



- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Request of Rocky Mountain Power for a Waiver of the Solicitation Process and for Approval of Significant Energy Resource Decision)	
)	<u>DOCKET NO. 08-035-35</u>
)	
)	<u>REPORT AND ORDER</u>
)	

ISSUED: August 1, 2008

By the Commission:

PROCEDURAL HISTORY

On March 26, 2008, PacifiCorp, doing business as Rocky Mountain Power (RMP), filed a Prefiling Notice of Intent to File Request for Waiver of Solicitation Process and Public Notice of Intent to File a Request for Approval of Significant Energy Resource Decision. This notice was filed pursuant to Utah Admin. Code R746-440-1(2) and paragraph 8 of the Protective Order issued April 17, 2007, in Docket No. 07-999-03 (Generic Protective Order). The Generic Protective Order was issued pursuant to Utah Code §54-17-501(2)(b), (8)(b) and (12) to provide protection for and limit the use of confidential information filed in connection with a request for waiver of the requirement for solicitation or approval with respect to acquisition of a significant energy resource under the Energy Resource Procurement Act, Utah Code §§54-17-101, et seq. (ERPA).

On April 1, 2008, RMP filed a Verified Request for Waiver of Solicitation Process and for Approval of Significant Energy Resource Decision (Request). The Request was supported by the testimony of three witnesses: Stefan A. Bird, Gregory N. Duvall and Bruce N. Williams. The testimony of Mr. Bird and Mr. Duvall was confidential and was filed under the Generic Protective Order. The Request sought waiver of the solicitation requirement of the

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ERPA (Solicitation Waiver) and approval of the acquisition (Acquisition Approval) by RMP of Chehalis Power Generating, LLC (Chehalis Power), the owner of an approximately 500 megawatt, natural gas-fired, electric generating plant located near Chehalis, Washington. Chehalis Power is owned by TNA Merchant Projects, Inc. (TNA), which is a wholly owned subsidiary of Suez Energy North America, Inc. (Suez) (Hereinafter, the plant will be referred to as Chehalis or the Plant and the owner of the Plant will be referred to as Suez unless it is necessary to differentiate between Chehalis Power, TNA and Suez.) At the time the Request was filed, RMP stated that information regarding the proposed transaction was confidential and requested that the transaction be referred to in public documents as Project Blue. On May 9, 2008, RMP informed the Commission and parties by letter that although much of the information regarding the Plant and the terms of its acquisition remained confidential, the foregoing information had been publicly disclosed and, thus, was no longer confidential.

Pursuant to Utah Code §54-17-501, on April 2, 2008, the Commission noticed a technical conference for April 9, 2008, on the Solicitation Waiver. The notice also provided that any comments on the Solicitation Waiver would be due by April 23, 2009. RMP, the Division of Public Utilities (Division), the Committee of Consumer Services (Committee), the Utah Association of Energy Users (UAE), Western Resource Advocates (WRA), Utah Clean Energy (UCE) and Wayne Oliver, Merrimack Energy Group, Inc., the Independent Evaluator (IE) retained by the Commission, participated in the conference held under the direction of the Commission on April 9, 2008. At the outset of the conference, the parties requested that the Commission schedule proceedings on both the Solicitation Waiver and the Acquisition

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Approval. The balance of the conference on April 9, 2008, was held as a confidential conference restricted to persons eligible to receive confidential information under the Generic Protective Order. During this portion of the conference, RMP provided information and responded to questions of the Commission and parties regarding the proposed transaction.

On April 11, 2008, RMP filed a verified Supplement to the Request. The purpose of the supplement was to file Substitute Confidential Exhibit RMP 1.1, the executed Purchase and Sale Agreement (PSA) between Suez and RMP (a near final draft was filed with the Request), to inform the Commission of an amendment to the statutory time frame from 180 to 120 days for action on the Acquisition Approval, and to clarify that the Request sought any necessary approval of the acquisition of Chehalis. On the same day, RMP filed the Motion of Rocky Mountain Power for an Accounting Order to Establish a Regulatory Asset and Acquisition Premium (Accounting Order Motion). The Accounting Order Motion requested an accounting order authorizing RMP to record a payment (Exclusivity Payment) to be made to Suez for the exclusive right to negotiate and pursue acquisition of Chehalis for a period of time in Account 182.3 (Other Regulatory Assets) during the pendency of the proposed acquisition and thereafter if the proposed transaction does not close. The Accounting Order Motion also sought authority for RMP to record any acquisition premium associated with the acquisition of Chehalis in Account 114 (Electric Plant Acquisition Adjustments).

On April 14, 2008, in response to questions raised during the April 9, 2008, conference, RMP filed signed copies of confidential agreements related to the PSA and reports cited in the confidential testimony of Mr. Bird and Mr. Duvall.

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On April 15, 2008, based on the agreement of the parties during the April 9, 2008, conference, the Commission issued a Procedural Order and Notice of Hearing, setting a schedule and procedures for the balance of the Solicitation Waiver proceeding and for the Acquisition Approval proceeding. The order directed any person that did not attend the conference on April 9, 2008, who objected to the schedule and procedures, to file an objection within seven days of the date of the order and scheduled a hearing on April 25, 2008, to hear any objection. No person filed an objection, so the Commission vacated the hearing.

Also on April 15, 2008, WRA and UCE filed a petition for leave to intervene in the proceeding. The petition was granted by order issued May 5, 2008. Although UAE did not file a petition to intervene, UAE participated in the proceeding without objection from any party.

On April 21, 2008, the Division filed a memorandum requesting the Commission to hold a scheduling conference to schedule proceedings on the Accounting Order Motion.

On April 23, 2008, the IE, Division, Committee and UAE filed comments on the Solicitation Waiver pursuant to the procedural order. No party opposed the Solicitation Waiver. However, the Committee filed comments of Michele Beck and Cheryl Murray and a response by legal counsel arguing that because of the Solicitation Request, the cost recovery mechanism in Utah Code §54-17-303 is inapplicable to the Approval Request. Parties also requested the Commission to impose conditions on approval of the Solicitation Waiver. RMP responded to the comments on April 25, 2008, arguing that the Committee's argument and conditions recommended by various parties should be addressed in connection with the Acquisition

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Approval rather than the Solicitation Waiver. The Commission issued its Order Granting Request for Waiver of Solicitation on April 30, 2008. In that order, the Commission noted that the only negative comments submitted on the Solicitation Waiver would be addressed in the Acquisition Approval process. The Commission concluded that waiver of the solicitation process was in the public interest and that approval of the acquisition under Utah Code §54-17-302 and recovery of costs associated with the acquisition under Utah Code §54-17-303 would be addressed in the Acquisition Approval process.

On May 13, 2008, RMP filed a motion for entry of a protective order to govern use of confidential information provided under the Generic Protective Order for the Solicitation Waiver and use of additional confidential information provided for the Acquisition Approval. The Commission issued a Protective Order on May 20, 2008.

On June 13, 2008, at the request of the parties, the Commission issued an Amended Procedural Order modifying the dates for filing testimony or comments. On June 20, 2008, the parties filed testimony and comments as follows: the IE filed Confidential Direct Testimony; the Division filed Confidential Testimony of Charles E. Peterson, including as a confidential exhibit an appraisal and assessment of Chehalis by Bodington & Company (Bodington), and Testimony of Shauna Benvegnu-Springer; the Committee filed confidential comments of Michele Beck, including as an attachment a confidential report of Phil Hayet, Hayet Power Systems Consulting; and the UAE filed comments. The IE raised questions about RMP's compliance with Rule R746-430-4, but concluded that the analyses he believed were required in the circumstances had been provided through the discovery process. Therefore, the

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IE supported the Acquisition Approval, subject to verification of information provided in a recent response to a data request. The Division supported the Acquisition Approval and, therefore, believed it unnecessary to address the Accounting Order Motion because it was recommending that Acquisition Approval be granted. The Division also testified that it believed the accounting for the acquisition adjustment proposed by RMP in the Accounting Order Motion was unnecessary because the entire cost of the Plant could be recorded in Account 101 (Electric Plant in Service). The UAE supported the Acquisition Approval, but raised concerns to be addressed in the future regarding the impact of confidentiality, which it agreed was necessary, on the process. The Committee recommended that the Commission grant the Acquisition Approval with conditions that the Committee argued were necessary to protect customers from risks associated with the Plant. The Committee also requested that the Commission rule on its earlier argument regarding recovery of costs when a waiver is sought and concluded that if the acquisition were approved, rate recovery and prudency issues should be deferred to a subsequent general rate case, opposed recovery of the Exclusivity Payment if the transaction does not close and asked the Commission to clearly identify the process for addressing the Accounting Order Motion. The Committee also raised issues regarding the process to be addressed in the future.

On July 11, 2008, the IE filed Supplemental Testimony, RMP filed Confidential Rebuttal Testimony of Stefan A. Bird and Gregory N. Duvall and Rebuttal Comments and the Division filed a confidential reply of Bodington to the Committee's confidential comments. The IE stated that he had verified the information provided in discovery and, therefore, concluded that acquisition of Chehalis was in the public interest. RMP testified that it had complied with

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Rule R746-430-4, that the conditions recommended by the Committee were unjustified because of the substantial benefits customers would receive from acquisition of Chehalis and because the risks associated with Chehalis were the type of risks associated with any generation plant similar to Chehalis. RMP's rebuttal testimony also provided a status report on regulatory approvals to the transaction and information about acquisition costs. RMP presented rebuttal argument to the Committee's argument that the cost recovery provisions of Utah Code §54-17-303 were inapplicable given the Solicitation Waiver and the Committee's recommendation that the Commission approve the acquisition, but defer prudence review and rate recovery. The Rebuttal Comments also addressed policy issues related to the Committee's other proposed conditions and discussed the process issues raised by various parties. Bodington responded to issues raised by the Committee regarding its original report.

On July 17, 2008, a hearing was held pursuant to the procedural order and amended procedural order. Because much of the evidence submitted in testimony and comments in this matter is confidential, the parties requested that the Commission hold the hearing as a confidential hearing with only persons eligible to receive confidential information present. The Commission granted this request. However, everyone wishing to attend the hearing was eligible to receive confidential information under the Protective Order, so no one was excluded as a result of this request. The testimony and comments of the parties, other than the Committee's response filed April 23, 2008, UAE's comments filed June 20, 2008, and RMP's rebuttal comments filed July 11, 2008, were offered and admitted into evidence. The parties confirmed their earlier agreement that Mr. Williams' testimony could be admitted without him being

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present and that they had no questions for Mr. Williams. Summaries of testimony, comments, live surrebuttal and updates were presented by Mr. Bird, Mr. Duvall, Mr. Peterson, Ms Benvegna-Springer, Mr. Jeff Bodington, Ms. Beck and Mr. Hayet. These witnesses were made available for questioning by the parties and the Commission. Mr. Bird noted during his testimony that the Federal Energy Regulatory Commission (FERC) had issued its approval of the acquisition under section 203 of the Federal Power Act that morning, leaving the Commission's Acquisition Approval as the last regulatory condition to be satisfied prior to closing the transaction.

DISCUSSION, FINDINGS AND CONCLUSIONS

In this Order we address two matters: 1. RMP's Acquisition Approval and 2. RMP's Accounting Order Motion. As much of the detailed evidence is provided as confidential information, our discussion herein is necessarily phrased in general terms.

APPROVAL OF THE SIGNIFICANT ENERGY RESOURCE DECISION

RMP seeks approval, pursuant to Utah Code §54-17-302, of its decision to obtain Chehalis. Under Subsection 54-17-302(5), the Commission may either approve a significant energy resource decision (hereafter, SERD), approve a SERD with conditions, or disapprove a SERD. The Commission is also required to make findings for the total projected costs for the SERD, see Utah Code §54-17-302(6). Approval of a SERD and the cost findings are significant as Utah Code §54-17-303 specifies certain mechanisms for the treatment of an approved SERD and its associated costs in future rate cases or other proceedings.

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UNANIMOUS SUPPORT OF THE ACQUISITION

Comments, testimony or pleading on Commission approval and projected costs have been filed by RMP, the Division, Committee, UAE and the IE. The Division, UAE and the IE support approval. Each has reviewed the evidence regarding the facility and has analyzed what impact acquisition of the facility may have on RMP's future utility operations and expenses. Based upon the information and data provided by RMP and their independent analyses, these parties conclude inclusion and operation of the facility with RMP's existing and likely future generating facilities and utility operations provide a net benefit to RMP and its Utah customers. The Committee as well provides its analysis of the impact on RMP's future operations and expenses. The Committee also concludes that RMP and its Utah customers may obtain benefit from acquisition of the facility. However, the Committee argues the specified cost treatment provisions of Utah Code §54-17-303 can not apply to the Chehalis SERD.

INTERPLAY BETWEEN UTAH CODE §54-17-501(10) AND §54-17-303

The Committee argues RMP's use of Utah Code §54-17-501(1), to obtain a waiver to acquire the facility outside of a solicitation process, precludes application of Section 54-17-303. The Committee relies upon language contained in Utah Code §54-17-501(10) for its position.

Utah Code §54-17-501(10) provides: "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

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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." The Committee argues Section 54-17-201 allows an affected utility to obtain a significant energy resource in only two ways: either through an approved solicitation process, or through another manner after obtaining a waiver from the approved-solicitation-process requirement. The Committee points to Section 54-17-501(10) as evidencing legislative intent that only if a significant energy resource is obtained through an approved solicitation process, with its attendant safeguards and benefits, and the utility receives approval through Section 54-17-302, will the significant energy resource qualify for the cost recovery treatment provided by Section 54-17-303.

The Committee reminds us we are to construe statutory provisions through their plain language, to render all parts relevant and meaningful and to avoid interpretations that render portions superfluous or inoperative. Subsection 54-17-501(10)'s language states Section 54-17-303 does not apply to "the significant energy resource decision." if the utility "is granted a waiver to acquire or construct a significant energy resource in accordance with this section." Under the Committee's interpretation, acquisition of a resource through a waiver of the solicitation process necessarily is a "significant energy resource decision." The ERPA does not define "significant energy resource decision." Part 54-17-501(10)(a) does seem to equate a "significant energy resource decision" with the subsection's initial phrasing of a utility being "granted a waiver to acquire or construct a significant energy resource in accordance with this section." If Subsection 54-17-501(10) were the only statutory provision in the ERPA, one could be drawn to the Committee's position. To do so, however, gives little application of statutory

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construction principles, conflicts with other provisions of the ERPA or renders them irrelevant or with little meaning.

Section 54-17-303 mandates its cost recovery treatment “if the commission approves a significant energy resource decision under Section 54-17-302.” Its mandatory “shall” is only conditioned upon “except as otherwise provided in this section . . .” This unambiguous language clearly precludes an exception coming from another section of the ERPA. This is in direct conflict with the Committee’s position on the application of Subsection 54-17-501(10). Section 54-17-303’s plain wording keys off of the operative act being approval of a SERD through Section 54-17-302. Section 54-17-302’s plain wording mandates the utility to seek approval of a SERD involving a significant energy resource for which it “obtains a waiver of the requirement to conduct a solicitation under Section 54-17-501, but does not obtain a waiver of the requirement to obtain approval of the significant energy resource decision under Section 54-17-501.” It is impossible to ignore that section’s unambiguous directive, “the affected electric utility shall obtain approval of its significant energy resource decision . . .” (emphasis added). Subsection 54-17-302(7) excuses a utility from obtaining Section 54-17-302 approval of the SERD only if the utility has obtained a Section 54-17-501 waiver of the approval requirement. The wording used notably distinguishes the exonerating Section 54-17-501 waiver being for the approval requirement rather than a waiver of the solicitation process requirement. Section 54-17-302(1)’s plain, mandatory, language requires RMP to seek approval of its decision to obtain Chehalis and include it as part of RMP’s electric generating resources. Section 54-17-302 equates this to being a “significant energy resource decision.” One principle of statutory construction is to avoid constructions which place statutory provisions in conflict with one

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another. To follow the Committee's position places the Subsection 54-17-501(10) provision in conflict with the mandatory directives of Subsections 54-17-302(1) and 54-17-303(1).

The Committee's position also creates difficulties between subsections of Utah Code §54-17-501 itself. Subsection 1 provides a utility may receive a waiver of the requirement to conduct a solicitation process, but, due to the use of the disjunctive word "or," a utility may separately receive a waiver of the approval requirement. Under the Committee's position, there is no need to obtain a waiver of the approval requirement (nor need for statutory language dealing with it). Under the Committee's position, waiver of the solicitation process alone accomplishes the same result. However, the plain wording of Section 54-17-501 distinguishes between a waiver of the solicitation process requirement and a waiver of the approval requirement, the latter is distinct from the former. The other sections of the ERPA follow the distinction and recognize the two as distinctly separate waivers. As RMP in this case, a utility may obtain a waiver of the solicitation process, but, not having as well a waiver of the approval requirement, must submit its resource decision for approval by the Commission under Section 54-17-302. If approval is granted, Section 54-17-303 then applies. We construe and will apply Subsection 54-17-501(10) to circumstances where a utility has obtained a waiver of the approval requirement, not a waiver of the solicitation process requirement only. Our application of Subsection 54-17-501(10) in this way does not create conflict between the other provisions of the ERPA, harmonizes the applicable provisions and renders them meaningful and operative. We conclude that RMP may seek approval of its Chehalis SERD, pursuant to Section 54-17-302. If approved, the cost recovery treatment of Section 54-17-303 will apply to Chehalis.

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APPROVAL OF CHEHALIS

Based upon the evidence presented, we find RMP's SERD for Chehalis was reached after waiver of the solicitation process, granted through our April 30, 2008, Order. We also find and conclude the SERD is in the public interest. The parties have presented evidence from their independent analyses showing it will likely result in the acquisition, production, and delivery of electricity at the lowest reasonable cost to Utah customers. These analyses have considered long-term and short-term impacts, risk, reliability, comparative costs, resource integration, and other factors provided in their comments, testimony and reports. As part of its testimony, the Committee recommends the Commission include certain conditions which could be construed as granting a conditional approval of the SERD pursuant to Section 54-17-302((5)(b)). We do not include them in our approval of the SERD, which we approve pursuant to Section 54-17-302(5)(a). We discuss the Committee's recommended conditions in relation to the determination of total projected costs.

DETERMINATION OF TOTAL PROJECTED COSTS

Utah Code §54-17-302(6) requires us to make findings as to the total projected costs for the acquisition of Chehalis. RMP's information and the analyses performed by participants in these proceedings have referenced a purchase price of \${Confidential¹} million. Subsequently, through its July 11, 2008, rebuttal testimony, RMP identified additional expenses or costs which RMP believes should be included in projected costs. These include a possible difference between the final working capital amount at closing and the target amount assumed in

¹This confidential number is disclosed in the Confidential Attachment to this Order.

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the PSA, consultant and legal fees, costs associated with long-term maintenance contracts, and payments to the Washington Energy Facility Site Evaluation Council. Other parties oppose inclusion of these additional amounts into the total projected costs. They complain they were presented late in the proceedings and were not identified and included in the analyses performed by the parties, including RMP. We agree that they should not be included in the total projected costs. The underlying analyses upon which we have relied to approve the SERD used only the PSA amount. That is the amount which we find should be the total projected costs for acquisition of Chehalis. Not including these additional costs in the total projected costs does not mean they are not potentially recoverable. Utah Code §54-17-303(1)(a)(iii) indicates that RMP may recover “up to the projected costs specified in the commission’s order . . .” In addition, Part 54-17-303(1)(b) provides a process through which additional costs above the total projected costs set herein can be considered.

As noted, the Committee includes recommendations which would effectively require RMP alone to bear possible additional costs or expenses if certain events are to occur, e.g., compressor blade failure, environmental costs or claims related to periods prior to RMP acquiring the facility, responsibility for payment of an Exclusivity Payment obligation should the purchase not be consummated, and others. We do not address the merits of the Committee’s recommendations nor include them in this order. Just as RMP’s proposal to address and specifically include certain expenses beyond the purchase price, the Committee’s proposal to address and specifically exclude certain expenses from customer responsibility can be considered in a future proceeding, if they actually materialize.

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ACCOUNTING ORDER MOTION

Based upon our review of the evidentiary information provided and our approval of the Chehalis SERD, we will deny, without prejudice, RMP's Accounting Order Motion. Our understanding of the Exclusivity Payment is that it will be applied to the purchase price if the facility is purchased. We have approved the SERD and established total projected costs, which would cover the Exclusivity Payment as part of the purchase price. Only if RMP fails to complete the purchase of Chehalis does the Exclusivity Payment become a separate cost apart from the facility. We believe it would be premature to address the matter prior to the triggering event or circumstances occurring.

Similarly, we decline to address RMP's request for consideration of the Acquisition Premium. If not included in the purchase price, an acquisition premium should have been included in the analyses presented as part of the Section 54-17-302 approval requirement. We have set the total projected costs for Chehalis. If there is an acquisition premium beyond the price identified in the PSA, it could be raised by RMP like the other costs RMP sought to include in the total projected costs.

Wherefore, based upon our discussion, findings and conclusions made herein, we enter this ORDER, wherein we:

1. Approve Rocky Mountain Power's significant energy resource decision to acquire Chehalis.
2. Set total projected costs for the acquisition of Chehalis at \${Confidential} million.

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3. Deny, without prejudice, Rocky Mountain Power's April 11, 2008, Motion for an Accounting Order Establishing a Regulatory Asset and Acquisition Premium.

This Order constitutes final agency action on Rocky Mountain Power's April 1, 2008, Request for Approval of a Significant Energy Resource Decision. Pursuant to Utah Code §63-46b-12, an aggrieved party may file, within 30 days after the date of this Report and Order, a written request for rehearing/reconsideration by the Commission. Pursuant to Utah Code §54-7-15, failure to file such a request precludes judicial review of the Report and Order. If the Commission fails to issue an order within 20 days after the filing of such request, the request shall be considered denied. Judicial review of this Report and Order may be sought pursuant to the Utah Administrative Procedures Act (Utah Code §63-46b-1 et seq.).

Dated at Salt Lake City, Utah, this 1st day of August, 2008.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
GH58405

Confidential Attachment hereafter