BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

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In the Matter of	)	**NORTHWEST AND**
	)	**INTERMOUNTAIN POWER**
Rulemaking Regarding Allowances for	)	**PRODUCERS COALITION**
Diverse Ownership of Renewable Energy	)	**REPLY COMMENTS**
Resources.	)	

I. INTRODUCTION

Northwest and Intermountain Power Producers Coalition ("NIPPC") submits these Reply Comments to the Oregon Public Utility Commission ("Commission") responding primarily to arguments made by the Joint Utilities.[1] NIPPC continues to recommend that the Commission strengthen the carefully considered proposals from the Commission staff ("Staff") rather than capitulate to the Joint Utilities' exaggerated and hyperbolic claims. As the Opening Comments make clear, there are broad areas of consensus among most of parties in this proceeding, with the exception of the Joint Utilities.

For example, all of the parties, but for the Joint Utilities, find it reasonable to limit the scope of the competitive bidding process, including independent evaluator ("IE") participation, where a utility does not seek to acquire utility-owned resources. The IE may provide value in all RFPs, but may not be worth the cost without a utility owned option that can bias the results.

With respect to utility-owned facilities, transmission and other assets, NIPPC reiterates that the Commission should state by rule that it is *per se* imprudent for a utility to decide not to

[1] Portland General Electric Company, PacifiCorp, and Idaho Power Company filed comments collectively as the Joint Utilities.

make its utility-owned facilities available to third-party bidders during a request for proposal ("RFP"). Contrary to the Joint Utilities' claims, this would not constitute a taking, and is well within the Commission's prudency authority.

Finally, although NIPPC agrees in principle with the Citizens' Utility Board of Oregon's ("CUB") assertion that the utilities' transmission investment activity should be subject to competitive bidding, NIPPC believes this issue has not yet been fully vetted and would be better addressed in a separate phase or proceeding.[2]

II. COMMENTS

A. Two RFP Paths

NIPPC's Opening Comments argue that two different RFP tracks are appropriate based on utility-ownership, and most of the parties agree. Of note, the Joint Utilities' description of "a perceived utility incentive" favoring utility-owned projects and a "perceived advantage" that utilities have in competitive bidding are beyond tone deaf.[3] This characterization is flatly inconsistent with the Commission's repeated findings and reiterated policies regarding the reality of the competitive bidding process.

While reasonable minds can disagree about the extent to which this bias has impacted utility decision making, claiming that attempting to institute protections against this bias provides a disadvantage to utilities signals a lack of willingness from the utilities to engage reasonably in this rulemaking. As Staff notes, utility bias is at least one of, if not the primary

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2 This is distinct from utility transmission rights, which like any other ratepayer funded utility asset should be made available to third-party bidders.

3 Joint Utilities' Opening Comments at 2-3.

reason for the Commission's competitive bidding rules.[4] As such, the Joint Utilities' arguments—at least those based on the premise that that there is no utility bias—appear largely disingenuous. NIPPC agrees with ICNU that the self-build bias is the greatest threat to a fair bidding process.[5] Given this context, it is imperative that the Commission take a firm stand during this rulemaking and be explicit about its efforts to mitigate the utilities' self-build bias.

The non-utility parties also agree that an IE is not necessary when an RFP does not include the opportunity for utility ownership. Although the Joint Utilities are clear about their opposition, they have not presented a convincing rationale to require an IE for all RFPs. Instead, they have offered mere hyperbole to support their claims that allowing an RFP without an IE would limit competition or undermine the goals of competitive bidding.[6] NIPPC has long been an avid supporter of competition, and a streamlined RFP (without the option for utility ownership) would lead to more bidding and increased competition.

NIPPC agrees with Staff that while IEs are always valuable, they should only be used when they are most needed, and are a cost effective use of ratepayer money.[7] While NIPPC believes an IE is generally not needed when there is no option for utility ownership, NIPPC does not oppose the concept of a case-by case determination where the utility can demonstrate a need for an IE to participate in an RFP with no utility ownership options. However, since the Joint Utilities claim that the new-and-improved-RFP process may cost millions of dollars, and take

4 Staff's Opening Comments at 2.
5 ICNU's Opening Comments at 2.
6 Joint Utilities' Opening Comments at 5-6.
7 Staff's Opening Comments at 4.

more than a year to administer, it is hard to understand why they might request any such participation.[8]

Regarding the issue of whether the significant costs of the IE are worth the benefits when there is no utility ownership option, NIPPC recommends that the Commission put the most weight on the opinion of customers, who will need to pay for the IE. CUB accurately points out that "IEs are expensive" and CUB "does not see what value an IE would offer to the competitive bidding process if all utility owned resources were removed from the RFP process."[9] ICNU similarly opposes using an IE in the absence of utility ownership and "questions whether the utilities would still make this claim if their shareholders were required to bear the costs of the IE."[10] ICNU's recommendation that shareholders, absent a clear showing of ratepayer benefit, pay for the costs of an IE when there is no utility ownership is reasonable.[11]

B. Utility-Owned Facilities

NIPPC agrees with Staff that there is no public policy rationale for allowing utilities to limit the use of their utility-owned facilities during an RFP, but disagrees that any "legal implications" warrant "an abundance of caution" on this point.[12] Despite the Joint Utilities' efforts to frame this as a takings issue, it is not. This issue is about the Commission's prudency authority. All of the non-utility parties agree that the Commission should encourage utilities to

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8 Joint Utilities' Opening Comments at n.8 and 17 ("the process may take up to 22 months" and "could add several million dollars of expenses to the RFP"). The Joint Utilities' Opening Comments do not explain why PGE took five months to procure an IE for its last RFP. See id. at 5.

9 CUB's Opening Comments at 2.

10 ICNU's Opening Comments at 3.

11 ICNU's Opening Comments at 5-6.

12 Staff's Opening Comments at 5.

allow bidders access to utility-owned facilities, and it is time for the Commission to explain that it can do more than just encourage utilities to do so.[13] That said, if the Commission does not adopt NIPPC's recommendation that it is *per se* imprudence for a utility to not offer up utility owned facilities, and adopts Staff's recommendation, then NIPPC agrees with Renewable Northwest that clarity is needed about what kind of justification is expected and what may happen if the utilities fail to provide sufficient justification.[14]

1. Takings

The Commission's January 25th Bench Notice requested comment on the following question:

> Can or should electric companies be compelled *or encouraged to offer* electric company owned facilities to bidders proposing non-utility owned resources if those same sites are utilized for benchmark or electric company owned bids?

In response to this question, NIPPC responded that "[a]ny decision by a utility not to allow bidders access to its utility-owned facilities or assets is harmful to customers and should be considered *per se* imprudence."[15] NIPPC's comments further explained that the utilities have

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13 CUB's current position is inconsistent with its views in previous proceedings that the Commission can order a utility to allow bidders access to its utility-owned sites. Re Investigation Regarding Competitive Bidding, Docket No. UM 1182, Order No. 06-446 at 5 (Aug. 10, 2006) ("comments focused on whether independent power producers should be given the opportunity to build on the utility's site as part of an RFP that includes a self-build option. NIPPC, ICNU, and CUB are in favor of such an opportunity"); Re PGE Request for Proposals for Capacity Resources, Docket No. UM 1535, CUB's Comments at 7 (June 22, 2011) ("CUB would like to see customer's historic investments in these sites used to supply the least cost option, whether it is from PGE or a competitive supplier").

14 Renewable Northwest's Opening Comments at 4 ("it is not clear what consequences—if any—would flow from the explanation provided or from failure to include such an explanatory statement in the draft RFP filing").

15 NIPPC's Comments at 12.

historically used their informational advantage in advance of solicitations to position themselves to prevail in past solicitations. Additionally, it appears that the utilities intend to recover as operating expenses in rates the costs of their site, transmission rights, and other development costs, even if the utility-owned bid is not successful in the solicitation and is never placed in service for recovery as used and useful plant. In short, without action by the Commission, the utilities will continue to use ratepayer-funded assets to achieve a competitive advantage in solicitations for generation resources. Therefore, if the Commission wished to ensure just and reasonable rates and protect customers from unreasonable exactions by vertically integrated monopolies, then the Commission would be within its authority to condition future recover in rates of a utility-owned benchmark bid or plant on the utility agreeing to make its own assets available for competing bids to use.

The general approach of the proposed rule is reasonable. It merely requires, *if* the utility proposes a cost-plus utility-owned bid to compete against fixed-price competitive bids, then the utility must *explain* why it would not be in the best interest of its customers to allow its benchmark site or associated project components (e.g., gas storage, transmission rights, etc.) to be made available for use by competitive bidders.[16] The proposed rule encourages the utility to make rate-payer funded project components available for use by competitors who may be able to supply the utility's customers with a lower, fixed-price product than the utility-owned cost-plus product. The Commission should just take the next step and clarify that any other action is *per se* imprudent.

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[16] OAR 860-0XX-0300(2)-(3).

The Joint Utilities agree that the Commission can *encourage* the utility to make its site available, but they argue that the Commission "should not adopt a rule requiring the utilities to explain themselves if they choose not to make their property available to third-party bidders."[17] The utilities comments then go into a lengthy exposition of physical takings law to argue the Commission would engage in a physical taking if it were to compel the utilities to make their site available, at the conclusion of which the utilities provide the conclusory assessment that appears to suggest that the proposed rule would effect a taking if adopted.[18] NIPPC disagrees.

The Joint Utilities primarily rely on GTE Northwest, Inc. v. Public Utility Commission, 321 Or. 458, 900 P.2d 495 (1995). In that case, GTE challenged an administrative rule that *required* local telephone companies (known as "local exchange carriers" or "LECs") to permit their competitors (known as "enhanced service providers" or "ESPs") to physically collocate equipment on the LEC's premises, including the LEC's "central offices, remote network facilities, or any other similar locations owned by the LEC."[19] The court concluded that the physical collocation requirement was properly characterized as the type of permanent physical invasion held to be a *per se* taking in United States Supreme Court precedent, as opposed to the more lenient regulatory takings analysis that applies to restrictions on the use of property.[20] The court also held that the PUC lacked the statutory authority to exercise the power of eminent

17 Joint Utilities' Opening Comments at 6-7.
18 Id. at 7-10.
19 321 Or. at 462.
20 Id. at 472-77.

domain, and therefore the monetary compensation to the LECs provided in the rule did not make it lawful.[21]

But the GTE holding was not as absolute as the Joint Utilities suggest. The holding was limited to the situation where the Commission *requires* the physical invasion of the property, as opposed to the situation where the Commission might simply regulate the use or rate recovery of the utility property. The court acknowledged that in the case where there is simply a regulation of use of the property a more lenient "regulatory takings" analysis applies.[22] The court also discussed the United States Supreme Court's holding that in regulatory takings analysis, the government can condition the issuance of a governmental benefits, such as a land use permit, on a requirement that the property owner makes a portion of its property available for public use if that governmental intrusion of the property is tied to the harm caused by the issuance of the permit.[23]

Therefore, the GTE decision does not bar the Commission from conditioning approval of recovery of the utility's costs and return on its plant in rates with a requirement that it first prove no independent developer could have delivered the power at a lower cost from those same ratepayer-funded facilities. In other words, unlike in GTE, the utility is not *per se required* to make its site and project components available; the utility could elect not to bid its site or its project components into the RFP if it were concerned with a possible physical invasion of its

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21 Id. at 466-67.
22 Id. at 475-76.
23 Id. (discussing Nollan v. California Coastal Commission, 483 U.S. 825, 836 (1987)).

property. Any legal analysis would of course depend on the specifics of the proposed rule and its factual application.

The larger problem with the Joint Utilities' argument, however, is that it never explains how the proposed rule at issue here would physically invade the utilities' property. Unlike the rule invalidated in the GTE decision, there is nothing in the proposed rules here that *requires* the utilities to allow any third party to enter utility property. The utilities are still able to use their own property to build their own project, sell it to someone else, or do something entirely different from building a power plant on it. They just may not be able to recover all costs and return on investment in a power plant for only one type of use of that property (if they did not make ratepayer-funded assets available for use in obtaining the lowest cost resource).

The Joint Utilities arguments completely fall apart under Staff's more limited proposed rule that merely requires the utility to *explain* why it would not make its site and project components available for competitive bidders and how withholding those assets from competition benefits the utility's ratepayers. The Joint Utilities' failure to connect the dots is telling. Nothing in the proposed rule or any other rule that merely *encourages* the utilities to make their sites available effects a physical taking.

Under the proposed rule, the utility is only required to explain in the RFP that it has not made its site available to third-party bidders because that would be a "taking" of the utility's property, even though it is likely to result in a much lower cost resource for the utility's customers. In other words, the utility could comply with the rule by clearly explaining that the site, and all other components supporting the bid, are a utility shareholder expense for the *sole* benefit of shareholders, not ratepayers. In that circumstance, if the utility site does not prevail

and is never placed in rates as used and useful plant, the Commission would be required to disallow recovery of those shareholder costs of development of the shareholder bid, including, but certainly not limited to, property acquisition, transmission reservation fees, no-notice gas storage development costs, as well as all soft costs of consultant and legal fees to assemble that project bid. In contrast, if the utility shareholders were to prevail and win the RFP, the Commission would be within its authority to not allow the full cost of the plant and return into rates, if the Commission could reasonably find that the result would likely have been a lower cost resource had the utility made its site or project components available for a competitive solicitation.

2. Prudency Authority

As noted above, NIPPC argues in its Opening Comments that the Commission should use this opportunity to affirm its authority to declare that any decision by a utility not to allow bidders to use their utility-owned facilities would be considered *per se* imprudence.[24] In short, this is not about limiting the Commission from doing indirectly what it cannot do directly, because the Commission can do this directly in its prudence review.

A utility always has the burden of proving it acted prudently in acquiring its resources, and of providing evidence to support that proposition, if it wants to pass along those costs to ratepayers.[25] For example, the Commission disallowed the entire costs of the Rolling Hills wind generation resource from rates based on a conclusion that PacifiCorp had not demonstrated the

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24 NIPPC's Opening Comments at 12.

25 Re PacifiCorp 2009 Renewable Adjustment Clause Schedule 202, Docket No. UE 200, Order No. 08-548 at 19 (Nov. 14, 2008).

acquisition was prudent. Staff's proposed rule would simply clarify what kind of evidence is required of utilities to demonstrate they have acted prudently, and NIPPC's recommendation would simply define certain actions (not providing access to utility owned assets) as being imprudent.

No party has argued that the Commission does not have the authority to set such a standard for its prudency review, or that the Commission should not do so. The Commission has previously concluded that certain actions are *per se* consistent with the public interest.[26] The definition of prudence is simply "whether the utility exercised the standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time the decision had to be made."[27] Staff has unequivocally stated there is no public policy rationale for allowing utilities to limit use of their facilities. NIPPC thinks Staff's rules, however, are too timid. There is no need for "an abundance of caution" here because there are simply no legal implications on record. The Commission should conclude that no reasonable utility acting in the best interest of its customers would decline to offer to a third party bidder the use of any utility-owned assets, which it intends to use for a utility-owned project and include in rates.

C. Utility-Owned Transmission

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26 Re United States Cellular Corp. Application for Designation as an Eligible Telecommunications Carrier, Pursuant to the Telecommunications Act of 1996, Docket No. UM 1084, Order No. 04-356 at 6 (June 24, 2004).

27 Re PacifiCorp, dba Pacific Power Request for General Rate Revision, Docket No. UE 246, Order No. 12-493 at 27 (Dec. 20, 2012).

The parties have inconsistent views on this issue, yet all but CUB appear to agree that this is not yet fully, appropriately before the Commission at this time.[28] NIPPC appreciates CUB's position and believes it is correct in the long run, but remains unconvinced that this is the time or proceeding to address transmission access.

D. Additional Discussion Ideas Should Be Limited to Policy Issues Rather than the Implementation Issues Raised by the Joint Utilities

The Commission's January 25th Bench Notice solicited comment on four specific issues, as well as "any additional key, high-level policy issues that should be addressed early in this process."[29] The Joint Utilities have taken this opportunity to complain about certain aspects of Staff's recommendation that they do not like. The two additional issues raised by the Joint Utilities seem more like implementation issues, which could be addressed later, than the key, high-level policy issues that should be addressed early. NIPPC therefore recommends the Commission defer consideration of the two additional issues raised by the Joint Utilities. Should the Commission decide to address them now, NIPPC provides a brief response to each below. NIPPC, however, strongly disagrees with the Joint Utilities' additional issues and urges the Commission to allow additional opportunity to fully brief the issues of bid scoring and due diligence later in this proceeding, if the Commission is going to consider the Joint Utilities' arguments. Comments on these topics should not be limited to simply replying to utility comments under an unreasonably tight timeline.

1. Scoring All the Bids

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28 CUB's Opening Comments at 2-3 ("CUB supports requiring transmission activity to be subject to competitive bidding requirements").

29 Notice at 1.

NIPPC disagrees with the Joint Utilities' claim that scoring all of the RFP bids "unduly constrains utility management's prerogative to acquire new resources."[30] NIPPC is struggling to understand how additional transparency and more information from an IE (which is so important that the Joint Utilities have argued it must be included in all RFPs) limits anything but the utility management's prerogative to *unfairly* acquire new resources. Scoring all of the bids, if anything, seems like it could provide duplicate or redundant information rather than impede upon the utilities' "judgment to select the best resources."[31] Scoring all bids is not the same as running a parallel RFP.[32] It would simply provide more of the transparency, and encouragement for bidders and competition that the Joint Utilities argue is so critical. Despite the scoring, utilities remain free to review the independently scored bids, and make whatever procurement decision they like.

2. Due Diligence Review

NIPPC also disagrees with the Joint Utilities' assertion that Staff's proposal for a due diligence review is unclear and/or unnecessary.[33] This review was discussed at great length during the workshops and was obviously clear enough for Staff to recommend its inclusion in the draft rules. NIPPC believes that incorporating this kind of additional review of utility-owned bids, which mimics the kind of review that is inherently part of nonutility-owned bids, would ensure a more level playing field for all types of bidders. Despite the Joint Utilities' claims, this kind of review would neither reduce the quality nor the quality of bids received. If the

30 Joint Utilities' Opening Comments at 16.
31 Id.
32 Id. at 17.
33 Id. at 18.

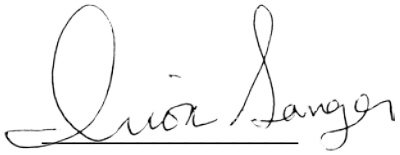
Commission is in any way disinclined to adopt Staff's recommended proposed rule, then all parties should be allowed a greater opportunity to comment on this proposal.

III. CONCLUSION

NIPPC looks forward to discussing these key policy issues with the Commissioners and other stakeholders at the March 6, 2018 workshop.

Dated this 26th day of February 2018.

Respectfully submitted,



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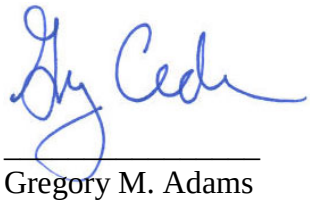

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