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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of PacifiCorp for Approval of a Request for Proposals for a Flexible Resource	<u>DOCKET NO. 05-035-47</u> COMMENTS AND RECOMMENDATIONS OF THE UTAH ASSOCIATION OF ENERGY USERS ON PACIFICORP'S REVISED (10/4/06) DRAFT 2012 RFP
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The Utah Association of Energy Users (“UAE”) submits the following comments and recommendations regarding PacifiCorp’s revised draft 2012 RFP dated October 4, 2006 (“RFP”).

Executive Summary

PacifiCorp’s revised draft RFP adequately addresses some, but not all, of UAE’s concerns. UAE’s focus remains on creation of an RFP document and process that will evoke a healthy diversity of bids proposing numerous competing resource alternatives and portfolios of resources. UAE has no inherent bias in favor of utility-built or owned resources or power purchase contracts. Rather, it is UAE’s goal to bring diversity and discipline to the resource procurement process by ensuring an open, fair and competitive RFP process. In that spirit, UAE offers the following comments on the revised draft RFP.

Detailed Comments

1. ***Comparability of Bids and Benchmarks.*** One of UAE's greatest concerns is that the proposed RFP process fails to make competitive bids and benchmarks options comparable in terms of costs and risks for scoring and evaluation purposes. In order for the RFP process to produce the desired result, all bids and benchmarks must, to the greatest extent possible, be made directly comparable and put on an even footing for all evaluation and scoring purposes. The RFP is very aggressive (often too aggressive) in identifying and quantifying PPA risks (e.g., credit, debt imputation). However, the RFP fails to show similar aggression in identifying and quantifying increased risks of the benchmark options (e.g., risks relating to construction cost, increased debt or equity cost, increased operation and maintenance cost, capital additions, fuel cost, equipment failure, etc.). It has been noted that competitive bidders will likely require a higher return on their equity than the incumbent utility will receive, given the greater risks that the bidders will face. If the regulated utility builds the resource on a cost-of-service basis, the return may be set lower than the target rate that the competitive participants would expect because many risks have been shifted to the utility's ratepayers.

The higher return on equity expected by bidders will be implicit in their bids. For the evaluation process to be fair and reasonable from a ratepayer perspective, that portion of the "risk premium" that will be shifted to ratepayers under a utility benchmark option (particularly given pre-approval of cost recovery) must somehow be quantified and incorporated into the evaluation process, whether as an additional cost to the Benchmark options or as a reduced cost to PPA bidders willing to accept such risks, or by making the products more comparable as the IE has

suggested. UAE encourages the Commission to ensure that RFP process is changed adequately to incorporate and reflect these risk differences in the evaluation process.

2. ***RFP Title and Flexibility.*** (Page 1* and throughout) UAE believes that the title of the RFP should be changed from “RFP 2012.” That title places undue emphasis on the 2012 timeframe - which is an unrealistic online date for nearly any new major coal-based resource - and may discourage bids from longer-term projects. UAE recommends changing the title of the RFP from “RFP 2012” to simply “RFP” or “RFP 2012-2014.” UAE also continues to advocate for a flexible RFP approach designed to solicit resources in the 2012 - 2014 timeframe. Few coal resources could meet an in-service date prior to (or maybe even by) 2014. Timing constraints must not be permitted to dictate the selection of sub-optimal resources. Rather, this RFP must be designed to solicit a wide range of resource options that can be available to meet PacifiCorp’s resource needs.

3. ***Role of the IE.*** (Page 1). UAE believes that the very first page of the RFP should emphasize and explain the role of the IE and the Commission. UAE fears that market confidence needs to be restored to PacifiCorp’s RFP process, and the active involvement of the independent evaluators and the Commission should be explained and emphasized for that purpose. UAE proposes adding a sentence such as the following after the first paragraph on page 1:

An Independent Evaluator (“IE”) hired by the Utah Public Service Commission will be involved in all aspects of receiving, evaluating and ranking bids in response to this RFP, and in ensuring fairness in the process. Another IE hired by Oregon will similarly be involved. The Utah Public Service Commission will ultimately be asked to approve the resources selected. Potential bidders are invited and encouraged to

* Page references are to the Redlined Version of the October 4, 2006 revised RFP.

contact either of the IEs with questions or concerns. Contact information for the IEs is as follows:

[Insert contact information]

4. ***Bridge Resources.*** (Page 2 and throughout). For some time now, UAE has urged active solicitation of “bridging” resources for the 2012-2014 timeframe in order to permit a timely and thorough evaluation of all resource options in this RFP process without undue time pressure. PacifiCorp and the IE suggest that this RFP may not be the best place to solicit short-term bridge resources. Even if that is the case, an effective mechanism should be identified now for soliciting shorter-term bridge resources in order to permit a full, timely and adequate analysis of all long-term resource options in this process.

This issue is also relevant to concerns expressed by UAE and others in previous comments regarding the elimination of Front Office Transactions for planning purposes in the IRP stack and the appropriate planning reserve margin. Front Office Transactions can serve as bridging resources. Indeed, PacifiCorp noted in its 2004 IRP (Page 52) that these “shorter-term, historically-based resources are intended to bridge the gap between reliance on spot market activity and long-term build-or-buy commitments in order to balance the system.”

5. ***Coal Resources.*** (Page 2 and throughout). UAE questions whether PacifiCorp’s changes to the RFP go far enough to create an even playing field for a meaningful diversity of coal-based resource options. UAE supports the IE’s comments in this regard and urges the IE to make specific wording recommendations for inclusion in the final, approved RFP.

6. ***Bid Fees.*** (Page 3 and throughout). UAE supports the proposal of the IE, which has been incorporated in the revised RFP by PacifiCorp, to allow one bid and up to two alternatives under the same bid fee. UAE suggests another step (also suggested by the IE as an alternative). Other bid alternatives (in addition to the two “free” alternatives) that utilize the same resource should be assessed a bid fee of only \$1,000 each. UAE’s goal is to encourage a broad range of creative proposals and to minimize the deterrent effect of bid fees.

In addition, certain portions of the section entitled “Bidder Evaluation Fees” (page 24) appear contradictory. The first paragraph explains that one proposal and two alternatives considered under the same bid fee “may consist of a different term or eligible resource options for the same Base Load Resource.” The third paragraph says that a bid submitted “under more than one Resource Alternative” will be considered “two separate proposals” with “separate bid fees.” This apparent inconsistency should be clarified or reconciled. The last paragraph on page 24 also states that a proposal with “two in-service years will only be required to pay for one bid evaluation fee.” Presumably, the alternative in-service date will be one of the two “free” alternatives, but the last paragraph does not make that clear.

7. ***Flexibility Options.*** (page 4). The IE suggested that the RFP should be more explicit in describing the value of flexible options (e.g., contract buy-out, in-service date deferral, in-service date acceleration), in encouraging flexible options, and in describing the information that should be provided regarding such options. The revised RFP does not appear to adequately incorporate these suggestions. UAE encourages the IE to propose specific language changes or additions to achieve these purposes.

8. ***Bidders' O&M Obligation.*** (pages 6-8). The revised RFP has added a requirement that certain categories of bidders will be required to operate and maintain the projects for up to 10 years. This new requirement has not yet been adequately explained or explored. UAE invites comments from the IE and potential bidders on whether such a requirement is reasonable or whether it might tend to chill or discourage bidding. For example, UAE questions whether it is reasonable to expect a bidder who proposes to build on a PacifiCorp site or an EPC bidder to operate and maintain the unit for up to 10 years.

9. ***Load Curtailment and QF.*** (page 8). The draft RFP proposes to impose on load curtailment and QF bidders the "same terms and conditions as other supply side resources." This requirement is both ambiguous and unreasonable. The utility should be encouraging customers to work with it to implement load curtailment and cogeneration arrangements rather than imposing onerous requirements that will chill any interest.

In addition, the "Same as above" reference in the second column of the QF row should be changed to reference the 10 MW minimum QF bid rather than the 100 MW minimum of the "above" resources.

10. ***Pro Forma Contracts.*** (page 11 and throughout). UAE agrees with the IE's conclusion that the pro forma contracts are too one-sided and disagrees with the utility's argument that only changes that are beneficial to the utility should be permitted. UAE encourages the IE to propose specific language changes and additions to make the contracts more even-handed.

Also, certain provisions in the revised RFP appear inconsistent; for example, in stating that the pro forma contracts “will be used to initiate the negotiations [with Bidders] on the final shortlist” (page 5), on the one hand, but stating that the bids “must be in the form of the Power Purchase Agreement (“PPA”) attached as Attachment 3” (page 11 and throughout) or similar language, on the other hand. The RFP should clearly state that the pro forma contracts are intended as starting points in negotiations and that they are subject to change as a result of good faith negotiations with short-listed bidders.

Similarly, the requirement that each bidder identify “any and all exceptions to the Pro Forma contracts when submitting the proposal” (page 26) is unreasonable and should be eliminated. Any credible counterparty will require negotiation of many of the terms of the pro forma agreements and it is unreasonable to require bidders to identify every proposed change with the initial bids. It may be reasonable to ask bidders to identify significant areas of disagreement that may materially affect cost or risk to PacifiCorp and its ratepayers.

11. ***Blinded Teams.*** (page 23 and Attachment 20). The RFP should be more explicit in ensuring bidders that non-blinded personnel will not be permitted to have any contact or share any information with blinded personnel. UAE invites comments from the IE and potential bidders on whether the self-imposed Code of Conduct will adequately assure bidders of the integrity of the process.

12. ***Effectiveness of Bids.*** (page 24). The IE suggested several changes to the “Effectiveness of Bids” section, particularly to clarify coal pricing flexibility options. UAE

supports the IE's comments and suggestions and invites the IE to provide specific proposed language to accomplish that goal.

13. ***Bidder Qualification.*** (page 25). The IE also challenged the bidder qualification language designed to require prior experience developing a similar resource. Given the dearth of coal and IGCC resources developed over the last several years, this language should be changed to require a demonstration of adequate experience and competence, without specifically requiring development of any specific type of technology.

14. ***Credit Requirements.*** (Page 25 and throughout). UAE participated in the credit workshop proposed by the IE and has a better understanding of the utility's process and intent. Nevertheless, it is not clear that the proposed credit requirements or credit matrix are fair and reasonable or reflect a proper balance of the dual objectives of broad RFP participation while avoiding unreasonable ratepayer risk. UAE encourages further input on this issue by the IE and potential bidders.

15. ***IE Involvement.*** (Pages 22 and throughout). PacifiCorp added and clarified IE involvement in some areas as suggested by UAE, but UAE urges IE involvement in other areas as well, such as in determining whether a late bid will be accepted (page 22), whether a bid should be rejected for failure to supply all required information (page 26), whether a bid should be deemed ineligible (page 27), or whether bid fees should be returned (pages 27, 28). Also, bidders should be assured that the IE will be given full access to, and will verify and validate, all of the forward price projections (page 31) and models (page 46) used in the bid evaluation process.

UAE urges the Commission to ensure that the IE will be permitted and expected to spend whatever effort (and expense) may reasonably be required to ensure that the evaluation models and the process are fair and appropriate and will lead to the selection of the optimal set of resources.

16. ***Minimum Eligibility Requirements.*** (page 27-28). UAE submits that some of the stated grounds for rejecting a bidder are unreasonable, including a bidder who is in or has threatened litigation (paragraph 3f). For example, every PacifiCorp customer could potentially be disqualified under this section. Also, litigation over unrelated issues or litigation that would not have a material impact on PacifiCorp should not automatically disqualify a bidder. Finally, the requirement that IGCC proposals be “fully backed” by the supplier (paragraphs 3k, m) is ambiguous and potentially unreasonable.

17. ***Reservation of Rights.*** (page 28). A bidder should not be expected to waive claims for “any other reason” as suggested in the second paragraph of section 4; only claims related to the evaluation and selection process should be waived. Also, the IE should be included in the list of entities against which bidders will have no recourse.

18. ***Debt Imputation.*** (Pages 30-31). UAE strongly objects to PacifiCorp’s proposal to impute costs for inferred debt, even in the final screening process. The reasoning and import of the Commission’s ruling in the QF docket squarely apply in the RFP context. PacifiCorp’s proposed debt imputation calculations go far beyond those used by most utilities in the country and would impose unfair and unreasonable requirements on PPA bidders. It is not adequate for the utility to acknowledge that it will be required to justify its imputation of debt costs in some

future proceeding. The RFP should not be tainted by this issue - which will likely chill, if not outright thwart, most PPA bids - unless and until the Commission has ruled, based on a new showing by PacifiCorp in an appropriate future docket, that its ruling on debt imputation in the QF context should be changed in the PPA context. That showing has not been attempted or made and will likely be hotly contested. At most, the RFP should inform bidders that the Commission may elect to take into account potential inferred debt implications in approving resource selections, predicated upon a proper evidentiary record yet to be made.

19. **CO₂ Costs.** (Page 39). UAE continues to question whether it is reasonable and in the ratepayers' best interest to require the utility (and thus its ratepayers) to bear the risk of CO₂ costs in all circumstances. If a bidder places a lower value on CO₂ risk than does the Company or the Commission and is able to sufficiently secure that liability, the bidder should be allowed to bear the risk and its bid should be credited with at least the assumed CO₂ risk level and cost utilized for purposes of benchmark resources.

20. **Price and Nonprice Weighting.** (pages 47-50). UAE supports PacifiCorp's elimination of the 10% weighting for pro forma contract terms. UAE is not certain, however, whether the price weighting should be increased to 80% or whether other factors should be given additional weighting. UAE invites comments from the IE and other interested parties on the appropriateness of the proposed weighting.

21. **Contracts, Exhibits and Attachments.** UAE continues to rely largely on the IE for comments and suggestions on the pro forma contracts and other exhibits and attachments to

the RFP. UAE urges the IE to provide specific proposed additions, deletions and changes to those documents.

22. *Other IE Comments.* The IE provided a great deal of information and numerous recommendations, some of which have been accepted by the company and some of which have not. UAE invites additional comments by the IE and further discussions on the RFP. The RFP should not be approved by this Commission until both the IE and the Commission can reasonably conclude that it is fair and reasonable and fully consistent with Utah statutory requirements.

Conclusion

Over the past decade, PacifiCorp has without exception selected itself or an affiliate to build or own each new major generating resource. The market has the right to be somewhat skeptical of the bona fides of this RFP process and great care must be taken to convince potentially skeptical market participants that bidders will be treated fairly and will have a competitive chance of being selected. The significant efforts of UAE and others, including this Commission and PacifiCorp, led to the passage of Senate Bill 26, codified at Utah Code §§ 54-17-101, et seq., the hiring of an independent evaluator and significant progress on draft rules to implement SB 26. If implemented properly, these efforts should result in a meaningful and productive RFP process.

UAE remains committed to lending its strong support to this process with the fervent hope that the result will be a diverse portfolio of future resource options that can create the optimum mix of low cost, low risk and reliability for the benefit of the utility and its Utah customers. UAE urges the Commission to carefully consider the comments of UAE, the IE and

other parties in this docket, in order to ensure a fair, open and competitive RFP process.

Dated this 13th day of October, 2006.

Hatch, James & Dodge

/s/ _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by email this 13th day of October, 2006, to the following:

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