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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of PacifiCorp for Approval of a 2009 Request for Proposals for Flexible Resource	) DOCKET NO. 05-035-47)) UTAH COMMITTEE OF CONSUMER) SERVICES' RESPONSE TO MOTION) TO AMEND 2012 REQUEST FOR) PROPOSALS

The Utah Committee of Consumer Services responds to PacifiCorp's Motion to Amend the 2012 Request for Proposals and Request for Expedited Treatment with its request that the Motion be denied. In addition, the Committee requests that the Utah Public Service Commission consider whether under Part 2 of the Energy Resource Procurement Act (Act), the 2012 RFP remains in compliance with the solicitation process, or if it is not now in the public interest under Utah Code §54-17-201(2)(c)(ii). The Committee also requests that the Commission consider, also under Part 2, whether the 2012 RFP must be amended to comply with the Act. And, if the Commission amends the 2012 RFP, the Committee requests that in connection with an application to approve a

resource decision, the Commission conduct a proceeding to determine whether costs arising from or related to the amendment and responsive bids are eligible for pre-approved cost recovery under Part 3 of the Act.

I. BEFORE CONSIDERING ITS AMENDMENT THE UTAH INDEPENDENT EVALUATOR AND THE COMMISSION MUST FIRST EVALUATE RESULTS FROM THE 2012 RFP AS REQUIRED BY THE ACT.

PacifiCorp's motion is grounded upon the utility's contention that the competitive nature of its 2012 RFP is at risk and must be amended. The utility contends that amending the RFP is necessary to "yield a more robust pool of bidders" and "provide a more robust selection of available resources". *Motion at ¶4 and ¶8.* The Motion implies that absent modifying the commercial credit terms, bid schedule, and adding two additional benchmarks,[1] the 2012 RFP will likely not result in the acquisition of low risk, reliable electricity at the lowest reasonable cost. The Motion further implies that the fairness and reasonableness, and competitive quality of the 2012 RFP required by the Act, is in jeopardy without the amendments. The Committee contends that the Motion may be construed as PacifiCorp's acknowledgment that the 2012 RFP as issued and the bids that resulted from it, do not now comply with the Act.

Of particular concern to the Committee, representing as it does residential and small commercial ratepayer interests, is the fact that PacifiCorp wishes to again extend the RFP process, which began in June 2005, and thereby compress the time within which

[1] Benchmarks are energy resources that PacifiCorp may construct or own and, in the event the Motion is granted, against which refreshed bids and new bids may be evaluated. Utah Code §54-17-102(2).

resources must be commercially available. The Committee is concerned that amending the RFP as the utility requests will unacceptably compress the time within which a bidder who has already submitted a bid, and particularly a bidder who did not respond to the original 2012 RFP, must develop and propose an energy resource that will be evaluated against the new benchmarks. The utility's Motion may lead inevitably to the utility selecting itself and justifying a self-build project by time constraints of its own making. As argued by the Utah Association of Energy Users, "[p]redictably, RMP proposes to add second units at Currant Creek and Lakeside as new 2012 benchmarks. UAE has repeatedly warned that RMP's process and timing will inevitably lead to its proposal to construct these second units, accompanied as always by dire predications *[sic]* of unacceptable reliability risks unless these plants are approved." *UAE's Response, page 6.*

The Committee is convinced that to address these concerns, the Independent Evaluator's and the Commission's deliberate and thorough analysis of the results from the RFP as issued should precede any amendment to the 2012 RFP.[2] If amending the RFP is justified, then the same deliberate and thorough analysis must be applied to craft amendments that will bring the RFP into compliance with the Act. These amendments may be quite different from the ones proposed in the Motion.[3]

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[2] Utah Code §54-17-203(3)(b) requires on-going scrutiny of the solicitation process and its results.

[3] The Committee is not resigned to the inevitability of PacifiCorp simply starting over if the Motion is denied, placing ratepayers at even greater risk from a delayed, unreliable and unreasonably expensive resource acquisition. The Committee believes that any additional cost or risk that is determined to flow from amendments to the RFP should be borne by the utility. Conditional approval of the resource decision permitted by Utah Code 54-17-302(5) and (6), or possibly the application of Part 5 to the Act, will place the risk where it should be.

The Independent Evaluator and the Commission must determine if the 2012 RFP, even if amended, can accomplish its purpose as defined by the Act. PacifiCorp tacitly acknowledges that the 2012 RFP did not produce a "robust pool of bidders" or a "robust selection of available resources." The utility cautiously describes an amended RFP as a bidding process that "will hopefully further the likelihood" of meeting the statutory standard. Not only must the Independent Evaluator and the Commission revisit the issued RFP, but the underlying methods and design relied upon to determine what bidders are asked to provide, must be thoroughly scrutinized. PacifiCorp should be required to address how amending the 2012 RFP will resolve concerns about rigid in-service dates, inflexible resource configurations, and unworkable evaluation procedures.[4]

A section of Merrimack Energy's October 13, 2006 Independent Evaluator Responsive Comments entitled *Comparability of Bids and Benchmarks: Cost of Service Principles and the Form Agreements*, may have anticipated that parts of the 2012 RFP as issued would prove to be not in compliance with the Act. For example, disagreement over the actual impact upon potential bidders from the utility's credit requirements lasted throughout the solicitation approval process. PacifiCorp's demonstrated knowledge about flaws in its 2012 RFP is sufficient reason at the very least, to afford the parties, the Independent Evaluator and the Commission an opportunity to examine in depth the 2012

[4] In November 2006, the Committee contended that the confusing and unexplained last minute changes to the proposed RFP warranted careful oversight as the solicitation process took place.

RFP process and results and whether it remains compliant with the Act and in the public interest.

II. ANY AMENDMENT TO THE 2012 RFP MUST COMPLY WITH THE ENERGY RESOURCE PROCUREMENT ACT PART 2.

The Procedural History in the Commission's December 21, 2006 "PacifiCorp RFP 2012 Suggested Modifications" documents that since the original application was filed on June 27, 2005, this process has been regularly suspended or extended for modifications to the RFP. PacifiCorp now insists that the integrity of the process is dependent upon approving material modifications to the RFP that the utility expects the parties to fully evaluate and address in 23 days (October 17th filing of supporting memorandum to November 9th filing of comments). In fact, providing a reasonable time and opportunity to scrutinize, analyze and monitor the solicitation, screening, evaluation and selection process is necessary to compliance with the Act. Such procedures are necessary to preserve ratepayer protections provided by traditional ratemaking when the utility's actual commercial practices and the completed construction or transaction can be reviewed.

Now that the RFP has closed and the bids evaluated, the Commission must not allow itself to be pressured by claims that the timeliness and viability of the utility's resource acquisition is dependent upon granting the motion to amend. Commission orders pertaining to amending the 2012 RFP, as with any application under the Act, must be supported by substantial evidence. *See Utah Department of Business Regulation v.*

Public Service Commission, 614 P.2d 1242, 1250 (Utah 1980). The Act requires PacifiCorp to provide the economic and other information from which the Independent Evaluator and the Commission may precisely analyze and determine if the 2012 RFP as issued or as amended, serves the public interest. [5] *Utah Code 54-17-201(2)(c)(ii)*; *see Utah Code §54-3-22 and Utah Department of Business Regulation v. Public Service Commission*, 614 P.2d at 1247.

III. IF THE 2012 RFP IS TO BE AMENDED, PACIFICORP MUST DEVELOP FILE AND INFORM ALL PARTIES ABOUT A RANGE OF MODIFIED BENCHMARKS, COMMERCIAL TERMS AND SCHEDULES SUFFICIENT TO COMPLY WITH THE ACT.

Before amending the 2012 RFP, the Commission must be convinced that such amendment at this stage in the proceeding will reliably restore competition to the RFP. The Commission must also, the Committee believes, determine that amending the RFP will not further distance the RFP from statutory compliance. The Commission must be satisfied that the significant change in circumstances undermines the competitiveness and fairness of the 2012 RFP as issued, that the significant changes are not of the utility's own doing or to which it has not contributed, and that the only remedy is to reject the results from the 2012 RFP as not compliant with the Act.

If the Commission makes such a finding, then Part 2 of the Act requires PacifiCorp to file such additional information from which the Commission can approve

[5] Particular attention must be paid to Part VI and Part VII of PacifiCorp's Confidential Memorandum in Support of the Motion to Amend, filed with the Commission on October 16th or 17th 2007. Any amendment to the 2012 RFP must be proven to cure process and bidding inadequacies, assure a competitive process and offer bidders a fair opportunity to meet the proposed timeline and schedule.

the proposed solicitation process, suggest modifications, or reject the proposal. *Utah Code §54-17-202(2)(f).* PacifiCorp must file information that demonstrates that the utility has considered all of the elements of a reasonable and prudent solicitation that complies with the Act, in particular Utah Code §54-17-202, the administrative rules in R746-420 and 430, and integrated resource plans and updates.

IV. IF THE 2012 RFP IS AMENDED, THE COMMISSION SHOULD CONSIDER WHETHER THE ACQUIRED RESOURCE IS ELIGIBLE FOR PRE-APPROVED COST RECOVERY.

The Act provides in §54-17-303 that an approved resource decision under Part 3, which results from an approved solicitation that complies with Part 2, shall be included in retail electric rates. One may reasonably conclude from what PacifiCorp has submitted in support of its Motion that the RFP 2012 while approved when issued, has not resulted in a selection of available resources that comply with Part 2 and none are likely to be approved under Part 3. At this point in time, the utility has not demonstrated that its proposed amendments are reasonably likely to correct the inadequacies of the bids and bidding process, restore competition to the process, or make it more likely that the amended RFP will timely meet its resource requirements.

PacifiCorp has known for some time about the "significant change in circumstances" that the utility now claims compels an amendment to the RFP, as if it is being forced upon them. Concerning the development of IPP Unit 3, PacifiCorp has known since October 2004 that Los Angeles Department of Water and Power would not

participate in Unit 3. PacifiCorp knew in March 2007 that LADWP and other California participants in IPP wished to reserve the Unit 3 site for "carbon compliant clean coal projects." See Letter, July 18, 2007, PacifiCorp Energy to Los Angeles Department of Water & Power, attached.[6]

In August 2007, the Utah Division of Public Utilities and the Utah Independent Evaluator filed with the Commission confidential comments and recommendations about the efficacy of the 2012 RFP. The Oregon Independent Evaluators October 29, 2007 comments upon PacifiCorp's motion to amend the 2012 RFP, reference an August 2007 memo addressing the same subject.[7] The Oregon Independent Evaluators note, with emphasis in the original:

> 4. **The bottom line of our comments today is that the Oregon IEs oppose PacifiCorp's proposed amendment and request for delay. Our opposition reflects our view that the proposal is unnecessary, unfair to existing bidders, and potentially harmful to ratepayers in both the near- and long-term.**
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> 5. Attached to these public comments is a document which explains in more detail our reasons for opposing the PacifiCorp proposal. It is marked Non-Public Information Subject to Special Protective Order because it relies on protected materials. We will note, however, that a key part of the confidential attachment is a memo Boston Pacific wrote to PacifiCorp, copying Oregon Staff, Utah Staff, and the Utah IE, on August 15, 2007, soon after PacifiCorp first proposed the idea of amending and delaying the 2012 RFP. In that August 15 memo we stated our opposition and the reasons for our position are mostly, if not entirely, identical to those we present today.

[6] PacifiCorp does not explain how or why its dispute with LADWP and the IPA place IPP Unit 3 at risk or how that risk is ameliorated by requiring bidders to bid against two new benchmarks four months after the bidding closed and bids have been evaluated.

[7] The Committee has not seen the August 15 memo and was not aware of it until November 6, 2007. The Committee does not know who the Utah Staff is that did receive a copy. The full text of the Oregon IE public version comments are attached and can be accessed at http://apps.puc.state.or.us/edockets/docket.asp?DocketID=12698.

It appears that upon receiving bids that responded to the 2012 RFP, PacifiCorp identified material deficiencies in the RFP, the results it produced, or both. At that time, regulatory agencies and independent evaluators apparently examined the RFP and addressed PacifiCorp's request to amend and delay the RFP process. PacifiCorp has not disclosed the facts or circumstances that precipitated the August proceedings, and does not explain what if anything the utility did to cure or mitigate the deficiencies when they were first identified. The Committee first became aware of the DPU's and Utah IE's filings on November 8, 2007. The Committee requests that it be granted leave to supplement its comments and recommendations following a reasonable time within which to evaluate these filings.

Given these circumstances, the Committee believes that any additional cost or risk that is determined to flow from amendments to the RFP should be borne by the utility. The Commission should at the appropriate time, review the non-compliant results from the 2012 RFP as issued, and the resource selections from the amended RFP, in relation to PacifiCorp's prudence under the circumstances that gave rise to the need to amend the RFP. The Committee contends that Utah Code §§54-17-302(5)(b), 303(2) and 303(3) permit such an inquiry. The Committee further contends that these provisions permit the

Commission to allocate to the utility, any additional cost or risk that is attributable to the utility's acts found to be imprudent.

DATED this 9th day of November 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November 2007, I caused to be e-mailed a true and correct copy of the foregoing Response to Motion to Amend 2012 Request for Proposals, to:

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