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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power for Approval of a Significant Energy Resource Decision and Request to Construct Wind Resource and Transmission Facilities	Docket No. 17-035-40
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**UTAH ASSOCIATION OF ENERGY USERS’
MOTION FOR STAY PENDING REVIEW**

Pursuant to Utah Code § 63G-4-405 and Utah Rule of Appellate Procedure 17, the Utah Association of Energy Users (“UAE”) hereby files this motion seeking a stay of the Commission’s June 22, 2018 Order in this docket as well as the August 8, 2018 Order on Review pending the appeal of those Orders. In the alternative, UAE seeks a stay of the effectiveness of any claimed cost-recovery aspect of those Orders.

RELIEF REQUESTED

UAE has appealed the Commission’s June 22, 2018 Order and August 8, 2018 Order on Review in this docket. With this Motion, UAE seeks a stay of those Orders or, in the alternative, a stay of the effectiveness of any potential cost-recovery aspects of those Orders. Specifically,

pending appeal of the Orders in this docket, UAE seeks a stay of the entirety of the Orders or, in the alternative, of the effectiveness (if any) of the Orders to the extent they might be read to ensure that costs incurred by Rocky Mountain Power (“RMP” or “PacifiCorp”) in connection with implementation of the Significant Energy Resource Decisions for various wind projects (“Wind Projects”) and the Voluntary Energy Resource Decisions for various transmission segments (“Transmission Projects”) will be recovered by RMP in customer rates.¹

GROUND FOR RELIEF

UAE has appealed the Commission’s decision in this docket to approve the Wind Projects and the Transmission Projects (“Resource Decision Appeal”). Pursuant to the Energy Resource Procurement Act (the “Act”), a proper Commission approval of those projects both permits PacifiCorp to construct the projects and triggers a requirement that any of PacifiCorp’s costs related to those projects will be recovered in rates. *See* Utah Code §§ 54-17-303(1)(a) & -403(1)(a). UAE’s appeal in this docket is directly related to its appeal of the Commission’s order in Docket No. 17-035-23 (“RFP Docket”) approving the solicitation process that preceded the resource decisions in this docket. The appeal in the RFP Docket is now fully briefed and awaiting oral argument in Appellate Case No. 20170967-CA (“RFP Appeal”).

In the RFP Appeal, UAE asserts that this Commission improperly approved the RFP that ultimately resulted in the resource decisions in this docket. Pursuant to the Act, PacifiCorp is not permitted to construct or acquire a significant energy resource unless it first conducts an approved solicitation process. *See* Utah Code § 54-17-201(2)(a). If UAE is successful in the RFP Appeal and the Utah Court of Appeals vacates this Court’s order approving the solicitation

¹ *See* Utah Code §§ 54-17-303(1)(a) & -403(1)(a).

process, Utah law prevents PacifiCorp from either constructing the Wind Projects or recovering costs associated with them. It is unknown when the Utah Court of Appeals will issue a ruling on the RFP Appeal. PacifiCorp has indicated that it does not intend to wait for such a ruling and plans to move forward with the construction of the Wind Projects and the Transmission Projects and that it will incur costs in connection with that construction. If the Utah Court of Appeals vacates the Commission order in the RFP Docket and in this docket, RMP should not be assured of recovery of the costs incurred in the interim. This motion seeks to confirm that, if UAE succeeds on appeal, RMP will not be assured of cost recovery if it chooses to proceed with construction of the Wind Projects and Transmission Projects notwithstanding the appeal.

RELEVANT FACTS

RFP Docket

1. In Commission Docket No. 17-035-23 (the “RFP Docket”), PacifiCorp sought Commission approval of a solicitation process for a limited set of wind generating resources.
2. PacifiCorp’s application and the Commission’s decision in the RFP Docket were governed by the Act, Utah Code §§ 54-17-101 to -807. The solicitation process itself is governed by Utah Code § 54-17-201 to -203.
3. In the RFP Docket, UAE and others argued that limiting the solicitation to wind generating resources is inconsistent with the Act.
4. On August 22, 2017, the Commission issued an Order and Notice of Scheduling Conference (“Aug. 22, 2017 Order”) in the RFP Docket indicating that it could not conclude based on the record before it that PacifiCorp’s decision to limit the proposed solicitation to wind generating resources “so apparently satisfies the ‘lowest reasonable cost’ standard” of the Act to

“warrant[] bypassing the opportunity to test that decision in the open market against other bidders who might choose to bid different resource types.” [Aug. 22, 2017 Order at 2-3].

5. The Commission gave PacifiCorp the choice of either proceeding with a solicitation limited to wind generating resources or opening the solicitation up to other resource types. [Aug. 22, 2017 Order at 3-4].

6. PacifiCorp elected to proceed with a solicitation limited to wind resources and the Commission held a hearing on September 18, 2017 regarding the solicitation limited to wind generating resources.

7. On September 22, 2017, the Commission issued an Order Approving RFP with Suggested Modification, approving the solicitation process limited to wind generating resources but suggesting that PacifiCorp modify the solicitation to include solar resources.

8. UAE appealed the Commission’s order in the RFP Docket and has argued to the Utah Court of Appeals that the Commission’s order approving the solicitation process was improper and should be vacated and the matter reversed to the Commission.

9. Briefing on the RFP Appeal is now complete and oral argument is scheduled for November 30, 2018.

The Resource Decisions Docket

10. In Commission Docket No. 17-035-40 (the “Resource Decisions Docket”), PacifiCorp sought Commission approval of a significant energy resource decision to build the Wind Projects pursuant to Utah Code § 54-17-302 as well as Commission approval of the resource decision to construct the associated Transmission Projects pursuant to Utah Code § 54-

17-402. Together, the Wind Projects and Transmission Projects are referred to as the “Combined Projects.”

11. The Wind Projects were those selected from the solicitation process approved in the RFP Docket.

12. PacifiCorp made clear in its application in the Resource Decision Docket that the Transmission Projects and the Wind Projects are “inextricably-linked,” “mutually dependent,” “are not economic” when considered alone, and that “[t]his interdependence requires that the Combined Projects be developed together.”² It is clear, therefore, that this Commission was not asked to approve the Transmission Projects without the Wind Projects and did not approve the construction of the Transmission Projects without the Wind Projects. This motion thus seeks a stay as to any potential cost recovery implications of the Orders in this case for both the Wind Projects and the Transmission Projects.

13. UAE and several other parties opposed Commission approval of the Combined Projects.

² See, e.g., June 30, 2017 Application at 5 (“The Combined Projects are time-limited opportunities and inextricably-linked—the Transmission Projects relieve congestion in eastern Wyoming, and the Wind Projects will rely on the new Transmission Projects for interconnection and allow the Company to realize the benefits of zero-fuel-cost energy and associated PTCs.”); *id.* at 9 (“The Combined Projects are mutually dependent. The Wind Projects are not economic without the Transmission Projects, which are needed to relieve existing congestion and to interconnect new PTC-eligible wind resources in high-wind areas of Wyoming. The Transmission Projects are not economic if there are no incremental cost-effective wind resources generating zero-fuel-cost energy and the associated PTCs. This interdependence requires that the Combined Projects be developed together.”).

14. In an Order dated June 22, 2018, the Commission approved the Combined Projects. In that Order, the Commission confirmed that the Transmission Projects and Wind Projects were “mutually dependent” on each other.³

15. On July 20, 2018, UAE filed an Application for Reconsideration and Rehearing of that Order, requesting that the Commission modify its Order to make clear that all of the Combined Projects are approved only to the extent that the Commission’s order approving the solicitation process in the RFP Docket is not reversed as a result of the RFP Appeal.

16. The Commission issued an Order on Review declining to modify its Order as UAE requested.

17. UAE filed a Petition for Review of the Commission’s Order and Order on Review in this docket and the matter is now on appeal. The purpose of the Resource Decision Appeal is to preserve a meaningful remedy in the event the Utah Court of Appeals rules in UAE’s favor in the RFP Appeal.

ARGUMENT

I. PENDING APPEAL, THE COMMISSION SHOULD STAY THE ORDERS IN THIS DOCKET OR, IN THE ALTERNATIVE, STAY EFFECTIVENESS OF ANY POTENTIAL COST-RECOVERY ASPECTS OF THE ORDERS

This Commission should stay the Orders in this docket approving the Wind Projects and Transmission Projects or, in the alternative, stay the effectiveness of any claimed or potential cost recovery aspects of its Orders in this docket to protect Utah ratepayers from paying higher rates to cover the costs associated with the Combined Projects if RMP chooses to proceed with

³ See June 22, 2017 Order at 7 (“PacifiCorp’s Application emphasizes the time-sensitive, mutually dependent nature of the Combined Projects”); *id.* at 32 (“We find the availability of the expiring PTCs to subsidize the fulfillment of these existing needs to be highly relevant and to strongly favor our finding the Combined Projects are in the public interest.”).

construction of those projects but they are not permitted to be completed as a result of the RFP Appeal. The grounds for a stay of an order issued by a state agency are similar to those for an injunction under Utah Rule of Civil Procedure 65A(e). *See Jensen v. Schwendiman*, 744 P.2d 1026, 1027 (Utah Ct. App. 1987) (finding that injunction standards apply to “[a] motion to stay the effect of an order,” because such a motion “is a request for an order ‘granting an injunction during the pendency of an appeal.’” (quoting Utah R. App. P. 8(a))). “A preliminary injunction is an anticipatory remedy purposed to prevent the perpetration of a threatened wrong or to compel the cessation of a continuing one.” *Hunsaker v. Kersh*, 1999 UT 106, ¶ 8, 991 P.2d 67 (internal quotation marks omitted). “Injunctive relief is fundamentally preventive in nature, and an injunction serves to ‘preserve the status quo pending the outcome of the case.’” *Zagg, Inc. v. Harmer*, 215 UT App 52, ¶ 8, 345 P.3d 1273 (quoting *Hunsaker*, 1999 UT 106, ¶ 8). “The main purpose of a preliminary injunction is simply to preserve the status quo pending the outcome of the case. In issuing a preliminary injunction, a court is primarily attempting to preserve the power to render a meaningful decision on the merits.” *Tri-State Generation & Transmission Ass’n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986) (internal citation omitted).

UAE seeks a stay to preserve the status quo pending the outcome of the RFP Appeal and the Resource Decision Appeal and to preserve meaningful remedies in connection with those appeals. The stay requested in this motion is appropriate given that 1) there is a substantial likelihood that UAE will prevail on the merits of its appeal, or the appeal presents serious issues on the merits which should be the subject of further litigation, 2) UAE will suffer irreparable harm unless the stay pending appeal is issued, 3) the threatened injury to UAE outweighs

whatever damage the stay may cause, and 4) the stay, if issued, would not be adverse to the public interest.⁴ As set forth below, these elements are met and this Motion should be granted.

A. There Is A Substantial Likelihood That UAE Will Prevail On The Merits Of Its Appeal, and The Appeal Presents Serious Issues On The Merits Which Should Be The Subject Of Further Litigation

UAE respectfully submits that it is substantially likely to prevail on the merits of its appeal in this matter and in the RFP Appeal or, at the very least, these appeals present serious issues on the merits which should be the subject of further litigation. “To meet the requirements of [this element], an applicant must, at the very least, make a prima facie showing that the elements of its underlying claim can be proved.” *Water & Energy Sys. Tech., Inc. v. Keil*, 1999 UT 16, ¶ 8, 974 P.2d 821. UAE’s underlying claim is based on an interpretation of the plain language of the Act.⁵ The Act requires that, before a utility may “acquire or construct a significant energy resource,” it must first “conduct a solicitation process that is approved by the commission.”⁶ The Act also requires Commission approval prior to construction of a significant energy resource decision, and such Commission approval must be fully compliant with the Act.⁷ *If* a proper solicitation process is properly approved by the Commission, and *if* the resulting significant energy resource decision is properly approved, then the state’s share of costs associated with the significant energy resource decision must be included in Utah rates.⁸ Conversely, if the solicitation process was *not* properly approved, and as a result the significant energy resource decision was also not properly approved, then the utility is not permitted to

⁴ See Utah R. Civ. P. 65A(e)(1)-(4).

⁵ Utah Code §§ 54-17-101 to -806.

⁶ *Id.* § 54-17-201(2)(a).

⁷ *Id.* §§ 54-17-302(1), (3).

⁸ *Id.* § 54-17-303(1).

construct the project and costs associated with an improperly-approved significant energy resource decision should not be included in customer rates.

PacifiCorp conducted a solicitation process, but UAE has appealed the Commission's approval of that process and the RFP Appeal is set for oral argument before the Utah Court of Appeals on November 30, 2018. If the Utah Court of Appeals agrees with UAE that the solicitation process was improperly approved and reverses the approval of the solicitation, then PacifiCorp's solicitation process will not have been properly approved under the Act and the resources resulting from the improper solicitation process cannot be completed.⁹ "A reversal of a judgment or decision of a lower court . . . places the case in the position it was before the lower court rendered that judgment or decision, and vacates all proceedings and orders dependent upon the decision which was reversed."¹⁰ Such a decision would prevent PacifiCorp from constructing the Combined Projects and would preclude the Commission from including the costs of the Combined Projects in retail rates.

The Order in this docket approved both the Wind Projects and the associated Transmission Projects," which are "inextricably linked" and "mutually dependent" on each other.¹¹ The Commission did not approve the Transmission Projects without the Wind Projects. Thus, the Commission should stay its Orders in this docket or, in the alternative, should also stay

⁹ *Id.*

¹⁰ *Phebus v. Dunford*, 198 P.2d 973, 974 (Utah 1948). *See also Grand Co. v. Rogers*, 2002 UT 25, ¶ 16, 44 P.3d 734 ("When the court of appeals renders a decision on an issue, that decision is automatically part of the law of this state . . ."); *Gunn Hill Dairy Properties v. Los Angeles Department of Water & Power*, 2015 UT App 261, ¶13, 361 P.3d 703 ("A vacated order is a nullity.").

¹¹ *See, e.g.*, June 30, 2017 Application at 5 and 9. *See also* June 22, 2017 Order at 7 and 32.

any potential cost recovery implications of its Orders for both the Wind Projects and the Transmission Projects.

PacifiCorp has made it clear that it intends to move forward and spend money associated with the Combined Projects notwithstanding the RFP Appeal.¹² Indeed, PacifiCorp, intends to spend significant funds before the Utah Court of Appeals can issue a decision in the RFP Appeal. While PacifiCorp may be free to do so, it should not be free to do so at ratepayer risk. With this Motion, UAE asks the Commission to stay the Orders in this docket, or at least any potential or claimed cost recovery aspects of the Orders, so that if PacifiCorp elects to expend funds notwithstanding the appeals, ratepayers will not be burdened with such costs if the Commission's approval of the solicitation process is ultimately reversed. PacifiCorp should not be guaranteed recovery of costs under the Act if the solicitation process underlying the Combined Projects did not comply with the Act. Utah ratepayers should not be subjected to higher rates for costs premised on a faulty solicitation process.

UAE has presented a prima facie showing that the elements of its claim can be proved and, therefore, that it is substantially likely to prevail on the merits of its appeal in this matter and in the RFP Appeal. At the very least, these appeals present serious issues on the merits, which should be the subject of further litigation. UAE respectfully requests that the Commission stay the Orders in this docket and/or any potential or claimed cost-recovery implications of its Orders until the Utah Court of Appeals issues a ruling in the RFP Appeal.

¹² See Exhibit A (Rocky Mountain Power's Response to Petitioner's Motion for Enlargement of Time to File Brief) at 3 (noting that "from July through December of 2018 [RMP] anticipates spending \$90 million" toward the Combined Projects).

B. UAE Will Suffer Irreparable Harm Unless The Stay Pending Appeal Is Issued

Unless the Commission stays the Orders in this docket and/or any potential cost recovery implications of those Orders, UAE and other Utah ratepayers will suffer irreparable harm. “Injunctive relief is not purely limited to cases where no other possible remedy will be available. Its broader purpose is preventive in nature.” *Hunsaker*, 1999 UT 106, ¶8. “Irreparable harm justifying a preliminary injunction includes wrongs of a repeated and continuing character, or which occasion damages that are estimated only by conjecture, and not by any accurate standard.” *Id.* ¶9 (internal quotation marks and alterations omitted). “Irreparable injury justifying an injunction is that which cannot be adequately compensated in damages or for which damages cannot be compensable in money.” *Id.* (internal quotation marks omitted). If the Commission declines to issue a stay and if UAE prevails in the RFP Appeal, Utah ratepayers will risk irreparable harm to the extent the Commission may be required to include in rates the costs incurred for projects that cannot ultimately be constructed because they were based on a defective solicitation process.

Because the Act requires a properly approved solicitation process prior to construction of a significant energy resource, if the Utah Court of Appeals finds in favor of UAE in the RFP Appeal, PacifiCorp will be required to cease construction of the improperly-approved resource decisions. PacifiCorp is well aware of this risk and is nevertheless moving forward with construction and intends to incur significant costs before the Utah Court of Appeals can issue a ruling in the RFP Appeal. PacifiCorp has claimed that it will incur up to \$90 million in costs

through the end of this calendar year.¹³ UAE and other Utah ratepayers should not be put at any risk of paying PacifiCorp for costs associated with the Combined Projects in order to advance a legitimate appeal addressing serious problems with the solicitation process that led to the selection of the projects in the first place.

A stay of the Orders and/or any cost recovery implications of the Act¹⁴ is necessary to avoid irreparable harm and to preserve the status quo pending the outcome of the RFP Appeal. *See Tri-State Generation & Transmission Ass'n, Inc.*, 805 F.2d at 355 (“In issuing a preliminary injunction, a court is primarily attempting to preserve the power to render a meaningful decision on the merits.”).

C. The Threatened Injury To UAE Outweighs Whatever Damage The Proposed Stay May Cause

The balance of harms weighs in favor of granting the stay. As noted above, UAE seeks a stay of the Orders in their entirety or, at a minimum, of any cost-recovery implications of the Act if PacifiCorp elects to proceed with construction of the Combined Projects notwithstanding the RFP Appeal. If the Commission does not stay the Orders, UAE and other ratepayers may be at a risk of being forced to pay costs associated with the Combined Projects despite the improperly-approved solicitation process. If the Commission stays the Orders in their entirety, the Wind Projects would be prevented from moving forward until the Utah Court of Appeals rules on the RFP Appeal. A stay of the Orders in their entirety would not jeopardize the Combined Projects’ eligibility for PTCs, however. During the course of this docket, PacifiCorp repeatedly stated that the construction schedule for the Transmission Projects was driving the time-sensitive nature of

¹³ *Id.*

¹⁴ *See, e.g.*, Utah Code § 54-17-303(1)(a).

the request for approval and that, therefore, “the Transmission Projects are critical path.”¹⁵ A stay would not prevent PacifiCorp from proceeding with the Transmission Projects if it elects to do so because they are not “significant energy resource decisions” under the Act and, therefore, do not require prior Commission approval for construction to proceed. Rather, PacifiCorp could choose to proceed with the Transmission Projects at the risk that it would not recover the costs of those projects, depending on the outcome of the RFP Appeal.

A stay of the Orders in their entirety would not jeopardize the Combined Projects’ eligibility for full PTCs for the additional reason that, if this Court enters a stay, PacifiCorp could file an application for a waiver of Commission approval under Utah Code § 54-17-501. Such a waiver, if approved, would permit PacifiCorp to continue its construction activities on both the Wind Projects and the Transmission Projects, but would not assure cost recovery.

A stay only of the cost-recovery implications (if any) of the Orders would also not jeopardize the eligibility of the Combined Projects for full PTCs. Such a stay would not prevent construction of either the Wind Projects or the Transmission Projects, and PacifiCorp could elect to proceed with those projects at its risk during the pendency of the appeal. If the RFP Appeal is unsuccessful, then PacifiCorp will be able to recover all of the costs it prudently incurs in constructing the Combined Projects. If the RFP Appeal is successful, then the stay will ensure that Utah ratepayers will not be required to pay higher rates for costs associated with projects

¹⁵ June 2017 Direct Testimony of Chad A. Teply at line 177. *See also id.* at lines 158-177 (noting that “[t]he critical path schedules of the Transmission Projects are the drivers for the proposed procedural schedule for review of the Application,” and that “the Wind Projects could accommodate a resource approval process” that is behind that of the Transmission Projects); June 2017 Direct Testimony of Rick A. Vail at lines 302-311 (“To achieve an in-service date before the end of 2020, the Company must complete acquiring the necessary rights-of-way by March 31, 2019”).

that PacifiCorp cannot complete and for which ratepayers will not benefit. Such a stay thus requires PacifiCorp to bear the risk of any costs of the Combined Projects that are incurred during the pendency of the RFP Appeal if PacifiCorp elects to proceed with the Combined Projects notwithstanding the RFP Appeal. That is, PacifiCorp will suffer harm from the stay *only* if it elects to incur costs associated with the Combined Projects during the pendency of the RFP Appeal *and* the Utah Court of Appeals determines that PacifiCorp’s solicitation process was defective. If UAE is successful in the RFP Appeal, it is PacifiCorp—and not UAE or other Utah ratepayers—who should bear the price for PacifiCorp’s decision to incur costs while a meritorious RFP Appeal is pending.

D. The Stay, If Issued, Would Not Be Adverse To The Public Interest

Issuance of a stay would not be adverse to the public interest. “The ‘public interest’ in a public utility case is actually the interest of purchasers of electric power.” *Tri-State Generation & Transmission Ass’n*, 905 F.2d at 357. UAE is a consumer group that represents the interests of purchasers of electric power before the Commission. UAE’s purpose in filing this appeal and the RFP Appeal is to ensure that PacifiCorp will not conduct solicitations or acquire generation resources in a manner prohibited by Utah law. The purpose of this Motion is to protect Utah ratepayers during a meritorious appeal. Absent a stay, UAE and other Utah ratepayers will be harmed if PacifiCorp seeks to increase electric rates to recover costs incurred during the pendency of the appeals that it otherwise would not be permitted to recover. UAE’s requested stay would not be adverse to the public interest.

II. A BOND IS NOT APPROPRIATE AND SHOULD NOT BE REQUIRED

Under the circumstances of this case, and because of the negligible threat of legitimate harm to PacifiCorp, UAE should not be required to post a bond for a stay pending appeal. Under Utah Rule of Civil Procedure 65A(c)(1), a bond is not required if no party will incur damage or if there are other reasons for dispensing with a requirement for security. UAE submits that such reasons exist, in that UAE is a trade group representing the interests of large Utah ratepayers that is not in a position to post a substantive bond and is seeking through this stay to prevent undue risk and costs for all Utah ratepayers.

CONCLUSION

For the foregoing reasons, UAE respectfully requests that this Commission issue a stay of any cost recovery implications of its orders in this docket pending appeal.

DATED this 12th day of October 2018.

HATCH, JAMES & DODGE, P.C.



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Certificate of Service
Docket No. 17-035-40

I hereby certify that a true and correct copy of the foregoing was served by email this day 12th day of October 2018 on the following:

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