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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 Voluntary Request for Approval of Resource Decision	Docket No. 17-035-40 **ROCKY MOUNTAIN POWER'S OPPOSITION TO UTAH ASSOCIATION OF ENERGY USERS' MOTION FOR STAY PENDING APPEAL**

PacifiCorp d/b/a Rocky Mountain Power ("RMP" or "Company") submits its opposition to Utah Association of Energy Users' ("UAE") Motion for Stay Pending Review ("Motion"). For the reasons stated below, UAE's Motion should be denied.

I. INTRODUCTION

On June 30, 2017, RMP requested the Commission approve (1) a "significant energy resource decision" to construct or procure four new Wyoming wind resources (the "Wind Projects"), and (2) a "resource decision" to construct specified transmission facilities ("Transmission Projects"). In an order dated June 22, 2018, the Commission approved both the Wind Projects and the Transmission Projects (together, the "Combined Projects"). UAE then filed a petition for rehearing, and the Commission denied this petition on August 8, 2018. UAE appealed both orders on September 7, 2018. It has now filed a Motion to stay these orders ("Orders") pending review.

UAE's Motion contains alternative requests. First, UAE seeks a stay of both Orders in their entirety pending its appeal. This request cannot satisfy *any* of the four elements required for a stay and should be denied. This stay, if granted, would preclude the Company from moving forward with the Combined Projects in a timely and efficient manner, placing the Company's customers, in all of the states it serves, at risk of losing the significant benefits recognized by the Commission when it approved the resource decisions. The benefits of the Combined Projects are largely predicated on the availability of federal productions tax credits ("PTCs"), but to be eligible for these credits under "safe harbor" provisions, the Combined Projects must be in service before the end of 2020. If a stay is granted that prevents the Company from moving forward with the Combined Projects until the appeal is resolved (a process that frequently takes more than a year), it would be very difficult, if not impossible, to complete the Combined Projects in time for them to qualify for the PTCs. Without the PTCs, the Combined Projects do not provide the economic benefits to customers upon which the projects were premised. A stay for such an undefined, and potentially lengthy, period could effectively end the Combined Projects and make the Commission's prior approval of them meaningless—even if affirmed on appeal. This request should be denied.

The second request, in contrast, is not actually a request for a stay. Instead, it appears to be an untimely request for further reconsideration or modification of the Commission's Orders. UAE describes this second request as seeking a stay "of the effectiveness (***if any***) of the Order to ***the extent they might be read to ensure that costs incurred by [RMP] . . .will be recovered by RMP in customer rates***." Motion at 2 (emphasis added). UAE later repeats that the 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*** . . . notwithstanding the appeal." Motion at 3 (emphasis

added). Asking for confirmation that RMP is not "assured of cost recovery" is not a request for a stay; it is an untimely request for modification of the Orders to include language the UAE previously sought and a declaration about the Commission's advisory view of what will happen if UAE succeeds on appeal. Notably, the Commission has already answered this question, stating that "a decision from an appellate court modifying our decision in the Solicitation Process Docket would be a changed circumstance to which Utah Code Ann. §§ 54-17-303, -304, -403, -404 could apply." *See* Order on Review, August 8, 2018. These statutes, cited in the Commission's prior order, provide the basis for again denying UAE's alternative request.

II. THE COMMISSION'S ORDERS SHOULD NOT BE STAYED PENDING APPEAL

UAE cannot satisfy the requirements for a stay of the Commission's Orders pending appeal. As UAE acknowledges in its motion, UAE must satisfy the same standards required for an injunction under Utah Rule of Civil Procedure 65A(e). *See Jensen v. Schwendiman*, 744 P.2d 1026, 1027 (Utah Ct. App. 1987). Thus, UAE must demonstrate that (1) there is a substantial likelihood that it will prevail on the merits of its appeal, (2) it 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. UAE cannot satisfy *any* of these requirements. Further, relief under Rule 65A of the Utah Rules of Civil Procedure is an "extraordinary remedy" that "should not be lightly granted." *Sys. Concepts, Inc. v. Dixon*, 669 P.2d 421, 425 (Utah 1983). UAE must satisfy by a "clear and unequivocal showing" the four elements outlined in Rule 65A. *See Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260–61 (10th Cir. 2004).[1]

[1] The Advisory Committee on Utah Rule 65A notes that Utah courts should rely upon "the substantial body of federal case authority in this area."

In addition, even if UAE were able to meet all of those requirements (which it cannot), UAE must post a bond before a stay is imposed "in such sum and form as the [Commission] deems proper . . . ." Utah R. Civ. P. 65A(c)(1). Here, RMP and its customers would suffer significant costs and damages from a wrongful injunction. At a minimum, UAE should be required to post a bond in an amount equal to the estimated PTC benefits that could be lost due to a delay, $1.2 billion over ten years. Even that amount would not include implementation costs and other expenses that could be lost as a result of a wrongful stay. The Company has been spending and continues to spend over $1 million per month on average toward these Projects. If a stay causes the Projects to become uneconomical, those costs will have been incurred for our customers but without providing them the intended benefits. Teply Dec at 7; *See* June 22, 2018 Order at 27.

A. UAE Has Not (And Cannot) Show a Substantial Likelihood of Prevailing on the Merits.

UAE has not shown a substantial likelihood of prevailing on the merits of its appeal. Indeed, despite nearly three pages of argument on this topic, it does not even attempt to identify a single error made by the Commission. Instead, UAE merely provides background on the solicitation process that is required in the Energy Resource Procurement Act (the "Act"), describes the posture of the case, notes that RMP has stated it intends to move forward with the project during the appeal, and states in conclusory fashion—without any explanation—that it is likely to prevail on the merits in this matter.[2] This does not satisfy the standard.

UAE largely relies on its unsupported assertion that it may prevail in a related, pending appeal addressing the Commission's approval of RMP's underlying request for proposals

[2] UAE also states without explanation that "these appeals present serious issues on the merits, which should be the subject of further litigation." While UAE successfully quotes the standard from Utah Rule of Civil Procedure 65A, it does not explain how or why this standard applies.

(“RFP”). Notably, that appeal has been pending for approximately one year, during which time UAE has never sought a stay. Having failed to move for a stay in the RFP appeal, UAE cannot now use the pendency of that appeal as the basis for a stay here. UAE must show it is likely to prevail on its appeal of the resource decisions to stay *these* Orders. UAE doesn’t even attempt to show how that burden is met.

In this appeal, UAE is not likely to prevail because the Commission clearly complied with the Act. Its Orders carefully described how it weighed the evidence, arguments, and issues in the case and applied the law as articulated by the legislature. Indeed, in the absence of any new argument from UAE on the point, the Commission would have to abandon both its original order *and* order denying reconsideration in order to conclude that UAE is likely to prevail on appeal. Simply stated, UAE again fails to demonstrate that the Orders are not supported by substantial evidence, amounted to an abuse of discretion, or are otherwise arbitrary or capricious. *See* Utah Code 63G-4-403 (listing the standards for when an appellate court can grant relief from agency action). Accordingly, UAE has not shown the required substantial likelihood of prevailing on appeal. This conclusion alone requires denial of the requested stay.

B. UAE Will Not Suffer Irreparable Harm.

Irreparable harm is that “which cannot be adequately compensated in damages or for which damages cannot be compensable in money.” *Hunsaker v. Kersh*, 1999 UT 106, ¶ 9, 991 P.2d 67 (quoting *System Concepts, Inc.*, 669 P.2d at 427-28.). Generally, if harm can be assigned a dollar value, or if monetary compensation can make a party whole, then it is not irreparable. *Id*; *see also Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (“It is also well settled that simple economic loss usually does not, in and of itself, constitute irreparable harm; such losses are compensable by monetary damages.”) Further, “to constitute

irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman*, 348 F.3d at 1189.

UAE cannot establish irreparable harm for at least three reasons. First, the only harm that UAE alleges—higher rates—is a simple economic loss that by definition does not qualify as an irreparable harm. *See, e.g*., *Hunsaker v. Kersh*, 1999 UT 106, ¶ 9, 991 P.2d 67 (irreparable harm is that "which cannot be adequately compensated in damages or for which damages cannot be compensable in money"); *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) ("It is also well settled that simple economic loss usually does not, in and of itself, constitute irreparable harm; such losses are compensable by monetary damages.").

Second, rates that are properly approved by the Commission under the Act cannot constitute harm. If the Commission determines that RMP satisfied the standards set forth in the Act, RMP may lawfully recover the costs expended through rates. Thus, the injury UAE identifies that warrants a stay is NOT a legal injury for which compensation is available.

UAE's argument is based on the false premise that UAE "should not be put at ***any*** risk" of paying for costs associated with the Combined Projects if there is any chance the Orders allowing those projects could be reversed. Motion at 12. That argument does not satisfy the requirements for a stay nor does it properly interpret the Act. The Act does not eliminate all risk to customers that a changed circumstances might impact a project after it has been approved by the Commission. To the contrary, the Act specifically allows a utility to recover costs when circumstances have changed as long as the utility has been prudent. *See* Utah Code Ann. §§ 54-17-303, -304, -403, -404. In this situation, as the Commission has already recognized, if a decision from an appellate court modifies the Commission decision (which is unlikely), that would be a changed circumstance under the Act and the Commission may then have the ability

to determine if RMP was "prudent" under these specific changed circumstances. *See* Order on Review, August 8, 2018. Rates approved by the Commission cannot constitute irreparable harm, nor can the mere *risk* that circumstance may change which *might* allow a prudence review.

Finally, the injury here is not "certain, great, [or] actual," but rather, it is entirely "theoretical." *See Heideman*, 348 F.3d at 1189. Indeed, UAE describes the harm this way: "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." Motion at 11. This language demonstrates that any potential harm UAE is concerned about is not certain; it is only theoretical. Such theoretical injury cannot constitute irreparable harm.

C. The Harm to the Company and its Customers from a Stay is Significant and Vastly Outweighs Any Harm to UAE.

In contrast to the lack of any irreparable harm to UAE, the harm that would be inflicted from a stay upon the Company—and to its customers—is significant. Thus, not only does UAE fail to show that the threatened injury to it outweighs the damage that the proposed stay would inflict upon RMP, as required by Rule 65A, the opposite is true.

UAE bluntly argues that a stay of the Orders would not jeopardize the Combined Projects' eligibility for PTCs. *See* Motion at 12. This is wrong. To obtain the PTCs under current "safe harbor" tax law, the Combined Projects must be in service before the end of 2020. *See* Decl. of Chad A. Teply ("Teply Decl.") at ¶ 3. To meet this deadline, the Combined Projects are on an uncompromising timeline. Any stay connected to the appellate process would be of unknown duration, although that process frequently takes over a year. A delay of that length would make it nearly impossible to finish the Combined Projects by the deadline. *Id*. And, even if the appellate process was shorter than that, any indefinite stay would still place the PTCs and

Combined Projects in grave danger. *Id*. The proposed stay would present enormous difficulties to plan for and work around, especially with a construction schedule that is already on a tight timeline and that requires long lead-times for materials to be ordered and staged. *Id*. Thus, the associated ramifications on project implementation activities that would result from either an indefinite stay or even a defined stay of any meaningful duration would significantly jeopardize the Company's ability to complete the projects on time and would make it likely that the PTCs would not be obtained. *Id*. The failure to obtain the PTCs would likely result in termination of the entire Combined Projects, for without the PTCs, the Combined Projects do not provide the full economic benefits to customers the projects were premised on. *Id.*

UAE also argues without basis that because the Company previously stated that the construction schedule for the Transmission Projects drove the urgency of the requested approval, it means that a stay that only prevents work on the Wind Projects will not jeopardize eligibility for PTCs. Motion at 13. This, again, is incorrect. While it is true that the timeline for the Transmission Projects is the critical path schedule for the Combined Projects now as it was in June 2017, and the Wind Projects at that time could accommodate a lengthier review process, it is now nearly 2019—much closer to the 2020 deadline for PTCs for the Combined Projects. The statement UAE refers to, out of context, cannot be read to imply that a stay of just the Wind Projects would allow the Combined Projects to satisfy all safe harbor provisions. *Id*. at ¶ 6. The Wind Projects will not be completed in time to receive full PTC benefits if there is any meaningful delay. *Id.* Thus, a stay that prevents the Company from proceeding with the Wind

Projects until the Utah Court of Appeals rules on the pending appeal would place receipt of the associated PTCs and the economics supporting the Combined Projects in grave danger. *Id*.[3]

In order to complete the Combined Projects by the end of 2020, the Company must press forward with implementation. To stay work while the Court of Appeals decides a case that was just filed—and in which briefing has not even begun—poses great risk to the Company's customers who should not be held in jeopardy simply because UAE wants a third attempt at its arguments against the Combined Projects. Failure to obtain these credits could mean that the Company's customers would forego an estimated $1.2 billion in PTC values over 10 years. *See* June 22, 2018 Order at 27.

D. A Stay Would Be Adverse to the Public Interest

A stay would be adverse to the public interest. As the Commission recognized in its June 22, 2018 Order, "the Combined Projects will most likely result in the acquisition, production, and delivery of electricity at the lowest reasonable cost." June 22, 2018 Order at 17. These projects "are most likely to result in future cost savings for customers." *Id*. at 25. The public has an interest in receiving the benefit of these PTCs to subsidize the costs of electricity and to realize future cost savings. A stay likely prevents the public from receiving this benefit.

E. Even If The Standards For A Stay Had Been Met, A Substantial Bond Would Be Necessary.

Under the rules for an injunction set forth in Utah Rule of Civil Procedure 65A, the court (or commission), "*shall* condition issuance of the order or injunction on the giving of security by the applicant, in such sum and form as the court deems proper." (Emphasis added). This mandatory language is mirrored in Utah Code Ann. § 54-7-17(3) that states that any court

[3] Further, the economics of the Transmission Projects are only viable when those projects are combined with the Wind Projects, and vice versa. *Id*. at ¶ 7. RMP cannot prudently decide whether or when to proceed with the Transmission Project by itself if the viability of the Wind Projects and the PTCs are placed in jeopardy by a stay.

ordered stay of an order by this Commission "shall" be conditioned upon the posting of a bond. This security or bond "serves two purposes: to compensate the enjoined party for harm caused by a wrongfully-granted injunction and to deter rash applications for injunctive relief." *Utahns For Better Transp. v. U.S. Dep't of Transp.*, No. 01-4216, 2001 WL 1739458, at *5 (10th Cir. Nov. 16, 2001); *see also Wright v. Westside Nursery*, 787 P.2d 508, 516 (Utah Ct. App. 1990) (recognizing that the purpose of the bond is to provide "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained"). Both purposes apply here. A bond is needed to compensate the Company's customers for harm that likely would be caused by a wrongfully granted stay.

The only applicable recognized exceptions to the bond requirement are if "it appears that none of the parties will incur or suffer costs, attorney fees or damage as the result of any wrongful order or injunction, or unless there exists some other substantial reason for dispensing with the requirement of security." Utah R. Civ. P. 65A(c)(1).

The first exception clearly does not exist here. As explained above, the Company and its customers will incur significant damage as the result of a stay, through the loss of $1.2 billion in PTC values over 10 years. *See* June 22, 2018 Order at 27.

Likewise, there is not "some other substantial reason for dispensing with the requirement of security." Utah R. Civ. P. 65A(c)(1). UAE argues that it is not in a position to post a substantive bond and that its status as "a trade group representing the interest of large Utah ratepayers" is such a substantial reason. But UAE does not cite any authority to support the claim that being a trade group is a "substantial reason for dispensing with the requirement of security," nor is there any intuitive logic behind such a claim. Indeed, in *Utahns For Better Transportation*, the court required a bond despite the plaintiff also being an organization

purporting to represent a larger group of people. 2001 WL 1739458, at *5. Accordingly, UAE's argument has already been rejected by Utah's courts.

Further, UAE does not provide any evidence to support its claim that it is not in a position to post a substantive bond. Indeed, its only claim in this regard is that it is a group of some of the largest energy customers in the state. This argument should be ignored.

Finally, while UAE claims to represent the interests of Utah ratepayers, a wrongful stay will jeopardize all energy customers. UAE should not be permitted to seek a stay that has the potential to cause significant damage that would impact *all* customers without posting security for that damage if it turns out that the order was wrongfully entered.

Accordingly, even if UAE was able to satisfy all of the requirements for a stay (it cannot satisfy *any*), it should be required to post security in an amount equal to the estimated PTC benefits that would be lost due to a delay—$1.2 billion, plus other implementation costs.

III. UAE'S ALTERNATIVE REQUEST IS AN IMPROPER, UNTIMELY REQUEST FOR RECONSIDERATION

UAE's second, alternative request is not even a true request for a stay. Instead, it merely repeats a request the Commission already rejected in its August 8, 2018 order. UAE describes this second request as seeking a stay "of the effectiveness (if any) of the Order to ***the extent they might be read to ensure that costs incurred by [RMP] . . .will be recovered by RMP in customer rates***." Motion at 2 (emphasis added). UAE later states that its 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*** . . . notwithstanding the appeal." Motion at 3 (emphasis added).

Asking for confirmation that the Company is not "assured of cost recovery" is not a request for a stay, but rather an untimely request for clarification or reconsideration of an order. The Commission has already answered that question, stating that "a decision from an appellate

court modifying our decision in the Solicitation Process Docket would be a changed circumstance to which Utah Code Ann. §§ 54-17-303, -304, -403, -404 could apply." *See* Order on Review, August 8, 2018.

Thus, in the hypothetical situation where the appellate court modifies the Commission's decision, it could be a changed circumstance that allows the Commission to reconsider cost recovery under the standards set forth in the existing statutory framework. That means that the existing statutory framework, as set forth in the Act, already answers the question about whether the Company is "assured" of cost recovery if UAE succeeds on appeal.

Despite the plain language in the motion, UAE may assert that its second, alternative request is not seeking the advisory opinion described above and is actually seeking a declaration that the Company should not be allowed to recover costs in the event the UAE prevails on appeal. This would be an improper, unripe request. The statutory framework set forth in the Act provides the standards for the Commission to consider when deciding whether changed circumstances warrant costs to be disallowed. *See* Utah Code Ann. §§ 54-17-303, -304, -403, -404. Those standards cannot be evaluated until the circumstances have actually arisen. If, and only if, UAE prevails on the appeal, then the Commission can apply the statutory standards to the circumstances as they exist at that time and determine what the cost recovery consequences will be. Until that time, however, the issue is not ripe for decision. The Commission would contradict the Act by ruling now that the Company could not recover costs even if it acted prudently under changed circumstances. *See* June 22, 2018 Order at 34 (explaining that the Commission "would contradict the Act" by placing a hard cap on capital costs that would preclude the Company from recovering an increase in costs even where the increase was

prudent). Thus, any request for a ruling now that the Company should not be allowed to recover costs in the event the UAE prevails on appeal is improper and unripe.

IV. CONCLUSION

UAE's first request should be denied because it cannot satisfy any of the four elements required for a stay and would likely result in the termination of the Combined Projects. UAE's second request should be denied because it is an improper request for reconsideration and the statutory framework set forth in the Act, as previously explained by the Commission, fully addresses the issue UAE appears to want clarified. The Commission should deny UAE's motion for a stay. In the alternative, if a stay is allowed, UAE should be required to post a bond that covers the full value of the PTCs jeopardized by such a stay, $1.2 billion, plus other implementation costs.

DATED this 29th day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October 2018, I caused to be served, via E-mail, overnight delivery, and/or hand delivery, a true and correct copy of **ROCKY MOUNTAIN POWER'S OPPOSITION TO UTAH ASSOCIATION OF ENERGY USERS' MOTION FOR STAY PENDING APPEAL** to the following:

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