what it believes are the relevant dates. As DPU Exhibit 1 demonstrates, if the Contract approval date is August 18, 2016, the date of the bench ruling, then the 180 days expired on February 14, 2017, placing the extension outside the 180-day window by approximately ten calendar days.

The Contract amendment and extension was signed on February 24, 2017, one day before the 180 days would expire under the date of the Commission's written order. Unless the Commission determines that the actual approval date was the date of its bench order, then the February 24, 2017 extension appears to have been timely and avoided the expiration of the Contract under Section 2.2(b).

Additionally, in the event the 180 day period began with the date of the Commission's written order, the Division questions the wisdom and efficacy of parties requesting and the Commission granting bench rulings, sometimes called bench orders. If they are of no legal effect and cannot be appealed, it seems unwise that they should be granted. If the Commission wishes to indicate its intent to rule in a certain way, it might wish to do so. But if a bench ruling is sought for an effect the party later claims it does not have, the public interest may not be served by them. Given the ambiguity in this case, and the issues it highlights concerning bench orders in general, the Division recommends that in the future the party requesting a bench ruling be required to indicate both the need or purpose for the ruling and the benefits that the bench order would provide that waiting for the written order would not.

¹ The first amendment, dated February 24, 2017 allegedly extends the time period of the automatic termination of the contract under Section 2.2(b) to "on or before 5:00 p.m. Mountain Time on March 2, 2018." The second amendment, which is dated February 22, 2018, allegedly extends the automatic termination of the contract under Section 2.2(b) to "on or before 5:00 p.m. Mountain Time on December 31, 2018."

Regardless of how the Commission rules on the date affecting the extension clause, the Division has other general concerns that are highlighted by the Utility's notice of this extension. These concerns relate to the public interest not being served by an approved contract whose terms arguably may allow for the continuance of that contract essentially forever, as long as PacifiCorp and Facebook agree to do so. The Division did not contemplate the terms to provide for an open ended ability of the Parties to extend the Contract without further Commission review when it recommended approval of the Contract. At some point the terms affecting the Utility's ratepayers generally may become detrimental to ratepayers without the Commission having the ability to review the contract terms for their continued benefits to the public interest. The Division further notes that the terms of the original Contract were negotiated approximately two and one-half years ago; the Contract was approved over two years ago. The Division understands and believes that the original Contract was approved—under an expedited process—as a time-limited opportunity based upon the circumstances as they existed in 2016. Consequently, the Division is uncomfortable that bilateral extensions of the Contract, including, of course, the terms negotiated in early 2016, were negotiated without regulatory input.

Given that the Division understood that the Facebook Contract was presented as a time-limited opportunity in competition with another state, continuing the contracts for more than two years past the original termination date does not conform to the spirit of the process as it unfolded in 2016. The Division further notes that the Commission has authority under its statutory powers to disregard contracts if it finds them to be in conflict with the public interest. However, such extreme measures should not be used outside of extreme circumstances. The Division does not believe that the instant case warrants invalidation of the Contract. The terms of the Contract as approved can reasonably be interpreted by the utility and customer to allow the extensions. In the future, the Division recommends that the Commission be wary of contracts providing for extensions, particularly when there is no accompanying resubmission to the Commission for a fresh evaluation of the terms.

Conclusion

The Division believes that the contract extensions entered into by PacifiCorp and Facebook may comply with the terms of the contract approved by the Commission. The Division will probably resist supporting contracts in the future that have such open-ended clauses and encourages the Commission to do likewise.

However, given the foregoing analysis, the Division recommends that the Commission take no further action on this matter at this time. The Division does, however, recommend that in the future the party requesting a bench ruling be required to justify the request so the Commission and other parties understand precisely the full intent of the party's request.

Cc: Jana Saba, Rocky Mountain Power

Michele Beck, Office of Consumer Services

Gary Dodge, attorney for Facebook