



WENDY MCINDOO  
Direct (503) 290-3627  
wendy@mrg-law.com

May 13, 2016

**VIA ELECTRONIC MAIL**

PUC Filing Center  
Public Utility Commission of Oregon  
PO Box 1088  
Salem, OR 97308-1088

**Re: AR 598/UM 1771 - In the Matter of NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, Petition for Temporary Rulemaking and Investigation into PacifiCorp's 2016 Requests for Proposal.**

Attention Filing Center:

Enclosed in the above-referenced dockets is an electronic copy of the Opening Comments of Idaho Power Company.

Please contact me with any questions.

Very truly yours,

Wendy McIndoo  
Office Manager

Attachment

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**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**AR 598  
UM 1771**

In the Matter of  
  
NORTHWEST AND INTERMOUNTAIN  
POWER PRODUCERS COALITION,  
  
Petition for Temporary Rulemaking and  
Investigation into PacifiCorp's 2016  
Requests for Proposal.

**Opening Comments of Idaho Power  
Company**

Pursuant to OAR 860-001-0400(4)(a), Idaho Power Company ("Idaho Power" or "Company") submits the following Opening Comments opposing Northwest and Intermountain Power Producers Coalition's ("NIPPC") Petition for a Temporary Rulemaking and Investigation into PacifiCorp's 2016 Requests for Proposal ("Petition").<sup>1</sup> Idaho Power's comments are limited to NIPPC's petition for a temporary rule. While Idaho Power does not address NIPPC's request for an investigation, the Company's silence should not be understood as support for that request.

**I. INTRODUCTION**

On March 8, 2016, Governor Kate Brown signed into law Senate Bill ("SB") 1547, which, among other requirements, increased the renewable portfolio targets ("RPS") for PacifiCorp d/b/a Pacific Power ("PacifiCorp") and Portland General Electric Company to 50 percent by 2040.<sup>2</sup> On April 11, 2016, Pacific Power issued two Requests for Proposals ("RFPs") for RPS-eligible resources. NIPCC has responded by filing the Petition asking the Public Utility Commission of Oregon ("Commission" or "OPUC") to adopt a temporary rule

<sup>1</sup> NIPPC's Petition (Apr. 26, 2016).  
<sup>2</sup> SB 1547, Section 5 at 4 (2016).

1 that would bar all Oregon investor-owned utilities from owning or acquiring an interest in  
2 new renewable generating facilities.<sup>3</sup> The rule provides an exception to the ownership  
3 prohibition for renewable resources acquired pursuant to the Commission’s competitive  
4 bidding guidelines.<sup>4</sup> Accordingly, NIPPC’s rule requires a utility seeking new renewable  
5 resources to adhere to the competitive bidding guidelines-- even for those resources under  
6 the 100 MW threshold.<sup>5</sup>

7 In support of the Petition, NPPC claims that its temporary rule is necessary because  
8 PacifiCorp’s RFP does not “ensure diverse ownership.”<sup>6</sup> Characterizing the Commission as  
9 “the guardian of competitive [energy] markets,”<sup>7</sup> NIPPC argues that the Commission is  
10 authorized to adopt the proposed rule which would “protect the ratepayers and the integrity  
11 of the competitive market.”<sup>8</sup>

12 NIPCC’s proposal must be rejected. First, it is beyond the Commission’s authority to  
13 prohibit electric utilities from acquiring new renewable resources. It is true that the  
14 Commission has broad authority to ensure that rates are fair and reasonable. However,  
15 that authority is exercised in the ratemaking process—not by controlling utility resource  
16 acquisition.<sup>9</sup> Similarly, NIPPC misunderstands the Commission’s mandate with respect to  
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18 <sup>3</sup> See NIPPC’s Petition at 10-14 and Attachment A.

19 <sup>4</sup> NIPPC’s Petition, Attachment A. NIPPC also exempts a power purchase agreement (“PPA”) from  
20 the definition of renewable energy resource, unless the electric company has a contractual option to  
21 acquire the resource during or at the end of the term of the PPA. Subject to that exception, NIPPC’s  
22 rule would consider any PPA less than five years in duration to be subject to the competitive bidding  
23 guidelines.

24 <sup>5</sup> The Commission’s current rules require adherence to the guidelines only for resources 100 MW  
25 and over. *Re Commission’s Investigation Regarding Competitive Bidding*, UM 1182, Order No. 14-  
26 149, Appendix A at 1 (Apr. 30, 2014).

<sup>6</sup> NIPPC’s Petition at 10.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 10.

<sup>9</sup> See *Re Pacific Power’s Request for a General Rate Revision*, Docket UE 246, Order No. 12-493 at  
25-27 (Dec. 20, 2012)

1 competitive markets. Contrary to NIPPC’s claim, the Commission has been given a very  
2 specific role—to adopt competitive bidding guidelines that **allow for** diverse ownership.<sup>10</sup>  
3 The Commission has not, as NIPPC argues, been charged to “ensure that there is a robust  
4 competitive electric generation market.”<sup>11</sup> Thus, the OPUC’s role with respect to competition  
5 does not provide the Commission with authority to dictate which resources a utility acquires.

6 NIPPC’s Petition invites the Commission to expand its traditional role beyond its  
7 delegated authority in order to take control of utility resource decisions. The proposal is  
8 unwise, illegal, and should be rejected.

## 9 II. DISCUSSION

### 10 A. NIPPC’s Proposed Rule Exceeds the Commission’s Authority.

#### 11 1. The Commission’s Delegated Powers do not Grant it Authority to Dictate 12 Resource Acquisition Decisions.

13 The OPUC’s general powers are enumerated at ORS 756.040, which declares that  
14 “[t]he Commission shall make use of the jurisdiction and powers of its office to protect . . .  
15 customers, and the public generally, from unjust and unreasonable exactions and  
16 practices and to obtain for them adequate service at fair and reasonable rates.”<sup>12</sup> In  
17 carrying out its ratemaking function, the Commission must, by necessity, determine  
18 whether a particular resource acquisition was prudent and therefore whether it should be  
19 included in rates.<sup>13</sup> The Commission has the discretion to disallow unnecessary,  
20 excessive, or inappropriate investments.<sup>14</sup> However, the prudence review is a strictly

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23 <sup>10</sup> ORS 469.075(4)(d).

24 <sup>11</sup> NIPPC’s Petition at 2.

25 <sup>12</sup> ORS 756.040(1).

26 <sup>13</sup> See Order No. 12-493 at 25-27.

<sup>14</sup> *Id.* at 31-32.

1 after-the-fact determination.<sup>15</sup> The OPUC’s authority **does not** extend so far as to allow  
2 the Commission to either mandate or prohibit a particular resource acquisition. This is  
3 particularly true here because NIPPC’s rule would interfere with a utility’s legislative  
4 mandate to comply with the renewable portfolio standards.<sup>16</sup>

5 The Commission has repeatedly made clear its view that utilities maintain ultimate  
6 responsibility to make resource decisions. For instance, when the Commission first  
7 established the least-cost planning process, it specifically explained that it did not intend  
8 “to alter the basic roles of the Commission and the utility in the regulatory process.”<sup>17</sup> In  
9 particular, the Commission explained:

10 The Commission does not intend to usurp the role of utility decision-  
11 maker. Utility management will retain full responsibility for making  
12 decisions and for accepting the consequences of the decisions. Thus,  
13 the utilities will retain their autonomy while having the benefit of the  
information and opinion contributed by the public and the  
Commission.<sup>18</sup>

14 In Idaho Power’s recent Integrated Resource Plan (“IRP”), the Commission stated:

15 The purpose of the IRP process is to provide the utility with the  
16 information and opinion of stakeholders and the Commission based on  
17 information presented by the utility. The question of whether a specific  
18 investment made by a utility in its planning process was prudent will be  
fairly examined in a subsequent rate case proceeding.<sup>19</sup>

19 The Commission’s order adopting the Competitive Bidding Guidelines articulates  
20 the same fundamental relationship between utilities and the Commission.<sup>20</sup> A primary goal

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21 <sup>15</sup> *Id.* at 25-27.

22 <sup>16</sup> See ORS 469A.052 and ORS 469A.055(1)-(3).

23 <sup>17</sup> *In the Matter of the Investigation into Least-Cost Planning for Resource Acquisitions by Energy  
Utility in Oregon*, UM 180, Order No. 89-507 at 6 (Apr. 20, 1989).

24 <sup>18</sup> *Id.*

25 <sup>19</sup> *In the Matter of, Idaho Power Company, 2013 Integrated Resource Plan*, LC 58, Order No. 14-253  
(Jul. 8, 2014).

26 <sup>20</sup> UM 1182, Order No. 06-446 (Aug. 10, 2006).

1 of the guidelines is to “[n]ot unduly constrain utility management’s prerogative to acquire  
2 new resources.”<sup>21</sup> The Commission reviews and approves the RFP and the independent  
3 evaluator (“IE”) oversees the RFP process to ensure that it is conducted fairly and  
4 properly.<sup>22</sup> However, “[t]he utility will conduct the RFP process, score the bids, select the  
5 initial and final shortlists, and undertake negotiation with bidders.” Importantly those  
6 guidelines apply only to major resources. Utilities need not to adhere to the guidelines for  
7 resources 100 MW and lower.<sup>23</sup>

8           Clearly, the Commission has taken special care over the years to maintain a  
9 careful balance.<sup>24</sup> While it oversees and reviews certain aspects of the resource  
10 acquisition process— it does not dictate results. On the other hand, the Commission  
11 retains complete authority to ensure that customer rates reflect only those resource  
12 acquisitions that it deems to be prudent. NIPPC’s proposed rule would upend that  
13 approach. As discussed above, NIPPC advocates a complete bar to utility ownership of  
14 new renewable resources, thus ensuring that new renewable generation is procured from  
15 independent power producers—whether or not the generation available from independent  
16 power producers represent the least cost resource. In this way, the rule not only transfers  
17 responsibility for selecting the resource from the utility to the Commission, it may result in  
18 a higher cost acquisition which presumably would be included in rates to the detriment of  
19 utility customers.

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22 <sup>21</sup> *Id.* at 2.

23 <sup>22</sup> Order No. 14-149, Appendix A at 1-5.

24 <sup>23</sup> *Id.* at 3.

25 <sup>24</sup> Idaho Power relies upon the OPUC’s consistency and careful balance not only in Oregon, but also  
26 Idaho. The Idaho Public Utilities Commission ordered Idaho Power to comply with Oregon’s RFP  
guidelines in the event Idaho Power “commence[d] an RFP process for a new supply-side resource  
prior to the development of Idaho-specific RFP guidelines.” *See In the Matter of the Development of  
Request for Proposal (RFP) Guidelines for the Procurement of Supply-Side Resources by Idaho  
Power Company*, Case No. IPC-E-10-03, Order No. 32745 at 2 (Feb. 12, 2013).

1 It is true that NIPPC’s proposal is for a temporary rule only. However, the  
2 Commission cannot and should not take an action even temporarily that is so far outside  
3 the Commission’s traditional role.

4 **2. NIPPC’s Proposed Rule Would Inappropriately Interfere with Out-of-State**  
5 **Utility Operations.**

6 NIPPC’s proposal is also beyond the authority of the Commission because it asks  
7 the Commission to prohibit resource acquisitions not only in Oregon, but in other states as  
8 well. For instance, Idaho Power’s service territory and customers are largely located in the  
9 state of Idaho and the Company might reasonably wish to acquire a renewable resource  
10 located in Idaho and/or to serve Idaho customers. And yet the proposed rule would, on its  
11 face, bar such an acquisition—or require the Company to adhere to the Competitive  
12 Bidding Guidelines, even for resources under 100 MW. This “extra-territorial” aspect of  
13 NIPPC’s proposed rule violates both state and federal law.

14 The Commission’s authority—as delegated by the Oregon Legislature-- is limited to  
15 powers that are expressly authorized or necessarily implied by statute.<sup>25</sup> There is nothing  
16 in the Commission’s statutes that suggest that the Legislature intended to empower the  
17 agency to dictate to a multijurisdictional utility what resources it may acquire in another  
18 state to serve another state’s customers. Furthermore, there is no implied power to take  
19 this action either because this authority is unnecessary to establish fair and reasonable  
20 rates for Oregon customers.<sup>26</sup>

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<sup>25</sup> *Gearhart v. Pub. Util. Commn. of Oregon*, 356 Or 216, 231-232, 339 P3d 904, 914 (2014).

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<sup>26</sup> Order No. 12-493 at 31-32 (The Commission determined that some of PacifiCorp’s emission control investments were imprudent. The Commission reduced the Oregon-allocated portion of the investment by 10 percent, not the system-wide total, to arrive at fair and reasonable rates for Oregon customers.).

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1 NIPPC's proposal would also run afoul of the U.S. Constitution's Commerce  
2 Clause.<sup>27</sup> "[T]he 'Commerce Clause . . . precludes the application of a state statute to  
3 commerce that takes place wholly outside of the State's borders, whether or not the  
4 commerce has effects within the State.'"<sup>28</sup> The Supreme Court also stated that "a statute  
5 that directly controls commerce occurring wholly outside the boundaries of a State  
6 exceeds the inherent limits of the enacting State's authority and is invalid regardless of  
7 whether the statute's extraterritorial reach was intended by the legislature."<sup>29</sup> NIPPC's rule  
8 attempts to control resource acquisition that may occur out of state and that may not  
9 impact Oregon customers. The proposal therefore exceeds the Commission's authority.

10 **3. The Commission's Primary Duty is to Establish Fair and Reasonable Rates,**  
11 **Not Foster Competition.**

12 NIPPC attempts to bolster its effort to expand the Commission's jurisdiction by  
13 arguing that it is necessary to promote competition in electric generation markets, which  
14 NIPPC claims it is the Commission's role to ensure. This attempt is misguided. First it is  
15 true that the Legislature has, in SB 1547, provided the Commission with a limited charge  
16 related to diverse ownership. Specifically, the Legislature modified ORS 469A.075, which  
17 is an existing law that requires an electric company to develop an implementation plan for  
18 meeting the requirements of the renewable portfolio standards. As part of this process,  
19 the Legislature now explicitly requires the Commission to adopt rules "providing for the  
20 evaluation of competitive bidding processes that allows for diverse ownership of  
21 renewable energy resources that generate qualifying electricity."<sup>30</sup> However, this fairly

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23 <sup>27</sup> U.S.C.A. CONST. Art. 1, Section 8, cl. 3.

24 <sup>28</sup> *Healy v. Beer Inst., Inc.*, 491 US 324, 336, 109 S CT 2491, 2499 (1989) (citing *Edgar v. MITE Corp.*, 457 US 624, 642-643, 102 S CT 2629, 2640-2641 (1982) (plurality opinion).

25 <sup>29</sup> *Id.*

26 <sup>30</sup> ORS 469A.075(4)(d).



1 modest direction cannot reasonably be understood to alter the Commission’s primary duty  
2 to set rates,<sup>31</sup> or the fundamental relationship between the Commission and the utility that  
3 allows the utility to make generation decisions, while the Commission reviews the  
4 decisions for prudence.

5 NIPPC also cites ORS 757.646 in support of its claim that the Commission has  
6 been charged with ensuring that there is a robust competitive electric generation market.<sup>32</sup>  
7 However, ORS 757.646 addresses the retail market, and does not support NIPPC’s  
8 proposed rule dictating renewable resource acquisition.

9 Finally, NIPPC cites to the Commission’s website, which notes the Commission’s  
10 responsibility to promote competitive markets.<sup>33</sup> This reference, however, pre-dates SB  
11 1547, and therefore likely refers to ORS 757.646 with respect to retail competition. In any  
12 event, the Commission’s authority is derived from the Legislature and the Legislature has  
13 not empowered the Commission to foster competition by dictating resource decisions, as  
14 requested by NIPPC.<sup>34</sup>

15 **B. NIPPC’S Proposal to Expand the RFP Process to Non-Major Resources Is**  
16 **Contrary to Commission Precedent and Burdensome.**

17 The Commission’s Competitive Bidding Guidelines direct a utility to issue an RFP  
18 for major resources, defined as “resources with durations greater than 5 years and  
19 quantities greater than 100 MW.”<sup>35</sup> Conversely, under current policy, a utility does not  
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21 <sup>31</sup> In fact, the Legislature in SB 1547, in the provision immediately before the provision NIPPC cites  
22 (ORS 469A.075(4)(c)), codified the Commission’s existing planning goals that seek the least-cost,  
23 least-risk acquisition of resources. This section reaffirms, rather than alters the Commission’s  
primary duty.

24 <sup>32</sup> NIPPC’s Petition at 2-3.

25 <sup>33</sup> *Id.*

26 <sup>34</sup> *Gearhart v. Pub. Util. Commn. of Oregon*, 356 Or at 231-232, 339 P3d at 914.

<sup>35</sup> Order No. 14-149, Appendix A at 1.

1 need to issue an RFP for non-major resources.<sup>36</sup> However, under NIPPC's rule, a utility  
2 would be permitted to own or acquire a renewable energy resource only if the resource  
3 was acquired pursuant to the Commission's Competitive Bidding Guidelines.<sup>37</sup> As such,  
4 the rule would eliminate the distinction between major and non-major resources, and  
5 require a utility to issue an RFP for **all** renewable resource acquisition.<sup>38</sup> NIPPC's attempt  
6 to so drastically expand the application of the Competitive Bidding Guidelines is contrary  
7 to Commission policy and should be rejected.

8 When the Commission first adopted the Competitive Bidding Guidelines in 2006,  
9 the straw proposal circulated by Staff included a 50 MW threshold for major resources.<sup>39</sup>  
10 The utilities all argued for a higher threshold.<sup>40</sup> Idaho Power in particular explained that  
11 such a "low threshold[] [set at 50 MW] may not permit the Company the flexibility needed  
12 to effectively purchase certain resources that, by their nature, are time and market  
13 sensitive."<sup>41</sup> The Commission agreed with Idaho Power and the other utilities, and  
14 established an RFP requirement only for those resources greater than 100 MW.<sup>42</sup>

15 In 2011, the Commission re-examined the 100 MW threshold as a part of its  
16 investigation into the potential for utility bias towards utility-owned resources.<sup>43</sup> Again the  
17 utilities opposed lowering the threshold, with Idaho Power pointing out that doing so would  
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19 <sup>36</sup> *Id.*

20 <sup>37</sup> NIPPC's Petition, Attachment A.

21 <sup>38</sup> Subject to the rule's exemption to PPAs that are not subject to utility acquisition.

22 <sup>39</sup> Order No. 06-446 at 3-4.

23 <sup>40</sup> Order No. 06-446 at 3.

24 <sup>41</sup> UM 1182, Idaho Power's Reply Comments at 3 (Oct. 21, 2005).

25 <sup>42</sup> *Id.* at 3-4, and Appendix A at 1. The Commission also defined major resources as resources with  
26 durations greater than five years.

27 <sup>43</sup> UM 1182(1), Phase 1, Order No. 11-340 at 1 (Sep. 1, 2011). *See also Re Commission's*  
*Investigation Regarding Performance-Based Ratemaking Mechanisms to Address Potential Build v.*  
*Buy Bias*, UM 1276, Order No. 11-001 (Jan. 3, 2011).

1 drive up costs and create inefficiencies.<sup>44</sup> The Commission “agree[d] with the majority of  
2 parties that the threshold for a ‘major resource’ should not be lowered”<sup>45</sup> and concluding  
3 that “lowering the threshold is unlikely to address the self-build bias.”<sup>46</sup> In fact, the  
4 Commission modified the definition of major resources to include smaller projects that in  
5 aggregate may be considered a major resource.<sup>47</sup>

6 Finally, the Commission retained the 100 MW threshold in the two most recent  
7 Competitive Bidding Guideline proceedings.<sup>48</sup>

8 NIPPC’s proposal disregards the Commission’s carefully considered RFP  
9 threshold that has been in place for a decade. If adopted NIPPC’s rule would deprive the  
10 utilities of the flexibility necessary to procure least cost resources, ultimately driving up  
11 costs for utility customers. The additional burden and time required to issue an RFP is not  
12 justified for non-major resources.

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23 <sup>44</sup> UM 1182(1), Opening Comments of Idaho Power at 5 (Mar. 31, 2011); UM 1182(1), Closing  
Comments of Idaho Power Company at 8 (Apr. 22, 2011).

24 <sup>45</sup> Order No. 11-340 at 5.

25 <sup>46</sup> *Id.*

26 <sup>47</sup> *Id.* at 5-6.

<sup>48</sup> Order No 14-149; Order No. 13-204 (Jun. 10, 2013).

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**III. CONCLUSION**

The Commission should deny NIPPC's proposed temporary rule. The rule exceeds the Commission's authority and conflicts with the Commission's primary duty, which is the establishment of fair and reasonable rates.

DATED: May 13, 2016.

**McDOWELL RACKNER & GIBSON PC**  


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Lisa F. Rackner

**IDAHO POWER COMPANY**

Lisa Nordstrom  
Lead Counsel  
PO Box 70  
Boise, ID 83707

Attorneys for Idaho Power Company