

**THE OREGON INDEPENDENT EVALUATOR'S  
ASSESSMENT OF PACIFICORP'S  
2008 ALL SOURCE RFP DESIGN**

**ADEQUACY, ACCURACY AND COMPLETENESS  
OF SOLICITATION MATERIALS**

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# TABLE OF CONTENTS

<b>I.</b>	<b>EXECUTIVE SUMMARY</b>	<b>1</b>
<b>II.</b>	<b>REVIEW OF SPECIFIC GUIDELINES AND ASPECTS OF THE RFP</b>	<b>4</b>
<b>III.</b>	<b>ASSESSMENT OF PROCESS INTEGRITY ISSUES</b>	<b>9</b>
<b>IV.</b>	<b>RFP DOCUMENTS</b>	<b>10</b>
<b>V.</b>	<b>CREDIT REQUIREMENTS</b>	<b>14</b>
<b>VI.</b>	<b>OPTIONS TO EXTEND ACCELERATE OF DELAY</b>	<b>18</b>
<b>VII.</b>	<b>CAPITAL LEASES AND VARIABLE INTEREST ENTITIES</b>	<b>18</b>
<b>VIII.</b>	<b>BID FEES</b>	<b>19</b>
<b>IX.</b>	<b>CONCLUSION</b>	<b>19</b>

# I. EXECUTIVE SUMMARY AND RECOMMENDATIONS

## A. INTRODUCTION & RECOMMENDATIONS

Accion Group Inc. (Accion) and Boston Pacific Company, Inc. (Boston Pacific) were selected by the Public Utility Commission of Oregon (Commission) to serve as the Independent Evaluator (IE) for PacifiCorp's 2008 Request for Proposals (2008 RFP). Under the terms of that contract, the IE is required to prepare the *IE Assessment of RFP Design*. This report is meant to satisfy that requirement. The scope of the IE Assessment is defined by the Commission as follows:

The assessment should take into account the Commission's goals (page 2 of the order) and the three criteria for RFP approval (Guideline 7) and specifically address Guidelines 6, 7, 8, 9, 10, 11 and 13, as well as issues raised by parties in UM 1208. The assessment should address the *evaluation criteria, methods and computer models* as well as the pro forma contracts included with the RFP. The assessment also should review *the adequacy, accuracy and completeness of all solicitation materials* to ensure compliance with the Commission's competitive bidding order and consistency with accepted industry standards and practices.

In conducting our review, Accion Group and Boston Pacific divided areas of review to avoid duplication, and to provide unambiguous commentary on the draft design and documents, with each firm providing separate reports. Accion Group's report addresses the adequacy of the RFP processes, Bidder qualification requirements, compliance with the Commission's Guidelines, and the documentation the Company has prepared. Boston Pacific's report assesses "evaluation criteria, methods, and computer models," including Guidelines relevant to that topic.

As part of our review, we considered the comments received by stakeholders during the stakeholder meeting. We also reviewed all written comments provided by interested parties and the Oregon and Utah Commission Staffs

The final draft of the 2008 RFP was filed in Oregon on March 28, 2008. We have previously provided to Commission Staff, PacifiCorp, and Stakeholders, in several forums, our preliminary comments on the preliminary 2008 RFP draft. Some concerns raised during the drafting by Stakeholders and the IE have been addressed and are not the subject of this report. Rather, this initial assessment identifies areas that continue to be of concern regarding the RFP design, along with recommendations for further improvement of the RFP.

In conducting this initial assessment, we reviewed the RFP processes affecting the ability of Bidders to participate; the evaluation tools, models, techniques, and assumptions to be used; and the Pro Forma Agreements prepared by PacifiCorp, which will be the basis on which transactions will be finalized. Our review also considered "lessons learned" in the RFP recently conducted by PacifiCorp, for which we served as IE. We paid particular attention to changes made in recognition of difficulties experienced in the conduct of that RFP.

As in our prior assessment of PacifiCorp RFP design and materials, we based our review on the Competitive Bidding Guidelines developed by the Commission, its Competitive Bidding Goals, and by the criteria for a fair and

transparent RFP adopted by the Federal Energy Regulatory Commission (FERC). We continue to think it appropriate to apply the standards of both jurisdictions because this provides the most comprehensive review and incorporates the areas known to be of concern to prospective Bidders and regulators. FERC recognizes threshold considerations for assessing the transparency of competitive solicitations. We adopted the FERC standard when conducting our review. In summary, from our review we believe that with the inclusion of the recommendations in this report:

- the RFP complies with the Commissions Guidelines;
- the process is designed to be open and fair, permitting all Bidders access to the same information at the same time;
- prospective Bidders and other Stakeholders were provided with draft RFP documents and the opportunity to request or recommend changes to those documents;
- the IE was provided open access to PacifiCorp personnel and evaluation modeling information, upon request;
- the IE was engaged before the RFP was completed and released to Bidders in final form, and provided sufficient time to review the RFP documents and processes;
- the RFP documents provided clear and complete product definition;
- the RFP documents provided full disclosure of the evaluation process that would be employed;
- the Company would appropriately and equitably evaluate all bids;
- the Company's proposed evaluation process adequately assesses the risks associated with various bids; and,
- as designed, the RFP process calls for all bids to be evaluated using the same standards and evaluation models and methodology.

**Recommendation 1:** The Commission Goals recognize that the RFP is to “Complement Oregon’s integrated resource planning process” and “Not unduly constrain utility management’s prerogative to acquire new Resources”. We do not at this time know whether the amount or type of generation sought will comply with an IRP that merits Commission approval. We do note that the RFP was designed to meet a portion of the resource needs identified by the Company in its filed IRP. We therefore recommend that the RFP be conditionally accepted pending approval of the Company’s 2007 IRP. If, the Commission determines that the Company’s 2007 IRP is not acceptable, the resource selections made pursuant to this RFP can be evaluated to determine whether those Company decisions are consistent with and complement the IRP process.

**Recommendation 2:** Amend footnote 11 in the RFP to clarify that bids with heat rates of less than 6900 MMBtu will be accepted, classified, and evaluated based on the resource’s unique operating criteria.

**Recommendation 3:** Amend the language in Appendix B to define which resource alternatives are eligible for credit requirement adjustments.

**Recommendation 4:** Clarify whether non-asset backed bids must be for terms of 5 years or for terms of no more than five years. If the latter, incorporate a credit matrix that reflects a lower risk exposure for such shorter term bids.

**Recommendation 5:** Provide credit matrices for intermediate and peaking resources no later than commencement of hearings on the Company’s Request for Approval of this RFP.

**Recommendation 6:** Begin discussions with the IE and the Staff to determine the appropriate treatment of bids that must be accounted for as Leases pursuant to SFAS 13.

**Recommendation 7:** In the RFP documentation, more fully describe the process the Company will use to determine the reduced credit requirements for shorter term bids, including a description of the methods to be used to calculate such reductions and the types of resources that could request such reductions.

**Recommendation 8:** The RFP should state whether PacifiCorp will accept any change of law risk, or if there is any opportunity to negotiate allocation of that risk after the final short list is identified. If PacifiCorp will entertain proposals for allocation of change of law risk, the PPA should include a change of law provision.

**Recommendation 9:** Adopt a success fee, in addition to the established bid fee, assign a large portion of the cost of the RFP process to successful Bidders.

## **B. BASIS OF REVIEW**

As in our prior tenure as the IE of PacifiCorp's 2012 RFP, the scope of our assessment has been defined by the Commission to include a review of whether the RFP addresses the Commissions stated "goals," "three criteria for RFP Approval," and "Guidelines 6, 7, 8, 9, 10, 11 and 13." All of these are contained in the Commission's Order on competitive bidding guidelines; Order No. 06-446 dated August 10, 2006.

The five goals stated by the Commission are:

- provide the opportunity to minimize long-term energy costs, subject to economic, legal, and institutional constraints;
- complement Oregon's integrated resource planning process;
- not unduly constrain utility management's prerogative to acquire new resources;
- be flexible, allowing the contracting parties to negotiate mutually beneficial exchange agreements; and
- be understandable and fair.<sup>1</sup>

The three criteria for RFP approval, as stated by the Commission are:

the alignment of the utility's RFP with its acknowledged IRP;

- whether the RFP satisfies the Commission's competitive bidding guidelines; and
- the overall fairness of the utility's proposed bidding process.<sup>2</sup>

The seven guidelines cited by the Commission can be summarized as follows:

(a) Guideline 6 addresses RFP design, specifically the process and content of the draft RFP;

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<sup>1</sup> Order at page 2.

<sup>2</sup> Order at page 9.

- (b) Guideline 7 addresses RFP approval, specifically the three criteria quoted above;
- (c) Guideline 8 addresses Benchmark Resource Score;
- (d) Guideline 9 addresses Bid Scoring and Evaluation Criteria, specifically the determination of the Initial and Final Shortlists plus the imputed debt issue;
- (e) Guideline 10 addresses Utility and IE Roles in the process;
- (f) Guideline 11 addresses the IE Closing Report; and
- (g) Guideline 13 addresses RFP acknowledgment.

## **II. REVIEW OF SPECIFIC GUIDELINES AND ASPECTS OF THE RFP**

### ***A. The Commission's Competitive Bidding Goals***

The RFP materials submitted in this solicitation were prepared using the recently conducted PacifiCorp 2012 RFP and associated materials as a template. As we previously observed, those RFP documents were designed to facilitate a RFP focused on acquiring Base Load resources. In this RFP resources to address base load, intermediate, and summer peaking needs are sought. In our review of the Final Draft RFP filed by the Company, we considered the structure of the RFP processes and documentation to assess both compliance with the Commission's Guidelines and the overall efficacy of the processes proposed.

In Order 06-446, the Commission established the following Goals for RFPs:

1. Provide the opportunity to minimize long-term energy costs, subject to economic, legal, and institutional constraints;
2. Complement Oregon's integrated resource planning process;
3. Not unduly constrain utility management's prerogative to acquire new resources;
4. Be flexible, allowing the contracting parties to negotiate mutually beneficial exchange agreements; and
5. Be understandable and fair.

The Commission also established certain Guidelines which were designed to further define the parameters that would define an equitable, transparent and auditable RFP process.

In the following sections, we discuss whether the design of PacifiCorp's All Source RFP is consistent with the goals and Guidelines set out by the Commission, and where it is not, suggest changes to the design that will, in our opinion, better facilitate achieving the Commission's objectives.

### ***B. GUIDELINE 6: RFP Design***

Guideline 6 states:

*The utility will prepare a draft RFP and provide it to all parties and interested persons in the utility's most recent general rate case, RFP and IRP dockets. The utility must conduct Bidder and stakeholder workshops on the*

*draft RFP. The utility will then submit a final draft RFP to the Commission for approval, as described in Guideline 7 below. The draft RFPs must set forth any minimum Bidder requirements for credit and capability, along with bid evaluation and scoring criteria. The utility may set a minimum resource size, but Qualifying Facilities larger than 10 MW must be allowed to participate. The final draft submitted to the Commission must also include standard form contracts. However, the utility must allow Bidders to negotiate mutually agreeable final contract terms that are different from ones in the standard form contracts. The utility will consult with the IE in preparing the RFPs, and the IE will submit its assessment of the final draft RFP to the Commission when the utility files for RFP approval.*

As part of our assessment of the draft RFP, we reviewed the Draft RFP and each of its attachments and appendices to assess the overall design of this RFP process with respect to compliance with Guideline 6.

PacifiCorp drafted and provided to all of the parties in its most recent general rate case RFP and IRP proceedings copies of its Initial and Final Draft 2008 All Source RFP. The Company also committed to make those documents available to other parties by posting them on the PacifiCorp website. The utility conducted the required stakeholder meetings and submitted its Final Draft RFP for Commission approval.

The Draft RFP clearly sets forth the capacity and energy products the Company seeks and the minimum resource size it will accept. It permits smaller QFs, load curtailment, and other renewables that can meet the Company's reliability criteria to bid in accordance with the requirements of this guideline. It sets out Bidder qualification requirements for experience, credit, and capability. The Final Draft also describes PacifiCorp's bid evaluation and scoring criteria. PacifiCorp has conferred with the Oregon IE as required. Several of the recommendations made by the IE have been incorporated into the Final Draft RFP PacifiCorp has filed.

We have several remaining suggestions regarding various aspects of this RFP, which we believe should be incorporated in the RFP. Each of these issues and our suggested changes to the RFP are discussed in full later in this report. In general however, we believe the RFP complies with the requirements of Guideline 6. With incorporation of the suggested changes noted in this Report, we believe the RFP can be conducted successfully.

### ***C. GUIDELINE 7: RFP Approval and Issues Raised by the Parties***

*Guideline 7: RFP Approval: The Commission will solicit public comment on the utility's final draft RFP, including the proposed minimum Bidder requirements and bid scoring and evaluation criteria. Public comment and Commission review would focus on (1) the alignment of the utility's RFP with its acknowledged IRP; (2) whether the RFP satisfies the Commission's competitive bidding guidelines; and (3) the overall fairness of the utility's proposed bidding process. After reviewing the RFP and the public comments, the Commission may approve the RFP with any conditions and modifications deemed necessary. The Commission may consider the impact of multi-state regulation, including requirements imposed by other states for the RFP process. The Commission will target a decision within 60 days after the filing of the final draft RFP, unless the utility requests a longer review period when it submits the final draft RFP for approval.*

We found the process used by the Commission Staff and PacifiCorp to ensure the public had sufficient opportunities to provide comments to be appropriate. The stakeholder meeting provided a complete overview of the RFP and ample opportunity for questions. All questions posed by stakeholders and Bidders were addressed.

PacifiCorp held two Technical, Bidder, and Stakeholder meetings prior to filing its Final Draft RFP with the Commission. These meetings addressed the design of the RFP. The Oregon IE participated in these meetings and provided to the attendees their observations and the opportunity for Bidders and other Stakeholders to pose questions to the Company and to the IE. Notices of the meeting were posted on the PacifiCorp web site and participants were notified by email that the sessions would be held. We were occasionally troubled by PacifiCorp's tendency not to provide adequate advance notice of the date and location of each meeting to both the public and to the IE. On one occasion, the Company was required to reschedule a Stakeholders meeting at the insistence of the IE. During these sessions, stakeholders identified concerns and questions about the process and draft provisions. All concerns were fully discussed among the stakeholders, PacifiCorp, the Commission Staff, and IE. Stakeholders and Bidders were also able to submit written comments to the Commission regarding concerns identified by those parties. Several of those concerns and suggested changes to the RFP have been incorporated in the Final Draft RFP.

#### **D. *GUIDELINE 10: Utility and IE Roles***

The Commission guidelines establish responsibilities for the Utility and the IE.

*Guideline 10: Utility and IE Roles in the RFP Process:*

- a. *The utility will conduct the RFP process, score the bids, select the initial and final short-list, and undertake negotiations with Bidders.*
- b. *The IE will oversee the RFP process to ensure that it is conducted fairly and properly.*

PacifiCorp designed the RFP process in conformity with the Commission's guidelines, respecting the role of the IE and the responsibilities of the utility. The Company also incorporated in this RFP, lessons learned during its recently conducted 2012 Base load RFP. We believe those adjustments to the RFP process will significantly improve the process and expedite the evaluation of bids. Our assessment of PacifiCorp's success in completing these responsibilities will, by necessity, come only after bids are received and evaluated.

PacifiCorp cooperated fully with the IE in providing the information that is critical to our assessment of the design of the RFP process, including information regarding the Company's credit requirements, and the design and management of the company's Code of Conduct.

#### **E. *CODE OF CONDUCT***

The sufficiency of the Code of Conduct design and implementation was identified as a significant concern of Bidders in both this and PacifiCorp's last RFP, in light of the company's initial intent to file self-build bids in lieu of submitting Benchmark bids as required by the Commission. We will continue to carefully monitor the adequacy of the separation of personnel and compliance with the established Code of Conduct.

Fidelity to the Code of Conduct is imperative to conduct a RFP that is both fair, and perceived to be fair by

Bidders. In the absence of Bidder confidence in the fairness of the RFP, the number and quality of bids will suffer. We began our review of PacifiCorp's compliance with Code of Conduct requirements on the experience in the most recent RFP. We found the protocols established by PacifiCorp in that RFP to be comprehensive and clear, and note that no Bidder questioned PacifiCorp's adherence to the Code of Conduct.

The Code of Conduct employed by PacifiCorp is designed to avoid all private conversations regarding the RFP between prospective and actual Bidders, and PacifiCorp personnel. We believe PacifiCorp has taken sufficient action to achieve this end, and the experience in the last RFP reinforces our confidence in PacifiCorp's commitment to avoid contact between Bidders and the company.

The Code of Conduct is also designed to avoid discussions between members of PacifiCorp's evaluation team and the individuals participating on developing PacifiCorp's benchmark or self-build proposals. We believe the protocols developed by PacifiCorp are sufficient to achieve that end. Indeed, in the last RFP we observed PacifiCorp personnel taking extreme care to separate personnel and functions to avoid the release of bid information beyond to unauthorized individuals.

PacifiCorp provided its Code of Conduct as Attachment 20 to the Final Draft RFP. The Company also provided a draft memorandum to the IE, which had been provided to PacifiCorp personnel participating in this RFP, giving specific direction on Code of Conduct compliance requirements. Draft Code of Conduct materials were provided as well. We also reviewed the personnel training process PacifiCorp developed, including the certification of when training is completed and the protocols for documenting adherence to the Code of Conduct training. The Code of Conduct documents and training are consistent with those used in the last PacifiCorp RFP. The documents are comprehensive and appropriate for informing personnel of their responsibilities and the limitations on their interaction with Bidders and other PacifiCorp employees.

By including the Code of Conduct as part of the RFP, the Company puts all participants, and not PacifiCorp personnel alone, on notice of the conduct expected of all parties. While the focus is typically on company personnel adherence to the Code of Conduct, in our experience it is far more likely that a Bidder will inadvertently contact company employees who are involved in the RFP. For this reason, we encouraged PacifiCorp to post a list of employees involved in the RFP so all prospective Bidders are informed of which employees are subject to the Code of Conduct restrictions.

PacifiCorp committed to complete Code of Conduct training by May 31, 2008. This is a reasonable time frame, especially since we anticipate many of the persons who will be trained in Code of Conduct protocols will also be involved in this RFP, so the training is, in effect, a reminder of their obligations.

The Code of Conduct expressly prohibits the IRP work group from sharing transmission system information with either the Evaluation Team or the Benchmark Team. Also, the Code of Conduct prohibits Evaluation Team members from having "contact or communication with any Bidder other than through the IE's."<sup>3</sup>

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<sup>3</sup> Attachment 20 at 1.

PacifiCorp's Code of Conduct details the separation of the Evaluation Team into work groups, and provides for the further separation of certain individuals before the final shortlist is selected. As in the last RFP, PacifiCorp proposes having so-called "blinded" work groups, which will include the Origination, Structuring and Pricing, Transmission Mangier, and Environmental groups. This structure may be revised as we are working with PacifiCorp to further review the "blinding" of bids due to some significant challenges identified in the prior RFP. Any changes will be established before bids are received and Bidders and the Commission will be advised on how bids should be submitted. There is also a recognition of shared services in conformity the FERC Standards of Conduct requirements.

We have found PacifiCorp to be cooperative and open in reviewing Code of Conduct issues with the IE. We are convinced that PacifiCorp recognizes the importance of fidelity to the Code of Conduct standards, and will take appropriate actions to implement the protocols as designed. Further, we believe PacifiCorp has designed Code of Conduct training and protocols that, if adhered to, will prevent inappropriate exchange of information between Bidders and PacifiCorp, and among PacifiCorp personnel. We are hopeful that our discussions with PacifiCorp regarding the need for a "blinded" group will be successful, thereby eliminating unnecessary complications in documenting adherence to the Code of Conduct.

#### ***F. COMMUNICATION PROTOCOLS***

Attachment 4 to the draft RFP details the Communications Protocols PacifiCorp proposes to use for this RFP. The protocols address how communications between PacifiCorp and Bidders will be conducted, and how communications between the Company and the IE will be managed. Additionally, Attachment 4 sets forth how communications between the Evaluation Team and the Self-Build Team will be conducted. Attachment 4 also recounts the role and functions of the IE, as established by the Commission's solicitation rules.

The review of Bidder questions by the Oregon IE is somewhat cumbersome with the need to coordinate the receipt questions and acceptance of PacifiCorp responses through the Utah IE. Notwithstanding the structure, the Utah and Oregon IE managed the dual roles well in the last RFP, and we are confident responses to questions will be provided to Bidders in a timely manner.

PacifiCorp designed communications restricting access to information by the Self-Build Team. Included is the need for the IE to monitor all communications between the Evaluation Team and the Self-Build Team. Excepted from the restriction are in-house attorneys and finance personnel responsible for credit issues. Of course, it is widely recognized that lawyers are a rarified cast who can be trusted with all confidential information, so excluding them from the communications restrictions is understandable. It is appropriate for credit personnel to have access to all bid information, even if they are to review the credit implications of any self-build proposal. We will expect PacifiCorp to work with the IE to confirm that the dissemination of RFP information to these two category of employees is limited to the fewest possible individuals, and that those individuals will not have direct responsibility

for the preparation of any self-build proposal.

#### **G. GUIDELINE 11: CLOSING REPORT**

*Guideline 11: IE Closing Report: The IE will prepare a closing report for the Commission after the utility has selected the final short list. In addition, the IE will make any detailed bid scoring and evaluation results available to the utility, Commission staff and non-bidding parties under protective orders that limit use of the information to the RFP docket subject to the terms of a protective order.*

We will prepare a closing report and make results available to utility after the RFP process is completed. While the RFP expresses expectations for the completion of the final report, the date for the submission of the final report may need to be established based on the status of discussions with Bidders on the final short list. We are prepared to work with PacifiCorp and the Staff to provide the report when it will be most appropriate and useful to the Commission and PacifiCorp.

#### **H. GUIDELINE 13 – RFP Acknowledgment**

*Guideline 13 states:*

*The utility may request that the Commission acknowledge the utility's selection of the final short-list of RFP resources. The IE will participate in the RFP acknowledgment proceeding. Acknowledgment has the same meaning as assigned to that term in Commission Order No. 89-507. RFP acknowledgment will have the same legal force and effect as IRP acknowledgment in any future cost recovery proceeding. The utility's request should discuss the consistency of the final short-list with the company's acknowledged IRP Action Plan.*

Until such time as the Commission approves this RFP and the Company determines that it will seek acknowledgement of the resources it selects, in any selected, as a result of this RFP, we cannot address this Guideline. In the event that PacifiCorp requests Commission acknowledgement of its selections, the IE will be available to participate in acknowledgment proceedings.

### **III. ASSESSMENT OF PROCESS INTEGRITY ISSUES**

PacifiCorp has determined that it needs to add up to 2,000 MWs of capacity to meet its system-wide energy and capacity needs identified in its 2007 IRP, now pending before the Commission. Generation resources of all types are solicited, which can be available on its system by 2012 through 2016 to meet its system needs. Accordingly, it developed its RFP to meet that need. The RFP seeks base load, intermediate, and summer peaking resources. The RFP adequately describes both the types of generation resources it seeks and the types of transactions it is prepared to enter into. The RFP describes and defines the terms and conditions it will entertain in negotiating any contract. The RFP clearly states the size and length of contract terms that need to be bid in order to meet the Company's criteria. For typical bids, a minimum bid size of at least 100 MWs is a reasonable standard and is consistent with RFP criteria we have seen in other similar RFP's. Likewise, minimum 5 year terms are reasonable.

We also note that the Company has established exceptions for QFs, load curtailment, and certain renewables that are reasonable. We also note that non asset backed ids are limited to terms no more than 5 years. We would suggest that the RFP be amended to clarify whether non asset backed Purchase Power Agreements (PPAs) must be for a term of 5 years or for a term of up to 5 years. If it is the former, the credit matrices notes contained in Appendix B need to be clarified to identify what bid types are subject to credit requirement adjustments.

At the suggestion of the IE, PacifiCorp committed to review the credit requirements for non base load resource bids. We continue to await PacifiCorp's credit matrices for intermediate and peaking resources.

The RFP establishes heat rate criteria as a means of defining how bid resources will be classified for evaluation purposes. We find that the criteria established are appropriate, but note that certain stakeholders have observed that certain renewable resources may have heat rates outside of the ranges noted in the RFP. We would therefore suggest that the RFP be amended to clarify that resources having heat rates lower than the range established for base load units will be evaluated as exceptions and will be classified based of the unique operating characteristics of the resource bid.

The RFP clearly sets out the credit requirements Bidders will need to satisfy in order to contract with the Company. The credit requirements are designed to provide the Company and its customers with adequate protection in the event of a failure to perform by a Bidder. The credit requirements are stringent because PacifiCorp prefers to contract with creditworthy parties. The requirements will only impose costs on Bidders that are not creditworthy or who do not provide a guarantee from a creditworthy entity. For those Bidders, these requirements may impose on them additional costs and may have the effect of increasing the prices bid, but they are established based on reasonable assumptions and are not out of line with credit requirements we have reviewed.

The PPAs, Tolling Agreements, APSAs, and other documentation are comprehensive and provide Bidders with adequate information on which to prepare bids. The attachments and appendices thoroughly describe the bases on which the Company will conduct this RFP and make its decisions.

For a discussion of the design of the Company's bid evaluation processes please see the Boston Pacific report filed under separate cover.

#### **IV. RFP DOCUMENTS**

##### **A. The Draft RFP**

The Company's draft described in detail the power supply products sought, the processes for conducting the RFP the Company intended to use, and the methods that would be used to evaluate the bids received. The Final Draft RFP also set out requirements Bidders would need to demonstrate in order to be considered qualified to bid. As opposed to the Company's last RFP, in this RFP, Bidders will not be required to provide credit assurances at the time RFQ and Intent to Bid information is submitted. This change reflects the lessons learned in the previous RFP and the revised procedure should vastly improve the RFP process. The RFP includes appropriate descriptions of

required Bidder technical qualifications and minimum creditworthiness standards. The Final Draft RFP discusses the RFP's proposed schedule and protocols for communicating with the Company. In its draft, PacifiCorp discusses each of the critical issues needed to conduct this RFP. The Final Draft includes information detailing the required Bid information, the process by which bids are to be submitted, bid fees, and how the PacifiCorp RFP Team will be organized. As described, PacifiCorp will establish separate Bid Teams to manage the RFP and to prepare the Benchmark bids. These teams will operate pursuant to a Code of Conduct designed to prevent any undue influence on the evaluation team and the inappropriate interchange of information between the Teams. Based on our review we have found the Final Draft RFP document is comprehensive and clear. We have compared it to other RFP documents we have reviewed and to PacifiCorp's previous RFP documents and find it to be consistent with the content found in those RFP documents. We also found that PacifiCorp was more open in its disclosures and in the provision of Company data than is usual in the industry. Appended to the RFP, PacifiCorp presented the required submittal forms, Pro Forma Contracts, and other pertinent information Bidders will need to prepare responsive bids.

In the following sections we discuss the pertinent attachments and appendices to the Draft RFP. We note that Final RFP attachments and appendices have also been amended to conform to several of the changes, proposed by Staff, Stakeholders, Bidders, and the IE.

## **B. The Pro Forma Contracts And Forms**

PacifiCorp has included in the RFP Documentation the following pro forma contracts:

- ◆ Purchase Power Agreement (PPA)
- ◆ Tolling Service Agreement
- ◆ Asset Purchase and Sale Agreement (APSA)
- ◆ Lake Side APSA Rights and Facilities
- ◆ Currant Creek APSA Rights and Facilities
- ◆ Site Purchase Agreement for Lake Side
- ◆ Site Purchase Agreement for Currant Creek

PacifiCorp also provided a number of forms. These include:

- ◆ Estimated Owner's Costs Under APSA
- ◆ Owner's Estimated Development Cost Assumptions
- ◆ Requirements for a Letter of Credit
- ◆ Non-Reliance Letter
- ◆ Confidentiality Agreement
- ◆ Due Diligence Items for the Acquisition of An Existing Facility

- ◆ Forms of Credit Commitment Letters
- ◆ Operating and Maintenance Terms And Conditions
- ◆ Specifications for the APSA at the Lake Side Site
- ◆ Specifications for the APSA at the Carrant Creek Site

We reviewed each of the pro forma contracts and all of the forms provided as part of the RFP. In summary, we found them to be consistent with industry standards, and to be without apparent bias towards or against any Bidder, or to favor a self-build option, except as noted below. The pro forma documents and forms provide adequate detail of what is expected of Bidders and clearly identify PacifiCorp's expectations for a business arrangement to allow Bidders to prepare a responsive bid, whether that be a PPA or the acquisition of generation.

### **PPA**

The PPA is found as Attachment 3 to the draft RFP. The PPA is similar to the pro forma PPA used in prior RFPs, including the one recently conducted by PacifiCorp. As is usually the case, the Company provides for modification to the pro forma design to accommodate corporate, operational, and financial issues that are unique to bidders or sites. We believe this is appropriate, as we have yet to see a pro forma PPA that would be appropriate in all circumstances.

Generally, we find the PPA to be comprehensive, addressing most of the terms and conditions normally covered in contracts of this type. The PPA includes adequate provisions for the posting of security, an area that frequently provides special challenges before a contract can be executed. The terms presented are consistent with the terms for security we have observed in similar PPAs, but bidders can suggest modifications as part of a bid. PacifiCorp will entertain changes to meet the legitimate needs of counter-parties, provided amendments to the PPA do not materially alter the value of the PPA or cost to ratepayers.

The omission from the PPA that gives us pause is a "Change of Law" provisions. As drafted, the PPA is silent regarding terms pursuant to which the risk associated with changes in Laws, Rules or Regulations are allocated between the contracting parties. Clearly this is not an oversight for the Force Majeure clause expressly excludes changes in Environmental Law. While change of law provisions are not found in all PPAs with which we are familiar, inclusion of such terms are becoming more common, particularly in light of the increased focus of Legislators and Regulators on environmental compliance issues with regard to carbon emissions. The increased probability that carbon restrictions or taxes will be enacted in the foreseeable future imposes on both Bidders and the utility increased risks that may impact on this RFP. Also, we are finding many instances where bidders seek to negotiate change of law risk as part of PPA discussions, regardless of whether the pro forma PPA has a change of law provision. Clearly, raising the reallocation of risk during negotiations can present unacceptable complications to the RFP process, even when accompanied by other attractive terms.

The absence of such a provision in the PPA may cause certain Bidders, particularly Bidders of coal fueled

generation to refrain from bidding. Others may incorporate a higher risk premium in their pricing to reflect the additional risk this PPA imposes on them. In particular, it may prove difficult for Bidders to determine their exposure to future security obligations, because the exposure would be un-quantifiable. As discussed below, lack of recognition of this economic uncertainty could be perceived as providing an unfair advantage to a self-build proposal, and if PacifiCorp entertains a sharing of the risk during PPA negotiations, unsuccessful bidders might well perceive a violation of the re-pricing prohibition.

Because the Company will be submitting Benchmark resource proposals that, if selected, will be afforded rate base and rate making treatment, the Benchmark will not insulate PacifiCorp's customers from "Change of Law" risks. To remove all doubt, we believe PacifiCorp should definitively state in the RFP whether the Company will consider accepting any portion of the risk of future changes in law or regulation. If bids with an allocation of the risk will be evaluated, a change of law provision should be added to the PPA so bidders can present their proposals as part of a "red-lined" document along with their bids.

As with the prior RFP, we will monitor all discussions with bidders and carefully review any suggested changes to the pro forma PPA to satisfy ourselves and the Commission Staff that only necessary modifications are accepted by PacifiCorp, and that changes do not result in a cost shift to ratepayers.

The PPA has standard terms that we believe are appropriate. Included are typical force majeure terms, the representations and responsibilities of parties, and warranties. These terms are consistent with those used in prior PacifiCorp RFPs, and with solicitations conducted in other jurisdictions. We believe the Pro Forma PPA is properly drafted and should be used as the basis for negotiating final contracts for service entered into as a result of this RFP.

#### **Tolling Agreement**

The pro forma Tolling Service Agreement attached to the Draft RFP as Attachment 5 is similar to the pro forma PPA, but incorporates terms and conditions necessary to provide the fuel tolling by PacifiCorp. It is appropriate to advise Bidders of the terms expected by PacifiCorp, while recognizing that Bidders may propose alterations. As with the PPA and all other contracts, the IE will monitor and review all proposed changes to the Tolling Agreement, and provide our views to PacifiCorp and the Staff during the negotiation phase of this RFP.

#### **Asset Purchase & Sale Agreements & Site Purchase Agreements**

The APSAs provided are comprehensive and complete. We find these documents to be of sufficient detail to advise prospective Bidders of the terms and conditions PacifiCorp would expect to be incorporated into a final Asset Purchase and Sale Agreement. The very nature of an APSA dictates that changes will likely be proposed by Bidders, as each situation is unique, if for no other reason than the real estate involved. We also believe the APSA for the Lake Side site and for the Currant Creek Site appear to be reasonable.

As with the APSA in the prior RFP, we recognize that there are details that are governed by Oregon law, and we offer no opinion on the legal sufficiency of the APSA or other contracts. We believe the APSAs provide a clear statement of the terms and conditions PacifiCorp would require before completing an acquisition. Also, we

believe the documents are consistent with terms and conditions with which we are familiar in other jurisdictions and with industry expectations.

The RFP provides form Site Purchase Agreements for Lake Side and Carrant Creek. These, too, we find to be reasonable. The agreements are tailored to the specifics of each site, while conforming to similar requirements. In our review we did not identify any terms that appear to provide a disadvantage to a third party supplier, or that would result in a bias in favor of a self-build proposal.

We believe the APSAs and Site Purchase Agreements are reasonable and that Bidders will be provided with reasonable opportunities to modify the terms to meet circumstances that will be unique to individual Bidders.

### **Forms**

PacifiCorp's RFP, PPA, and other contract drafts are supported by and incorporate attachments and appendices that disclose to Bidders information that will be required to prepare a responsive bid. Many are documents that must be submitted. Others clearly describe PacifiCorp's assumptions regarding contract related costs and qualification requirements. Taken as a whole the information presented is adequate and in many regards exceeds the level of disclosure we normally see in RFPs of this type. While some of PacifiCorp's assumptions and requirements may not be consistent with what Bidders may hope for, they are clear and within the norms of assumptions and requirements we have observed in other RFPs.

The RFP provides as attachments the forms PacifiCorp will require of Bidders. As with the pro forma contracts, Bidders will have the opportunity when submitting bids to identify terms they would want modified.

## **V. CREDIT REQUIREMENTS**

PacifiCorp provided in Appendix B, Attachment 21 and Attachment 22 to the RFP, a thorough description of its proposed credit requirements and credit scoring process and templates for credit assurances if required. Consistent with industry practice, the Company requires Bidders to:

- submit qualification related information prior to bid;
- identify affiliate relationships, if any;
- provide evidence of creditworthiness; and,
- if required, evidence of additional credit assurances being offered.

The Company will evaluate the creditworthiness of each Bidder using 6 criteria;

1. Type of resource
2. The Bid Category (Base Load, Intermediate Load and Summer Peak)
3. Size of Resource Alternative
4. Expected energy delivery start date
5. Term of underlying contract

## 6. Creditworthiness of Bidder and Bidder's credit support provider, if applicable

Actual credit requirements will be set based on a number of factors. The lower the credit rating of the Bidder or entity providing credit support, the higher the value of required credit assurance. Resources that are based on acquisition of an asset by PacifiCorp have a lower value of required credit assurance than other resources. Non-Asset backed resources require higher credit assurance than asset-backed resources. The larger the resource the higher the required credit assurance. The later the resource comes online, the higher the value of required credit assurance. PacifiCorp reserves the right to update the credit assurance information of the Bidders during the process.

Bidders who are already credit counter parties of PacifiCorp may be subject to additional credit assurance requirements or exclusion from bidding if necessary to protect PacifiCorp from counter party credit concentration risk.

Credit requirements can be satisfied using cash, Letters of Credit, or Third Party Guarantees. Security is to be provided on a sliding schedule from the effective date of the contract until the commencement of service. All counter parties have the opportunity to meet established credit requirements regardless of the Bidders credit rating. More highly creditworthy Bidders may not need to provide security while less creditworthy parties may need to post security for any size bid of any duration. Each Bidder's credit requirement will be evaluated based on information provided by the Bidder in the Request for Qualifications portion of the RFP and will be based on submitted financial information.

As in the prior RFP, the dollar amount of credit to be provided will be determined based on PacifiCorp developed estimates of replacement costs, essentially a mark to market basis augmented by a risk factor. PacifiCorp's credit and security requirements are fully described in tabular form in Appendix B and it's credit methodology in Attachment 21. As compared to the Company's last RFP, these credit requirements are substantially lower for comparable years. They were developed using the methodology described and do continue to provide adequate protection for PacifiCorp's customers.

PacifiCorp has indicated that it is prepared to reduce credit requirements for shorter term bids, but has not indicated how such determinations will be calculated and whether there will be any restrictions placed on such determinations. The Company should clarify its intent and disclose the particulars of how it intends to calculate such reductions in the RFP to be issued.

In its prior RFP, the Company made no provision for reduction in posted security as any transaction matured. At the suggestion of the IE the Company has now incorporated a mechanism that functions to reduce the amount of collateral that must be provided by non-creditworthy counter parties over time. The reduction occurs only after the transaction has been in effect for half of its intended term, and collateral requirements are thereafter reduced proportionally during the remaining term.

These requirements are similar to requirements we have observed in other RFP's conducted recently, and

reflect provisions in general use in the industry.

In a recently completed RFP for firm power, conducted by Georgia Power Co. for deliveries commencing in 2012, the following security requirements were approved by the Georgia Public Service Commission:

For Intermediate load (Combined Cycle Bids)

<b>Applicable Dates</b>	<b>Eligible Collateral (\$/kW) for 5 Year PPA Term</b>	<b>Eligible Collateral (\$/kW) for 10 Year PPA Term</b>	<b>Eligible Collateral (\$/kW) for 15 Year PPA Term</b>
Agreement execution through Threshold Date	70	77	77
From the Threshold Date through the earlier to occur of the RCOD and Commercial Operation Date	70	120	120
From the earlier to occur of the RCOD and the Commercial Operation Date through the Term of the Agreement	Annual Period 1-3: 70	Annual Period 1-4: 120	Annual Period 1-5: 170
	Annual Period 4-5: 35	Annual Period 5-7: 75	Annual Period 6-10: 120
		Annual Period 8-10: 45	Annual Period 11-15: 65

For Peaking bids (Combustion Turbines)

<b>Applicable Dates</b>	<b>Eligible Collateral (\$/kW) for 5 Year PPA Term</b>	<b>Eligible Collateral (\$/kW) for 10 Year PPA Term</b>	<b>Eligible Collateral (\$/kW) for 15 Year PPA Term</b>
Agreement execution through Threshold Date	70	77	77
From the Threshold Date through the earlier to occur of the RCOD and Commercial Operation Date	70	110	120
From the earlier to occur of the RCOD and the Commercial Operation Date through the Term of the Agreement	Annual Period 1-3: 70	Annual Period 1-4: 110	Annual Period 1-5: 155
	Annual Period 4-5: 40	Annual Period 5-7: 80	Annual Period 6-10: 110
		Annual Period 8-10: 50	Annual Period 11-15: 70

Georgia Power also recently issued a RFP for 30 year base load power for deliveries commencing in 2016. In that RFP Bidders will be required to post the following collateral if they are not creditworthy as defined by Georgia Power:

<b>Applicable Dates</b>	<b>Eligible Collateral (\$/kW)</b>
Agreement execution through Threshold Date	100
From Threshold Date through 2012	160
2013	220
2014	280
2015	340
From the earlier to occur of the RCOD and the Commercial Operation Date through the Term of the Agreement	Annual Period 1-5: 415 Annual Period 6-10: 410 Annual Period 11-15: 385 Annual Period 16-20: 315 Annual Period 21-25: 175 Annual Period 26-30: 100

A comparable 30 year base load bid for 1000 MWs of capacity with deliveries beginning in 2016 in PacifiCorp’s RFP, would require the posting of approximately \$189/kW

Alternatively, Arizona Public Service typically used a methodology for establishing credit support based on an estimate of the replacement cost of power as periodically determined by APS. Parties to PPAs with APS have the right to request independent third party quotes if they challenge APS’ calculations. Credit requirements for APS vary over time as support levels are adjusted to reflect current market conditions. Although this method differs from that used by PacifiCorp, it resulted in levels of support roughly comparable to those established by PacifiCorp.

In auctions conducted in New Jersey and Illinois, the soliciting utilities established the credit support requirements using a “mark to market” methodology. Bidders were provided with an “unsecured line of credit” that varied between \$0 and \$60,000,000 in New Jersey, and up to \$80,000,000 for one utility in Illinois, based on the Bidder’s credit rating. More financially secure counter parties were offered the larger credit lines. This approach is similar to the approach employed in Arizona. It also corresponds to PacifiCorp’s schedule of required security as described in its Attachment 21.

In this RFP, PacifiCorp has provided form Letters of Guarantee and Letters of Commitment to issue a Letter of Credit. While these appear on their face to be reasonably drafted, we are cognizant of the fact that providers of credit support may wish to provide such preliminary assurances using their own documents. Based on our experience in the Company’s last RFP, we will monitor the Company’s approach to dealing with these documents to assure that appropriate latitude is provided to Bidders regarding strict conformance with the Company’s templates.

PacifiCorp will also require counter parties to provide to PacifiCorp a perfected subordinated security interest in all of the real property associated with the resource used to provide the service contracted for. According to PacifiCorp, such terms are in general use in contracts it has negotiated with energy providers. In our experience such terms are not generally required in RFPs being conducted in the industry. We recognize the intent is to provide an additional layer of security for PacifiCorp and its customers but we are concerned that such a requirement may both complicate Sellers ability to contract and may discourage some bids. We will carefully monitor the concerns, questions, and comments made by potential Bidders and if appropriate recommend that PacifiCorp reconsider this requirement.

In our opinion, PacifiCorp has structured the security requirements in a manner that will allow all qualified parties to participate. While creditworthy counter-parties are advantaged by this approach, PacifiCorp has appropriately imposed obligations on less creditworthy parties in an effort to mitigate the risk to Oregon consumers and its shareholders of operational or economic defaults. While these terms may create a barrier to participation by under-funded or financially weaker Bidders, we believe PacifiCorp has struck an appropriate balance.

The above requirements appear to be reasonable and consistent with good industry practice.

## **VI. OPTIONS TO EXTEND ACCELERATE OR DELAY**

In order to encourage Bidders to provide to the Company bids containing some degree of flexibility, thus allowing the Company to better manage the introduction of new capacity and to tailor it's portfolio to its load, the Company has requested that Bidders specify the terms and conditions under which bids can be extended, accelerated, or delayed. Once accepted, the Company shall have the right to exercise those terms if it so chooses. This approach is well developed and will allow Bidders to submit bids that are more valuable to PacifiCorp's customers. All options bid will be evaluated and to the extent that PacifiCorp determines the value of the option such value will be used in the selection of bids to be short-listed. Allowing Bidders to submit options of this type in our opinion a good practice and PacifiCorp's decision to incorporate such terms has enhanced the probable success of this RFP. The Company has further encouraged such bids by structuring it's Bid Fees in a manner that permits multiple bids at reduced fees.

## **VII. CAPITAL LEASES AND VARIABLE INTEREST ENTITIES**

In this RFP, PacifiCorp has indicated that, in the event that a bid is identified as requiring lease treatment if selected, it will not incorporate into its bid evaluation any costs the Company anticipates it will incur to reflect the addition of imputed debt on its balance sheet as a result of such lease treatment. It has, however, indicated that in seeking acknowledgement of such a bid, it will include those costs. This presents two distinct problems. First, the RFP does not indicate how PacifiCorp will calculate those costs; and second, how the Company will assure that after taking those costs into account that the selected bid is still the most cost effective. We do not believe that this

issue in any way renders the RFP flawed as it primarily impacts the Acknowledgement that may be requested, but we believe these issues need to be resolved prior to bids being received and evaluated. We would urge the Company to commence discussions of this issue with the Staff and the IE as soon as possible.

The RFP also indicates that the Company is unwilling to engage in any transaction that would result in the counterpart being treated as a Variable Interest Entity (VIE). Such restrictions are common in recent RFPs, and we believe the Company is acting prudently in restricting the ability of potential VIEs to bid.

### **VIII. BID FEES**

A bid fee of \$10,000 is required with each bid, except Bidders submitting bids under Resource Alternative #8 (load curtailment or QFs) are required to pay a bid fee of \$1,000. For purposes of the bid fee, one fee will be charged for one base proposal and two alternatives. The alternatives must be in the same Resource Alternative category, and may differ from the base proposal in size, contract term, pollution control technologies, water cooling technologies, in-service date, and price structure. Bids submitted for different Resource Alternatives are separate bids, requiring a separate bid fee.

These bid fees are comparable to bid fees typically charged in RFPs of this type. We see no reason why these fees should impair the ability of qualified Bidders to participate in the RFP.

In several recent RFPs we have observed that in addition to modest bid fees, the soliciting utility also imposed a substantial “success fee” on the winning Bidder. This fee was designed to reimburse the Company for a portion of the costs it incurred to conduct the RFP. Typically, the fee was for a not to exceed amount and was offset by any bid fees collected. In discussions we have had with Bidders in several of those RFPs they indicated that they believed such an approach would not deter them from bidding, and many expressed a preference for a success fee structure. A success fee also has the benefit of placing more of the expense for the RFP process on successful Bidders, rather than on ratepayers. We would, therefore, suggest that a reasonable success fee be incorporated in this RFP in an amount not to exceed PacifiCorp’s out of pocket expenses incurred to conduct this RFP.

### **IX. CONCLUSION**

As noted in our previous discussions, PacifiCorp assembled a comprehensive set of RFP materials and provided them to the Stakeholders, Commissions, and potential Bidders in a timely manner. There has been ample opportunity for all interested parties to review and comment on the filed documentation and proposed processes. As noted, we have not observed any instance in which the RFP documentation is inadequate, inaccurate, or incomplete. We do have concerns, as noted, about whether decisions made by the Company in this RFP can be accurate in the absence of bids for non-base load resources and whether the evaluation processes can be appropriately completed.

PacifiCorp has developed an RFP that is consistent with RFP processes and procedures used by other utilities seeking long-term power supply contracts. It is, however, more expansive in its product requests than most others we have reviewed. Typically, utilities will not seek bids for asset acquisition and sales, though we are seeing this more frequently as fewer existing resources are available for long term contracting. According to PacifiCorp, it has uniquely tailored this RFP to meet the requirements of its regulatory environment and the specific issues facing western utilities. On balance the RFP appears to be slightly biased in favor of the Buyer. This is usually the nature of draft RFPs and should not impede participation by qualified Bidders. The terms and conditions detailed in the RFP fall within the range of terms we have reviewed in other RFPs, as are the Pro Forma contracts included in the RFP documentation.