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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’
REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL**

The Utah Association of Energy Users (“UAE”) hereby files this Reply in support of its motion seeking a stay (“Motion”) 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, and responds to the memoranda filed by Rocky Mountain Power (“RMP” or “PacifiCorp”) and by Interwest Energy Alliance (“Interwest”).

ARGUMENT

I. THE COMMISSION SHOULD STAY ITS ORDERS, OR THE COST-EFFECTIVENESS OF THOSE ORDERS, PENDING APPEAL

This Commission should stay the Orders in this docket 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 construction of those projects but they are not permitted to be completed as a result of the RFP Appeal.

UAE seeks a stay to preserve the status quo pending the outcome of the RFP Appeal and the appeal in this docket and to preserve meaningful remedies in connection with those appeals. Below, UAE responds to the arguments raised by PacifiCorp and Interwest in their memoranda opposing the Motion. As set forth below and in the Motion, UAE meets the elements of a preliminary injunction, which are required for a stay pending appeal, and the Motion should be granted.

A. UAE Is Substantially Likely To Prevail On The Merits Of Its Appeal Or The Appeal Presents Serious Issues On The Merits Which Should Be The Subject Of Further Litigation

UAE 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. As UAE noted in its Motion, the Act requires PacifiCorp to “conduct a solicitation process that is approved by the commission” before it may “acquire or construct a significant energy resource,”¹ and that, as such, if the solicitation process was *not* properly approved, then any resulting significant energy resource decision cannot be properly approved, and the utility may not construct the project and the costs associated with an improperly-approved significant energy

¹ *Id.* § 54-17-201(2)(a).

resource decision cannot be included in customer rates. This requirement forms the basis of UAE's appeal in this docket. Neither PacifiCorp nor Interwest have offered any argument in opposition to UAE's assertion that a ruling by the Utah Court of Appeals in the RFP Appeal that vacates or reverses the Commission's orders in the RFP Docket would prevent PacifiCorp from moving forward with the Combined Projects.

UAE's likelihood of success on the appeal in this docket is, therefore, linked with its likelihood of success in the RFP Appeal.² UAE will not repeat the arguments made by the parties in their respective briefs to the Utah Court of Appeals in the RFP Appeal,³ but will simply note that UAE has raised several objections to the Commission's orders in the RFP Docket and, for the reasons set forth in its briefs to the Utah Court of Appeals, UAE is likely to prevail on the merits of the RFP Appeal and/or the objections UAE has raised present serious issues on the merits which should be the subject of further litigation.

If UAE prevails in the RFP Appeal, then PacifiCorp is prevented from moving forward with the Combined Projects. In such an event, PacifiCorp will have incurred costs for the Combined Projects for which it will seek reimbursement in the next general rate case. UAE's Motion seeks to prevent Utah ratepayers from being required to reimburse PacifiCorp for costs incurred on the Combined Projects in the event that the Combined Projects cannot go forward

² UAE acknowledges that its Motion places the Commission in the position of having to rule on the likelihood that UAE will succeed in the RFP Appeal, in which the Commission is the Respondent and has argued that the Utah Court of Appeals should deny UAE's requested relief. UAE notes that it is required by Utah Rule of Appellate Procedure 17 to first seek a stay with the Commission before it seeks a stay with the Utah Court of Appeals.

³ As UAE noted in its Motion, briefing in the RFP Appeal is complete. UAE also noted in its Motion that the RFP Appeal was set for oral argument before the Utah Court of Appeals on November 30, 2018. Since UAE filed its Motion, however, the Utah Court of Appeals has postponed oral argument on the RFP Appeal and has ordered the parties to mediate the matter.

because the solicitation was improperly approved. UAE has presented a prima facie showing 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.

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

UAE and other Utah ratepayers will suffer irreparable harm if the Commission does not stay the Orders in this docket and/or any potential cost recovery implications of those Orders. PacifiCorp makes several claims that UAE will not suffer irreparable harm in the absence of a stay, each of which lack merit.

First, PacifiCorp's claim that UAE does not suffer irreparable harm if it can quantify the monetary damages it will suffer from the imposition of higher rates to pay for the costs incurred on the Combined Projects during the pendency of this appeal is incorrect as a matter of law. Irreparable harm exists when "there is no adequate remedy at law," *Strawberry Elec. Serv. Dist. v. Spanish Fork City*, 918 P.2d 870, 881 (Utah 1996), such as that "which cannot be adequately compensated in damages *or* for which damages cannot be compensable in money." *Hunsaker v. Kersh*, 1999 UT 106, ¶ 9 (emphasis in original) (internal quotation marks omitted). Simply being able to quantify the monetary damages is not enough. UAE would have to have an adequate remedy at law to recover those damages. PacifiCorp has not identified, and UAE is currently unaware of, any cause of action or Commission proceeding whereby UAE could avoid the monetary damage or recover damages UAE will incur if this Commission declines to stay the

Orders or their cost recovery implications pending appeal in this matter. In the absence of a stay, UAE would suffer harm for which there is no adequate remedy at law and a stay is appropriate.

Second, PacifiCorp's claim that UAE cannot be irreparably harmed because "rates that are properly approved by the Commission under the Act cannot constitute harm,"⁴ simply ignores the issues raised by UAE in the RFP Appeal and on appeal in this matter. UAE contends in these appeals that the costs incurred by PacifiCorp on the Combined Projects are not "properly approved by the Commission," for the reasons identified in the RFP Appeal. UAE *would* be irreparably harmed if forced to pay higher rates for costs that were not properly approved under the Act.

Third, PacifiCorp's assertion that a ruling by the Utah Court of Appeals reversing the Commission's Orders in the RFP Docket can *only* be viewed in the context of a "changed circumstance" under the Act should also be rejected. As noted in Section I, above, the Act clearly prevents PacifiCorp from commencing the Wind Projects unless it first obtains Commission approval for a solicitation process and then obtains approval for the resources selected. A decision from the Utah Court of Appeals reversing the Commission's approval of the solicitation process removes one of these two required legs, and the Wind Projects would not be permitted to proceed. If the Commission's order approving the solicitation process were vacated or reversed by the Utah Court of Appeals, this is not a "changed circumstance" that the Commission can consider in determining whether the Wind Project can proceed. The Combined Projects would be barred from proceeding by operation of the Act itself. Any costs incurred on the Combined Projects in such a scenario should not be borne by Utah ratepayers.

⁴ RMP Memo at 6.

Fourth, PacifiCorp's claim that UAE's irreparable harm is merely "theoretical" is also incorrect. To warrant an injunction, UAE must show that it is substantially likely to prevail on the merits of its claim or that its claims present serious issues on the merits warranting further litigation. If UAE meets that standard, then UAE is also substantially likely to suffer irreparable harm. As made clear above and in UAE's Motion, UAE will suffer irreparable harm if PacifiCorp receives automatic cost recovery for the Combined Projects if the Combined Projects were improperly approved under the Act.

Finally, UAE notes that a stay of the Commission's Orders and/or any cost recovery implications of the Act⁵ is necessary to preserve the power of the Utah Court of Appeals, in the appeal of this matter and in the RFP Appeal, to render a meaningful decision on the merits. *See Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986) ("In issuing a preliminary injunction, a court is primarily attempting to preserve the power to render a meaningful decision on the merits."). If PacifiCorp receives guaranteed recovery of Combined Project costs from now until the Utah Court of Appeals finds that the solicitation process in the RFP Docket should not have been approved, UAE and other Utah ratepayers will be forced to reimburse PacifiCorp for those costs despite the fact that they were incurred in a manner that does not comply with the Act. As such, a stay is warranted.

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

The threatened harm to UAE and other Utah ratepayers of being forced to incur higher rates even if the Combined Projects are not permitted to proceed outweighs the damage a stay might cause. PacifiCorp argues that the balance of harms tips in favor of denial of a stay because

⁵ *See, e.g.*, Utah Code § 54-17-303(1)(a).

a stay of the Commission's orders may jeopardize the Combined Projects. This argument should be rejected for at least two reasons.

First, PacifiCorp fails to acknowledge the risks posed by a failure to stay or to explain why the potential economic benefits of the Combined Projects overrides those risks. PacifiCorp asserts that a stay of the Commission's orders in this docket would jeopardize the viability of the Combined Projects. Even if that were true, the Commission must weigh this potential outcome against the potential that, in the absence of a stay, Utah ratepayers will be required to pay higher rates for costs associated with the Combined Projects even if the Utah Court of Appeals finds that the Combined Projects were not properly approved under the Act. The Combined Projects *may* result in reduced rates for Utah ratepayers if they are completed on budget and on time and if PacifiCorp's gas price forecasts are correct, but the Combined Projects *will* result in increased rates for Utah ratepayers without providing any value to those ratepayers if the stay is not entered and if the Utah Court of Appeals vacates this Commission's orders in the RFP Appeal. The threatened injury to UAE and other Utah ratepayers outweighs the damage the proposed stay may cause.

Second, PacifiCorp's balance of harms argument further fails to acknowledge that UAE's Motion seeks to avoid jeopardizing the viability of the Combined Projects by requesting, in the alternative, an order staying any cost-recovery aspects of that Order pending the RFP Appeal. A stay of any such cost-recovery aspects of the Commission's approval of the Combined Projects would permit PacifiCorp to continue to build the Combined Projects pending the RFP Appeal, but would also eliminate the potential for Utah ratepayers to be forced to pay higher rates to repay PacifiCorp for costs related to the Combined Projects if the Utah Court of Appeals finds

that the Commission’s approval was inconsistent with the Act. PacifiCorp refuses to squarely address UAE’s request for a stay of any cost recovery aspects of the Commission’s Order. Rather, PacifiCorp incorrectly asserts that this request for alternative relief is not a request for a stay, but is instead a request for reconsideration of a prior motion. UAE acknowledges that the request for alternative relief is similar to the relief it requested in its Motion for Reconsideration and Rehearing, but the fact that UAE has previously requested similar relief does not mean that the request in the Motion somehow is not a request for a stay or otherwise cannot be made in a motion to stay. UAE’s alternative request for relief requests a stay of a portion of the Commission’s Orders and PacifiCorp offers no support for its assertion that this request for a stay is not properly made in a motion to stay. UAE’s alternative request for relief is appropriate and the balance of harms weighs in favor of granting the stay.

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

A stay of the Orders in this docket would not be adverse to the public interest. Interwest agrees that the interests of Utah ratepayers is the relevant “public interest” at issue in this element. Interwest and PacifiCorp each note that the Commission’s Orders in this matter found approval of the Combined Projects was in the public interest, but both parties incorrectly assume that a stay of those Orders is, *ipso facto*, adverse to the public interest.⁶ It is not. As noted above and in UAE’s Motion, UAE’s purpose in filing the RFP Appeal and the appeal in this docket is to ensure that PacifiCorp will not conduct solicitations or acquire generation resources in a manner prohibited by Utah law. The purpose of the Motion is to protect Utah ratepayers during

⁶ Interwest’s brief focuses entirely on the “public interest” element, but its arguments echo those made by PacifiCorp on the “balance of harms” element, which UAE addresses in Section I.C., above.

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. A stay for those purposes is certainly not 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. As noted in the Motion, security is not required if no party will incur damage from a wrongfully-issued injunction. *See Corp. of Pres. Of Church of Jesus Christ of Latter-Day Saints v. Wallace*, 573 P.2d 1285, 1287 (Utah 1978) (“[T]he court may dispense with security altogether if grant of the injunction carries no risk of monetary loss to the defendant . . . and if there is an absence of proof showing a likelihood of harm, certainly no bond is necessary.”). As an initial matter, UAE notes that PacifiCorp does not assert that it will suffer harm if the Commission stays any cost recovery aspects of its Order in this docket. As such, no bond should be required if the Court stays only the cost-recovery aspects of the Order.

In addition, PacifiCorp’s request for a \$1.2 billion bond in the event of a stay of the entirety of the Commission’s order in this docket is without support. PacifiCorp asserts that any bond required for a stay should equal the \$1.2 billion in PTCs that PacifiCorp estimates will be generated if the Combined Projects qualify for 100% of the PTCs. PTC values are, however, an inappropriate measure of the estimated actual damages of a wrongfully-issued stay. PacifiCorp has repeatedly stated that it will not move forward with the Combined Projects if they do not qualify for 100% of the PTCs. As such, if a stay threatens qualification for the PTCs, then

PacifiCorp will not go forward with the Combined Projects and Utah ratepayers will be spared the costs of the Combined Projects. Any bond issued must take this into account, but PacifiCorp has not estimated the amount of costs that will not be incurred in the event of a full stay of the Commission's orders. A \$1.2 billion bond is inappropriate.

In any event, UAE is a non-profit corporation organized under the laws of the State of Utah and, as such, it cannot afford to post a substantive bond. PacifiCorp's assertion that because UAE represents the interests of large energy users in the state that it must have sufficient funds to post a bond is without knowledge of UAE's financial situation and should be rejected. UAE represents the interests of large Utah ratepayers. Like all corporations, however, it is a distinct legal entity separate from the individual interests that it represents. UAE 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 reasons set forth above and in UAE's Motion to Stay Pending Appeal, UAE respectfully requests that this Commission issue a stay of its orders in this docket or of any cost recovery implications of its orders in this docket pending appeal.

DATED this 5th day of November 2018.

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Certificate of Service
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