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VIA ELECTRONIC FILING

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

Re: Docket No. AR 600, In the Matter of Rulemaking Regarding Allowances for Diverse Ownership of Renewable Energy Resources.

Attention Filing Center:

Enclosed in the above-referenced docket is an electronic copy of the Joint Utilities' Opening Comments on Policy Issues.

Please contact this office with any questions.

Very truly yours,

Alisha Till

Alisha Till
Legal Assistant

Attachment

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

AR 600

In the Matter of: Rulemaking Regarding Allowances for Diverse Ownership of Renewable Energy Resources.	JOINT UTILITIES' OPENING COMMENTS ON POLICY ISSUES

I. INTRODUCTION

Portland General Electric Company (PGE), Pacific PacifiCorp d/b/a Pacific Power (PacifiCorp), and Idaho Power Company (Idaho Power) (collectively, Joint Utilities) submit these opening comments to the Public Utility Commission of Oregon (Commission) in response to Administrative Law Judge (ALJ) Grant's January 25, 2018 Notice (Notice).

After approximately six months of informal process, at the January 17, 2018 Public Meeting, Staff presented its draft proposed rules (Draft Rules) and recommended that the Commission initiate the formal rulemaking process. Representatives from each of the Joint Utilities provided comments at the Public Meeting expressing significant concern with the Draft Rules—in particular, that certain proposals depart from the Commission's long history of promoting fairness and transparency in competitive bidding, and instead reflect an anti-utility bias.[1] To address these issues, the Joint Utilities requested that the Commission provide policy direction to Staff before initiating the formal process. The Commission adopted Staff's recommendation to open formal rulemaking, but extended the timeframe for the proceeding from 90 to 150 days to allow for an early opportunity for the Commission to provide policy direction to

[1] PGE and Idaho Power also provided written comments in advance of the Public Meeting.

Staff.[2] On January 25, 2018, ALJ Grant issued a Notice outlining four discrete policy questions, soliciting input from stakeholders on each issue, and asking the parties to identify and comment on any additional key policy issues that should be addressed early in the process.[3] The Joint Utilities appreciate this opportunity to address the significant policy issues in this proceeding.

II. POLICY CONCERNS

This proceeding was initiated in response to legislative direction in Senate Bill (SB) 1547 to the Commission to adopt rules providing for the evaluation of competitive bidding processes ***that allow for*** diverse ownership.[4] To achieve this end, certain stakeholders have proposed rules that tip the scales in favor of non-utility ownership by imposing additional burdens on RFPs allowing for utility ownership, or by allowing for reduced scrutiny and oversight for RFPs that prohibit utility ownership. This approach reflects an unduly narrow view of the purpose of the Commission's competitive bidding process—one that suggests that the only benefit is to counteract a perceived utility incentive to favor the selection of utility-owned projects. In fact, the Commission's competitive bidding process serves the overarching and critical goal of enhancing competition, leading to the selection of lower cost and lower risk resources for customers—regardless of the ownership structure.

Throughout its long history of investigating and refining the Guidelines, the Commission has continually reaffirmed that the fundamental purpose of competitive bidding is to allow for competition among sellers of energy resources to allow for the selection of the best resources.[5]

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[2] *In the Matter of Rulemaking Regarding Allowances for Diverse Ownership of Renewable Energy Resources – Competitive Bidding Guidelines*, Docket No. AR 600, Order No. 18-015 (Jan. 17, 2018).

[3] *In the Matter of Rulemaking Regarding Allowances for Diverse Ownership of Renewable Energy Resources – Competitive Bidding Guidelines*, Docket No. AR 600, Notice (Jan. 25, 2018).

[4] *See* 2016 Or. Laws, ch. 28, sec. 6, § 4(d) (amending ORS 469A.075 and requiring the Commission to adopt rules "[p]roviding for the evaluation of competitive bidding processes that allow for diverse ownership of renewable energy sources that generate qualifying electricity").

[5] *In the Matter of an Investigation into Competitive Bidding by Investor-Owned Electric Utility Companies*, Docket No. UM 316, Order No. 91-1383 (Oct. 18, 1991); *In the Matter of an Investigation Regarding Competitive Bidding*, Docket No. UM 1182, Order No. 06-446 (Aug. 10, 2006); *In the Matter of Pub. Util. Comm'n of Or. Investigation Regarding Competitive Bidding*, Docket No. UM 1182, Order No. 14-149 (Apr.

When pressed by the Northwest and Intermountain Power Producers Coalition (NIPPC) in 2014 to structure some RFPs to exclude the possibility of utility ownership, the Commission reaffirmed that the end goal is to achieve the least cost/least risk resource, and that it would not "put a thumb on the scale" for non-utility resources absent explicit legislative direction:

> NIPPC's proposal is contrary to the goal underlying the IRP process that utilities obtain resources that are least risk and cost to ratepayers. Absent clear legislative direction, we are unwilling to consider any mechanism that would require a utility to procure certain types of resources regardless of the impact on customer rates.[6]

Importantly, the explicit legislative direction in SB 1547 requires that the rules "allow" for diverse ownership, but ***does not*** direct the procurement of diverse resources irrespective of cost or risk.

The Joint Utilities understand that several provisions advanced by stakeholders are designed to compensate for a perceived advantage that utilities have in the competitive bidding process. However, to the extent that parties are concerned that such advantages exist, the Joint Utilities believe that they are best addressed by rules that will promote bidder confidence that the process is both transparent and fair—such as those provisions in the Draft Rules that provide additional clarity in RFP design, or that provide for more objective and transparent scoring criteria. On the other hand, the Joint Utilities oppose those provisions that seek to correct any perceived utility bias by introducing bias in favor of third-party bidders because they ultimately will undermine the larger goals of promoting robust competition and fostering the selection of lower cost and lower risk resources for customers.

III. POLICY QUESTIONS

The Joint Utilities discuss the issues raised in Judge Grant's Notice in turn, and then address several other important policy questions.

30, 2014); *see also In the Matter of Pub. Util. Comm'n of Or. an Investigation Regarding Performance-Based Ratemaking Mechanisms to Address Potential Build-vs.-Buy Bias,* Docket No. UM 1276, Order No. 11-001 (Jan 3, 2011).

[6] Order No. 14-149 at 16.

Issue #1: Is it appropriate to allow exemptions from certain competitive bidding rule sections if a Request for Proposal (RFP) does not incorporate or consider electric company ownership of resources?

No. The Joint Utilities strongly oppose exemptions from the competitive bidding requirements for RFPs that prohibit utility ownership.

Competition in the bidding process applies pressure to ***all*** participants to lower their costs and prices, which is the core benefit of competitive bidding. Importantly, the competitive bidding process is most robust when the utility receives bids from the greatest number and most diverse set of offers. With numerous and diverse offers, the Joint Utilities and the Commission can be confident that the resources with the best combination of cost and risk are selected for the benefit of customers.

Diminishing the regulatory standards[7] for a PPA-only RFP will create a disincentive for the utility to propose, or other stakeholders to support, an RFP that allows for a utility ownership option, particularly when the regulatory standard is as time-intensive,[8] resource-exhausting, and expensive as that currently suggested. And the potential impact of this disincentive may be compounded if the competitive bidding process is applied to resources as small as 50 MW, where the cost of compliance may be disproportionate to the cost of the resource—or when a resource is required within a shorter timeframe than the rules allow. In such cases, allowing exemptions from the rules for RFPs that prohibit utility ownership will discourage utilities from proposing,

[7] Staff's Draft Rules propose that an IE may not be required if an RFP prohibits utility ownership and provides for reduced IE scrutiny for non-utility owned resources under the application of the IE's financial due diligence review.

[8] For an RFP under the existing Guidelines, it appears that the entire RFP process could be completed in about a year or less. *See, e.g., In the Matter of PacifiCorp, dba Pac. Power Request for Proposals*, Docket No. UM 1845 (while this proceeding is on-going, it appears that the schedule contemplates a year or less from start to finish). Under Staff's proposal, the process is lengthened to about 18 months, unless the Commission grants an extended period for the RFP approval process, in which case the process may take up to 22 months.

and/or stakeholders from supporting a process that might result in utility ownership, which in turn will result in a less diverse solicitation.

The Commission's competitive bidding rules should be agnostic as to bidder ownership structure, should continue to emphasize the benefits of competition, and should not create incentives, regulatory or otherwise, that would result in *reduced* competition.

Issue #2: Is the engagement and participation of an Independent Evaluator (IE) in the competitive bidding process valuable regardless of whether the RFP contemplates utility resource ownership options?

Yes. The Joint Utilities believe that the use of an IE benefits customers, the Commission, and the utility in all cases and should therefore be used for all RFP structures. The suggestion that an IE may not be required if an RFP prohibits utility ownership incorrectly implies that the primary purpose of IE participation is to scrutinize the utility's proposal for a utility-owned resource. On the contrary, an IE's role is to ensure fairness, promote transparency, and apply impartial judgment within a competitive procurement, and the IE's oversight and participation is valuable in all RFPs, irrespective of potential ownership outcomes. Consistent IE participation will benefit all solicitations, and ultimately increase bidder confidence and motivate bidders to expend the significant resources necessary to submit a bid.

The Joint Utilities are also concerned that inconsistent use of an IE may undermine the goals of the competitive bidding process. IE participation in an RFP—while valuable—necessarily results in a longer and more expensive competitive bidding process. As an example, PGE's most recent IE selection process spanned more than five months, and it is likely that IE selection will

take even longer under the Draft Rules.[9] In addition, the services of an IE and supporting team are costly. Consistent with IE costs recently incurred by the Joint Utilities, the Commission should expect that the IE costs borne by customers will consistently exceed $1 million, and will likely be significantly more under the Draft Rules given the longer overall duration of the RFP proceeding and additional IE tasks proposed in the Draft Rules.

For those reasons, the Draft Rules create incentives for both the Commission and the Joint Utilities to avoid expending resources on IE engagement if possible. By requiring an IE only if utility ownership is an option, Staff's Draft Rules create an incentive to ***reduce*** competition within an RFP. The Joint Utilities urge the Commission to reject this proposal, as it is contrary to the purpose and goal of competitive bidding and counterproductive to the selection of least-cost, least-risk resources.

Issue #3: 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?

No. The Joint Utilities believe any proposal suggesting that a utility ***must offer*** its owned facilities to bidders would exceed the scope of the Commission's legal authority and would constitute an unconstitutional taking of utility property.[10] The Commission has consistently recognized the limits of its authority in this respect, and has never required a utility to offer its

[9] Draft Rules, OAR 860-0XX-0200(2) and (3) (describing process for IE selection). Beyond the increased timeframe for the IE selection process, the Joint Utilities expect that the overall duration for the competitive bidding process will be extended to approximately 18-22 months.

[10] *GTE Nw., Inc. v. Pub. Util. Comm'n of Or.*, 321 Or 458, 463 n.3 (1995) (describing constitutional basis for takings argument: "Article I, section 18, of the Oregon Constitution, provides in part: 'Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation.' The Fifth Amendment to the Constitution of the United States provides in part: 'Nor shall private property be taken for public use, without just compensation.' The Takings Clause of the Fifth Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827 (1987)").

owned facilities to a third party.[11] For these reasons, the Commission should not adopt a rule requiring the utilities to explain themselves if they chose not to make their property available to third-party bidders. If the Commission wishes, it may ***encourage*** utilities to make their property available to bidders. But the ultimate decision must remain a judgment call for utility management.

A. The Commission lacks authority to compel electric utilities to offer owned facilities to bidders.

The Commission may not compel electric utilities to offer owned facilities to third-party bidders, and any rule requiring a utility to do so would represent an unconstitutional taking of utility property.

1. The Commission does not have authority to adopt rules that effect a taking of private utility property.

Private property may be taken for public use only through an exercise of eminent domain.[12] The Oregon Supreme Court "has repeatedly and consistently held that 'the right of eminent domain . . . can be exercised only by legislative authority.'"[13] As a result, "an agency may not act in eminent domain without an express grant of power from the legislature."[14] And the Oregon Supreme Court has further concluded that "[t]he [Commission] does not have express statutory authority to promulgate rules that would effect a taking."[15] There is no statute in place authorizing the Commission to exercise eminent domain in the manner proposed here. Thus, if the Draft Rules result in an impermissible exercise of eminent domain, they would also be unconstitutional.

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[11] *See* Order No. 06-446 at 5-6 (rejecting proposal to mandate third party access to benchmark resource sites); *In the Matter of Portland Gen. Elec. Co.*, Docket No. UM 1535, Order No. 11-371 at 6 (Sep. 27, 2011) (declining to adopt proposal that PGE be required to allow third parties to submit bids for projects at the utility-owned Port Westward site).

[12] *Hall v. State*, 355 Or 503, 510 (2014) ("A 'taking' of property is a shorthand description for an exercise of the government's power of eminent domain, which is the power of the sovereign to take property for 'public use' without the property owner's consent.").

[13] *GTE Nw.*, 321 Or at 466 (quoting *B.V.L. Co. v. Johnson*, 30 Or 205, 208 (1896)).

[14] *Id.* at 467.

[15] *Id.* at 468.

2. Requiring a utility to consent to third-party use of utility property would constitute a physical taking.

A governmental intrusion on private property which provides for the permanent physical occupation or invasion of that property is a physical taking.[16] Occupation of private property by a third party—as opposed to by the government—is particularly egregious, as it "literally adds insult to injury."[17] Thus, any proposal requiring a utility to allow a third party to develop a resource on the utility's property would constitute a physical invasion taking.

The Oregon Supreme Court has previously overturned Commission rules that would effect a physical invasion taking. In a 1995 telecommunications case,[18] *GTE Northwest*, the court considered Commission rules that required local exchange carriers (LECs)[19] to offer "collocation"[20] to third-party enhanced service providers (ESPs)[21] competing in their service areas.[22] Under those rules, a LEC would be required to make its property available to the third-

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[16] *Hall*, 353 Or at 511 (describing a physical taking in comparison with a regulatory taking); *West Linn Corporate Park, L.L.C. v. City of West Linn*, 349 Or 58, 78 (2010) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005)) (""A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests.").

[17] *GTE Nw.*, 321 Or at 474 n.7 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982)).

[18] Note that this case considered rules adopted *prior* to the Telecommunications Act of 1996, which specifically mandated collocation. *See also In re Open Network Architecture*, Docket No. AR 469, Order No. 04-012 at 2 (Jan. 8, 2004) (recognizing that the federal Telecommunications Act of 1996 specifically required ILECs to provide unbundled network elements, making the Commission's collocation rules "no longer necessary"); *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 419 (D.C. Cir. 2000) ("The 1996 Act completely revamped the statutory landscape by providing explicit congressional authorization for physical collocation.").

[19] LECs provide basic telecommunications services within geographic boundaries established by the Commission. *GTE Nw.*, 321 Or at 461.

[20] As defined in the Commission rule at issue, "collocation" means "a service, offered by a LEC, which provides for placement and installation of a customer's equipment, software, and databases on LEC premises. Premises include central offices, remote network facilities, or any other similar location owned by the LEC. The equipment, software, and databases are owned by the customer." *Id.* at 462 (quoting OAR 860-035-0020(8)).

[21] ESPs provide "enhanced services" that "employ computer processing applications that act on the format, content, code, protocol or similar aspects of the customer's transmitted information, provide customers with "additional, different, or restructured information." *Id.* at 461-462.

[22] *Id.* at 462 (describing the Commission's rules requiring a LEC to allow a third party "to occupy a portion of the LEC's property"). While the Commission's rules provided that collocation could be either physical

party ESPs, and would be compensated for costs related to the collocation.[23] The Oregon Supreme Court unambiguously concluded that mandating access for the installation of third-party equipment on the LEC's property was an unconstitutional physical taking for three reasons. First, "the 'installation of [a third party's] equipment, software, and databases on LEC premises" was "a direct physical attachment" to the property, and thus a "physical invasion."[24] Second, a third party owned the equipment on the LEC's property.[25] And third, the LEC was required to accept the physical invasion.[26]

The Commission posited two theories to suggest that its collocation rules did not effect a taking, each of which the court rejected. First, the Commission stated that, "because public utilities are restrained in how they make use of their property," they lack the right to exclude an occupier and, "therefore, the occupation is not a taking."[27] The court disagreed, stating that "the facts that an industry is heavily regulated, and that a property owner acquired the property knowing that it is heavily regulated, do not diminish a physical invasion to something less than a taking."[28]

Second, the Commission argued that the state's "power to forbid a particular use of property" allows the Commission to condition that use by "requir[ing] the owner to submit to a physical invasion of that property as long as there is a substantial nexus between the

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(by installing third-party equipment on LEC property) or virtual (by allowing a third party to make use of a LEC's equipment), the parties only challenged the physical collocation portion of the Commission's rules. *Id.* at 463 ("GTE does not challenge the rules regarding virtual collocation.").

[23] *Id.* at 462 (noting that the LEC property owner would "be reimbursed for both collocation and virtual collocation").

[24] *Id.* at 472.

[25] *Id.* at 472 ("[I]t is the [third party], not the LEC, that owns the equipment placed on the LEC's property."); *see also Qwest Corp v. US*, 48 Fed. Cl. 672, 693 (2001) (finding that no physical taking occurred where the equipment to be installed on the LEC's property was not "*another party's* equipment") (emphasis in original).

[26] *GTE Northwest*, 321 Or at 472 ("[C]ollocation constitutes a physical invasion [because] the rules require an LEC to provide collocation to an ESP that requests collocation.").

[27] *GTE Northwest*, 321 Or at 473-74.

[28] *Id.* at 474.

governmental purpose and the invasion."[29] That is, the Commission argued that the physical invasion was merely an exaction on the utility's permitted use. Again the court disagreed, noting that the exactions analysis applied to regulatory taking, not to a physical invasion taking case.[30]

Here, the Draft Rules imply that the Commission may require utilities to accept physical installation of third-party equipment on utility property. Such mandatory installation by a third party both exceeds the Commission's authority and plainly results in an unconstitutional taking of property. As a result, the Commission cannot and should not compel a utility to offer its owned resources to a third party.

B. The Commission has consistently recognized the limits on its authority to compel the disposition of utility owned property.

The Commission has indicated in the past that it has serious doubts about its authority to require utilities to make their property available to bidders. Specifically, in a 2006 investigation into competitive bidding, the Commission considered whether to modify the Guidelines to require utilities to allow third parties access to benchmark resource sites—and declined to include such a requirement in the Guidelines.[31] In that proceeding, parties noted the potential difficulties of fairly implementing such a proposal,[32] and that the proposal could add risk for utility customers,[33] but ultimately the Commission did not even reach these issues because it could not overcome the more fundamental problem—that it was concerned that it ***could not legally implement the proposal***. The Oregon Department of Justice had advised Staff and the Commission that there

[29] *Id.* at 475.

[30] *Id.* at 476-477.

[31] Order No. 06-446 at 5-6.

[32] *In the Matter of an Investigation Regarding Competitive Bidding,* Docket No. UM 1182, PGE's Reply Comments at 5 (Oct. 21, 2005) (suggesting that "to truly foster competition" all bidders should be allowed to bid on each others' sites, including the utility, and that such an approach would present challenges for implementation).

[33] *In the Matter of an Investigation Regarding Competitive Bidding,* Docket No. UM 1182, PacifiCorp's Reply Comments at 9-10 (Oct. 21, 2005) (different bid types present different risk profiles, and "a requirement that the utility always permit EPC bids on its site could easily result in ratepayers being inappropriately exposed to risks that cannot effectively be managed or hedged").

were "legal impediments" to implementing the proposal,[34] and the Commission ultimately adopted Staff's recommendation that utilities should not be directed to offer their sites to third party developers.[35] Similarly, the Commission has rejected this sort of proposal when it has been made in the context of a utility RFP, reaffirming the limited scope of its authority.[36]

C. The Commission should not require utilities to "explain themselves" if they choose to not offer utility owned resources to third-party bidders.

As described in detail above, the Commission ***has no authority*** to require utilities to offer utility owned property to third-party bidders. Yet in the Draft Rules, Staff proposes that a utility must provide an "explanation" if it decides to not offer its utility-owned resources to third-party bidders.[37] Thus the implication is clear—that the utility not only should offer its site, but is expected to do so. In essence, Staff's proposal improperly requires utilities to rebut an unconstitutional presumption that utility property must be made available to bidders. In other words, Staff proposes that the Commission do indirectly what it cannot do directly. This proposal reaches beyond the limits on the Commission's authority, and should be eliminated from the Draft Rules.

D. The Commission may encourage utilities to offer owned facilities to third-party bidders, but does not need to adopt rules to do so.

The Commission may, consistent with its existing authority, encourage utilities to offer owned facilities to third-party bidders, but the Joint Utilities do not believe that it is necessary to adopt rules to implement this policy. When the Commission considered this issue in 2006, the

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[34] Order No. 06-446 at 5; *In the Matter of an Investigation Regarding Competitive Bidding,* Docket No. UM 1182, Staff's Reply Comments at 6-7 (Oct. 21, 2005).

[35] Order No. 06-446 at 5-6 ("We will not require a utility to offer its site locations for development by independent power producers. Granted, a utility could allow a resource to be built upon a particular named piece of utility property. However, that is a decision to be made by the utility. We share Staff's concerns, raised after consultation with the Department of Justice, whether this Commission has the legal authority to implement the [proposal]. Rather, we adopt Staff's suggestion that the utility be encouraged to offer its site for third party development . . . ").

[36] Order No. 11-371 at 6 (declining to adopt proposal that PGE be required to allow third parties to submit bids for projects at the utility-owned Port Westward site).

[37] Draft Rules, OAR 860-0XX-0300(2) and (3).

Commission's order noted that the Commission would encourage utilities to offer owned facilities to bidders, but that the ultimate decision would remain with the utility's management—and the Commission made no update to the Guidelines to explicitly reflect that policy decision.[38] In this case as well, the Joint Utilities believe it is unnecessary to codify this approach within an administrative rule.

As a practical matter, the Joint Utilities typically *do* consider whether to offer an element of a benchmark resource in the early stages of their RFP development—and in some cases they may elect to offer up their site, depending on the particular resource needs and the particular site. Ultimately, though, that decision must remain with the utility.

Issue #4: Should transmission activity be subject to competitive bidding requirements?

No. In the Draft Rules, Staff eliminated the existing definition of a Major Resource, which has historically been applied only to proposals for generating resources. Instead, Staff proposes that the new competitive bidding rules will apply to "energy or capacity resources," which is broad enough to include transmission resources. Though the Notice indicated that "[o]thers have raised questions whether competitive bidding requirements should apply where transmission is considered as an alternative to or as part of a capacity or energy acquisition," the Joint Utilities are unaware of any party affirmatively advocating that transmission activity should be included within the scope of the competitive bidding rules. Indeed, the Joint Utilities are not even certain that Staff intended for transmission activity to be included in the rules. As discussed further below, the Joint Utilities believe that the Commission should specifically exclude transmission activity from the competitive bidding requirements.

[38] Order No. 06-446 at 5-6.

A. Including transmission in the competitive bidding rules would be a major policy shift, for which no policy rationale has been advanced to-date, and which would require a full investigation.

To date, no party has provided a rationale for the potential inclusion of transmission resources in the competitive bidding rules. It should be noted that this rulemaking was opened to fulfill the legislature's policy direction in SB 1547, which requires the Commission to adopt rules that allow for diverse ownership of *renewable energy resources*.[39] In contrast, there has been no recommendation from the legislature, the Commission, or any party suggesting that diverse ownership of transmission resources is needed or desirable. And as described below, the Joint Utilities believe that requiring utilities to comply with the Commission's competitive bidding rules when acquiring transmission resources would be expensive, burdensome, and unproductive. Accordingly, the Joint Utilities recommend that the Draft Rules be revised to explicitly exclude transmission resources.

If, on the other hand, the Commission believes that this idea has merit, the Joint Utilities recommend that the Commission open a new proceeding specifically to investigate the issue. Given the ambiguity about the justification for the proposal, as well as the significant potential consequences, the Commission should not attempt to evaluate the issue without a fully-developed record. And the Commission should not consider making such a substantial policy change in this rulemaking docket—which has a completely different focus.

B. There is no competitive market for transmission in Oregon.

There is currently no competitive market for transmission in Oregon or the Pacific Northwest, and because of the significant cost and financial risk associated with permitting and

[39] *In the Matter of Rulemaking Regarding Allowances for Diverse Ownership of Renewable Energy Resources – Competitive Bidding Guidelines*, Docket No. AR 600, Order No. 17-173, App. A at 1-2 (May 16, 2017); s*ee also NIPPC Petition for Temporary Rulemaking*, Docket No. AR 598, Order No. 16-188 at 1-2 (May 19, 2016).

developing transmission, it is unlikely that requiring competitive bidding for transmission resources would result in the creation of a market.

Depending on the project size, location, and other characteristics, addressing all federal, state, and local environmental and land use permitting requirements may take anywhere from several years for a short and simple project, to a decade or more for a longer project. In the case of the Boardman to Hemingway Transmission Line Project (B2H), state and federal permitting efforts have been ongoing since 2007, and will likely continue for at least another two years. Additionally, the development and permitting process for a transmission project is enormously costly. In the case of B2H, the partners have invested roughly $95 million as of December 31, 2017, and anticipate spending millions more before ground can even be broken. Finally, permitting linear projects is particularly challenging because the developer may encounter environmental or species issues, landowner opposition, and other unforeseen obstacles that have the potential to stall or shut down a project. Developers would bear significant risk—including risk that the project cannot be permitted and delivered on time and risk that the need for the resource may change before permitting can be completed.[40] Thus, even if the Commission extended the competitive bidding rules to apply to transmission, it is unlikely that a third-party developer would participate in an RFP for a transmission resource. Given the dubious benefit, it would be unreasonable to require utilities to bear the additional administrative burden and expense of completing an RFP process.

C. If or when such a competitive market is established, competitive bidding would likely occur through the RTO or ISO.

Additionally, if a competitive transmission market were to emerge in the Pacific Northwest, it would likely be a result of the formation of a Regional Transmission Operator (RTO) or

[40] Given the significant cost and risk discussed above, a developer may demand "contractual outs" to mitigate risk. These off-ramps could result in higher overall costs for the bid and significant costs even if a project is never developed—which would likely be borne by customers.

Independent System Operator (ISO).[41] Where RTOs and ISOs have been established, some transmission needs have been fulfilled by the regional operator's competitive solicitation process.[42] Thus, if an RTO or ISO were established in the Pacific Northwest,[43] any competitive bidding for transmission would likely be conducted through the bid process established by the RTO or ISO, obviating the need for a separate—and potentially conflicting—Commission process. Because any duplicative or contradictory state regulations could have a stifling effect on the future development of a competitive market, the Commission should specifically exclude transmission from the Draft Rules.

D. Including transmission in the competitive bidding rules is unworkable and unnecessary.

To the extent the hypothetical proposal does not contemplate third-party development and/or ownership of transmission resources, and instead simply asks that utilities engage in the Commission's solicitation process for the construction of a transmission project, this approach is impracticable and unnecessary. First, as explained above, permitting a transmission project may take anywhere from a few years to a decade or longer. It is unreasonable to require utilities to participate in an additional 18- to 22-month long competitive bidding process after the permitting

[41] Additionally, it seems unlikely that a competitive market would develop in the absence of the formation of an RTO or ISO to establish a structure for the market.

[42] For instance, in New York, the Public Service Commission establishes transmission needs and certain public policy parameters (such as favoring projects "that result in upgrades to aging infrastructure," and the New York Independent System Operator (NYISO) then issues a competitive project solicitation subject to regional fulfillment. *Competitive Transmission Developers v. N.Y. Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,164 at 61,718 (2016). Also, the Midcontinent Independent System Operator (MISO) conducts regional competitive solicitations for transmission needs identified in the regional transmission planning process. *Midwest Indep. Sys. Operator, et al.*, 147 FERC ¶ 61,127 at 61,631 (2014) (discussing whether MISO would hold a competitive solicitation for transmission selected in the regional planning process, where state and local laws independently prohibited nonincumbent transmission developers from developing the project in a given state).

[43] While the establishment of a competitive market via the creation of an RTO or ISO in the Pacific Northwest may occur in the future as a natural progression from the Energy Imbalance Market (EIM), Peak/PJM market expansion, or Mountain West transmission group joining the Southwest Power Pool, it is uncertain when such a transition might occur. Importantly, there is no competitive market for transmission on the immediate horizon.

process is complete. Such a mandate could jeopardize timely completion and disrupt the overall resource acquisition process. Assuming the purpose of applying the competitive bidding rules to the construction phase would be to ensure that utilities build the project at the lowest cost, such a requirement is not necessary because the Joint Utilities would typically voluntarily engage in an RFP to solicit and retain an Engineering, Procurement, and Construction (EPC) Contractor for a transmission line project to ensure that the project is developed for the lowest cost. Allowing the utility to conduct its own RFP for the EPC contractor provides needed flexibility regarding project timing that may be critical to ensuring timely delivery of a project.

In sum, the Joint Utilities believe there is no compelling reason to include transmission activity within the competitive bidding rules, and urge the Commission to provide policy direction to Staff to specifically exclude transmission activity from the Draft Rules.

Issue #5: Should the role of the IE be expanded to require scoring of all bids for RFPs that include a utility ownership option?

No. The Commission has explained that competitive bidding should "not unduly constrain utility management's prerogative to acquire new resources."[44] On the other hand, Staff's Draft Rules inappropriately infringe upon the utility's role in the competitive bidding process and diminish the responsibility of the Joint Utilities to exercise judgment to select the best resources by significantly expanding the IE's role in the process.

The Draft Rules require that the IE independently score ***all bids*** if affiliate or utility ownership is an option,[45] whereas the existing Guidelines[46] require independent scoring for only

[44] Order No. 06-446 at 2.

[45] Draft Rules, OAR 860-0XX-0450(5).

[46] Guideline 10(d).

a sample of bids.[47] The Commission's current policy is appropriate and consistent with the IE's role as an independent auditor of the RFP process. In contrast, the proposed provision redefines the role of the IE and would essentially require the IE to conduct a parallel assessment of the RFP, unnecessarily duplicating the utility's efforts and substantially increasing the cost of the IE's participation in the RFP process.

While the difference between requiring independent scoring for all bids versus a sample of bids may seem subtle, this change presents serious cost implications if the utility's RFP generates substantial response from bidders. In the Joint Utilities' experience, depending on the type of RFP, anywhere from a small handful to over 100 bidders might respond. Requiring the IE to score all bids to confirm the reasonableness of the initial and final shortlists for an RFP with a high volume of bidder response would result in significant and unnecessary cost increases in the RFP process. For example, based on PGE's recent RFP experiences, PGE estimates that this additional analysis could add several million dollars of expense to the RFP.

The Joint Utilities request the Commission provide Staff with policy direction to clarify that the appropriate role for the IE is to help ensure a fair and transparent process, and not to replicate the utility's efforts in a parallel RFP proceeding. The Joint Utilities further request that the Commission direct Staff to reinstate the language from the Guidelines providing the option that the IE may independently score a sample of bids.

Issue #6: Should the Commission establish a third-party financial due diligence review?

No. The Draft Rules provide that the IE will conduct a "project finance due diligence review" on any bids on the final shortlist that provide for the possibility of utility or affiliate ownership of the resource; on the other hand, the same type of due diligence is *not required* if

[47] Order No. 14-149 at 2, 17.

utility ownership is not an option. The proposal to require a third party financial due diligence review has not been adequately explained or justified, and should be eliminated from further consideration at this time. Additionally, Staff's Draft Rules create an unequal standard for the application of third-party review of financial information, but include no rationale for disparate treatment.

At the time the Commission determined that this issue would be addressed in this proceeding, the Commission indicated that it would be incumbent on the entity proposing this concept, NIPPC, to explain and support the proposal. Yet to date, no party has provided any legitimate justification or detailed the scope for this new proposed requirement, much less its unequal application. The Draft Rules as proposed do not specify what additional analysis the IE should perform and remain exceptionally vague on what standards the IE should apply. Nor were such details discussed during the informal process, and stakeholders have no information about the anticipated cost or timing needed to complete such a review. NIPPC has failed to support its proposal, and accordingly, this provision should be removed from Draft Rules.

If the Commission wishes to require additional project finance due diligence review, the review should be applied even-handedly to any bids on the final short list. Adoption of an unequal standard of review, depending on resource ownership, would create the appearance of resource favoritism, and introduce a strong incentive for bidders to submit PPA-only bids, in order to avoid additional IE scrutiny. Such an incentive would reduce the quantity and quality of bids received in the competitive procurement to the detriment of customers.

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IV. CONCLUSION

The Joint Utilities respectfully submit these opening comments, and look forward to continued participation in this proceeding.

Respectfully submitted this 14th day of February, 2018.

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