BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1856

In the Matter of	)	
	)	NORTHWEST AND
PORTLAND GENERAL ELECTRIC	)	INTERMOUNTAIN POWER
COMPANY,	)	PRODUCERS COALITION
	)	REPLY BRIEF
Draft Storage Potential Evaluation	)	
	)	

I. INTRODUCTION

The Northwest and Intermountain Power Producers Coalition ("NIPPC") respectfully submits its reply brief in this proceeding. This docket requires the Oregon Public Utility Commission (the "Commission") to determine whether Portland General Electric Company's ("PGE's") Energy Storage Proposals (the "Proposals") are consistent with the statutory requirements laid out in House Bill 2193 ("HB 2193") and Order Nos. 16-504, 17-118, and 17-375. The sole remaining issue being litigated by the parties is whether PGE can refuse to allow a fair competitive bidding process. As a matter of law, the Commission should conclude that HB 2193 and the Commission's orders encourage PGE to consider different ownership options and do not include any basis to support PGE's proposal to require utility-ownership. As a matter of policy, the Commission should conclude that it will not approve PGE's Proposal unless it allows third-party ownership bidding for the new energy storage system ("ESS") at Coffee Creek.

Contrary to PGE's claims, NIPPC is not advocating for the Commission to force PGE to hand over its property to third-party bidders or to require PGE to enter into a third-party contract as a threshold for going forward with the Coffee Creek project.

Instead, NIPPC is simply asking the Commission not to endorse PGE's refusal to allow third-party ownership bids in its impending request for proposals ("RFP") for the Coffee Creek project.

Importantly, PGE's brief fails to respond to much of the testimony provided jointly by NIPPC and the Alliance of Western Energy Consumers ("AWEC" formerly known as ICNU) and Staff refuting PGE's claims about the risks associated with third-party ownership at the Coffee Creek location. As both NIPPC-AWEC and Staff have pointed out, PGE has a number of options to choose from to minimize risks, but PGE has not evaluated any non-utility ownership options.

Finally, it is worth highlighting that PGE's refusal to allow third-party bids appears to assume that the third-party bids will be the least cost/risk bids received. Otherwise, why would PGE object so strongly to even receiving this kind of information from the market?

II. ARGUMENT

A. PGE's Arguments About Utilities Being Forced to Hand Over Utility-Owned Property Are Misguided Because No Party is Advocating For That

PGE misrepresents NIPPC's arguments. NIPPC is not asking the Commission to require that PGE build the Coffee Creek ESS as a non-utility owned project. This means that much of PGE's opening brief is responsive to an argument that nobody is making. To be clear, no party has argued that PGE should be forced "to hand over utility-owned land to facilitate third-party ownership."[1] Despite PGE's efforts to frame the competitive bidding issue as a takings problem, it is not. The Commission's authority over

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[1] PGE's Opening Brief at 4; see also id. at 7-8 ("require utilities to make utility-owned property available for third-party ownership").

competitive bidding for the Coffee Creek ESS derives from its prudence authority and the statutory authority provided in HB 2193. The parties agree that PGE bears a burden to demonstrate that the costs incurred to bring the HB 2193 projects online are prudent.[2] And the Commission is well within its authority to require PGE to evaluate different ownership alternatives and the use of utility-owned land during the RFP for Coffee Creek.

1. PGE Conflates Takings and the Commission's Prudence Authority

Requiring fair competitive bidding for the Coffee Creek project has nothing to do with either constitutional or regulatory takings. By way of reminder, a constitutional taking occurs when private property is taken for public use without just compensation and a regulatory taking occurs when government regulation limits the use of private property so drastically that it effectively deprives the property owner of any economically reasonable use of the effected property. The classic takings examples are creating a sidewalk through a homeowner's front yard (constitutional) and establishing zoning laws that deny any economic viable use of one's land (regulatory).

Neither of those scenarios reflects what NIPPC is advocating for in this docket. NIPPC does not want the Commission to take PGE's property for public use or bar PGE from using its property. If PGE wants to build a new ESS without evaluating third-party options, it absolutely can, but PGE's ratepayers should not shoulder any unreasonable costs due to PGE's ownership preference. Additionally, NIPPC generally agrees that PGE should be adequately compensated for any third-party use of its property.

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[2] Id. at 8.

PGE maintains that the Commission already determined that allowing third-party ownership of the Coffee Creek project is a utility-management decision, which ignores the Commission's broad authority to ensure just and reasonable rates and the specific statutory authority granted in HB 2193 to allow *any* bidding requirements. As described below, even PGE acknowledges that the Commission has repeatedly and consistently encouraged utilities to allow bidders access to utility-owned facilities during competitive procurement.[3] This leaves little doubt that the Commission can tie a utility's decision to allow third-party ownership options to its prudence review.

While NIPPC does not believe the Commission needs to address PGE's straw-man argument (that the Commission lacks the authority to require third-party bidding), if the Commission does, it should take this opportunity to clarify its prudence authority rather than retreat behind an old Department of Justice ("DOJ") opinion about constitutional takings that has never been publicly described.[4]

2. The Commission Has Consistently Encouraged Utilities to Make Their Sites Available to Third-Party Bidders

PGE downplays the obvious here: throughout all of the proceedings cited by PGE (UM 1182, UM 1534 and AR 600) the Commission has consistently encouraged utilities to do precisely what PGE is currently refusing to do. PGE appears to concede that the Commission's long-held policy encourages it to make its property available to third party bidders. It also concedes that policy is very likely to be codified when the AR 600

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[3] Id. at 15.

[4] Order No. 06-446 noted concerns raised by Staff that it may not have the legal authority to implement this type of requirement and referenced some kind of "consultation" with the DOJ, but the DOJ did not provide any legal basis on the record in UM 1182 and the Commission did not explain the DOJ's position.

rulemaking concludes. Yet, PGE fails to openly acknowledge that the Coffee Creek proposal is not consistent with the Commission's policy or impending rules.

NIPPC's position, on the other hand, is consistent with the Commission orders PGE relies upon in its opening brief. First, although the Commission declined to *require* utilities to offer utility-owned facilities for development by independent power producers in 2006, it did adopt Staff's suggestion to *encourage* utilities to offer their sites for third-party development.[5] This means that as far back as 2006 it has been the Commission's policy that utilities *should* make their property available to third-party bidders.

Next, in PGE's 2012 RFP for new capacity resources, NIPPC and other stakeholders again argued that PGE should be required to allow third parties to submit bids for projects at PGE's Port Westward site. PGE responded by relying upon the Commission's 2006 order and questioning the Commission's legal authority. Although the Commission did not require PGE to offer its utility-owned facilities to bidders, it never stated whether it either did or did not have the authority to do so. Instead, the Commission explained,

> Whether the Commission can require PGE to make its site available to prospective bidders is a legal question that is not decided in this order. Whether to make its site available is a PGE management decision subject to prudency review by the Commission. In making its decision, PGE should consider the recent build-own-transfers acquired by other utilities, recognizing that proof of prudent decision making is the key to future cost recovery.[6]

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5 Re Investigation Regarding Competitive Bidding, Docket No. UM 1182, Order No. 06-446 at 5-6 (Aug. 10, 2006).

6 Re PGE Request for Proposals for Capacity and Baseload Energy Resources, Docket No. UM 1535, Order No. 11-371 at 6 (Sept. 27, 2011).

A plain reading of that order leaves the constitutional question unanswered and instead links the Commission's authority to determine just and reasonable rates to its previously articulated policy that utilities should make their sites available to bidders.

Finally, in AR 600, the current draft rules again encourage utilities to make their assets available to bidders. Although PGE is correct that because this rulemaking is ongoing it would be premature to speculate on any exact rule language, there is no reason to believe that the Commission will do anything less than continue to encourage utilities to allow third-party bidding at utility-owned property during competitive procurements. Because the final rules in that case may apply to PGE's Coffee Creek proposal, PGE should at least be encouraged to allow third-party bidding.

PGE claims that because the Commission "rejected a more stringent proposal—one that is very similar to AWEC and NIPPC's proposal here—directing utilities to turn over utility-owned assets to third parties" in AR 600 it should do so here. But, PGE's logic is over-simplified. This proceeding is much more limited than the AR 600 rulemaking. The Commission has every reason to continue its policy of encouraging utilities to allow third-party access to its facilities by requiring that PGE allow bids with different ownership structures if PGE wants to recover the costs of any winning bid for the Coffee Creek project.

The simple fact is that PGE does not have unfettered discretion over costs it wants to include in rates. PGE could go out and build any kind of storage project it wanted to just to learn about ESS—and it would have unfettered management decisions over those acquisitions. But, because PGE wants to recover its costs and earn a rate of return, it must act prudently and ensure it selects the lowest cost and risk options. It is hard to

imagine how PGE could demonstrate that it acted prudently if it designs its RFP to preclude potentially lower cost and lower risk options. Thus, the Commission should confirm that PGE's current Coffee Creek proposal is inconsistent with its long-held policy and should therefore effectively be deemed *per se* imprudent if and when PGE submits the Coffee Creek storage project for ratemaking.

3. PGE Also Ignores the Commission's Broad Authority to Require Any Competitive Bidding Guidelines to Develop A Project Under HB 2193

PGE suggests that the Commission is limited by its decisions in the predecessor to the current docket, UM 1751, but that is not supported by the plain language in HB 2193 allowing the Commission to require "any" bidding requirements. Although the Commission initially declined to impose the bidding guidelines, it could still decide to impose *any* bidding requirements, which includes the new bidding rules.

PGE ignores that the AR 600 rulemaking is likely to conclude before PGE issues its RFP for the Coffee Creek project. As Staff's explains in its brief, "if the proposed rules in AR 600 … are adopted as currently filed, Coffee Creek may be subject to the competitive bidding requirements."[7] Staff concludes by "mak[ing] the Commission aware that the litigated issue in this docket may be resolved by the outcome of AR 600."[8] PGE has not provided any rationale for exempting the Coffee Creek RFP from the Commission's new rules, once adopted.

B. PGE's Arguments About the "Foundation" of NIPPC's Position Are Disingenuous Because PGE Knows That There Are Other Examples

Contrary to PGE's assertions, this type of ownership structure is not "completely novel" or "untested" with these kind of storage projects, meaning that PGE would not be

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[7] Staff's Opening Brief at 2-3.
[8] Id.

forced to "engage in cutting-edge, never-done-before and untested contracting practices" if it were to allow third-party bidding in the Coffee Creek RFP—and PGE knows that.[9] PGE's Opening Brief states, "AWEC and NIPPC filed an erratum removing references to [the two Tesla facilities sited at substations], but inexplicably did not amend any of their arguments that are founded on these examples."[10] There was nothing "inexplicable" here and PGE knows why NIPPC did not modify its arguments and still stands behind them.

NIPPC and AWEC testified that PGE's ratepayers should not be expected to pay above-market costs for PGE to learn what other utilities already know, given that other utilities and energy storage providers have already confronted the issues PGE raised as potential problems and learned how to solve them.[11] More specifically, NIPPC argued that PGE overlooked the fact that substation-sited ESSs currently exist under third-party ownership.[12] NIPPC and AWEC's testimony, however, incorrectly referenced two Tesla projects as being third-party owned when they were turnkey projects purchased by Southern California Edison ("SCE") and Pacific Gas and Electric ("PG&E) after they were built by Tesla. After learning of this mistake, NIPPC reached out to PGE before making an errata filing and offered to provide additional examples as exhibits. PGE indicated they would object to the addition of any new evidence in the record. Rather than litigate a procedural question, the decision was made to allow the testimony to stand without reference to specific examples.

PGE could have conducted cross examination on NIPPC and AWEC's witness, but likely elected not to because it would have elicited additional information into the

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9 PGE's Opening Brief at 18.
10 Id. at 12.
11 AWEC-NIPPC/300, Fitch-Fleischmann/4.
12 AWEC-NIPPC/300, Fitch-Fleischmann/3.

record. NIPPC would not normally recount this kind of back and forth, but believes that it is necessary due to PGE's claims. In the end, there is evidentiary support that this type of ownership structure should not be too difficult for PGE to figure out since other utilities have been able to mitigate any associated risks.

Overall, the California examples highlight how weak PGE's arguments really are. As the testimony from Fractal Energy Storage Consultants ("Fractal") points out, "most of the storage procured by the three California investor owned utilities were procured through a tolling/lease agreement."[13] And this is notwithstanding PGE's claim that neither SCE nor PG&E have third-party owned ESSs *on utility property* and the fact that California state law makes it unlawful for third-parties to own distribution facilities.[14] PGE notes that California is working to establish 1,325 MW of storage by 2020, and mentions "California's energy storage targets and law support third party-owned, customer-owned and utility owned energy storage."[15] But PGE fails to mention that the California PUC ("CPUC") Order it cites to requires at least *half* of all the storage projects in California to be owned by third parties rather than utilities.[16]

The CPUC order PGE relies upon explains that its rules were "intended to embrace a mix of ownership models and contribute to a diverse portfolio that can

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13 ICNU-NIPPC/200, Crotzer/9.

14 PGE/400, Bekkedahl/4.

15 PGE/400, Bekkedahl/5 (citing Ferron, Mark J., Michael R. Peevey, "Decision Adopting Energy Storage Procurement Framework and Design Program", CPUC, Dec. 16, 2010 [hereinafter CPUC Order]).

16 CPUC Order at 48, ("Utility-Owned versus Third Party Storage") available at http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M079/K533/79533378.pdf.

encourage competition, innovation, partnerships, and affordability."[17] It went on to conclude,

> we find that the utility ownership of storage projects should not exceed 50 percent of all storage across the three grid domains at this time. In other words, utilities may own no more than half of all of the storage projects they propose to count toward the MW target, regardless of whether it is interconnected at the transmission or distribution level, or on the customer side of the meter. We believe that setting this limit will ensure that any viable market options are not preempted.[18]

The Commission should follow California's lead and similarly allow utility ownership only to the extent necessary—and only where the utility can demonstrate it is the least cost and risk alternative.

C. PGE's Claims About Increased Risks And Decreased Learnings Have Been Refuted On the Record and Are Utterly Unpersuasive

PGE continues to claim that allowing third-party ownership of the Coffee Creek ESS would lead to significant risks and diminish PGE's ability to learn from the Coffee Creek project, but PGE's justifications are light on merit. PGE's rationale is circular and often undermines its own arguments. For example, PGE appears to concede that neither the fact that the project would be on PGE-owned property nor the fact that it would be connected to a substation are in and of themselves problematic. PGE again confirms it "is generally not opposed to third-party ownership of ESSs" and that "[t]hird-parties can currently develop and own ESSs that interconnect to PGE's system."[19] Yet, PGE appears to suggest that because this project will be both on PGE property and connected to a

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[17] Id. at 51.
[18] Id. at 51-52.
[19] PGE's Opening Brief at 15.

substation it will be too risky.[20] PGE even argues that there will be "unknown risks" with this project that would (somehow) be minimized if PGE is able to own the project.[21] PGE's brief leaves one wondering, how exactly is PGE protecting its captive customers from unknown risks?

Staff was unconvinced that any of the "risks" PGE identified warranted utility ownership and unequivocally stated "PGE should be open to third party ownership (TPO) of the energy storage system (ESS) at their Coffee Creek substation."[22] Staff pointed out that "PGE has not actually evaluated the possibility of TPO being beneficial" and "merely highlights the associated increased risk, and leaves any actual evaluation up to the reader."[23] NIPPC has consistently argued that PGE could spend less and learn more about energy storage by working with experienced third-party vendors. According to Staff, "[i]t is entirely reasonable, given the rapid development of the ESS industry, that third-party owners, with their greater experience installing and operating ESSs, could do so more efficiently than PGE."[24]

PGE also completely ignores the expert testimony provided by Fractal contradicting its cybersecurity claims. Fractal testified that, in its experience, projects like Coffee Creek do not require full integration and should not be fully integrated, meaning there would be no increased risk that the ESS owner could (somehow) control the substation. Fractal explained that, contrary to PGE's claims, there are not any latency or interruption issues associated with this kind of setup. Yet PGE's opening brief ignores

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20 Id. ("PGE generally does not lease property in the immediate vicinity of generation or substation facilities to third-parties.").
21 Id.
22 Staff/200, Wiggins/2.
23 Staff/200, Wiggins/4, 6.
24 Staff/200, Wiggins/9.

this evidence and repeats its claims that the Coffee Creek ESS would need to be fully integrated, which would lead to increased risk and decreased learnings.

Similarly, PGE notes that Staff's suggestion that "PGE could either lease or sell PGE-owned land directly adjacent to its Coffee Creek substation to enable third-party ownership of the Coffee Creek ESS" without responding on the merits and instead simply argues that Staff's suggestion is inconsistent with Commission precedent.[25] As described above, this would not be inconsistent with Commission precedent. But, PGE's claims undermine its own arguments. If PGE owns the Coffee Creek ESS then it will actually have *more* liability because PGE will own all of the hardware, software and PGE will be responsible for the safety of PGE personnel at the Coffee Creek storage project. PGE fails to acknowledge it could actually limit its liability if Coffee Creek were owned by a third-party.

Given the lack of credible evidence provided by PGE that third-party ownership would make the Coffee Creek project more risky, and the overwhelming evidence that it would not, the Commission should require PGE to evaluate bids with different ownership options.

III. CONCLUSION

PGE always retains the choice to do whatever it wants with its property, even if its actions result in inflated or above-market costs; however, the Commission also always has the power to decide that any decision that PGE makes is not reasonable or prudent. Here, it would not be reasonable or prudent for PGE to preclude third-party ownership bidding for the new ESS at the Coffee Creek substation. NIPPC therefore continues to

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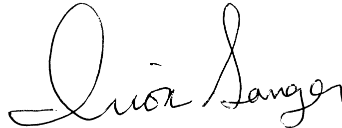
[25] Id. at 6.

recommend that the Commission direct PGE to allow third-party ownership options during the competitive bidding for the Coffee Creek pilot project.

Dated this 11th day of July 2018.

Respectfully submitted,



Irion Sanger
Sidney Villanueva
Sanger Law, PC
1117 SE 53rd Avenue
Portland, OR 97215
Telephone: (503) 756-7533
Fax: (503) 334-2235
irion@sanger-law.com

Attorneys for the Northwest and Intermountain Power Producers Coalition