



825 NE Multnomah, Suite 2000
Portland, Oregon 97232

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Public Utility Commission of Oregon
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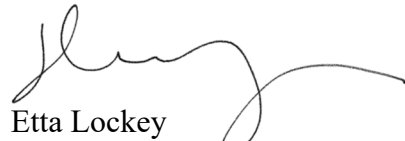
Attn: Filing Center

**RE: UM 1631 – PacifiCorp’s Reply Comments Regarding its Petition for a Partial
Waiver of Oregon Administrative Rule 860-089-0500(2)**

PacifiCorp d/b/a Pacific Power submits for filing its Reply Comments in the above referenced docket.

Informal inquiries may be directed to Cathie Allen, Manager, Regulatory Affairs, at (503) 813-5934.

Sincerely,



Etta Lockey
Vice President, Regulation

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1631

In the Matter of

PUBLIC UTILITY COMMISSION OF
OREGON,

Petition for Partial Waiver of OAR 860-089-
0500(2).

**PACIFICORP’S REPLY COMMENTS
REGARDING ITS PETITION FOR A
PARTIAL WAIVER OF OREGON
ADMINSTRATIVE RULE 860-089-
0500(2)**

Pursuant to the schedule set forth by Staff of the Public Utility Commission of Oregon (Commission), PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) respectfully submits its reply comments to the comments submitted by Longroad Energy Partners, LLC (Longroad), which provides support for the Company’s request, and Northwest & Intermountain Power Producers Coalition (NIPPC), which recommends denial of the Company’s request. The arguments and alternative proposals set forth by NIPPC are without merit and should be rejected. PacifiCorp continues to request the Commission grant a partial waiver of OAR 860-089-0500(2) for its 2020 All-Source Request for proposal (2020AS RFP) as it is in the public interest.

I. LEGAL STANDARD

NIPPC reaches back to Order 14-419 in docket UM 1102 to establish the standard that needs to be met to show good cause for a waiver of OAR 860-089-0500(2).¹ Docket UM 1102² was the Commission’s docket that established competitive bidding guidelines prior to the Commission’s adoption of rules for competitive bidding. Citing Order 14-419, NIPPC claims that in order to receive a waiver of OAR 860-089-0500(2), a utility must show that “the time

¹ NIPPC Comments at 14.

² *In the Matter of Public Utilities Commission of Oregon, Investigating Regarding Competitive Bidding*, Docket No. UM 1182. Order No. 14-149 (Apr. 30, 3014).

required for a shortlist acknowledgement will preclude the ability to successfully complete negotiations with a top bidder, causing harm to ratepayers.”³ However, in docket AR 600, the Commission adopted rules to replace the guidelines established in docket UM 1102.⁴ In Order 18-324, which adopted OAR Division 089, Resource Procurement for Electric Companies, the Commission adopted its generic waiver provision, specifically, OAR 860-089-0010(2), which provides:

Upon request or its own motion, the Commission may waive any of the Division 089 rules for good cause shown. A request for waiver must be made in writing to the Commission prior to or concurrent with the initiation of a resource acquisition.

The Commission does not qualify its generic waiver provision based on Order 14-419 in either OAR 860-089-0010 (Applicability and Purpose of Division 089) or OAR 860-089-0500 (Final Shortlist Acknowledgement and Result Publication).

The Commission’s standard for its generic waiver provision is set forth in Order 11-346 in docket AR 554.⁵ At the time of that docket, prior to the adoption of OAR Division 089, the Commission acknowledged it opened the rulemaking because not all of its rule divisions provided the Commission the general authority to waive rules.⁶ In addition to adding waiver authority to all rule divisions, the Commission proposed to use the same generic waiver provision, specifically:

Upon request or its own motion, the Commission may waive any of the Division [XX] rules for good cause shown, A request for waiver must be in writing, unless otherwise allowed by the Commission.⁷

³ NIPPC Comments at 14, citing Order No. 14-419.

⁴ *In the Matter of Rulemaking Regarding Allowances for Diverse Ownership of Renewable Energy Resources*, Docket No. AR 600, Order No. 18-324 (Aug. 30, 2018).

⁵ *In the Matter of a Rulemaking to Update Waiver Provisions in the Commission’s Administrative Rules*, Docket No. AR 554, Order No. 11-346 (Sept. 8, 2011).

⁶ *Id.* at 1.

⁷ *Id.*

In adopting this generic waiver provision, with respect to the good cause standard, the Commission specifically states,

We expressly clarify that a person seeking waiver of any rule under the generic waiver provision adopted here must establish a sufficient reason for the waiver, and that the Commission will only grant the request if the waiver of the rule is in the public interest.⁸

In Division 089, Resource Procurement for Electric Companies, the Commission chose to include its generic waiver provision without qualification. In interpreting rules, a court's task is to ascertain the intent of the body that promulgated the rule.⁹ To perform this task, a court begins by examining the text and context of the rule in question.¹⁰ With the adoption of its general waiver provision in Division 089, the Commission established a public interest standard for an electric utility to show good cause when requesting a waiver. The clear and unambiguous language of the rule does not support the standard argued by NIPPC.¹¹

Finally, NIPPC appears to imply that because the Company raised concerns around the negotiation of PPAs in dockets UM 1182 and AR 600 and the Commission either rejected or addressed those concerns, its waiver request is somehow improper.¹² However, the very purpose of a waiver is to account for unique circumstances that could not have been predicted at the time the rule was adopted. In Order 11-346, the Commission opened a rulemaking to provide itself the authority to waive the application of any of its rules and "sought to include general waivers

⁸ *Id.* at 4.

⁹ *Marshall's Towing v. Department of State Police*, 339 Or. 54, 62 (2005), citing *SAIF v. Kurcin*, 334 Or. 399, 406, 50 P.3d 1167 (2002).

¹⁰ *Id.*

¹¹ *Furs v. Motor Vehicles Division*, 47 Or. App. 447,453, 615 P.2d 331 (1980), citing *Schoen v. University of Oregon*, 21, Or. App. 494, 500, 535 P.2d 1378 (1975); "An unambiguous regulation, like an unambiguous statute, should not be interpreted but should be enforced according to its clear language."

¹² NIPPC Comments at 16.

in all of [its] rule divisions ‘to more effectively regulate utilities under conditions of rapidly changing environments and technologies and under extenuating circumstances.’”¹³

II. PACIFICORP HAS SHOWN GOOD CAUSE TO GRANT THE REQUESTED WAIVER

PacifiCorp requested a partial waiver of OAR 860-89-0500(2) for its 2020AS RFP based on the unique circumstances the Company finds itself in this RFP cycle. Because the Company is engaging in its first interconnection cluster study, with respect to the 2020AS RFP, it finds itself in a holding pattern until the study is completed and it can prepare and submit its request for Commission acknowledgment of its final shortlist. First, the negotiation process for purchase power agreements (PPAs) for these resources is time-intensive as noted by Longroad.¹⁴ The Company believes that allowing it to start preliminary negotiations with developers on the initial shortlist would be an efficient use of time and alleviates the pressure on the backend for the final shortlist bidders as PPAs can be expediently finalized following Commission acknowledgment and bidders can turn their attention to getting their projects built. Second, the 2020AS RFP is expected to result in significantly more bidders and projects on the final shortlist than in previous RFPs completed by the Company. This is demonstrated by the size of the initial shortlist that includes twenty-one bidders with 37 projects, many of which have multiple bid alternatives to consider. Most of the Company’s previous RFPs resulted in the negotiation of a single agreement. Third, this RFP includes a new resource type, battery storage combined with a solar resource. This alone will require additional negotiation time as bidders and the Company work through new and unique contract terms and conditions applicable to the inclusion of battery

¹³ Order 11-346 at 4.

¹⁴ Longroad Comments at 1, “The PPAs associated with the RFP are comprehensive commercial documents and will require substantive discussion and negotiation. The process takes a significant amount of time and coordination with internal and external teams both for the utility and the developer.”

storage operation in the agreement. NIPPC’s argument that the Company has not shown good cause is without merit and should be rejected.

NIPPC claims that the Company has not shown good cause because it has not demonstrated that the “time required for a shortlist acknowledgement will preclude the ability to successfully complete negotiations with a top bidder, causing harm to ratepayers.”¹⁵ As noted above this is not the proper standard as PacifiCorp must demonstrate that it is within public interest for the waiver to be granted. The Company has met this standard. As explained in its petition and in these reply comments, the granting of the waiver will shorten final contract negotiations with bidders selected to the final short list and allow those successful bidders to move forward with the development and construction sooner instead of waiting several additional months to conclude negotiations. Promptly executing contracts following the Commission’s acknowledgement of the final shortlist is in the public interest as it brings these projects online sooner to the benefit of customers.

In previous RFPs, the Company held confirmation calls with bidders on bid detail and contract issues and redlines after bids were received but before an initial short list was developed. In those discussions, details of the bids were confirmed, and contract comments discussed. In the 2020AS RFP, due to the large volume of bids and bid alternatives submitted, there was insufficient time to coordinate calls with bidders and Independent Evaluators to work through those items. While conducting such calls now to seek detail and clarifications would not rise to the level of negotiations, such calls could be perceived as “negotiations” and any allegation of the Company violating the Commission’s rules is not an acceptable risk. For this reason, a waiver allowing PacifiCorp to engage in preliminary negotiations that includes in part

¹⁵ NIPPC Comments at 14.

clarifying a bidder's contract issues list, pro-forma redline comments, and proposed change requirements could assist PacifiCorp and the bidder in determining any significant obstacles to address for an executable final contract. Common issues lists provided by the initial shortlist bidders indicate that there will need to be clarifying conversations and later negotiations with respect to certain, common key items (credit terms and development security, liquidated damages related to commercial operations date, definitions of force majeure and compensable curtailment, indemnifications, etc.). If the waiver is denied, once a final shortlist is selected and submitted to the Commission, contract negotiations will start from scratch with not even a joint call with the bidder as afforded in previous RFPs rather than starting from a common understanding of terms and conditions in the pro-forma. PacifiCorp also will have contractual language and operating procedures that are new to PacifiCorp and the electric industry overall given the advent of battery storage and the significant amount of battery storage selected to the initial shortlist. Granting of the requested waiver offers the opportunity and more time to pursue with bidders a common understanding regarding operating parameters and expected performance metrics that will yield a more effective overall contract for bidders, PacifiCorp and its customers.

NIPPC dedicates much of its comments to the history leading to the adoption of OAR Division 089, including that the rules were designed to prevent bias toward the selection of bids that would result in ownership.¹⁶ The implication is that allowing PacifiCorp to begin negotiations introduces bias into the selection of the final shortlist. However, this argument falls short. In the 2020AS RFP, the initial shortlist make-up only includes one bidder proposing two assets totaling 522 MW as build-transfer compared to 21 bidders and 34 assets totaling 4,163 MW that are PPAs and/or PPAs with battery storage.

¹⁶ NIPPC Comments at 4-13.

Furthermore, contract terms are not a consideration in the selection of the final shortlist; the non-price scoring is set, and the final shortlist is developed with the IRP production cost models which does not take into account any contract terms and conditions. Non-price scoring of bids was completed as part of the scoring and evaluation prior to the initial shortlist and will not be modified for the final shortlist. Like the initial shortlist, the final shortlist evaluation will be based on the IRP production cost modeling with no “non-price” scoring adjustment allowed. PacifiCorp is currently conducting an internal review of all contract issues lists and comments and redlines in the pro forma documents provided by bidders in order to understand common issues across documents. Early discussions/negotiations would allow PacifiCorp and the bidder to clarify and agree on a majority of the final contract terms and conditions yet allow for final modifications if the Commission’s acknowledgment included any additional contract conditions. As noted above, in the 2020AS RFP, due to the large number of bids and bid alternatives submitted, there was insufficient time to conduct preliminary calls with bidders and IEs prior to the selection of the initial shortlist.

Finally, if the Commission determines that in order to grant a waiver the Company must demonstrate that the “time required for a shortlist acknowledgement will preclude the ability to successfully complete negotiations with a top bidder, causing harm to ratepayers,” it is still appropriate to grant the Company’s request. As discussed further below, while the Company will attempt to compress timelines if the waiver is not granted, there is harm caused to customers if negotiations must wait until the Company requests acknowledgement to enter into negotiations with bidders. Negotiations with all bidders would need to be completed by no later than November/December 2021. At which point bidders would then need to finalize LGIAs with PacifiCorp Transmission and then proceed with the development, construction financing, and

construction activities for their projects. Failure to finalize the PPAs in sufficient time would ultimately adversely impact a bidder's ability to achieve the projects commercial operation dates (COD). Not timely bringing these projects online is harmful to customers as resources will not be available to provide electricity to deliver to customers.

III. PROPOSED ALTERNATIVES TO THE REQUESTED WAIVER ARE UNWORKABLE

NIPPC presents alternatives that are not workable solutions. The first alternative is to shorten the current schedule and have the Commission issue its acknowledgement order earlier.¹⁷ This alternative relies on an improper reading of OAR 860-89-0500(1) and (2), which provide:

(1) For the purposes of this section, “acknowledgement” is a finding by the Commission that an electric company’s final shortlist of bid responses appears reasonable at the time of acknowledgement and was determined in a manner consistent with the rules in this division.

(2) An electric company must request that the Commission acknowledge the electric company’s final shortlist of bids before it may begin negotiations. Acknowledgement of a shortlist has the same legal force and effect as a Commission-acknowledged [Integrated Resource Plan (IRP)] in any future cost recovery proceeding.

While NIPPC correctly states that “[t]he rules specifically require the electric company to request that the Commission acknowledge the electric company’s final shortlist of bids *before* it may begin negotiations,”¹⁸ NIPPC goes on to assert that electric utilities must wait to engage in negotiations “*only after* the Commission has determined that the list is reasonable and the process was fair.” NIPPC’s interpretation of OAR 860-89-0500(2) is contrary to its clear meaning.¹⁹ OAR 860-89-0500(2) requires that an electric utility *request* the Commission acknowledge the electric company’s final shortlist before it may begin negotiations. The

¹⁷ NIPPC Comments at 3.

¹⁸ NIPPC Comments at 13. (emphasis in the original)

¹⁹ *Furs*, 47 Or. App. 447,453, 615 P.2d 331 (1980).

Merriam-Webster Dictionary defines “request” as the “act or an instance of asking for something” or “something being asked for.”²⁰ NIPPC’s interpretation of the rule ignores the word “request” and reads into OAR 860-89-0500(2) that an electric utility must wait for Commission acknowledgment prior to engaging in negotiations, which is contrary to the plain meaning of the rule’s language. NIPPC’s interpretation unnecessarily restrains negotiations between an electric company and the developers on the final shortlist. If NIPPC’s interpretation is accurate, which it is not, it only serves as further support to grant the Company’s waiver request as negotiations could not even begin until June 2021.

The second alternative NIPPC presents is to extend the dates at the back end of the 2020AS RFP to allow additional time for negotiations, to the extent such time would still align with taking advantage of federal tax incentives and similar external constraints.²¹ Recent Federal tax law changes, specific to the Investment Tax Credit and Production Tax Credit, will have no impact to the 2020AS RFP process or schedule or create an event that would permit a change in a bidder’s offered commercial operations date in its original bid submittal. However, bidders reliant on PacifiCorp Transmission’s Gateway South project for interconnection service will be permitted to move their commercial operations dates from 2023 to 2024 due to the shift in Gateway South completion date. If the Company’s requested waiver is not granted, PacifiCorp will not recommend modification to the current 2020AS RFP schedule in order to be consistent with all the bidders who participated in the RFP process. Deciding to add time on the backend of the 2020AS RFP process because of a change in tax law would only benefit those who have successfully made it on to the initial shortlist but would not be available to those bidders who did not make the initial shortlist but might have, had the tax law changes been known prior to the

²⁰ <https://www.merriam-webster.com/dictionary/request>.

²¹ NIPPC Comments at 3.

initial shortlist. Activities within certain defined timeframes will be adjusted and likely compressed. The annual cluster study process will now set the timing for all future RFP procurement and preclude the ability to catch up and take advantage of lost tax credits if the 2020AS RFP procurement is not realized on its current schedule.

IV. CONCLUSION

Based on the foregoing, PacifiCorp respectfully requests that the Commission grant PacifiCorp a partial waiver of OAR 860-089-500(2) to allow it to begin PPA negotiations with bidders prior to its request for acknowledgement of the final shortlist of bidders for its 2020AS RFP. Good cause exists to grant the Company's request as it is in the public interest. Granting the partial waiver will result in a more expedient and efficient process and will not prejudice the competitive solicitation process.

Respectfully submitted this 28th day of January, 2021, on behalf of PacifiCorp.



Carla Scarsella
OR Bar #193139
PacifiCorp
825 NE Multnomah Avenue, Suite 2000
Portland, OR 97232
carla.scarsella@pacificorp.com

Counsel for PacifiCorp d/b/a/ Pacific Power