

Application of Rocky Mountain Power for Waiver of the Solicitation Process and Waiver of the Requirement for Preapproval of Significant Energy Resource Decision	<u>DOCKET NO. 23-035-11</u> <u>ORDER</u>
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ISSUED: March 23, 2023

1. Procedural History

On March 6, 2023, Rocky Mountain Power (RMP) filed an application (“Application”) to waive certain requirements otherwise applicable, under the Energy Resource Procurement Act (the “Act”),¹ to two procurement contracts RMP entered on behalf of a Schedule 34 customer. Specifically, the Application requests waivers under Utah Code Ann. § 54-17-501 of (1) the solicitation process that Utah Code Ann. § 54-17-201(3) would otherwise require (“Solicitation Requirement”) and (2) the requirement to obtain the Public Service Commission’s (PSC) approval prior to acquiring a significant energy resource as Utah Code Ann. § 54-17-302 ordinarily requires (“Approval Requirement”).

The Act requires the PSC to adjudicate requests for such waivers on an accelerated basis, enumerating procedural milestones that ultimately require the PSC to issue an order approximately three weeks after the utility files its request for a waiver.²

¹ Utah Code Ann. § 54-17-101, et seq.

² See *id.* at § 54-17-501.

Consistent with the Act, the PSC hosted a technical conference on March 9, 2023 and received comments from the Division of Public Utilities (DPU) on March 16, 2023 (“DPU Comments”). The DPU recommends the PSC approve the Application. No other stakeholder filed comments.

2. Factual Background

a. The Schedule 34 Customer and the Resource.

The Sustainable Transportation and Energy Plan Act (“STEP Act”), passed in 2016, authorized the PSC to implement a tariff that allows RMP to procure renewable generation on behalf of a statutorily qualified customer and to deliver the resulting energy to the participating customer as utility service.³ Soon thereafter, the PSC approved Schedule 34 of RMP’s tariff, which facilitates and governs such service.⁴

RMP represents PacifiCorp entered the two contracts at issue in this docket on behalf of a single customer (the “Customer”) that RMP serves under Schedule 34. Specifically, PacifiCorp executed (1) a power purchase agreement (PPA) with Faraday Solar B, LLC for 525 megawatts (MW) of output from a solar generating facility located in Utah County, Utah;⁵ and (2) a Battery Storage Agreement (BSA) with Faraday Energy Storage, LLC for a 150 MW battery with four-hour duration located at

³ See *id.* at § 54-17-806.

⁴ See *In the Matter of RMP’s Proposed Electric Service Schedule No. 34, Renewable Energy Tariff*, Docket No. 16-035-T09, Order Memorializing Bench Ruling Approving Settlement Stipulation issued Aug. 18, 2016.

⁵ The expected commercial operation date of the PPA is September 30, 2025, with the Schedule 34 customer taking output on the same date.

the same site in Utah County.⁶ RMP states the terms of both the PPA and BSA (collectively, the “Resource”) became effective on January 20, 2023 and expire April 30, 2046.

RMP notes the Customer has an existing Renewable Energy Service Contract (the “RES Contract”), which the PSC approved in 2016, to receive service under Schedule 34. Since then, RMP states it has procured six renewable resources for the Customer under the RES Contract.⁷ RMP confirms the RES Contract that governs those six prior acquisitions will govern the PPA and BSA. Further, “[u]nder the terms of the [RES] Contract, 100 percent of the actual costs of the [Resource] are passed through to the [Customer].”⁸

b. RMP’s Request for Waivers of the Solicitation Requirement and Approval Requirement under the Act.

Absent the PSC granting waivers, the Resource is of sufficient capacity as to be subject to the Solicitation Requirement and the Approval Requirement under the Act, discussed *infra* at 6-7. That is, for a generation resource of this type and size, the Act

⁶ The expected commercial operation date for the BSA is June 1, 2026, with the Schedule 34 customer taking output on the same date.

⁷ RMP states the Resource “will be the seventh renewable resource PacifiCorp has procured on behalf of the Schedule 34 Customer” under its RES Contract. Direct Test. of C. Eller at 3:57-58.

⁸ Application at 7.

ordinarily requires RMP to conduct a PSC-approved solicitation process and to obtain the PSC's approval prior to acquiring the Resource.⁹

RMP argues waivers of the Act's requirements are appropriate because the Resource will not be a system resource for which other customers pay. Rather, the Customer chose to purchase this renewable energy, selected the Resource, and will pay for it. RMP further emphasizes the Resource is consistent with Schedule 34 and the Customer's existing RES Contract, both of which the PSC already approved in 2016.¹⁰

RMP reiterates that pursuant to the Customer's RES Contract, the Customer is responsible for 100 percent of the actual costs of the Resource, and the Customer is contractually responsible for any costs associated with the Resource in the event of early termination or default. RMP further states that "[a]dequate credit provisions are in place to ensure that [RMP] and other customers are protected in the event of early termination or default."¹¹ The Customer is also responsible for paying all applicable application and administrative fees pursuant to Schedule 34.

⁹ RMP represents the six prior resources RMP procured for the Customer were not large enough to trigger the Act's procurement requirements. RMP states it, therefore, notified the PSC of the transactions but did not seek a waiver or request the PSC approve them.

¹⁰ Application at 6.

¹¹ Application at 7.

Under these circumstances, RMP argues the PSC should grant its request for waivers of the Act's solicitation and approval requirements because doing so is in the public interest.

c. DPU's Comments and Recommendation to Approve the Application.

DPU confirms the Customer is responsible for 100 percent of all costs under the pertinent contracts, including full payment in the event the Customer or the contractors developing the Resource default. Although DPU concludes "potential cost shifting to other customers seems unlikely," DPU contends the Application and its attachments nevertheless contain insufficient information to preclude the possibility RMP will incur costs for which the Customer does not ultimately compensate it.¹² DPU contends RMP should bear the risk of any such costs, as opposed to other ratepayers.

Finally, based on its review of the materials RMP provided in this docket, the DPU concludes "RMP has followed the applicable statutes and [PSC] rules pertaining to renewable energy [service] contracts and waivers associated with the solicitation process and preapproval of a [significant energy resource] decision."¹³ DPU further confirms it "had adequate time to review RMP's Application" and concludes the

¹² DPU notes RMP did not include the Resource in its 2021 IRP or its 2021 IRP Update, and DPU cannot presently verify the Resource will be properly included in RMP's upcoming 2023 IRP. DPU also notes questions exist as to the Resource's potential impact on the Energy Balancing Account during periods the Resource is producing a surplus or deficit of energy with respect to the Customer's load.

¹³ DPU Comments at 5.

Application “satisfies the required public interest standard set forth in the [Act].”¹⁴ The DPU believes RMP’s request for the waivers is “just, reasonable, [and] in the public interest,” and recommends the PSC approve the Application.¹⁵

3. Discussion, Findings, and Conclusions

a. Legal Standard.

As alluded above, the Act imposes certain requirements relating to RMP’s acquisition of any “significant energy resource” (SER).¹⁶ Section 54-17-201 requires RMP conduct a PSC-approved solicitation process before acquiring an SER, which this order has referred to as the Solicitation Requirement, and Utah Code Ann. § 54-17-302 requires RMP submit any SER it ultimately selects from the solicitation process to the PSC for approval prior to acquiring it, i.e. the Approval Requirement.¹⁷

The Act permits RMP to seek and obtain a waiver of these requirements provided the PSC determines it is in the public interest to waive them because of a clear emergency, time-limited opportunity, or other condition that renders waiving the requirements in the public interest.¹⁸ In making this determination, the Act

¹⁴ *Id.*

¹⁵ *Id.* at 6.

¹⁶ SER is statutorily defined as a resource that is 100 MW or more of new generating capacity with a dependable life of 10 or more years or the purchase of electricity or electric generation capacity not less than 100 MW with a contract term of 10 or more years. Utah Code Ann. § 54-17-102(4).

¹⁷ If the SER is a “renewable energy source,” as defined in Utah Code Ann. § 54-17-601, the PSC’s approval is only required for resources greater than 300 MW. Utah Code Ann. § 54-17-502.

¹⁸ *Id.* at § 54-17-501(1).

requires the PSC “use reasonable efforts to [hire] an independent evaluator [IE] to participate in any application for a waiver,” but provides the PSC may decline to use an IE if the PSC determines doing so is not appropriate under the circumstances or an IE is not available to participate or complete a recommendation within the short statutory window in which the PSC must adjudicate the request for a waiver.¹⁹

To obtain a waiver, RMP must also satisfy filing requirements enumerated in Utah Admin. Code R746-430-4 (the “PSC Rule”), including an explanation of the emergency, opportunity, or other condition supporting its request. When requesting a waiver of the Solicitation Requirement, the PSC Rule requires RMP provide evidence: (1) acquiring the resource is consistent with PacifiCorp’s most recent Integrated Resource Plan and any pending solicitation process; (2) regarding the resource’s value relative to other similar resources; (3) explaining how the Resource will be connected to and integrated with PacifiCorp’s system; (4) of the costs RMP anticipates to recover from ratepayers; and (5) of any effect the resource will have on future resource acquisitions.

Both the Act and the Rule specify granting a waiver does not create any presumption RMP acted prudently and any cost recovery RMP ultimately seeks is subject to the PSC’s future review to determine whether RMP acted prudently in acquiring the resource.²⁰

¹⁹ *Id.* at § 54-17-501(11).

²⁰ *Id.* at § 54-17-501(10); R746-430-4(3).

a. The PSC Declined to Retain an IE and Finds Waiving the Requirements is in the Public Interest.

As an initial matter, the PSC carefully considered whether it was appropriate to retain an IE to evaluate RMP's Application. Ordinarily, RMP's procurement of an SER can reasonably be expected to result in costs passed down to all customers. Here, however, a single Customer selected the Resource at issue and that Customer is contractually responsible for all associated costs. That is, other customers are significantly insulated from rate impacts associated with this procurement relative to those occurring outside of the Schedule 34 context. Given these unique conditions and the tight statutory timeframe in which the PSC must act, the PSC determined that retaining an IE was inappropriate under the circumstances and declined to do so.

While RMP does not claim a "clear emergency" or "time-limited commercial or technical opportunity" exist, the Act authorizes us to grant a waiver where "any other factor [exists] that makes waiving the requirement in the public interest."²¹ We conclude the following are other factors that cumulatively render waivers to be in the public interest: (1) the Customer, as opposed to RMP, selected the Resource consistent with Schedule 34 and the STEP Act; (2) the Customer, as opposed to other ratepayers, is reasonably expected to bear all costs associated with the Resource, including risks associated with default or early termination, under the terms of the PPA, BSA, and RES Contract; and (3) RMP has, since 2016, acquired six other

²¹ Utah Code Ann. § 54-17-501(1)(c).

resources to serve the same Customer under Schedule 34 and no evidence suggests any associated costs have impacted other ratepayers.

We further find the explanations offered in the Application and the attached written testimony are sufficient to fulfill the filing requirements enumerated in the PSC Rule.

Accordingly, based on our review of the Application and attached testimony, the DPU Comments, information RMP provided during the technical conference, and in the absence of any opposition to the Application, we find and conclude it is in the public interest to approve the Application and associated waivers of the Act's Solicitation Requirement and Approval Requirement as regards RMP's procurement of the Resource.

We are mindful of the questions DPU raises, notwithstanding its recommendation we approve the Application. Though the risk seems remote, the record does not support a finding that no scenario could conceivably arise where the Customer fails to pay all associated costs, which could, in turn, prompt RMP to seek recovery from the rest of its customers. Of course, nothing in the Act or other applicable law requires RMP to make such a showing. The record shows RMP negotiated contract terms that mitigate risk to RMP and its other customers as much as is reasonably possible and include adequate credit provisions to protect them.

Finally, we conclude, as the Act and PSC Rule make patently clear, that our approval of these waivers creates no presumption RMP has acted prudently in

procuring the Resource. RMP may not recover any costs associated with the Resource from ratepayers other than the single Customer taking service under Schedule 34 unless RMP establishes in a separate and appropriate proceeding that it acted prudently in acquiring the Resource.

4. Order

The Application is approved, and RMP's underlying request for waivers of the Solicitation Requirement and Approval Requirement are granted.

DATED at Salt Lake City, Utah, March 23, 2023.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

Attest:

/s/ Gary L. Widerburg
PSC Secretary
DW#327381

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a request for review or rehearing with the PSC within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the PSC fails to grant a request for review or rehearing within 30 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the PSC's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on March 23, 2023, a true and correct copy of the foregoing was delivered upon the following as indicated below:

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