

**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).

Renewable Northwest’s
Comments on PacifiCorp’s
Petition for Partial Waiver

February 22, 2021

**Renewable Northwest’s Comments on PacifiCorp’s
Petition for Partial Waiver of OAR 860-089-0500(2)**

Renewable Northwest respectfully submits these comments regarding PacifiCorp’s December 9, 2020 Petition for Partial Waiver of OAR 860-089-0500(2) (“Petition”). With apologies to the Oregon Public Utility Commission (“OPUC” or “Commission”) for submitting these comments significantly later than the opportunity for comment reflected in Staff’s schedule, Renewable Northwest agrees with PacifiCorp that good cause exists for the partial waiver the company has requested and accordingly joins PacifiCorp in requesting that the Commission grant the Petition.

The Commission May Grant PacifiCorp’s Requested Waiver for Good Cause

PacifiCorp has requested a partial waiver of the requirement in OAR 860-089-0500(2) that “[a]n electric company must request that the Commission acknowledge the electric company’s final shortlist of bids before it may begin negotiations.” Specifically, the company seeks permission “to begin PPA negotiations with bidders prior to its request for acknowledgement of the final shortlist of bidders for its 2020AS RFP.”¹ Under OAR 860-089-0010(2), the Commission has discretion to grant the requested waiver “for good cause shown.”

One issue remains to be addressed. Staff’s February 11, 2021 memo notes: “OAR 860-089-0010(2) states that an application for a waiver must be filed concurrent with the initiation of a

¹ Petition at 4. The referenced “2020AS RFP” is PacifiCorp’s 2020 All-Source RFP seeking “up to 4,400 megawatts (MW) of new generating resources and 600 MW of energy storage resources targeting a commercial operation date on or before December 31, 2024.” See PacifiCorp’s Application To Open Independent Evaluator Selection Docket at 1, Docket No. UM 2059 (Feb. 24, 2020) (“Application”).

resource acquisition.” While OAR 860-089-0010 does provide that “[a] request for waiver must be made in writing to the Commission prior to or concurrent with the initiation of a resource acquisition,” the rule language is nevertheless ambiguous on timing given that a subsection of OAR 860-089-0010(2) specifically contemplates that the Commission may grant a waiver request filed *after* resource acquisition.² Moreover, in the context of a similar rule providing that a regulated entity “must” take action by a certain time, the Oregon Supreme Court has held that the regulating agency may nevertheless accept an untimely filing.³ Finally, OAR 860-089-0010(2) also allows the Commission to grant a waiver on “its own motion.” Together, these rule and administrative-law provisions suggest that the Commission is well within its authority to grant PacifiCorp’s request on a finding of good cause.

Good Cause Exists for the Commission To Grant the Requested Waiver

Several unique circumstances of PacifiCorp’s 2020 All-Source RFP establish good cause for the waiver requested by the company.

First, both PacifiCorp and Renewable Northwest have highlighted throughout the development of this RFP the importance of maintaining a tight timeline to capture the benefits of expiring federal tax credits for PacifiCorp’s customers. Renewable Northwest noted in comments on PacifiCorp’s 2019 Integrated Resource Plan that “a delay in any one process is likely to delay the procurement writ large[, a]nd it is already possible that the back end of the proposed schedule ... may be too far in the future to allow PacifiCorp to leverage the full benefit of retiring federal tax credits for customers.”⁴ PacifiCorp noted in its initial application that its “proposed schedule is condensed and rigorous in order to accommodate the significant reduction in the federal investment tax credit (ITC) at the end of 2023 and the expiration of federal production tax credits (PTCs) at the end of 2024.”⁵ We reiterated the importance of maintaining a “faster-than-usual pace” in light of back-end timing constraints in comments in the RFP docket.⁶ Indeed, we appreciated the Commission’s acknowledgments in Order No. 20-114 that the unique timing constraints of this RFP justified an earlier waiver of the competitive bidding rules and in Order No. 20-228 that the sunseting solar Investment Tax Credit (“ITC”) factors into the RFP’s timing

² OAR 860-089-0010(2)(b) (“If a request for waiver is filed by an electric company after it acquires a resource, granting, if any, of the waiver request does not result in or equate to the Commission’s acknowledgment of the resource acquisition.”).

³ See *ONRC Action v. Columbia Plywood, Inc.*, 332 Or. 216, 26 P.3d 142 (2001) (holding that “DEQ has the legal authority to accept and process permit renewal applications that do not meet the 180-day filing requirement in OAR 340-045-0030(1)(1989)”).

⁴ Final Comments of Renewable Northwest at 5-6, Docket No. LC 70 (Mar. 4, 2020).

⁵ Application at 2.

⁶ Renewable Northwest’s Comments on Staff Report at 5, Docket No. UM 2059 (Jun. 26, 2020) (“We appreciate PacifiCorp’s and the Commission’s efforts to keep the IRP and RFP process moving at a faster-than-usual pace to avoid potential back-end pressures that we highlighted in our IRP comments.”).

constraints.⁷ Allowing negotiations to begin early would help avoid back-end time constraints in a manner consistent with other Commission decisions in this docket.

Second, the pending expiration of federal tax credits creates pressure on bidders that could be alleviated by an earlier negotiating opportunity. The same time constraints noted in the previous paragraph with respect to customer benefits from expiring federal tax credits apply to the bidders who must execute contracts in time to build projects that retain tax credit eligibility. Earlier negotiation may allow for stronger contracts.

Third, the scale of this procurement is significantly greater than usual, and this unique scale means there will likely be a need for many distinct negotiations to occur concurrently. The combination of a high number of shortlisted bids and the prospect of ultimately procuring up to 4,400 MW of generating resources plus 600 MW of storage weighs in favor of an earlier opportunity to begin negotiations. Renewable Northwest again agrees with PacifiCorp that this circumstance constitutes good cause for a waiver.⁸

Fourth, we again agree with PacifiCorp that the inclusion of a significant amount of solar-plus-storage on the company's initial shortlist may "require additional negotiation time as bidders and the Company work through new and unique contract terms and conditions applicable to the inclusion of battery storage operation in the agreement."⁹ This resource offers unique value to the company as it looks to replace retiring coal capacity with new, cost-effective, non-emitting capacity. The requested waiver would allow additional time for the development of fair and functional contracts that align with the timing necessary to secure ITC eligibility for an important new resource.

Fifth, the concerns and policy direction that underlay the Commission's 2018 Division 089 rulemaking, cited by the Northwest & Intermountain Power Producers Coalition ("NIPPC") in its opposition to PacifiCorp's requested waiver, are important considerations but ones that largely do not apply to this RFP. Specifically, while we agree with NIPPC that the Division 089 rules were founded in significant part on a concern about the potential for a bias in favor of utility ownership, in this RFP PacifiCorp has no benchmark bids¹⁰ and only 18% of the compliant bids were for build-transfer projects.¹¹

⁷ See Order No. 20-114 at Appx. A p. 11; Order No. 20-228 at 2.

⁸ See PacifiCorp's Reply Comments Regarding its Petition for a Partial Waiver of Oregon Administrative Rule 860-089-0500(2) at 4, Docket No. UM 1631 (Jan. 28, 2021) ("Reply Comments").

⁹ Reply Comments at 4-5.

¹⁰ Application at 5.

¹¹ Independent Evaluator's Updated Status Report on PacifiCorp's 2020AS RFP at Fig. 2-1, Docket No. UM 2059 (Nov. 20, 2020).

We note that our support for this waiver request is support only for this waiver request -- it is highly likely that future procurements will not bring together the unique set of circumstances present here, with a very large procurement that includes new resource types against a tight deadline for federal tax credits in a solicitation with no utility benchmark bids. In this specific case, however, we agree with PacifiCorp that there is good cause for a waiver. As PacifiCorp observed in its Petition, allowing negotiations to take place in advance of a request to acknowledge the company's final shortlist "may reduce months of negotiation time off the backend of the RFP process for those bidders included in the final shortlist ... allowing bidders to move forward on development and financing, bringing these projects online sooner to the benefit of PacifiCorp customers."¹² While this identified benefit may not be unique to the 2020 All-Source RFP -- unlike those identified above -- we respectfully request that the Commission find that, taken as a whole, the circumstances identified in our comments above constitute good cause for the Commission to grant PacifiCorp's requested partial waiver of OAR 860-089-0500(2).

Respectfully submitted this 22nd day of February, 2021,

/s/ Max Greene
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¹² Petition at 4.