

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1845

In the Matter of

Comments of Renewable Northwest

PACIFICORP, dba PACIFIC POWER

Request for Proposals of an Independent
Evaluator to Oversee the Request for
Proposal Process

I. INTRODUCTION

Renewable Northwest thanks the Oregon Public Utility Commission (“Commission”) for the opportunity to comment on the final draft 2017R Request for Proposals (“RFP”) that PacifiCorp, dba Pacific Power (“PacifiCorp” or “the Company”) submitted on August 4, 2017.¹ These comments also take into account The Independent Evaluator’s Assessment of PacifiCorp’s Final Draft 2017R Request for Proposals that Baites White, LLC (“the Independent Evaluator” or “the IE”) presented to the Commission on August 10, 2017.² We commend the IE for the thorough and thoughtful review of the draft RFP, particularly in light of the compressed timeframe.

The RFP is based on action items identified in the Company’s 2017 Integrated Resource Plan (“IRP”), scheduled to be considered for acknowledgment on December 5, 2017. PacifiCorp’s proposed schedule contemplates Commission review of the Final Shortlist after the Commission’s decision on IRP acknowledgement.³ As discussed in these Comments, we encourage the Commission to approve PacifiCorp’s RFP with certain modifications.

In the introduction to the RFP, PacifiCorp states:

As stated in its 2017 Integrated Resource Plan (IRP), PacifiCorp has identified plans to add at least 1,100 megawatts (MW) of new wind resources that will

¹ PacifiCorp’s Final Draft 2017R Request for Proposal (Aug. 4, 2017) [hereinafter PacifiCorp 2017R RFP].

² The Independent Evaluator’s Assessment of PacifiCorp’s Final Draft 2017R Request for Proposals (Aug. 10, 2017) [hereinafter IE Assessment of Draft RFP].

³ IE Assessment of Draft RFP at 3

qualify for fullfederal production tax credits (PTC) and achieve commercial operation by December 31, 2020, in conjunction with implementation of certain Wyoming transmission infrastructure projects within that same timeframe.^[4]

As Renewable Northwest discussed in our opening comments on PacifiCorp's 2017 IRP, we are supportive of the Company taking prompt action in moving forward with an RFP in order to pursue the above-referenced time-limited opportunity.⁵ While propose certain revisions to the RFP, we recommend that any revisions to the RFP be incorporated without delaying issuance of the RFP.

In these comments, we encourage the Commission to direct PacifiCorp to modify the RFP in order to (1) revise the system impact study requirement, and (2) eliminate or significantly modify the minimum requirement that would disqualify bidders based on litigation against the Company.

II. THE COMPANY SHOULD MODIFY THE SYSTEM IMPACT STUDY REQUIREMENT

The RFP requirement that bidders to submit a completed system impact study ("SIS") before November 11, 2017 in order to be considered for shortlist evaluation is unreasonable. Although not required for initial bidding eligibility, "PacifiCorp will ultimately require a completed interconnection system impact study [...] to be factored in when PacifiCorp develops the shortlist." Meanwhile, the indicative schedule for the RFP requires bids by October 13, 2017, with the initial shortlist evaluation/scoring due November 11, 2017.⁶

In considering the reasonableness of the current RFP deadline for a SIS, it is important to remember that this RFP is requesting bids for wind projects to interconnect with a transmission line that: (1) is not yet part of an acknowledged IRP; and (2) if acknowledged and authorized, will not be built for at least three years (assuming no delays).

The Company did not make stakeholders aware that it was considering such a transmission project, and the associated Wyoming wind that it would engender, until early March 2017.⁷ Specifically, at the March 2-3, 2017 IRP stakeholder meeting, the Company initially indicated that it would be exploring "a time limited opportunity to align development of Energy Gateway sub-segment D2 with wind projects that can qualify for the full value of the [production tax

⁴ PacifiCorp 2017R RFP at 1.

⁵ Re PacifiCorp, dba Pacific Power, 2017 Integrated Resource Plan, Docket No. LC 67, Comments of Renewable Northwest at 4-5 (Jun. 23, 2017) [hereinafter LC 67 RNW Opening Comments].

⁶ PacifiCorp, 2017R Request for Proposals, Indicative Schedule (updated as of August 4, 2017), available at <http://www.pacificorp.com/sup/rfps/2017-rfp.html>.

⁷ LC 67 RNW Opening Comments at 3.

credits].”⁸ It was only in PacifiCorp’s actual IRP filing, submitted April 4, 2017, that the Company explicitly indicated its intention to propose pursuing additional wind generation facilitated by a transmission expansion.⁹ The March 2017 meeting was the first public announcement that could have alerted potential bidders to the Company’s plans to build a transmission line that potential projects would have to interconnect into. Though the Company’s justification for giving such relatively short notice appears reasonable, the SIS requirement is unreasonable in light of the short notice. Given the timing of the notice, bidders should not be required to submit a completed SIS before November 11, 2017 in order to be considered for shortlist evaluation.

While some bidders may be able to complete a SIS within the accelerated timeframe, other bidders may not be in a position to do so due to the short notice. As a result, this unreasonable criterion could impact competition in this solicitation as well as unduly potential benchmark self-build proposals.

The Company’s SIS requirement appears to be attempting to address two legitimate concerns: the viability of a bidder’s project and the potential need for transmission cost estimates for bid evaluation purposes. Renewable Northwest therefore recommends that the following requirements be considered as potential alternatives to a completed SIS: (1) the bidder must have submitted a request for a SIS, and, in lieu of a completed study, must provide an additional security deposit; (2) in addition to the SIS request, the bidder must provide a demonstration of site control and/or an additional security deposit; or (3) the SIS must be completed by a date reasonable to the development community.¹⁰ Under any of these alternatives, a developer could provide PacifiCorp a third-party assessment of estimated transmission costs (prepared by a consultant from a list of acceptable consultants) should information on transmission costs be needed for evaluation of bids before the SIS can be reasonably completed.

Furthermore, Renewable Northwest agrees with the IE’s recommendation that ratepayers and bidders be held harmless for any cost impacts resulting from PacifiCorp missing the Commercial

⁸ PacifiCorp, 2017 IRP, Public Input Meeting 8, March 2–3, 2017, slide 43, available at www.pacificorp.com/content/dam/pacificorp/doc/Energy_Sources/Integrated_Resource_Plan/2017_IRP/PacifiCorp_2017_IRP_PIM08_03T01T17_Final_Presentation.pdf.

⁹ Re PacifiCorp, dba Pacific Power, 2017 Integrated Resource Plan, Docket No. LC 67, 2017 Integrated Resource Plan at 2-3 (Apr. 4, 2017).

¹⁰ For example, in the Utah Public Service Commission’s proceeding for review of this RFP, the Interwest Energy Alliance suggested January 5, 2018 as a deadline for completion of the SIS that would both give developers a reasonable opportunity to submit an interconnection request and account for the processing time of the request under OATT guidelines. A SIS could only be completed by January 5, 2018 if a bidder waives the feasibility study and if the transmission operator meets the deadline required by the OATT. As a result, adoption of this deadline in the RFP should be accompanied by language to the effect that a bid would be considered conforming and be scored by PacifiCorp in case any delays are caused by the transmission operator’s failure to meet the OATT deadline. Initial Comments of the Interwest Energy Alliance before the Public Service Commission of Utah, Docket No. 17-035-23 at 3 (Aug. 4, 2017) available at <https://pscdocs.utah.gov/electric/17docs/1703523/295767InitialCommInterwestEnerAllian8-4-2017.pdf>

Operations Date (“COD”) of the Gateway Segment D2 Project.¹¹ Wind resources must come online by December 31, 2020, in order to be eligible for the full PTC.¹² However, PacifiCorp has indicated that it is seeking resources capable of:

(1) directly interconnecting with PacifiCorp’s Wyoming system inclusive of the proposed Gateway Segment D2 Aeolus to Bridger Anticline substation and transmission system; or (2) interconnecting with a third-party system and using third-party firm transmission service to deliver to PacifiCorp’s Wyoming system.^[13]

Given the extent to which bidders are likely to rely upon the yet unacknowledged and unconstructed Gateway Segment D2 project, bidders and ultimately ratepayers should be held harmless should the transmission completion “slip beyond the date by which winning projects must come online to recover the PTC.”¹⁴ Renewable Northwest also agrees with the IE that “[b]idders should not be penalized if PacifiCorp fails to construct the Gateway Segment D2 Transmission Project.”¹⁵ Should Gateway Segment D2 not be approved, or fail to be constructed in time or at all, a bidder could be found in default of their contract through no fault of their own. As the IE suggests, we recommend that the RFP “should make clear that the contracts may be terminated without penalty if the Gateway Segment D2 Project fails to be constructed.”¹⁶

III. THE 2017R RFP SHOULD NOT EXCLUDE BIDDERS FOR LITIGATION AGAINST PACIFICORP

Renewable Northwest recommends eliminating the minimum qualification requirement that would disqualify bidders on the basis of litigation against the Company. Such a requirement is unfair and would arbitrarily limit the pool of potential bidders. PacifiCorp’s Final Draft 2017R RFP includes a minimum eligibility requirement that gives the Company discretion to deem a proposal ineligible if “[t]he bidder, or an affiliate of bidder, is in current litigation with PacifiCorp or has, in writing, threatened litigation against PacifiCorp, respecting an amount in excess of one hundred thousand dollars.”¹⁷ As outlined below, such language could unfairly penalize parties for enforcing their rights and could negatively impact ratepayers.

¹¹ IE Assessment of Draft RFP at 12.

¹² PacifiCorp 2017R RFP at 1.

¹³ *Id.* at 16.

¹⁴ IE Assessment of Draft RFP at 12.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ PacifiCorp 2017R RFP at 10.

A. PacifiCorp’s proposed restriction is unfair and arbitrarily limits the pool of prospective bidders.

Disqualifying bidders on the basis of litigation or threats of litigation against PacifiCorp raises questions of fairness in this RFP. Fairness is one the goals of a competitive bidding process.¹⁸ As the IE observed in its assessment of the draft RFP, “[f]airness means that all parties are treated equally.”¹⁹ However, PacifiCorp’s proposed requirement would allow the Company to deem a proposal ineligible solely because the bidder has raised a claim against PacifiCorp. As a result, PacifiCorp’s proposed requirement could penalize entities for enforcing their rights in disputes with the Company, even when the claim in question was caused by PacifiCorp’s behavior. The proposed requirement could also disincentivize developers from asserting their legal claims against PacifiCorp for fear of exclusion from future PacifiCorp RFPs. Hence, the proposed requirement reduces fairness in this solicitation.

PacifiCorp’s proposed language does not appear consistent with the ratepayer protection purpose of minimum qualification requirements. Minimum qualification requirements are intended to address the credit and capability of prospective bidders in order to protect ratepayers.²⁰ However, excluding bidders in litigation with PacifiCorp, or that have threatened litigation against the Company, does not appear to address the credit or the capability of prospective bidders. Neither does PacifiCorp’s proposed minimum qualification requirement appear to address other issues intended for the protection of ratepayers. In fact, such a requirement may have the opposite effect by arbitrarily excluding bidders who may have otherwise been able to offer the least cost and least risk resource. Therefore, we recommend excluding this proposed minimum qualification requirement from the final RFP.

B. The IE’s suggested modifications to PacifiCorp’s proposed language do not adequately address fairness concerns.

Even if it were appropriate to exclude bidders from an RFP on the basis of litigation against the utility, PacifiCorp’s proposed minimum qualification requirement language is vague and appears overly restrictive. As the IE identified in its assessment of the draft RFP, “there is no time limit regarding the latter clause [regarding threats of litigation]” and “the dollar amount mentioned is quite small, especially in the context of utility projects.”²¹

To address concerns with PacifiCorp’s language, the IE recommends that PacifiCorp adopt the following language from its All Source RFP released in 2012: “Bidder is in current material

¹⁸ Re Investigation Regarding Competitive Bidding, Docket No. UM 1182, Order 06-446 at 2 (Aug. 10, 2006).

¹⁹ IE Assessment of Draft RFP at 23.

²⁰ See Order 06-446 at 8-9.

²¹ IE Assessment of Draft RFP at 18.

litigation or has threatened material litigation against PacifiCorp. The Company will work with the IE to determine if the Bidder should be excluded from the RFP in the event the Bidder is threatening or in litigation with the Company."²² The IE also suggest that PacifiCorp make its minimum requirement more precise by adopting the following definition of “material litigation” from a prior draft of the All Source RFP released in 2012: "a dispute in excess of five (5) million dollars under circumstances in which the Bidder has issued a demand letter to PacifiCorp, the Bidder and PacifiCorp are currently in dispute resolution, the Bidder and PacifiCorp have an unresolved dispute pending or the Bidder has noticed a pending legal action against PacifiCorp."²³

Renewable Northwest appreciates the IE’s efforts to increase fairness in this RFP, but reiterates its recommendation against any minimum qualification requirement that could exclude bidders based on litigation or threats of litigation against PacifiCorp. Though the IE’s recommended modifications are an improvement on the draft RFP, we would continue to have fairness concerns about excluding bidders even with the IE’s recommended modifications incorporated. The IE’s proposed modifications would also not adequately address the concern that such restrictions would disincentivize developers from raising legitimate claims against PacifiCorp for fear of multi-year exclusion from future RFPs of one of the largest utilities in the western United States.

Should the Commission decide that some restriction of bidders on the basis of litigation is reasonable, Renewable Northwest encourages the Commission to adopt a version of the IE’s recommended modifications that includes a definition of “material litigation” with an amount significantly higher than what was originally proposed for the All Source RFP released in 2012.²⁴ Additionally, we recommend that the IE provide a written report on the reasoning for the exclusion, and that the bidder be able to contest the exclusion.

²² *Id.*

²³ *Id.*

²⁴ As an example, a jury awarded over \$100 million to USA Power in its lawsuit against PacifiCorp for misappropriation of trade secrets. USA Power, LLC v. PacifiCorp, No. 20130442, 2016 WL 2866139, at *7 (Utah May 16, 2016).

IV. CONCLUSION

For the reasons stated herein, we encourage the Commission to (1) direct PacifiCorp to revise the draft RFP in accordance with our recommendations; and (2) approve the draft RFP in order to allow PacifiCorp to pursue the time-limited opportunity afforded by the PTC.

Respectfully submitted this 18th day of August, 2017

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