

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

**AR 598
UM 1771**

In the Matter of)	
)	
The Northwest and Intermountain Power)	NORTHWEST AND
Producers Coalition)	INTERMOUNTAIN POWER
)	PRODUCERS COALITION REPLY
)	
Petition for Temporary Rulemaking and)	
Investigation into PacifiCorp’s 2016 Requests)	
for Proposal)	
)	
)	
_____)	

I. INTRODUCTION

The Northwest and Intermountain Power Producers Coalition (“NIPPC”) submits this reply to PacifiCorp’s (or the “Company”) response in opposition to the Oregon Public Utility Commission (the “Commission”) adopting a temporary competitive bidding rule and opening an investigation into the 2016 renewable energy request for proposal (“RFP”) (“2016R Renewable RFP”). PacifiCorp’s primary arguments are that: 1) there are time-sensitive opportunities to acquire new renewable resources that warrant deviating from Oregon law and Commission policies; and 2) the Commission lacks the ability to take any preventive actions to protect ratepayers and the competitive market, even if it wanted to. PacifiCorp also opposes any delay its in 2016 renewable energy certificate (“REC”) RFP (“2016 REC RFP”) and refuses to seek any guidance from the Commission on its new policy of meeting its renewable portfolio standard (“RPS”) obligations with REC purchases.

NIPPC is also providing a limited reply to the Commission Staff report that was posted on May 12, 2016. Staff agrees with NIPPC regarding many of the flaws in the 2016R Renewable RFP, but recommends against adopting a temporary rule or investigation because: 1) PacifiCorp could decide not to proceed; and 2) Staff could not identify any changes that could be made without causing unnecessary delay.¹

There is simply no urgent need to have a RFP that does not fairly treat non-ownership options.² NIPPC **supports** PacifiCorp's recognition that its resource needs have changed, and NIPPC **wants** the Company to conduct a properly designed RFP for new generation resources. NIPPC and its members would prefer to focus on submitting competitive bids instead of expending resources in an effort to simply obtain a fair opportunity to sell power to PacifiCorp.

PacifiCorp's arguments regarding the Commission's legal authority are mere distractions. The Commission has ample authority to preemptively protect ratepayers and the competitive markets before, rather than after, permanent and irreparable harm has been done. It is not reasonable to wait to review any resource acquisitions in a prudency review given how deeply flawed the 2016R RFP is and that the Commission can act now to ensure that there is a fair RFP that benefits customers.

The Commission should act immediately because there is time to correct the 2016R Renewable RFP to make reasonable changes, make it fairer, and to better ensure that any actual resource acquisitions are truly the least cost and risk. Contrary to Staff's

¹ Staff Report at 11-12.

² PacifiCorp states that it proposes to "clarify that the renewable resource RFP was never intended to limit PPA proposals to those that include terminal ownership options". PacifiCorp Opposition at 2.

concerns, there is plenty of time to complete an RFP that includes these changes. The Commission has a variety of options available, including but not limited to:

- Barring any utility ownership options, by order or temporary rule, until permanent competitive bidding rules are adopted;
- Opening an investigation into PacifiCorp's resource need, and the reasonableness of PacifiCorp's RFPs;
- Rejecting PacifiCorp's 2016R Renewable RFP because it is not "understandable and fair", as is required by the Commission's competitive bidding guidelines, unless PacifiCorp acquires a certain percentage of power that does not include ownership options;
- Issuing an order adopting rules that preemptively bar PacifiCorp's recovery from Oregon ratepayers of any costs associated with new renewable resource acquisitions that have ownership options, until after the adoption of permanent rules or the conclusion of an investigation;
- Limiting the ownership options in the 2016R Renewable RFP to no more than 50% of the total capacity of resource acquisitions; or
- Issuing an order or rule barring rate recovery, if the total capacity of resources acquired in the 2016R Renewable RFP has ownership options that exceed 50%.

Finally, unless there are no ownership options allowed, the Commission should require that an independent evaluator be used (and is selected by the Commission), and that PacifiCorp seek acknowledgment of any short-list of resources. A prudent utility concerned with a true time sensitive resource opportunity would not withdraw an RFP because it includes a requirement for at least some non-utility owned generation.

NIPPC's true motives are not, as PacifiCorp claims, to bar all utility ownership and ensure that third-party bids proposed by independent power producers are selected over bid proposals that contemplate utility ownership. NIPPC's members want to sell power to PacifiCorp and other utilities through build own transfers, power purchase agreements with utility ownership options, and pure power purchase agreements.

Essentially, NIPPC wants a competitive market with **all options** rather than only a monoculture in which utility ownership is the only practical alternative. Given how quickly PacifiCorp’s 2016R Renewable RFP was proposed and how it is designed to favor ownership options, the only way to protect ratepayers and the competitive market right now is to prevent utility ownership, or explicitly limit any ownership to a percentage of the capacity that is acquired.

II. REPLY

1. The Commission Should Consider NIPPC’s Reply

The Commission has the discretion to accept a reply to a response to a petition or other initiating pleading.³ The Commission often accepts replies or other responsive pleadings when matters are brought before it at public meetings.⁴ To the extent necessary, NIPPC requests that the Commission accept this reply as it better explains NIPPC’s position, and provides the Commission with additional options to address the deficiencies in PacifiCorp’s RFPs.⁵

2. There Was Time For PacifiCorp to Properly Design a Fair RFP

The core of PacifiCorp’s position is that there are time-limited opportunities that justify the Company circumventing the spirit, intent, and plain language of the Commission’s bidding guidelines and other laws and policies protecting competitive

³ OAR § 860-001-0400(5).

⁴ E.g., Re PacifiCorp, dba Pacific Power, Application to Update Schedule 37 Qualifying Facility Information, Docket No. UM 1729(1), Responsive Comments of PacifiCorp (March 18, 2016) (PacifiCorp filed a reply to comments responding to its own initiating pleading requesting lower avoided cost rates).

⁵ Re Portland General Elec. Co. Application for Deferred Accounting of Excess Power Costs Due to Plant Outage, Docket No. UM 1234, Order No. 07-227 at 4 (June 8, 2007)(“the applicable rules do not provide for ICNU’s reply... We nevertheless take ICNU’s reply into consideration, finding that it better explains ICNU’s original position”).

markets. This case is a “crisis” entirely of PacifiCorp’s own creation as the Company had the opportunity to propose a properly designed RFP that provided a fair opportunity for non-utility ownership options. PacifiCorp has placed the Commission in the uncomfortable position of choosing between preemptively taking action to protect ratepayers, or allowing the Company to proceed with an unfair and biased RFP.

Even assuming that there are time-limited opportunities, there was no need for PacifiCorp to explicitly require ownership options or to dispense with all the requirements and protections afforded to customers and independent power producers. While NIPPC has significant concerns with Portland General Electric Company’s (“PGE”) recently proposed RFP, PGE’s actions at least demonstrate that PacifiCorp could have approached its own RFPs differently. Despite filing its petition to partially waive the competitive bidding guidelines about a month after PacifiCorp, PGE has proposed a schedule to review its RFP that may allow time to retain an independent evaluator, provide parties an opportunity to comment on the RFP design, and ensure that the Commission has an opportunity to acknowledge any short-list.⁶ PGE’s application shows that there is time to make changes without, as Staff is concerned, “essentially serv[ing] to terminate the RFP”.⁷

NIPPC recognizes that the production and investment tax credits are gradually declining, but PacifiCorp overstates their importance. The solar investment tax credits will not start decreasing until 2020, and the production tax credit only has a 20% reduction for projects that do not start construction in 2016. PacifiCorp knew about

⁶ Re PGE, Petition for Partial Waiver of Competitive Bidding Guidelines and Approval of RFP Schedule, Docket No. UM 1773, Petition at 7 (May 4, 2016) (It is important that NIPPC strongly opposes the IE selected by PGE).

⁷ See Staff Report at 11.

Congressional phase out of the tax credits in December 2015, which should have provided the Company with sufficient time to provide notice and work with the Commission and interested stakeholders. The tax credits are entirely irrelevant to already operating projects, which may be bid into the RFP.

Meanwhile, the Internal Revenue Service (“IRS”), has provided developers **four years** to complete a new wind farm or other renewable energy project that qualify for tax credits without having to prove that the construction work was continuous.⁸ NIPPC understands, as PacifiCorp must, that many wind developers will start construction or order turbines in light of this ruling. The fact that the IRS has released the four-year clarification is a changed situation that PacifiCorp should adapt to.

The phase out of the production tax credits will lower the costs of **both** utility owned and purchased power. Even if the Commission allows PacifiCorp’s 2016R Renewable RFP to proceed with ownership options, there is no reason to discourage power purchase agreements that do not allow the utility an option to purchase the project. Simply put, there has not been any change in federal tax policy that supports biasing the results of any RFP toward utility ownership.

The Commission should be mindful that rushing into a utility-owned asset also has significant risks and can potentially result in additional costs that far outweigh any ratepayer benefits—as demonstrated by the unfolding saga with PGE’s Carty plant. In the end, PacifiCorp’s actions and this poorly designed RFP are not the result of any

⁸ IRS Notice 2016-31 at 5, available at: <https://www.irs.gov/pub/irs-drop/n-16-31.pdf> (“if a taxpayer places a facility in service during a calendar year that is no more than four calendar years after the calendar year during which construction of the facility began, the facility will be considered to satisfy the [safe harbor provisions]”).

alleged time limited opportunity. PacifiCorp has had months to inform and work with the Commission and stakeholders to develop a fair RFP, even as legislative action was contemplated. The Commission should rectify the flaws in the Company's RFP to explicitly prohibit, or significantly limit, the selection of utility owned options.

2. The Commission Has the Responsibility and Legal Authority to Protect Competitive Markets and Ensure Diverse Resource Ownership

PacifiCorp's legal arguments are not well supported and are simply an effort to prevent the Commission from giving full attention to the fundamental flaws in both the 2016R Renewable RFP and the 2016 REC RFP. The Commission has broad authority to pre-emptively take a wide variety of actions to require significant changes to PacifiCorp's RFPs. Despite a decade of effort to improve the resource acquisition process and mitigate against utility bias, the Commission's efforts have not been successful to date.⁹ The Commission should take this opportunity to exercise its power to clearly and firmly protect competitive markets.

A. Oregon Law Now Requires the Commission to Allow for Diverse Ownership of Generation Assets as Well as Protecting Competitive Markets

PacifiCorp misses the forest for the trees when parsing the language of SB 1547 to argue that competitive bidding rules are not immediately needed to protect market diversity.¹⁰ PacifiCorp is correct that the new requirement is part of the renewable portfolio standard implementation plan; however, the legislature has significantly

⁹ See Attachment A (detailing results from RFPs run under Competitive Bidding Guidelines).

¹⁰ PacifiCorp Opposition at 10-12.

strengthened the Commission’s role in protecting competitive markets, including the requirement to evaluate and adopt rules that “allow for diverse ownership”.¹¹

The Commission must also consider the practical impact of delaying action. PacifiCorp may acquire hundreds of megawatts of power, which could result in the Company being surplus and putting off future renewable resource acquisitions for the next decade. The Commission’s decision regarding PacifiCorp’s RFPs not only may be the best opportunity to ensure diverse ownership and protect market competition, but the Commission’s **only** real opportunity for years.

PacifiCorp also makes the unusual argument that SB 1547 does not apply because any acquisition would be “pursuant to commission competitive bidding rules.”¹²

Notwithstanding the fact that PacifiCorp is disregarding the intent and plain meaning of the Commission’s competitive bidding guidelines, they are **guidelines** and not rules. The Commission must follow a specific established process for adopting rules,¹³ and a rule is not valid unless it is adopted in substantial compliance with Oregon Administrative Procedures Act (“Oregon APA”) rulemaking procedures.¹⁴ Likewise, policy statements like guidelines are not rules because they are not promulgated under the Oregon’s APA’s rulemaking provisions.¹⁵ The Commission knows the difference between guidelines and

¹¹ ORS § 469A.075(4)(d).

¹² PacifiCorp Opposition at 7.

¹³ The Commission’s rules are set forth in Oregon Administrative Rules (“OAR”) Chapter 860. OAR § 860-001-0240 sets out the process for Rulemaking Action, including notice and comment opportunities, and both submission to and publication by the Secretary of State.

¹⁴ ORS §§ 183.335(11), 183.400(4)(c); McCleery v. State by & Through Oregon Bd. of Chiropractic Examiners, 132 Or.App. 14, 16–17, 887 P.2d 390 (1994).

¹⁵ Ortiz v. Adult and Family Services Division, 45 Or.App. 925, 927, 609 P.2d 1309 (1980); see Christensen v. Harris County, 529 U.S. 576, 587 (2000). In fact, if the competitive bidding guidelines were rules, then PacifiCorp would have been

rules and knows how to adopt rules under the APA.¹⁶ As the competitive bidding guidelines were adopted through an investigation and have not been codified as administrative rules,¹⁷ they cannot be considered the new competitive bidding rules required by SB 1547.

B. The Commission Would Abdicate Its Statutory Responsibilities If It Fails to Take Action to Revise the 2016R Renewable RFP

Oregon law allows the Commission to take broad actions to protect market competition and ensure diverse ownership, including: 1) barring ownership options; 2) concluding that the 2016 R Renewable RFP is not fair or reasonable, or 3) mandating that PacifiCorp acquire no more than 50% of its new capacity from ownership options. PacifiCorp admits that the Commission has the statutory authority to consider the “competitive *retail* marketplace”, but argues that the Commission cannot proactively bar ownership options and its only remedy is a retroactive prudency review.¹⁸ PacifiCorp further asserts that any proactive efforts to protect ratepayers and markets would constitute improper extra-jurisdictional regulation or violate the Dormant Commerce Clause.¹⁹ If correct, PacifiCorp’s arguments call into question the majority of the Commission’s enabling statutes that are used every day to protect customers.

¹⁶ barred from recovery of the hundreds of megawatts of wind generation that it acquired in the mid-2000s rather than only the Rolling Hills wind project. See, e.g., Re Commission Investigation into Integrated Resource Planning Requirements, Docket No. UM 1056, Order No. 07-002 at 2 (Jan. 8, 2007) (adopting guidelines and announcing that a later rulemaking would promulgate rules consistent with the guidelines).

¹⁷ Re Commission Investigation Regarding Competitive Bidding, Docket No. UM 1182, Order No. 06-446 at 2 (Aug. 10, 2006).

¹⁸ PacifiCorp Opposition at 5 (emphasis added by PacifiCorp).

¹⁹ PacifiCorp Opposition at 6-7.

As explained in NIPPC’s petition, the Commission has expansive powers to not only protect “retail” markets, but also wholesale markets, including ensuring that utilities do not increase their share of generation asset ownership.²⁰ This means that the Commission is not limited to an after the fact prudence review to fulfill its responsibility. The Commission should take preventative action to protect against potential irreversible harm to customers and the competitive market.

The legislature has granted the Commission the power to do all things “necessary and convenient” in the exercise of its power and jurisdiction.²¹ Utility regulation, including ratemaking, is a legislative function, and the legislature has granted the Commission broad power to perform its delegated function.²² For example, the Oregon courts have found that the Commission can order utilities to pay millions of dollars in refunds, even without the explicit statutory authority granting such power.²³ The Commission has the explicit statutory authority to prevent a: 1) third party purchasing the entire utility (not just a particular resource); and 2) utility from entering into certain contracts, selling stock, or selling, leasing, assigning or otherwise disposing of more than \$100,000 in property.²⁴ All of these statutes place far more of an onerous burden on interstate commerce and give the Commission much broader “extra-jurisdictional” powers than a short-term and temporary suspension of a utility’s ability to own new renewable generation resources.

²⁰ NIPPC Petition at 3-4, 10-12.

²¹ ORS § 756.040.

²² American Can v. Lobdell, 55 Or.App. 451, 461, 638 P.2d 1152, rev. den. 293 Or. 190, 648 P.2d 851 (1982).

²³ Pacific Northwest Bell Telephone Co. v. Katz, 116 Or.App. 302, 841 P.2d 652, 656-57 (1992).

²⁴ ORS §§ 757.480, .485, .490, .495, & .511.

Finally, PacifiCorp claims that a rule prohibiting the acquisition of resources located outside Oregon violates the Dormant Commerce Clause because it would impose an excessive and unconstitutional burden on interstate commerce.²⁵ As the cases cited by PacifiCorp demonstrate, the Dormant Commerce Clause prevents a state from favoring in-state economic interests over their out-of-state counterparts.²⁶ NIPPC's proposed rule does not discriminate against or support any state, but only requires PacifiCorp to follow Commission competitive bidding rules before owning new generation. Other states have taken similar actions that PacifiCorp appears to believe violates the U.S. constitution. For example, Colorado's competitive bidding law explicitly limits utility ownership and requires utilities to enter into power purchase agreements.²⁷

The Commission has adopted numerous policies to proactively protect ratepayers from imprudent or harmful utility decisions. The underlying premise of the integrated resource planning policies and rules as well as the competitive bidding guidelines are to improve the utility decision making process in the hope of avoiding a prudency review. The Commission has also conditioned utility mergers and purchases based, in part, on the requirement that a utility commit to making significant transmission and generation investments.²⁸ PacifiCorp did not balk, and even encouraged, the requirement that it build new long-term resources, but now argues that the Commission does not have the authority to temporarily prevent the Company from acquiring a certain type of resource.

²⁵ PacifiCorp Opposition at 6.

²⁶ E.g., Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (forbidding state to require work to be done within its jurisdiction to promote local employment).

²⁷ CRS § 40-2-124 (Renewable energy standard).

²⁸ Re MidAmerican Energy Holdings Co. Application for Authorization to Acquire Pacific Power & Light, dba PacifiCorp, Docket No. UM 1209, Order No. 06-082 at 10-12 (Feb. 24, 2006) (commitment to acquire 1400 MW from renewable energy sources by 2015).

Instead of barring utility ownership, the Commission could bar PacifiCorp from recovering costs associated with new renewable resources that have any, or more than a specific amount of, utility ownership. Regulatory agencies have expansive legal authority to regulate in state activity, including what costs the Company can recover in its in-state electricity sales.²⁹ This would allow PacifiCorp to acquire any resource it wants, but not to pass those costs along to Oregon ratepayers.

III. CONCLUSION

The Commission should take immediate action to protect ratepayers and the competitive markets, and ensure diverse ownership of renewable energy resources. The simplest and most clear action would be to require PacifiCorp to modify the 2016R Renewable RFP by adopting temporary rules and opening an investigation that prohibits any bids that would be build transfers or otherwise allow the Company any potential ownership interest. The Commission has broad powers to take other actions that would allow the 2016R Renewable RFP to proceed in a fair and transparent manner, including requiring that a certain percentage of the resources selected not have ownership options, informing PacifiCorp that it will disallow rate recovery if more than a certain percentage of resources are utility owned, and (if ownership options are allowed) requiring PacifiCorp to seek acknowledgement of any final short-list. Finally, while PacifiCorp's

²⁹ Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1101-06 (9th Cir. 2013) cert. denied, 134 S. Ct. 2875 (2014) (upholding California's low carbon fuel standard, which regulates use of fuels *in* California and products sold *in* California); Southern Union Co. v. Missouri Pub. Serv. Comm., 289 F.3d 503, 507-08 (8th Cir. 2002) (holding that state public service commission could lawfully require a utility to seek approval of out-of-state stock sales as part of regulation of the utility's in-state retail electricity sales).

response did not focus on the 2016 REC RFP, NIPPC continues to recommend that this RFP be reviewed and vetted to determine if it is the least cost and least risk approach.

Dated this 13th day of May 2016.

Respectfully submitted,

A handwritten signature in black ink that reads "Irion Sanger". The signature is written in a cursive style with a large, looped initial "I".

Irion Sanger
Sanger Law, PC
1117 SE 53rd Avenue
Portland, OR 97215
Telephone: 503-756-7533
Fax: 503-334-2235
irion@sanger-law.com

Of Attorneys for the Northwest and Intermountain
Power Producers Coalition

Attachment A

Oregon Public Utility Commission Results from RFPs run under Competitive Bidding Guidelines¹

Year	Utility	Location	Docket	Project/Capacity	Utility Owned ²	Outcome
2008	PacifiCorp	Chehalis, WA	UM 1208, 1374	Chehalis Generation Facility 520 MW gas-fired CCCT	Yes	PacifiCorp acquires power plant from Suez Energy, with a waiver of the OPUC competitive bidding guidelines.
2008	PacifiCorp	Converse County, WY	UM 1368	Top of the World Windpower 200 MW	No	PacifiCorp and Duke Energy sign 20 year PPA. ³
2009	PacifiCorp	Carbon County, WY	UM 1429	Dunlap I wind farm 111 MW	Yes	PacifiCorp follows Utah PSC's bidding process in parallel with OPUC.
2010	PacifiCorp	Utah County, UT	UM 1360	Lake Side 2 637 MW CCCT	Yes	PacifiCorp selects CH2M Hill E&C as its EPC contractor to build the power plant adjacent to its Lake Side 1 CCCT unit.
2010	Portland General Electric	Gilliam County, OR	UM 1499	Rock Creek Wind Power Facility 400 MW	Not completed	PGE petitioned to waive the bidding guidelines for a self-built project only to withdraw its request due to new USFWS golden eagle protection policy.
2012	Idaho Power	Payette County, ID	UE 248	Langley Gulch 330 MW gas-fired CCCT	Yes	After Idaho Power skips bidding guidelines, the OPUC conditions Oregon's share of Idaho Power's <i>future</i> rate recovery on adherence to Oregon's bidding guidelines ⁴
2012	Portland General Electric	Columbia County, OR	UM 1535	Port Westward Unit 2 220 MW gas-fired reciprocating engines	Yes	Self-built power project with 12 reciprocating engines adjacent to Unit 1, a PGE-owned gas-fired CCCT power plant.
2013	Portland General Electric	Morrow County, OR	UM 1535	Carty Generating Station 440 MW gas-fired CCCT	Yes	PGE selects Abengoa S.A. as its EPC contractor to build the power plant adjacent to Boardman coal-fired power plant slated for retirement.
2013	Portland General Electric	Columbia County, WA	UM 1613	Tucannon River Wind Farm 267 MW	Yes	PGE acquires development rights from Puget Sound Energy and builds its first power plant outside Oregon.

¹ Oregon originally enacted its bidding guidelines in September 2006 with Order No. 06-446. It applies to resource acquisitions over 100 MW.

² In late 2003, PacifiCorp "won" its own RFP and, after securing regulatory approvals, built the 525 MW Currant Creek CCCT near Mona, UT. Last year a jury awarded USA Power \$134 million after a jury concluded that PacifiCorp stole the plans from the IPP's bid submittal and used them to build its plant.

³ In 2007-2009, PacifiCorp built a number of wind farms in close proximity to each other and sized "under" 100 MW to avoid the competitive bidding guidelines. Since 2005, outside of any Commission approved competitive bidding processes, PacifiCorp has obtained ownership of the 99 MW Glenrock I, 39 MW Glenrock III, 94 MW Goodnoe Hills, 99 MW High Plains, 100.5 MW Leaning Juniper, 140.4 MW Marengo, 70.2 MW Marengo II, 28.5 MW McFadden Ridge, 99 MW Rolling Hills, 99 MW Seven Mile Hills, and 19.5 MW Seven Mile Hills II wind facilities, a power purchase agreement with the 99 MW Campbell Hill-Three Buttes wind facility, and power purchase agreements with qualifying facilities.

⁴ The Idaho PUC approved Idaho Power's Langley Gulch power project in September 2009 despite opposition.