

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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Application of Rocky Mountain Power for Approval of Solicitation Process for Wind Resources	<u>DOCKET NO. 17-035-23</u> <u>ORDER ON REVIEW</u>
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ISSUED: November 9, 2017

On September 22, 2017, the Public Service Commission of Utah (“PSC”) issued its order approving RFP with suggested modification (“Order”) in this docket. On October 23, 2017, the Utah Association of Energy Users (“UAE”) filed a petition for reconsideration and rehearing of the Order (“Petition”), and on November 7, 2017, Rocky Mountain Power (“RMP”) filed a response in opposition to the Petition (“Response”). For the reasons and with the clarifications discussed in this order on review, we decline to modify our decision in the Order.

**1. The Order Addresses and Applies the Factors Required by Statute and Rule.**

We agree with UAE that both statute<sup>1</sup> and administrative rule<sup>2</sup> outline factors we must consider before approving RMP’s request for proposals (“RFP”) under the Energy Resource Procurement Act (“Act”).<sup>3</sup> We must determine whether the proposed RFP is in the public interest, taking into consideration various factors.<sup>4</sup>

Our Order articulated those requirements and approved the RFP as proposed, including modifications proffered by RMP during the hearing. In doing so, we relied on the report of the

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<sup>1</sup> Utah Code Ann. § 54-17-201(2)(c)(ii).

<sup>2</sup> Utah Admin. Code. R746-420-3.

<sup>3</sup> Utah Code Title 54, Chapter 17.

<sup>4</sup> We agree with the analysis of RMP in its Response that none of those factors are individually determinative of whether the proposed RFP is in the public interest. They are factors we must consider, and there is no further statutory directive as to the manner in which they must be considered or discussed in an order.

Independent Evaluator appointed by the PSC pursuant to Utah Code Ann. § 54-17-203. The Independent Evaluator is a critical component of the Act and of our approvals under the Act.

The Independent Evaluator appointed by the PSC made thorough determinations of all statutory and rule requirements related to the RFP, and recommended that the RFP was in the public interest if certain recommendations were implemented. RMP generally agreed to those recommendations, some prior to the hearing and some during the hearing, and our approval was conditioned on that agreement. The Independent Evaluator's report and testimony was entered as evidence without objection from any party, and the Independent Evaluator was subject to cross-examination by parties.

The Order did not restate all of the Independent Evaluator's determinations and discussion. Instead, the Order focused on the primary issues of dispute during the hearing: whether the RFP should be expanded to include consideration of solar resources, and the subordinate issue of whether delays to the RFP, if it were expanded to include solar resources, could put at risk the tax benefits on which the RFP was heavily based. Undisputed determinations by the Independent Evaluator were not restated in the Order.

In its Response, RMP cites to legal authority for the proposition that a required finding or determination may be either explicit or implicit. Our discussion of the legal standards and required determinations, our admission into evidence of the Independent Evaluator's report, testimony, and cross-examination, and our ultimate approval of the proposed RFP made the required determination explicit.

To the extent our determination may be viewed to have been implicit,<sup>5</sup> we state and clarify our determination here. We find that the Independent Evaluator thoroughly reviewed all of the required factors in statute and administrative rule. We incorporate by reference the analysis of the Independent Evaluator. Considering that evaluation in its entirety, including the Independent Evaluator's report, testimony, and cross-examination, and RMP's proffers at the hearing in connection with the Independent Evaluator's recommendations, we determine that the proposed RFP is in the public interest. To clarify, while that determination is contingent on the modifications proffered during the hearing to be accepted by RMP, it is not contingent on the suggested modification we included in the Order. RMP met its burden to establish that the RFP should be approved. Evidence from other parties was inconclusive and insufficient to overcome that determination, but raised an issue that, in our judgment, warranted a suggested modification that RMP could consider in context of the showing it will be required to make when it selects a resource from the RFP.

**2. The Order Permits Meaningful and Effective Review of any Resulting Resource Decision.**

Whether we approve a specific resource selected through the RFP is a separate evaluation that will occur in a separate docket. While UAE is correct in its Petition that the statutory factors for consideration are the same, RMP is correct in its Response that both the context and the available information are different.

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<sup>5</sup> We agree with the legal analysis provided in RMP's Response that an implicit determination is sufficient.

To suggest that our approval of the issuance of an RFP prevents meaningful review of a resulting resource decision makes the Act meaningless. The Act requires approvals at both stages. Including the same factors for consideration, and requiring the same determination, does not make the resource decision review meaningless. If it did, the review of a resulting resource decision would always be equally meaningless in every instance, because it always would occur after an RFP had been approved by the PSC. The legislative intent would thus be frustrated; there is no reason to include the resource selection review in statute if the outcome is predetermined by RFP approval.

Another significant distinction between the PSC's approval of an RFP process under Utah Code Ann. § 54-17-201 and the PSC's approval of a significant energy resource decision under Utah Code Ann. § 54-17-302 is the latter's explicit tie to the cost recovery provisions found in Utah Code Ann. § 54-17-303. In short, if the PSC approves a significant energy resource decision, under Utah Code Ann. § 54-17-302, the utility is (with some limited exceptions found under Utah Code Ann. § 54-17-302(2)(a)) allowed to include in retail electric rates Utah's share of projected costs approved by the PSC in its resource approval decision.<sup>6</sup> Because of this nexus between approval of a significant energy resource decision and cost recovery, we view the consideration of factors under Utah Code Ann. §§ 54-17-201 and 302 to be separate and distinct. Indeed, as noted above, the Order made reference to the fact that the PSC will be separately evaluating the factors enumerated under Utah Code Ann. § 54-17-302 when and if RMP seeks ultimate approval of a significant energy resource decision in Docket No. 17-035-40.

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<sup>6</sup> The utility is also allowed to include in retail rates Utah's share of other costs identified in Utah Code Ann. § 54-17-303.

The hearing in Docket No. 17-035-40 is scheduled in March 2018 to consider any resource resulting from the RFP. RMP will provide in that docket the RFP results, and we anticipate testimony will be filed by multiple parties evaluating the results of the RFP. We consider the legislative intent expressed by the plain language of that evaluation's inclusion in the statute, and we conclude that the resource evaluation must be meaningful and effective. Additionally, we stated multiple times in our Order that we expect RMP to be prepared to defend the outcome of the RFP in that proceeding.

**3. The Order's Approach toward Regulation is Appropriate.**

We expressed some regulatory philosophy in the Order. That expression was neither a finding of fact nor a conclusion of law. It was simply context to explain the findings and conclusions we did make. That regulatory philosophy did not result in our abandonment of any of our statutory requirements. We considered RMP's application and other party's comments on that application, and determined that further process was necessary. While not required by the statute, we supplemented our record with testimony and a hearing before deciding to approve the proposed RFP.

Our expression of regulatory philosophy was simply an explanation to provide context to our suggested modification. It did not negate our requirement to make findings and conclusions. When evaluating the contested issues from the hearing, we made a finding that we consider it reasonable that RMP's "cost assumptions reflect commercially operational solar projects, rather than more recent indicative avoided cost pricing under which no resources have yet achieved

commercial operation.”<sup>7</sup> We similarly made a finding that RMP “provided good faith testimony related to its concerns that delays in the RFP, and particularly delays in transmission, might risk those tax credits.”<sup>8</sup> We ultimately determined the proposed RFP is in the public interest, but our regulatory philosophy led us to include with that approval a suggested modification.

**4. The Order Appropriately Recognizes RMP’s Burden of Proof.**

Based on the evidence and testimony, and particularly on the report, testimony, and cross-examination of the Independent Evaluator, we determined that RMP met its burden of proof and that the proposed RFP is in the public interest. Once RMP accepted the recommendations of the Independent Evaluator, our attention then turned to the challenges to the RFP based on the exclusion of solar resources and the subordinate issue of whether a delay to include solar resources would jeopardize the production tax credits.

Our discussion of inconclusive evidence on those two issues related primarily to the challenges to the RFP. We were required to decide whether, notwithstanding the evaluation and recommendations of the Independent Evaluator, we should reject the proposed RFP because it did not include solar resources. We concluded, after evaluating the evidence on both sides of that issue,<sup>9</sup> that the evidence was inconclusive to overcome the Independent Evaluator’s recommendation to approve the RFP.

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<sup>7</sup> Order at 8.

<sup>8</sup> Order at 10.

<sup>9</sup> As noted previously, that evaluation included a finding that RMP’s solar cost assumptions were reasonable, and that their concerns about the effect of a delay on the production tax credits were based on good faith testimony.

**5. The Order Approved the RFP Based on Substantial Record Evidence.**

UAE's argument that once we ordered a hearing to be held in this docket, RMP failed "to add anything of substance to this insufficient record"<sup>10</sup> makes incorrect assumptions about the role further testimony and a hearing play in our evaluation. When we declined to approve the proposed RFP based solely on the application, the Independent Evaluator report, and comments of parties, we referred to an "insufficient record" and "limited regulatory review."<sup>11</sup> We solved those deficiencies with further sworn testimony and a hearing to allow that testimony to be subject to cross-examination.

UAE's assertion that "RMP simply restated and re-hashed the same evidence and arguments that led the [PSC] to find that the record is inadequate"<sup>12</sup> is factually inaccurate because RMP proffered at hearing to accept a crucial recommendation of the Independent Evaluator to which RMP had not agreed prior to the hearing: to expand the RFP to include wind resources outside of the more limited geographic requirements contained in the initial RFP. That proffer alone added something of significant substance to the proceeding.

Even if RMP had not offered that concession during the hearing, UAE's assertion that RMP's additional process failed "to add anything of substance"<sup>13</sup> is inaccurate. Providing sworn testimony is something of substance. Subjecting sworn testimony to cross-examination is something of substance. We never expected, and never should have expected, RMP to retreat from its original arguments, or for the Independent Evaluator to materially change his

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<sup>10</sup> Petition at 11.

<sup>11</sup> Order and Notice of Scheduling Conference, issued August 22, 2017, at pp. 2-3.

<sup>12</sup> Petition at 11.

<sup>13</sup> *Id.*

recommendations. We simply decided after receiving RMP's application, the Independent Evaluator report, and comments from parties, to supplement our record and review with sworn testimony and a hearing. We did so and issued an appropriate order based on that record and proffers made by RMP during the hearing.

For the reasons and with the clarifications discussed in this order on review, we decline to modify our decision in the Order.

DATED at Salt Lake City, Utah, November 9, 2017.

/s/ Thad LeVar, Chair

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg  
PSC Secretary  
DW#297837

**Notice of Opportunity for Agency Review or Rehearing**

Judicial review of the PSC's final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30 days after final agency action. Any petition for review must comply with the requirements of §§ 63G-4-401 and 63G-4-403 of the Utah Code and with the Utah Rules of Appellate Procedure.



CERTIFICATE OF SERVICE

I CERTIFY that on November 9, 2017, a true and correct copy of the foregoing was delivered upon the following as indicated below:

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DOCKET NO. 17-035-23

- 10 -

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