PACIFIC POWER
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May 6, 2016

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
201 High Street SE, Suite 100
Salem, Oregon 97301

Attn: Filing Center

RE: Docket AR 598 & UM 1771
PacifiCorp's Opposition to Petition for Temporary Rulemaking and Investigation

PacifiCorp d/b/a Pacific Power encloses for filing in the above-referenced docket its Opposition to Petition for Temporary Rulemaking and Investigation.

If you have any questions about this filing, please contact Erin Apperson, Manager of Regulatory Affairs, at (503) 813-6642.

Sincerely,

R. Bryce Dalley
Vice President, Regulation

Enclosure

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

AR 598 & UM 1771

In the Matter of THE NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION Petitions for Temporary Rulemaking and Investigation into PacifiCorp's 2016 Requests for Proposals.	**PacifiCorp's Opposition to Petition for Temporary Rulemaking and Investigation**

I. INTRODUCTION

PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) opposes the Northwest and Intermountain Power Producers Coalition's (NIPPC) efforts to bar PacifiCorp from acquiring ownership interests in renewable energy facilities and delay PacifiCorp's recently issued Requests for Proposals (RFP). On March 8, 2016, Governor Kate Brown signed Senate Bill (SB) 1547 into law, which requires PacifiCorp and Portland General Electric Company to achieve a renewable portfolio standard (RPS) target of 50 percent by 2040. In addition, the legislation incentivizes early compliance action by creating a special category of "golden" non-expiring renewable energy certificates (RECs) from new renewable energy facilities. Combined with the recent extension of federal tax credits for wind and solar, Oregon has a unique opportunity to take its first steps towards implementation of SB 1547 while potentially moving forward with a renewable acquisition that can maximize value to customers.

In light of the unique acquisition opportunities available right now, PacifiCorp issued two RFPs on April 11, 2016. These RFPs are designed to solicit bids for all RPS-eligible resources, including utility- and third-party-owned options, that maximize the time-limited

opportunities associated with the extension of federal tax credits. PacifiCorp's RFPs are driven by two principle factors. First, PacifiCorp is committed to least-cost, least-risk RPS compliance options for its customers. To achieve that, the Company is seeking competitively priced bids that can take full advantage of federal income tax credits known to be ramping down and expiring. The Company is concurrently seeking bids for renewable RECs so that it can comprehensively assess RPS compliance alternatives. The RFPs cast a wide net so that they will provide tangible market offers for a wide variety of near-term RPS compliance alternatives. The RFPs will simultaneously give the Company the data it needs to fully analyze whether early resource or REC acquisition, or both, makes sense compared to potential future compliance alternatives while providing the vehicle to act should low-cost opportunities be identified through the competitive procurement process. While the Company stands ready to move forward and move forward quickly if the right opportunity presents itself, the Company also recognizes that any decision will be closely reviewed and evaluated by the Public Utility Commission of Oregon (Commission) and other parties as the least-cost, least-risk option for customers.

Second, PacifiCorp is subject to increased RPS compliance obligations not only in Oregon, but also in Washington[1] and California,[2] and the RFPs will evaluate opportunities for minimizing compliance costs in these three states. To address NIPPC's stated concerns, the Company proposes to (1) clarify that the renewable resource RFP was never intended to limit PPA proposals to those that include terminal ownership options, and (2) hold a

[1] PacifiCorp's Washington RPS target increases from 9 percent to 15 percent in 2020. *See* RCW 19.285.400(2)(a)(iii).
[2] Senate Bill 350 increased PacifiCorp's California RPS target to 50 percent by 2030.

confidential stakeholder workshop in July 2016 to update parties on the RFP analysis and selection process.

NIPPC asks the Commission to adopt a temporary rule that would bar all Oregon investor-owned utilities (IOUs) from owning or acquiring an ownership interest in new renewable generating facilities. NIPPC also asks the Commission to delay PacifiCorp's RFPs and initiate an investigation into PacifiCorp's RPS compliance strategy.[3] NIPPC frames its requests in terms of competitive concerns, but NIPPC's true concerns are quite transparent: NIPPC would preclude utility ownership of renewable generating projects even if these projects were prudent and the least-cost, least-risk option customers. NIPPC appears to only want non-competitive markets where IOUs must purchase output from independent power producers (IPPs), the exact opposite of competitive, diverse markets.

Setting aside NIPPC's motives, NIPPC's petition is fundamentally flawed. First, NIPPC's proposed rule to bar utility ownership exceeds the Commission's delegated authority, ignores the geographic limitations of the Commission's jurisdiction, and implicates the Dormant Commerce Clause of the U.S. Constitution. Second, NIPPC misunderstands the RFP process and compels an unnecessary and costly delay in the face of an obvious time-sensitive production tax credit opportunity, wherein actual potential customer benefits cannot be reasonably measured without actual market-based proposals. Third, NIPPC conflates competitive bidding processes with prudence review. PacifiCorp's RFP does not compel any particular resource acquisition outcome or any resource acquisition at all. Customers are

[3] NIPPC fails to acknowledge that PacifiCorp will file a new Renewable Portfolio Implementation Plan (RPIP), as directed by the Commission, on July 15, 2016. This new RPIP will include analysis, requested by Staff and the Commission, addressing the impacts of SB 1547 on the Company's RPS compliance position.

ultimately protected from any imprudent resource acquisition decision through existing formal ratemaking requirements and procedures.

Fourth, NIPPC offers a selective and misleading interpretation of SB 1547. Contrary to NIPPC's assertions, the statute does not require the Commission to develop new competitive bidding guidelines addressing market diversity before an RFP can be issued. Instead, the language cited by NIPPC instructs the Commission to develop rules that evaluate the competitive bidding process in a utility's renewable portfolio implementation plan (RPIP). Finally, NIPPC misapprehends the nature of the Investment Tax Credit (ITC) and Production Tax Credit (PTC), and as a result misunderstands the time-sensitive nature of the opportunities the RFPs seek. For these reasons, NIPPC's petition should be denied in its entirety.

PacifiCorp recognizes that an acquisition made as the result of this RFP could be the first acquisition made in furtherance of the goals established in SB 1547, which specifically encouraged early action. Combined with potential time-limited opportunities to maximize federal income tax credits, the need for swift action on the part of the Company is critical to ensuring realization of maximum customer benefits. PacifiCorp is equally aware of the need for a fair, transparent, and inclusive acquisition process that is expedient and does not eliminate opportunities for least-cost, least-risk acquisitions and therefore urges the Commission to reject NIPPC's petition, in part due to consideration of PacifiCorp's proposed clarification to the resource RFP and RFP review process.

II. ARGUMENTS

A. NIPPC's Proposal to Bar Utility Ownership of New Renewable Generating Projects Exceeds the Commission's Jurisdiction

NIPPC proposes a temporary rule that would prohibit PacifiCorp from owning or acquiring "any new renewable energy resources" unless the ownership or acquisition is "acquired pursuant to commission competitive bidding rules." As a threshold matter, NIPPC's proposed rule, which would bar utilities from owning an interest in renewable generating facilities, exceeds the Commission's delegated authority. As the Commission itself has stated, the Commission's authority "is naturally limited by the boundaries of the legislature's delegation" and must be exercised "within the confines of both the state and federal constitutions."[4] As an economic regulator, the Commission is expressly charged with establishing "fair and reasonable rates" for utility services while balancing "the interests of the utility investor and the consumer."[5]

Certain provisions of Oregon law require the Commission to consider market competitiveness issues. For example, ORS 757.646 directs the Commission to develop policies that eliminate barriers to the development of a competitive *retail* marketplace. The legislature, however, has not authorized the Commission to preclude a utility from acquiring ownership interests in renewable generation facilities or otherwise deploying capital. Of course, the Commission may deny cost recovery if a utility's investments are imprudent, but that is an after-the-fact determination of prudence and not a before-the-fact prohibition on seeking prudent project acquisition opportunities on behalf of its customers. It is the sole

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[4] *In re Portland Gen. Elec. Co.*, Docket Nos. DR 10, UE 88, and UM 989, Order No. 08-487 at 4. *See also Gearhart v. Public Util. Comm'n of Oregon*, 356 Or. 216, 231-32 (2014) (the Commission's powers "are limited to those expressly authorized or necessarily implied by statute.").

[5] *Gearhart* at 231-32. (quoting ORS 756.040(1)) (internal citations and quotations omitted).

purview of the legislature to determine whether a utility should acquire or avoid specific resource types.[6]

Furthermore, NIPPC's proposed rule is overly broad. NIPPC would have the Commission adopt a rule prohibiting PacifiCorp and other utilities from acquiring ownership rights "in any new renewable energy resources" after May 18, 2016.[7] Under NIPPC's proposed rule, this prohibition would not apply to acquisitions made "pursuant to the commission's competitive bidding rules."[8] To be clear, this is not a rule barring cost recovery; it is a rule prohibiting utilities from acquiring any ownership interest in a facility. The implications of NIPPC's requested relief would prohibit PacifiCorp, a multi-state utility providing retail service in six states, from acquiring resources located in another state. Such an outcome would willfully ignore the geographic limits on the Commission's jurisdiction and would run afoul of the Dormant Commerce Clause because a rule prohibiting PacifiCorp from acquiring resources located outside Oregon would impose an excessive and unconstitutional burden on interstate commerce.[9]

Furthermore, NIPPC's proposed rule would result in unconstitutional extraterritorial regulation.[10] PacifiCorp's RFPs are designed to evaluate time-sensitive opportunities to meet PacifiCorp's California, Oregon, and Washington RPS compliance obligations at a

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[6] For example, the recently repealed Oregon Solar Capacity standard that required utilities to acquire a certain capacity of Oregon-based solar resources.
[7] NIPPC Petition for Temporary Rulemaking and Investigation, Appendix A.
[8] *Id.*
[9] The Dormant Commerce Clause limits the ability of individual states to impede the flow of inter-state commerce. *See, e.g., Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 98 (1994) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
[10] *See, e.g., Healy v. The Beer Inst.*, 491 U.S. 324-336-37 (1989).

reasonable cost while accounting for long-term compliance cost risk.[11] NIPPC's proposed rule would result in unlawful extraterritorial regulation to the extent that it would prohibit PacifiCorp from acquiring resources in other states to comply with those states' RPS requirements. Such a rule would not withstand judicial scrutiny and should be rejected by the Commission.

Finally, it is worth noting that, even if NIPPC's proposed rule were to go into effect, any early-action acquisition by the Company in this instance would be "pursuant to commission competitive bidding rules."[12] Specifically, Guideline 2(a) sets forth the circumstances under which a utility may proceed with an acquisition without following the typical competitive bidding process outlined in the remainder of the guidelines.[13] One of the exceptions in the competitive bidding guidelines is for a time-limited opportunity with unique value to customers.[14] In that circumstance, the acquiring utility is required to file a report *after the fact* explaining how the acquisition met the requirements. In other words, NIPPC does not have a compelling argument that PacifiCorp's acquisition is outside the bounds of the Commission's competitive bidding guidelines; the guidelines expressly contemplate the situation PacifiCorp faces now.

B. NIPPC Misunderstands the RFP Process

The Commission's competitive bidding guidelines establish a process that is flexible, understandable, and fair; minimizes long-term energy costs; complements Oregon's process for short- and long-term planning through the Integrated Resource Plan; and does not

[11] PacifiCorp issued the RFP in response not only to SB 1547, but also to stepped-up RPS requirements in California and Washington.
[12] NIPPC Petition for Temporary Rulemaking and Investigation, Appendix A.
[13] *In the Matter of an Investigation Regarding Competitive Bidding Guidelines*, Docket No. UM 1182, Order No. 06-446, Appendix A (Aug. 10, 2006)
[14] *Id.*

constrain utility investment decisions.[15] In addition, the RFP process established by the guidelines is intended to "promote and improve the resource actions identified in the utility's IRP Action Plan," while recognizing that "it is not in the customer's best interest for any utility to march lockstep without any deviation from the [IRP Action Plan]. We have found that flexibility is important in meeting the goals[.]"[16]

For example, while the guidelines contemplate a utility seeking approval of the RFP and acknowledgment of the shortlist, the Commission has also stressed that failure to receive approval of the RFP does not preclude the utility from moving forward with selection of a shortlist and eventually seeking acknowledgment of the shortlist.[17] In the context of the shortlist, "acknowledgment" has the same meaning as in the IRP.[18] In other words, acknowledgment does not pre-judge the prudence of an action or otherwise determine ratemaking treatment.

NIPPC erroneously states that PacifiCorp "circumvented" the guidelines when, in fact, PacifiCorp relied on Guideline 2(a) in structuring its RFPs, which specifically allows for a utility to move forward with time-limited acquisition opportunities without imposing the full requirements of the competitive bidding process. NIPPC, however, appears to take the position that regardless of the process used—a Commission-approved exception to the guidelines or the full RFP review process—any acquisition that is utility-owned is improper.

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[15] Order No. 06-446 at 2.
[16] *Id.*
[17] *Id.* at 3 ("We do not share CUB's opinion that RFP approval is a required prerequisite to Commission acknowledgment of a final short list . . . even in the absence of an approved RFP, a utility might be able to obtain acknowledgment of a short list if it can demonstrate the final choice of resources is aligned with its acknowledged IRP.").
[18] *Id.* at 14 ("Such Commission action would carry the same weight as an acknowledgment of an IRP—that is, a conclusion that the final short-list seems reasonable, based on the information provided to the Commission at that time. It will not, as ICNU fears, provide a guarantee of favorable ratemaking treatment during rate recovery.").

This position ignores the impacts to customers if the least-cost, least-risk option is not selected and undermines NIPPC's purported concern for a competitive marketplace; NIPPC's primary concern is in ensuring that third-party bids proposed by IPPs are selected over competitive potential bid proposals that contemplate utility ownership.

Furthermore, NIPPC argues that the RFP should be delayed because "PacifiCorp has not made a case that there is any time-sensitive opportunity to acquire RECs immediately to comply with the renewable portfolio standard."[19] Under NIPPC's theory, a utility should not submit an RFP to the market unless the utility can first demonstrate that cost-effective opportunities *do in fact* exist. An RFP does not, in and of itself, commit a utility to any particular resource acquisition. The Commission should not be persuaded by NIPPC to flip the RFP process on its head by establishing a threshold requirement for utilities to demonstrate that cost-effective resources exist *before* issuing an RFP.

Furthermore, NIPPC's proposal to delay PacifiCorp's RFP until an investigation is conducted conflicts with the RFP guidelines. The Commission's guidelines expressly allow utilities to deviate from the full RFP process "where there is a time-limited resource opportunity of unique value to customers."[20] Notably, this exception does not require Commission action before the acquisition is made. As further detailed below, the recent extension of the PTC and ITC present the type of "time-limited resource opportunity" that the RFP guidelines contemplate. A ruling prohibiting PacifiCorp from exploring whether

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[19] NIPPC at 2.

[20] Order No. 06-446, Appendix A. PacifiCorp is aware of Portland General Electric's (PGE) petition to issue its own request for proposal. PGE and PacifiCorp are taking advantage of different exceptions to the competitive bidding guidelines: waiver before an acquisition (PGE) and notice to the Commission after an acquisition (PacifiCorp). Both approaches are explicitly allowed for within the competitive bidding guidelines.

potential "time-limited resources opportunities" exist would conflict with the Commission's guidelines—to the detriment of PacifiCorp's customers.

C. NIPPC Conflates the Competitive Bidding Process with Ratemaking Treatment and Effectively Requests that the Commission Prejudge the Prudence of Certain Types of Acquisitions

Well-established Commission policy draws a bright-line distinction between prudence review in ratemaking and the competitive bidding and long-term resource planning processes. In the context of competitive bidding, unambiguous Commission precedent establishes that "the lack of an approved RFP does not automatically bar cost recovery".[21]

Similarly, the Commission has ruled that approval of an RFP waiver has no bearing on later prudence review. For example, in docket UM 1374, the Commission approved a RFP waiver for PacifiCorp's Chehalis facility, adopting Staff's recommendation which stated that "the Commission is not making any ratemaking decisions when waiving an RFP requirement. Therefore, in granting a waiver, the Commission is not determining the prudence of the acquisition or conveying any time of resource preapproval." [22]

The Commission has incorporated this concept into its Internal Operating Procedures:

> The Commission's acknowledgment of short-list has the same meaning as that used in the IRP process—that is, a conclusion that the final short-list seems reasonable, based on the information provided to the Commission at that time. Any ratemaking determinations would occur at a later time. Similarly, RFP dockets are not considered contested cases under the [Administrative Procedures Act], and an acknowledgment order is not a final order subject to judicial review.[23]

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[21] *In the Matter of PacifiCorp, dba Pacific Power Draft 2012 Requests for Proposals*, Docket No. UM 1208, Order No. 06-676, 4 (Dec. 20, 2006).
[22] *In the Matter of PacifiCorp, dba Pacific Power Petition for Wavier of the Commission's Competitive Bidding Guidelines*, Docket No. UM 1374, Order No. 08-349, Appendix A at 3.
[23] *In the Matter of Public Utility Commission of Oregon Internal Operating Guidelines,* Docket No. 1709, Order No. 14-358, (Oct. 17, 2014).

NIPPC ignores this well-established distinction between the RFP process and ratemaking and argues that the "Commission should act now rather than wait for a rate proceeding to review the prudence of acquisitions in the 2016R Renewable RFP."[24] In effect, NIPPC asks the Commission to pre-judge the prudence of a *potential* acquisition and prohibit PacifiCorp from even exploring whether opportunities for cost-effective RPS compliance presently exist. Indeed, NIPPC goes so far as to claim that "[failing] to immediately…bar or limit PacifiCorp's ownership of new renewable resources will result in serious prejudice to the public interest, ratepayers, competitive markets, and non-utility generation owners."[25] But as the Commission has repeatedly stated, prudence review is a separate process from RFPs.

D. NIPPC Promotes a Selective and Misleading Interpretation of SB 1547

NIPPC offers an impermissibly selective reading of SB 1547 to argue that the Commission must develop new competitive bidding guidelines before "a utility acquires any new renewable energy sources." NIPPC's narrow interpretation ignores the statute's true purpose and should be disregarded.

Among other things, SB 1547 added a provision to ORS 469A.075. ORS 469A.075 establishes the requirement for utilities to file biannual RPIPs[26] and directs the Commission to adopt rules regarding the contents of RPIPs, procedures for acknowledging RPIPs, and providing for the integration of RPIPs and IRPs.[27] SB 1547 added a new subsection (4)(d) to ORS 469A.075, which instructs the Commission to develop rules providing for "the

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[24] NIPPC at 10.
[25] *Id.* at 11.
[26] ORS 469A.075(1).
[27] ORS 469A.075(4).

evaluation of competitive bidding processes that allow for diverse ownership of renewable energy sources that generate qualifying electricity." When viewed in the broader architecture of ORS 469A.075, this new subsection imposes a requirement on the Commission to establish review of competitive bidding processes *as part of the RPIP*. Contrary to NIPPC's interpretation, ORS 469A.075 does not call for the creation of entirely new competitive bidding guidelines; rather, the new provision is aimed at establishing rules that allow for the evaluation *in the RPIP process* of any competitive bidding process used by the utility.

By cherry-picking language from SB 1547 and disregarding the broader statutory context, NIPPC's interpretation conflicts with a bedrock principle of statutory construction. When interpreting a statute, agencies "do not look at one subsection of a statute in a vacuum; rather, we construe each part together with the other parts in an attempt to produce a harmonious whole."[28] Interpreted in context of the statute as a whole, this newly added subsection does not require the Commission to adopt new competitive bidding guidelines that "ensure" utilities do not own generation resources, as NIPPC claims.[29] Instead, it simply adds a process for review of competitive bidding processes during the RPIP process.

E. NIPPC Misunderstands the Nature of the PTC and ITC

PacifiCorp is committed to providing least-cost, least-risk RPS compliance opportunities for its customers. To that end, the recent extension of the federal ITC and PTC may present PacifiCorp's customers with time-sensitive opportunities to reduce costs for RPS compliance in California, Oregon, and Washington.

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[28] *State ex rel. Dep't of Transp. v. Stallcup*, 341 Or. 93, 99 (2006) (quoting *Lane County v. LCDC,* 325 Or. 569, 578, 942 P.2d 278 (1997)).
[29] NIPPC at 3.

NIPPC misapprehends how the ITC and PTC operate. As a result, NIPPC ignores the time-sensitivity associated with maximizing the potential benefits of the extended tax credits.

Congress extended the expiration date for the ITC and PTC in December 2015.[30] Both tax credits provide maximum benefits for projects that begin construction *before* 2020 (in the case of the federal ITC) and 2017 (in the case of the federal PTC). After those times, the available credits begin to lose value and, in the case of the PTC, disappear entirely without future congressional action.

NIPPC misstates the tax credit step-down provisions, leading it to the incorrect conclusion that "wind and solar projects that can be on-line in 2019 or beyond can still maximize the benefit of tax benefits,"[31] which is incorrect and unsupported by law. The full 30 percent ITC (and thereby maximum customer benefits) is only available for projects that begin construction on or before December 31, 2019, and that are placed into service before 2024. The ITC steps down for projects that begin construction after December 31, 2019 (to 26 percent for projects beginning construction in 2020; to 22 percent for projects beginning construction in 2021; and to 10 percent for projects beginning construction in 2022 and beyond). The PTC includes similar step-down provisions. To achieve the maximum PTC, wind projects must *begin construction on or before December 31, 2016*. The available PTC steps down 20 percent for projects beginning construction in 2017; 40 percent for projects beginning construction in 2018; and 60 percent for projects beginning in 2019. The PTC is eliminated in 2020 without future congressional action.

It is true, as NIPPC argues, that PTCs are potentially available (at some value) for wind projects that start construction by investing in qualifying equipment in 2017. But

[30] *See* H.R. 2029, Consolidated Appropriates Act, 2016, Division P, Title III, § 301-304.
[31] NIPPC at 17.

NIPPC neglects to mention that for a project to receive the *maximum* PTC, it must "begin construction" (as that term has been interpreted in guidance issued by the Internal Revenue Service) no later than December 31, 2016. Projects that begin construction in 2017 would be eligible for only 80 percent of the maximum PTC. PacifiCorp's time-sensitive RFP is tailored specifically to evaluate whether projects that can take advantage of *maximum* tax benefits (as contrasted with *partial* tax benefits) present the Company with a unique, time-sensitive RPS compliance option for its customers in California, Oregon, and Washington. As discussed in the Company's 2015 IRP Update, the potential cost savings achieved through early action are significant. To illustrate, denying PacifiCorp the opportunity to pursue acquisition of a 100 megawatt renewable project claiming the full PTC would deny PacifiCorp customers the value of 20 percent of the otherwise available PTCs, which PacifiCorp has estimated to be between $20-25 million over a ten-year period.[32]

III. CONCLUSION

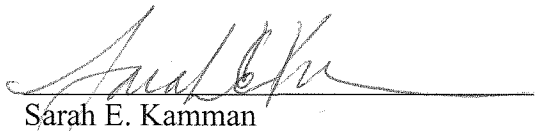
PacifiCorp requests the Commission reject NIPPC's request for a temporary rule prohibiting utility acquisition of renewable resources. The Commission has a well-established competitive bidding process that specifically allows for deviations from the full process if there is a time-limited opportunity of unique value to customers. PacifiCorp believes that opportunity exists now, while PTCs can be maximized at their full value and the RECs associated with a new renewable energy generation facility are "golden." PacifiCorp urges the Commission to adhere to its well-established principles of keeping the competitive bidding process and prudence review process separate and distinct. By reserving the determination of prudence to the appropriate ratemaking proceeding, the Commission can

[32] *See* PacifiCorp's 2015 Integrated Resource Plan Update at 55 (March 31, 2016).

ensure that PacifiCorp customers have the opportunity to take advantage of this unique moment.

For the reasons set out above, PacifiCorp respectfully requests that the Commission deny NIPPC's rulemaking petition.

Respectfully submitted this 6th day of May, 2016.

By: 

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