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May 14, 2018

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' Rulemaking Comments.

Please contact this office with any questions.

Very truly yours,

Wendy McIndoo

Wendy McIndoo
Office Manager

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' RULEMAKING COMMENTS

I. INTRODUCTION

Portland General Electric Company (PGE), PacifiCorp d/b/a Pacific Power (PacifiCorp), and Idaho Power Company (Idaho Power) (collectively, Joint Utilities) submit these comments to the Public Utility Commission of Oregon (Commission) regarding the proposed competitive bidding rules published on April 18, 2018 (Proposed Rules), in advance of the rulemaking hearing scheduled for May 16, 2018. The Joint Utilities will plan to file additional comments prior to the close of the record, on June 15, 2018, responding to issues raised by other parties at the rulemaking hearing, or in their written comments.

The Joint Utilities appreciate Staff's efforts to implement the legislative direction in Senate Bill (SB) 1547 to adopt rules providing for the evaluation of competitive bidding processes ***that allow for*** diverse ownership[1] by crafting rules intended to increase the transparency and fairness of the competitive bidding process in Oregon. The Joint Utilities note that the Proposed Rules accurately implement the policy direction provided by the Commission in Order No. 18-087, which addressed many of the overriding concerns the Joint Utilities have expressed throughout the informal stages of this rulemaking docket. As a result, the Joint Utilities believe that the

[1] *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").

Commission has the opportunity to adopt rules in this docket that encourage robust competition in the resource selection process, open to all ownership options, while ensuring the overarching goal of the selection of the least cost/least risk resources for customers' benefit.

Nevertheless, the Joint Utilities remain concerned about specific aspects of the Proposed Rules, which may unintentionally discriminate against utility ownership bids, unreasonably restrict competition among diverse ownership and transactional structures, and unduly increase the cost and burden of the competitive bidding process. In particular, the Joint Utilities continue to emphasize the following concerns:

- ***50 Megawatt (MW) Resource Threshold is Too Low.*** Current competitive bidding rules apply only to resources that are over 100 MW and five years in length. Lowering the threshold to 50 MW (or 25 megawatt hours (MWh) for energy storage projects), as recommended in the Proposed Rules would inappropriately require relatively small projects to go through a long and expensive regulatory process—which cost may be disproportionate to the cost of the resource. The current threshold strikes a sensible balance between project size and cost and effort for the utility and stakeholders, and the Joint Utilities urge the Commission to maintain the 100 MW threshold.

- ***The Rules Should be Even-Handed and Agnostic as to Resource Ownership.*** From the inception of this rulemaking proceeding, the Joint Utilities have emphasized their belief that the adoption of fair and even-handed competitive bidding rules is the best way to promote robust competition, and thus critical to ensuring the selection of the least cost/least risk resources. Conversely, rules that explicitly treat Requests for Proposals (RFP) differently based on ownership outcome will inevitably decrease competition. The Joint Utilities appreciate the Commission's policy guidance, directing Staff to include a provision clarifying its intent to not prefer one ownership structure over another, and the Joint Utilities believe that the current Proposed Rules are improved over previous versions in this respect. Nevertheless, certain provisions in the current Proposed Rules continue to differentiate between ownership structures. The Joint Utilities urge that these provisions be removed, to ensure a balanced environment for competitive bidding in Oregon.

- ***Inconsistent Use of an Independent Evaluator (IE) Will Inhibit Competition.*** The 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. Inconsistent use of an IE will create a disincentive for utility participation in an RFP, and decrease competition, undermining the goals of the process. Accordingly, the Joint Utilities continue to oppose rules that selectively require increased IE involvement for RFPs that allow for utility-owned resources or suggest that the IE may not be needed or provide benefits for all RFPs.

- ***The IE's Role Should Not be Expanded.*** Earlier versions of the rules expanded the IE's role by requiring the IE to independently score ***all*** bids on the initial and final shortlist if the RFP allowed for a utility or affiliate ownership option. The Joint Utilities argued against this proposed requirement, explaining that it would duplicate the utility's process and create needless expense without commensurate benefit. The Joint Utilities appreciate the Commission's guidance in directing Staff to revise the rules to provide the option that the IE score all ***or a sample*** of bids on the initial and final shortlists, and that a party may later request that all remaining bids be scored. The Joint Utilities believe the Proposed Rules appropriately reflect the Commission's direction, and propose a refinement to the rule language to clarify that in the event that a party requests that the IE score all (or a broader sample of) remaining bids, the Commission may direct the IE to do so for good cause shown.

- ***Utilities Should Not Be Encouraged to Offer Shareholder-Owned Property for Use by Third-Party Bidders.*** The Joint Utilities recommend that the rule encouraging utilities to make utility property available to third-party bidders should be revised to exclude property if the cost of acquiring the property has not been included in rates.

- ***No Project Finance Due Diligence Requirement Should Be Added to the Rules.*** The Proposed Rules appropriately exclude the finance due diligence requirement that earlier drafts of the rules proposed to be applied to utility-ownership bids only. As the Commission has correctly noted, no party has proposed a sound rationale for such a requirement, or articulated how it could be applied, and the Commission should reject any renewed requests to reconsider such requirement.

- ***Transmission Resources Should be Excluded from the Competitive Bidding Requirements.*** The Proposed Rules appropriately exclude acquisition of transmission assets from the competitive bidding requirements, and the Joint Utilities propose revising the rule language to clarify that the acquisition of transmission rights is also excluded.

In addition to these important issues, the Joint Utilities offer detailed, line-by-line comments on the Proposed Rules in Attachment 1.

II. BACKGROUND

The Commission initiated this proceeding in response to direction from the Oregon legislature in 2016 to adopt rules providing for the evaluation of competitive bidding processes ***that allow for*** diverse ownership.[2] Following the issuance of the scoping order on May 16, 2017, the parties participated in several months of informal process, which culminated in the circulation

[2] *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").

of Staff's initial draft rules (August 2017 Draft Rules). The Joint Utilities provided informal comments on the August 2017 Draft Rules, which registered concern that the rules: (1) introduced bias against utility ownership to the detriment of customers; (2) were overly prescriptive and infringed on utility management's judgment in resource procurement; and (3) implicitly encouraged the Commission to exceed its legal authority by requiring an explanation if a utility did not make utility-owned property available to third-party bidders.[3]

Thereafter, the parties participated in two workshops during the fall of 2017, and then on January 10, 2018, Staff filed revised draft rules (January 2018 Draft Rules) and recommended that the Commission initiate formal rulemaking. The Joint Utilities provided comments at the January 17, 2018 Public Meeting noting that the January 2018 Draft Rules perpetuated the problems raised by the August 2017 Draft Rules, and that there was sharp disagreement among parties on these issues. In an effort to resolve these questions, the Joint Utilities requested—and the Commission agreed—that policy direction was required. Accordingly, the Commission established a procedural schedule allowing for two rounds of policy comments and a Commissioner workshop before the draft rules were to be filed with the Secretary of State.

The Joint Utilities (and other stakeholders) filed opening policy comments and reply comments, and the Commissioner workshop was held on March 6, 2018. The workshop provided an opportunity for stakeholders to engage directly with each other and with the Commissioners. Following a robust discussion, the Commission directed[4] Staff to revise its draft rules to: (1) clarify that any distinction in the rules based on ownership structure is not intended to discourage or favor any particular RFP outcome based on ownership; (2) clarify that the rules are not intended to apply to transmission projects; (3) eliminate the requirement that a utility provide an "explanation" if it does not offer elements of its benchmark bid to third parties and instead

[3] The Joint Utilities also argued that the rules exceeded the scope of the rulemaking as articulated in the Commission's scoping order.
[4] This direction was later memorialized in Order No. 18-087.

encourage utilities to make those elements available; (4) revise the rule requiring the IE to independently score all bids on the initial and final shortlists for RFPs that include a utility or affiliate ownership option to provide instead that the IE score either all bids or a sample of all bids; and (5) eliminate the rule provision requiring financial due diligence for a utility owned resource. The Commission also requested that Staff provide additional information regarding IE costs.

On April 5, 2018, Staff issued revised draft rules implementing the Commission's guidance and recommended that the draft rules be filed with the Secretary of State and formal rulemaking be initiated. The Commission adopted Staff's recommendation, and Staff filed the proposed rules with the Secretary of State on April 18, 2018.

III. DISCUSSION

The Commission provided direction in its Order No. 18-087, though that policy guidance did not address all of the important policy issues in this proceeding. Notably, the Commission did not address the threshold for application of the competitive bidding rules. The following discussion will first address the Joint Utilities' concerns with lowering the threshold for application of the rules, and will then discuss Staff's implementation of the Commission's policy direction in Order No. 18-087.

A. The Proposed Thresholds for Application of the Competitive Bidding Rules Are Too Low and Will Needlessly Consume Commission and Utility Resources

The current competitive bidding guidelines (Guidelines) apply to Major Resources—which are defined as energy or capacity resources of at least 100 MW with a length of at least five years.[5] The Proposed Rules eliminate the Major Resource definition and reduce the size threshold to just 50 MW, or to 25 MWh for energy storage.[6] This is a significant decrease, and one for which Staff has provided no clear justification. The Joint Utilities believe that this change

[5] *In the Matter of Pub. Util. Comm'n of Or. Investigation Regarding Competitive Bidding*, Docket No. UM 1182, Order No. 14-149, App. A at 1 (Apr. 30, 2014).
[6] *Proposed* OAR 860-089-0100(1)(a) and (3).

is problematic because it will impose a lengthy and expensive regulatory process on relatively small projects. For example, Idaho Power's 2017 Integrated Resource Plan (IRP) Preferred Portfolio includes the addition of 54 MW reciprocating engines in 2035 and 2036. These projects are small enough that a multi-million-dollar competitive bidding process could be disproportionate to the overall resource cost. This added expense—along with the required 18 to 22-month regulatory process—would unduly burden such simple and relatively small resource acquisitions. Further, the volume of additional projects that will be subject to the rules as a result of the lower threshold may consume a significant amount of both utility and Commission resources.

With respect to the proposed threshold for energy storage, the Joint Utilities believe that the 25 MWh threshold is much too low and will subject very small projects to an onerous and time-consuming process. The Joint Utilities understand that the concern driving the proposal for a lower threshold is that an energy storage resource may be more costly than a generic capacity resource. However, the Joint Utilities urge that an energy storage resource is not so costly that a 25 MWh threshold is appropriate. The proposed 25 MWh threshold corresponds with a 6.25 MW battery with a four-hour duration. Conducting a lengthy and expensive solicitation process for a 6.25 MW resource is unreasonable and an inefficient use of Commission and utility resources.

Additionally, it is not clear what cost assumptions went into the 25 MWh energy storage threshold. For example, the cost of a 49 MW generic capacity resource—which would be exempt under the Proposed Rules—could also pay for a 30 MW, 120 MWh battery energy storage project. Additionally, the cost of a 100 MW generic capacity resource could instead pay for a 60 MW, 240 MWh battery energy resource.[7] Thus, if the intent of lower threshold is to ensure that resources

[7] As indicated in PGE's Direct Testimony for PGE's Energy Storage Proposal, a four-hour energy storage resource has a real-levelized cost that (as of 2017) is approximately 60% more expensive per MW than a simple cycle frame combustion turbine. However, the Proposed Rules provide a threshold that would be 800% higher for non-energy storage resources than for energy storage resources on a per MW basis. *See* Docket No. UM 1856, PGE's Direct Testimony for PGE's Energy Storage Proposal, Exhibit 200, Page 26, Table 4.

of comparable cost are subject to the rules, without regard to size, then the proposed 25 MWh threshold misses the mark. Moreover, while these cost assumptions may be accurate today, with rapid changes and improvements in energy storage technology, any threshold based on cost assumptions linked to a particular technology may quickly become outdated. The Joint Utilities urge that a 25 MWh threshold is too low, is not at all comparable to the threshold for generic capacity resources, and may soon be outdated and irrelevant.

For the foregoing reasons, the Joint Utilities maintain that no separate threshold is necessary for energy storage. Accordingly, the Joint Utilities recommend that the Proposed Rules be revised to maintain the Major Resource definition from the existing Guidelines, and to apply this definition without special treatment for energy storage resources. However, to the extent that the Commission determines that a storage-specific threshold is appropriate, the Joint Utilities urge the Commission to set a much higher threshold to allow for cost parity between energy storage resources and alternative capacity resources.

B. Comments Regarding Staff's Implementation of the Commission's Policy Direction

The following discussion addresses Staff's implementation of the Commission's policy direction in Order No. 18-087 and provides recommendations for additional refinements to the Proposed Rules.

1. The competitive bidding rules should be applied equally to all RFPs, regardless of ownership outcome.

Over the course of this proceeding, stakeholders have debated the appropriate approach to implement the legislature's mandate in SB 1547 that the Commission adopt rules providing for the evaluation of competitive bidding processes ***that allow for*** diverse ownership.[8] Certain parties have advocated that the Commission put its "thumb on the scale" for independent power

[8] *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").

producers (IPPs), to the disadvantage, or even potential exclusion, of utility-owned projects. The Joint Utilities, on the other hand, have consistently urged that even-handed treatment is essential to promote competition and fulfill the purpose of competitive bidding—the acquisition of least cost/least risk resources for the benefit of utility customers.

In response to provisions in the January 2018 Draft Rules that would establish different requirements for RFPs based on the ownership outcome contemplated therein, the Joint Utilities expressed concern that unequal treatment could potentially result in an advantage being afforded to an IPP-owned resource over a utility-owned resource, and may serve to diminish competition within an RFP. Competition is vital to the bidding process, as it drives all participants to lower their costs and prices, thereby enhancing confidence that the resources with the best combination of cost and risk are selected for the benefit of customers. Diminishing the regulatory standards for a PPA-only RFP would 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, resource-exhausting, and expensive as that currently suggested. Indeed, the Joint Utilities expect that the overall duration for the competitive bidding process will be extended to approximately 18-22 months, which does not even account for acquisition of long lead-time materials. 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, and stakeholders from supporting a process that might result in utility ownership, which in turn will result in a less diverse solicitation.

In response to concerns raised by the Joint Utilities, the Commission directed Staff to add a statement of purpose to the rules clarifying that any distinction between a utility-owned resource and non-owned resource is not intended to discourage or favor any particular RFP ownership

outcome.[9] While the Joint Utilities appreciate this statement and believe Staff's proposed rule language fulfills this direction, the Joint Utilities remain concerned that this language alone is not adequate given the other parts of the rules that discriminate against RFPs that allow for utility ownership. Any different treatment in the rules that would exempt a PPA-only RFP will inevitably result in additional financial and administrative burdens on RFPs that allow for utility ownership. Even if this result is unintended, this different treatment will likely discourage utility ownership—to the potential detriment of utility customers who may bear increased costs due to more limited resource options.

While the statement of purpose contained in the Proposed Rules is an improvement, the intent behind it will be undercut if the Commission adopts rules that result in discrimination against utility ownership options. The Joint Utilities urge the Commission to ensure future RFPs result in fair and robust competition by removing any differential treatment from the rules and applying even-handed treatment of RFP bids, regardless of the ownership outcome. Accordingly, in the detailed comments provided as Attachment 1, the Joint Utilities are proposing to eliminate rule language that provides for different treatment of RFPs based on potential ownership outcomes.

2. Additional information regarding IE expense will substantiate utility concerns that inconsistent use of an IE may create a disincentive to utility participation in an RFP.

In the January 2018 Draft Rules, Staff had proposed that an IE may not be required if an RFP prohibits utility ownership. The Joint Utilities commented that the IE's role in an RFP 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

[9] Order No. 18-087 at 1 ("Addition of a section on the purpose of the rules. In addition to describing the overall purpose of these rules, this section should be clear that the intent with respect to any differentiation between requests for proposals (RFPs) with utility-owned resources and those with no utility-owned resources is not to discourage the former or favor any particular RFP outcome in terms of ownership structure.").

ultimately increase bidder confidence and motivate bidders to expend the significant resources necessary to submit a bid. On the other hand, inconsistent use of an IE may undermine the goals of the competitive bidding process by creating a disincentive for utility participation in an RFP, and thus reducing competition within an RFP.

The Commission did not determine whether, as a matter of policy, an IE should be required for all RFPs regardless of ownership, and instead noted that it wished to see more data regarding IE costs in a variety of scenarios.[10] Staff made no changes to the rule provision regarding engagement of an IE for an IPP-only RFP, and the Joint Utilities understand that Staff will be providing additional data regarding IE costs either at the rulemaking hearing or in written comments after the rulemaking hearing. The Joint Utilities expect that the data that Staff will provide will confirm the concerns raised by the Joint Utilities in their earlier policy comments. To implement the Commission's proposed statement of purpose that the rules are not intended to favor or prejudice any particular resource ownership outcome, the Joint Utilities recommend that the *proposed* OAR 860-089-0200 should be revised to either delete subsection (7) in its entirety, or revise subsection (7) so that the Commission may determine that IE participation is not required on a case-by-case basis, and without regard to resource ownership. The Joint Utilities have provided proposed revisions to the rule in Attachment 1.

3. The IE's role should not be expanded to replicate the RFP in a parallel proceeding.

In the January 2018 Draft Rules, Staff had proposed a requirement that the IE independently score *all* bids on the initial and final shortlists if the RFP includes an affiliate or utility ownership option, whereas the existing Guidelines require independent scoring for *all or a*

[10] Order No. 18-087 at 2 ("Additionally, we note that we wish to see more data and information from Staff regarding IE costs in a variety of scenarios. As discussed in the workshop, we believe that part of the rationale for the proposal to allow exemption from the IE retention requirement in the case of an RFP that does not contemplate electric company ownership of resources is cost savings. We expect Staff to provide analysis to us during the public comment portion of this proceeding on IE costs.").

sample of bids.[11] The Joint Utilities expressed concern that a requirement to score all bids would inappropriately expand the IE's role, unnecessarily duplicating the utility's efforts and substantially increasing the cost of the IE's participation in the RFP. The difference between requiring independent scoring for all bids versus a sample of bids may present serious cost implications, and potentially result in significant and unnecessary cost increases in an RFP. The Joint Utilities urged instead that the Commission's current policy in Guideline 10(d) is appropriate and consistent with the IE's role as an independent auditor of the RFP process.

The Commission agreed that the bid scoring provision from Guideline 10(d) should be maintained, with the additional flexibility to allow parties to request that the Commission require scoring of all bids where appropriate.[12] Staff implemented the Commission's direction in its Proposed Rules,[13] and the Joint Utilities believe the rule is an improvement over the previous version, but should be further refined. Specifically, the Joint Utilities are concerned that a bidder who was not selected to the initial or final shortlist may request that Commission order the IE to score the remaining bids—even if there is no legitimate reason to question the reasonableness of the bid scoring results. To address this issue, the Joint Utilities recommend adding a clarification that prior to directing the IE to score all or a broader sample of the remaining bids, the Commission must determine that there is good cause to require the IE to do so. The Joint Utilities proposed recommended rule language to address this issue in Attachment 1.

4. Utilities should not be encouraged to make property paid for by shareholders available to third-party bidders.

In the January 2018 Draft Rules, Staff had proposed that a utility be required to provide an explanation if it declines to make utility owned property or other elements of a benchmark bid

[11] Order No. 14-149, App. A at 4.
[12] Order No. 18-087 at 2 ("Revisions to revert proposed bid scoring language in OAR 860-0XX-0450(5) to reflect our current guidelines, while adding flexibility for parties to request that we require the scoring of all bids where appropriate. The current draft provision requires the independent evaluator (IE) to score all bids, while our existing guideline 10 (d) permits the IE to score all or a sample of submitted bids.").
[13] *See Proposed* OAR 860-089-0450(5).

available to third-party bidders. The Joint Utilities expressed concern that the proposal suffered from significant legal, policy, and practical problems. As explained in the Joint Utilities' opening policy comments, the Commission cannot legally compel a utility to offer its property to a third-party bidder,[14] and given this fact, it would make little sense to require them to provide an explanation for declining to do so.

In response to these concerns, the Commission directed Staff to eliminate the explanation requirement and instead clarify that utilities are encouraged to make utility property available to third-party bidders.[15] The revised provision is consistent with the direction provided by the Commission and an improvement over the January 2018 Draft Rules. However, the Joint Utilities believe that the rule language as drafted is overbroad. First, to the extent that the Commission adopts a rule providing that it will "encourage" utilities to make certain property available to third parties, the Joint Utilities understand that the Commission is not imposing any *requirement* that utility property be made available to third parties, and that there would be no consequence if a utility declined to do so.

Second, to the extent that the Commission is encouraging certain property to be made available to third parties, the rule should be revised to clarify that the Commission encourages utilities to make available to third-party bidders utility property that is, or has been, included in customer rates, as opposed to property that has been paid for by shareholders. As the Joint Utilities explained in their earlier policy comments, it is unreasonable to expect that property funded by shareholders would be made available to third parties because that property has been treated as plant held for future use, and is paid for by shareholders and with no return on the

[14] Joint Utilities' Opening Comments on Policy Issues at 6-10 (Feb. 14, 2018).
[15] Order No. 18-087 at 1 ("Amendment to proposed rule OAR 860-0XX-0300 to eliminate the requirement that an explanation of customer interest be provided where an electric company will not allow the use of elements of its benchmark bid by third-parties, and replacement with a clear encouragement to electric companies to make these benchmark elements available to third party bidders as part of an RFP.").

investment.[16] Allowing third parties access to such sites could create a disincentive for utilities to make otherwise prudent investments in land for future development.

Finally, to the extent that a utility *does* make certain property available to third parties, the rule language should be revised to clarify that those parties would be expected to provide compensation for use of such property. The Joint Utilities have proposed revised rule language to implement these comments in Attachment 1.

5. The Commission should not include a project finance due diligence requirement.

In the January 2018 Draft Rules, Staff included a provision that was originally proposed by the Northwest and Intermountain Power Producers Coalition to require that the IE 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 was not required if utility ownership is not an option. The Joint Utilities expressed concern that the proposal to require a third-party financial due diligence review had not been adequately explained or justified over the course of the informal rulemaking process, and that the unequal treatment of a project based on ownership had not been explained or supported. The Commission directed Staff to remove the financial due diligence provision, but indicated that the rule proponents may revise the proposed rule language and propose it again as part of the rulemaking process.[17]

Even though the Commission's policy direction was provided to parties over two months ago,[18] to date, no party has offered a revised proposal. As time grows shorter in this rulemaking proceeding, the Joint Utilities believe it is too late to consider and fully vet a financial due diligence

[16] Joint Utilities Reply Comments on Policy Issues at 10-11 (Feb. 26, 2018).
[17] Order No. 18-087 at 2 ("Removal of proposed rule OAR 860-0XX-0400(5)(b). We find that this provision lacks clarity. The proponents of this financial due diligence provision are welcome to tighten its language and clarify its intent, then propose the provision again as this rulemaking process continues if they so desire.").
[18] The policy direction was provided orally at the Commissioner workshop on March 6, 2018 and again in the Commission's Order No. 18-087 on March 19, 2018.

proposal, which may have significant implications to cost and schedule for an RFP. Accordingly, the Joint Utilities urge the Commission to decline to adopt any such proposal if it is offered in the remaining weeks before the close of the comment period.

6. Transmission Projects Are Appropriately Excluded from the Competitive Bidding Rules.

In the January 2018 Draft Rules, Staff proposed that the new competitive bidding rules would apply to "energy or capacity resources," which is broad enough to include transmission resources. The Joint Utilities expressed concern that the inclusion of transmission resources in the competitive bidding framework could be problematic, costly, and provide no benefits given the current lack of a competitive market for transmission.[19]

In response to the Joint Utilities' concerns, the Commission directed Staff to revise the rules to clarify that they should not apply to transmission projects.[20] In the Proposed Rules, Staff implemented this direction by adding a clarifying statement that the "acquisition of transmission assets is not subject to the rules" in Division 089. The Joint Utilities recommend also clarifying that the acquisition of transmission rights is not subject to the rules, and the Joint Utilities provided a proposed revision to the rule language in Attachment 1.

IV. CONCLUSION

As the Commission considers how it will fulfill the legislative mandate of SB 1547, the Joint Utilities urge the Commission to adopt rules that will increase transparency and promote bidder confidence in the bidding process. The Commission's policy guidance in Order No. 18-087 set a

[19] It is unclear whether, at this point in the rulemaking process, any party will continue to advocate that the Proposed Rules apply to transmission resources. For this reason, the Joint Utilities will not provide a detailed discussion of its objections to such a proposal. However, in the event that any party does recommend that transmission resources be addressed in the rules, the Joint Utilities will respond in future rounds of comments.

[20] Order No. 18-087 at 1 ("Clarification that the rules are not intended to require competitive bidding of transmission projects.").

course for an even-handed, ownership agnostic approach, and the Joint Utilities urge the Commission to continue this approach.

The Joint Utilities respectfully submit these rulemaking comments and look forward to engaging with the Commissioners and other stakeholders at the May 16, 2018 rulemaking.

Respectfully submitted this 14th day of May, 2018.

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Attachment 1

to

Joint Utilities' Rulemaking Comments

Detailed Comments of Joint Utilities

May 14, 2018

Detailed Comments of Joint Utilities

Proposed OAR 860-089-0010—Applicability of Division 089

Subpart 2: Subpart 2 provides that a waiver from the Division 089 rules may be available for "good cause shown." The Joint Utilities agree with the inclusion of a waiver provision, but disagree with the proposed requirement that the request for waiver be made "prior to or concurrent with the initiation of a resource acquisition process," for the following reasons.

- ***First***, *proposed* OAR 860-089-0020(11) defines resource acquisition as a process that begins with circulation of a final or draft RFP to third parties or communication of an offer or receipt of an offer in a two-party negotiation. To the extent the "resource acquisition process" is being regarded as initiated by any activities short of final contract negotiations, the provision is impractical. Typically, a utility devotes a significant amount of time and energy studying a potential resource acquisition before engaging in serious discussions with a counterparty, or otherwise taking concrete action to pursue an acquisition; to the extent the acquisition involves a purchase from a third party, the utility would spend a significant amount of time and energy in discussions and contract negotiations with the third party before it could conclude that it wished to move forward with the acquisition. Based on the outcome of studies, discussions or negotiations, the utility might abandon its acquisition efforts altogether, in favor of another solution. Requiring the utility to file a request for a waiver prior to a final decision to move forward (subject to regulatory approval) could prove to be a serious waste of utility and stakeholder resources.

- ***Second***, requiring the request for waiver to be made prior to or concurrent with resource acquisition activities is inconsistent with Subpart 3, which implicitly would allow a waiver to be requested ***after*** the resource is acquired (while at the same time limiting the impact of an order granting the waiver). Consistent with our comment below, the Joint Utilities believe that the rules should, on a case-by-case basis, allow the Commission to grant a waiver requested after an acquisition has been completed, and therefore oppose the inclusion of a temporal restriction.

- ***Third,*** if Staff wishes to impose a temporal requirement on filing of the request for waiver, the Joint Utilities suggest that the Proposed Rules specify that the waiver must be requested "prior to the completion of the resource acquisition."

- ***Fourth,*** the rule should clarify that utilities may request, and the Commission may grant, a waiver of all or part of the competitive bidding rules. For instance, a utility may propose to follow all rules, but under shorter timelines; or may propose to conduct an RFP under the rules, but not employ an IE. The rules should preserve flexibility to propose a waiver of some requirements while adhering as closely as possible under the circumstances to the overall framework.

For the foregoing reasons, the Joint Utilities propose revising subpart 2 as follows:

> (2) Upon request or its own motion, the Commission may waive any part or all of the Division 089 rules for good cause shown. A request for waiver must be made in writing

to the Commission prior to ~~or concurrent with the initiation of a~~ completion of the resource acquisition, and the request must indicate whether the electric company intends to request acknowledgement of the final short list or resource acquisition.

Subpart 3: This subpart provides that if a utility files a request for a waiver after the acquisition is completed, an order granting the waiver should not be equivalent to Commission acknowledgment of the resource acquisition. The Joint Utilities agree that the rules should allow a request for a waiver to be made after acquisition, in an appropriate case, so that the utility would not be deemed in violation of Commission rules. However, the Joint Utilities do not believe that the Commission should pre-judge the impact of such a waiver. Rather, the Commission should have the flexibility to determine the impact of the waiver on a case-by-case basis.

(3) ~~Any~~ request for waiver may be filed by an electric company after it acquires a resource in appropriate circumstances. The Commission will determine the impact of such waiver, if granted, on a case-by-case basis. ~~does not result in or equate to the Commission's acknowledgment of the resource acquisition.~~

***Proposed* OAR 860-089-0015—Purpose of Division 089**

Subpart 1: Subpart 1 is a new statement of purpose for the Division 089 rules. The Joint Utilities recommend that in addition to emphasizing the importance of cost in resource selection, the rule should also note the importance of risk. To address this issue, the Joint Utilities recommend adding "and risks" after the word "costs."

(1) OAR chapter 860, division 89 is intended to provide an opportunity to minimize long-term energy costs and risks, complement the integrated resource planning process, and establish a fair, objective and transparent competitive bidding process, without unduly restricting electric companies from acquiring new resources and negotiating mutually beneficial terms.

Subpart 2: This subpart implements the Commission's direction from Order No. 18-087 that Staff add a statement of purpose to the rules to clarify that, to the extent that the rules accord different treatment to for RFPs that preclude utility ownership, the Commission does not intend this treatment to favor a particular result in terms of ownership outcome. While the Joint Utilities appreciate the policy guidance from the Commission to adopt a statement of purpose and believe Staff's proposed rule language fulfills this direction, the Joint Utilities remain concerned that that this language alone is not adequate given the other parts of the rules that discriminate against RFPs that allow for utility ownership. Any different treatment of RFPs with utility ownership may result in a disincentive for utility participation, ultimately reducing competition within an RFP. This result will inevitably occur, even if it is not intended. Accordingly, the Joint Utilities are proposing revisions to other portions of the rules to promote even-handed treatment of all RFPs, regardless of potential ownership outcomes.

Proposed OAR 860-089-0020—Definitions

Subpart 5—Emergency: Subpart 3 defines an emergency. In Section 100, the Proposed Rules specify that a utility need not comply with the rules before seeking to acquire a resource in an emergency. Staff proposes to define emergency as either a human-caused or natural disaster, such as an earthquake, flood, war, or energy plant failure. The Joint Utilities believe that Staff's definition is unduly narrow, and should be broadened to include any unexpected event that creates an immediate need for the utility to acquire a new resource. Accordingly, the Joint Utilities propose that emergency be defined to mean ***"any unplanned for and unexpected event, including but not limited to earthquake, flood, war, market disruption, change in law, or energy plant or infrastructure failure, that requires an electric company to take immediate action to acquire additional resources."*** Any of these circumstances could require a utility to make a very prompt resource acquisition, without the time to conduct an RFP under the rules, or to request a waiver. For that reason, the Joint Utilities recommend that the Proposed Rule be revised as follows:

> (5) "Emergency" means ~~a human-caused or natural catastrophe resulting from an unusual~~ any unplanned for and unexpected event, including but not limited to earthquake, flood, war, market disruption, change in law, or a catastrophic energy plant or infrastructure failure, that requires an electric company to take immediate action to acquire additional resources.

Subpart 6—Independent Evaluator (IE): This subpart defines an IE. The current Guideline 5 specifies that an IE must be "independent of the utility and likely potential bidders". The independence of the IE is key to promoting confidence in the bidding community and therefore, these qualifications—which are omitted from the definition of the IE in the Staff Proposed Rules—should be included in the definition. The Joint Utilities propose revising the rule to add the statement regarding IE qualifications from Guideline 5, as shown below.

> (6) "Independent evaluator" or "IE" refers to a person engaged by an electric company to oversee an RFP process under the rules in this division and who also reports directly to the Commission Staff during that process. The IE must be independent of the utility and likely potential bidders, and also be experienced and competent to perform all IE functions identified in these Division 089 rules.

Subpart 11—Resource Acquisition: The proposed definition of resource acquisition includes a clarification regarding the initiation of the process, which appears to be for purposes of determining the appropriate timing for a waiver. As described in the above comments, the Joint Utilities believe that it would be more appropriate and efficient to provide that a waiver must generally be filed prior to completion of a resource acquisition. Additionally, the term "resource acquisition" is also used in *proposed* OAR 860-089-0100(5), and the reference in that section appears to contemplate that the utility has actually acquired the resource, so defining resource acquisition as a process may be confusing or ambiguous. Accordingly, the Joint Utilities would recommend deleting subpart 11 in its entirety or revising it for additional clarity and consistency.

> ~~(11) "Resource acquisition" refers to a process for the purpose of acquiring energy or capacity or storage resources that starts with an electric company's~~
> ~~(a) Circulation of a final or draft RFP to third parties; or~~
> ~~(b) Communication of an offer or receipt of an offer in a two party negotiation~~.

Major Resource—The Joint Utilities believe that the definitions section should include the definition of the resources to which the rules will apply, which would negate the necessity of much of Section 100 of Staff's proposed Rules. For the reasons discussed in greater detail in their rulemaking comments, the Joint Utilities believe that Major Resource should be defined as it is today. Accordingly, the Joint Utilities propose the following definition:

> *"Major Resource" means a generation or capacity resource with a duration greater than 5 years and quantities greater than 100 MW.*

Proposed OAR 860-089-0100—Applicability of Competitive Bidding Requirements

Overall, the Joint Utilities believe that the current definition of Major Resource in the Competitive Bidding Guidelines remains appropriate and effective in promoting the goals of competitive bidding. Accordingly, the Joint Utilities urge Staff to substitute the simple, clear definition of Major Resource provided above.

The Joint Utilities' concerns with the specific subparts are detailed below.

Subpart 1: This subpart describes the threshold for application of the Division 089 rules. Consistent with the Joint Utilities' comments above, this subpart should read as follows:

> (1) An electric company must comply with the rules in this division when it seeks to acquire ~~energy or capacity resources,~~ or ~~to~~ contract for ~~energy or capacity if any of the following apply:~~ a Major Resource.

Subpart 1(a): Staff's Proposed Rule requires a utility to comply with the rules when the resource acquisition is for "more than 50 megawatts." This subpart is unacceptable for numerous reasons.

- ***First***, reducing the threshold to 50 MW has the potential to consume substantial time and resources for both the Commission and the utilities and other stakeholders. Simply put, the threshold is too small for a process that requires such a high level of regulatory engagement. The requirement to conduct a lengthy and expensive regulatory process may even threaten project economics for some small projects.
- ***Second***, the 50 megawatt threshold appears to be arbitrarily low, and Staff has provided no indication of how it arrived at the threshold amount—or why Staff now believes that the 100 MW Major Resource threshold is too high.
- ***Third,*** given the cost and length of time involved in the competitive bidding process, this framework will act as a disincentive for utilities to propose and develop small or modular projects, and may be contrary to a layered procurement strategy, which may include many smaller or shorter-term transactions.
- ***Fourth,*** this threshold yields a particularly uneven result in light of PURPA's 80 MW threshold, whereby the utility would be required to conduct a lengthy competitive bidding process for a resource that could simply trigger the must-purchase obligation by certifying as a QF with no such process, review or approval whatsoever.

- ***Fifth***, the Commission has linked the resource sufficiency/resource deficiency determinations to the Major Resource threshold of 100 MW as defined in the Guidelines, and it is unclear and has been unexplored whether a change in the threshold for competitive bidding would also flow through to the Commission's policies for establishing avoided costs.

Subpart 1(b): Subpart 1(b) requires utilities to comply with the rules for acquisition of resources where the utility does not specify the size or duration of the resource sought. On its face, this requirement appears to forbid a utility from conducting a search of the market through a request for interest (RFI) such as the one conducted by PGE in 2017 in the course of its bilateral negotiations. Additionally, the rule would also appear to preclude a utility from entering into an enabling agreement or master agreement like the EEI or WSPP Agreement that facilitates trading and the procurement of shorter term purchases. To address these issues, the Joint Utilities recommend revising the rule language to clarify that an RFI or enabling agreement will not trigger the requirement to initiate a competitive bidding process or require a waiver until the utility determines that it appears reasonably likely that the RFI or enabling agreement will result in procurement of a resource that otherwise meets the threshold.

> (1)(b) The acquisition is of a resource or contract in which the electric company does not specify the size or duration of the resource or contract sought but may result in an acquisition described in subsection (1)(a) or (1)(c) of this rule. Notwithstanding the foregoing, this requirement does not apply to a request for information for the purposes of gaining more information about opportunities available on the market or to an enabling agreement intended primarily to facilitate trading and transactions that do meet the Major Resource threshold. If and when it becomes reasonably likely that a transaction emerging from a request for information or enabling agreement will meet the Major Resource threshold, the electric company shall then treat the transaction as a Major Resource acquisition consistent with these Division 089 rules or file a request for waiver.

Subpart 1(c): This subpart codifies the resource aggregation policy from Guideline 1. For the same reasons explained above regarding subpart (1)(a), the 50 MW threshold in the rule should be replaced with a 100 MW threshold, consistent with the Major Resource threshold.

> (1)(c)The acquisition is of resources more than five years in length that in the aggregate provide the electric company with more than ~~50~~ 100 megawatts and these resources:
> (A) Are located on the same parcel of land, even if such parcel contains intervening railroad or public rights of way, or on two or more such parcels of land that are adjacent, and
> (B) The generation equipment of any one of these resources is within five miles of the generation equipment of any other of these resources and construction of these resources is performed under the same contract or within two years of each other.

Subpart 3: Staff's Proposed Rule provides that the competitive bidding rules would apply to the acquisition of an energy storage resource greater than 25 megawatt hours. As discussed in greater detail in the Joint Utilities' policy comments, the Joint Utilities do not agree that it is appropriate to create separate threshold for energy storage, and believe that the 100 MW threshold for a Major Resource should apply to energy storage. And because energy storage is a capacity resource, such an acquisition would be captured under the definition of a "Major

Resource," and there is no need to include a separate rule for storage. Accordingly, the Joint Utilities propose that the Commission delete subpart 3.

> ~~(3) An electric company must comply with the rules in this division when it seeks to acquire energy storage resources or contracts for a storage resource greater than 25 megawatt hours and with a duration of more than five years.~~

Subpart 4: This subpart describes circumstances in which the competitive bidding rules do not apply. It appears that the intent of this rule provision is to create a limited set of exceptions to the rules, and thus the Joint Utilities propose clarifying that no waiver is required in such circumstances.

> (4) An electric company is not required to comply with the rules in this division or file a request for waiver before seeking to acquire a resource under section (1) or (3) of this rule in the following circumstances:
> (a) In an emergency;
> (b) When there is a time-limited opportunity to acquire a resource of unique value to the electric company's customers; or
> (c) When an alternative acquisition method was proposed by the electric company in the IRP and explicitly acknowledged by the Commission.

Subpart 6: In an earlier version of the rules, Staff proposed that the new competitive bidding rules would apply to "energy or capacity resources," which is broad enough to include transmission resources. The Joint Utilities expressed concern that the inclusion of transmission resources in the competitive bidding framework could be problematic, costly, and provide no benefits given the current lack of a competitive market for transmission. 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. As part of its policy guidance in Order No. 18-087, the Commission directed Staff to revise the rules to clarify that they should not apply to transmission projects.[1] Staff implemented this direction by adding a clarifying statement that the "acquisition of transmission assets is not subject to the rules" in Division 089. The Joint Utilities recommend also clarifying that the acquisition of transmission rights is not subject to the rules, and accordingly propose the revision below:

> (6) Resource acquisitions and RFPs for resources or contracts other than those identified in sections (1), and (3) of this rule are not subject to the rules in this Division. Specifically, the acquisition of transmission assets or transmission rights is not subject to the rules in this Division.

Proposed OAR 860-089-0200—Engaging an Independent Evaluator

Subpart 6: This section requires that the IE contract require the IE to fulfill its duties under the Division 089 rules, and that the IE confers as necessary with the Commission and Commission Staff. While the Joint Utilities do not oppose the inclusion of such language in a contract, the

[1] Order 18-087 at 1 (Clarification that the rules are not intended to require competitive bidding of transmission projects.).

Joint Utilities are concerned about enforcement of such language short of civil litigation initiated by the utility. Who would determine whether the IE fulfills its duties and confers "as necessary"—the Commission, Commission Staff, or the utility? And if the Commission or Staff were to make the determination, would the Commission or Staff then direct the utility to terminate the contract and retain a different IE? Or seek some other remedy? Due to the ambiguities regarding enforcement, the Joint Utilities would recommend deleting this subpart or revising it to clarify how enforcement of this provision might work.

> ~~(6) The electric company's contract with the IE must require that the IE fulfills its duties under the rules in this Division and that the IE confers as necessary with the Commission and Commission Staff on the IE's duties.~~

Subpart 7: Under current Guideline 5, an independent evaluator (IE) "must be used in each RFP to help ensure that all offers are treated fairly." Subpart (7) departs from current practice and provides the Commission may determine that an IE is not required if the RFP precludes utility or affiliate ownership:

> (7) The Commission may determine that engagement of an IE under this rule is not necessary *when the electric company's RFP explicitly prohibits the submission of proposals that allow the electric company to own the resource that is the subject of any bid or acquire an ownership interest in the resource at a later date.*

(emphasis added).

As discussed in greater detail in the Joint Utilities' policy comments, the Joint Utilities are concerned that, even if a preference for non-utility ownership is not intended, the change has the potential to result in inconsistent use of an IE if utility ownership is prohibited, and will incentivize power purchase agreements (PPAs) while discriminating against utility ownership options. This proposal is directly contrary to the Commission's previous statements that IEs "should be used for *all* RFPs," not just RFPs involving utility/affiliate ownership. *See* Docket No. UM 1182, Order No. 06-446 at 6 (Aug. 10, 2006) (emphasis added). Whether or not to grant any waiver of the rules (including but not limited to an IE's participation) should be determined on a case-by-case basis without any bias or prejudice towards any particular type of future waiver requests. The Joint Utilities recommend either deleting this subpart in its entirety or revising it to clarify that the Commission may determine whether an IE is required on a case-by-case basis, without differentiating between utility and non-utility ownership options.

> (7) The Commission may determine that engagement of an IE under this rule is not necessary ~~when the electric company's RFP explicitly prohibits the submission of proposals that allow the electric company to own the resource that is the subject of any bid or acquire an ownership interest in the resource at a later date~~ on a case-by-case basis.

Proposed OAR 860-089-0250—Design of Requests for Proposals

Subpart 2: Subpart 2 introduces a new requirement that an RFP must reflect the scoring methodology and associated modeling from the utility's Commission-acknowledged IRP. Because there may be circumstances in which the proposed RFP scoring or methodology vary from that included in the IRP, the Joint Utilities recommend revising subpart 2 to include greater

flexibility and provide that the utility will explain and support any differences in scoring or modeling.

> (2) The draft RFP must reflect the RFP elements, scoring methodology and associated modeling described in the Commission-acknowledged IRP. The electric company's draft RFP must reference and adhere to the specific section of the IRP in which RFP design and scoring is described. To the extent that RFP design and scoring differs from that proposed in the IRP, the electric company must explain and support the different approach taken in the RFP.

Subpart 2(a): Subpart 2(a) requires that, if the utility's Commission-acknowledged IRP does not include information about RFP design, scoring methodology, and related modeling, the utility must develop and present a separate filing containing such information. While the Joint Utilities are not opposed to presenting such information, the Joint Utilities believe that a separate docketed filing is unnecessary and will needlessly extend an already lengthy process. Instead of requiring a separate docketed filing, the Joint Utilities propose that the rule instead require the utility to prepare and submit the RFP design and scoring information as part of its draft RFP filing, and the Commission may allow additional time-100 days instead of 60 days—for review (see also related comments on Subpart 9).The Joint Utilities recommend the following revisions to streamline the review process for scoring methodology and associated modeling.

> (2)(a) If the electric company's Commission-acknowledged IRP does not include a specific section devoted to describing the RFP design, scoring methodology and associated modeling process, the electric company must develop and present ~~in a separate filing with the Commission~~ a proposal for scoring and any associated modeling ~~which must be filed with the Commission before the electric company may prepare the draft RFP~~. The electric company must consider resource diversity (e.g. with respect to technology, fuel type, resource size, and resource duration) in preparing its proposal. ~~The Commission or an administrative law judge may establish a process for review of the filing.~~

Subpart 3(e): Subpart 3(e) suggests that utilities need to provide bidders with information about the bid ranking process. It is possible that bidders could use technical bid ranking information to learn confidential information about other bidders, which raises significant concerns that are addressed further below in the discussion of protected information.

> (3)(e) Description of how the electric company will share information about bid scores, ~~including what information about the bid scores and bid ranking may be provided to bidders~~ and when and how it will be provided; and

Subpart 4: Subpart 4 allows a utility to establish a minimum resource size, but provides that it "must allow qualifying facilities that exceed the eligibility cap for standard avoided cost pricing to participate as bidders." This proposal is problematic because it could potentially include resources as small as 3 MW for solar. Additionally, the rule language is arguably broad enough to allow a qualifying facility (QF) with an executed power purchase agreement (PPA) the ability to bid into an RFP. This result would undermine both the QF PPA process, as well as the utilities' resource planning efforts. To the latter point, the Joint Utilities include QF PPAs in their resource planning efforts, and thus if the QF abandons its PPA to bid into an RFP, it is also undermining the utility's resource planning assumptions. To address this issue, the Joint Utilities propose creating a cut-off for QF participation in an RFP, which would be at the time a

PPA is executed. To address these issues, the Joint Utilities recommend revising the rule as follows:

> An electric company may set a minimum resource size in the draft RFP~~, but it must allow qualifying facilities that exceed the eligibility cap for standard avoided cost pricing to participate as bidders~~. Qualifying facilities that have not yet executed a power purchase agreement may participate in the RFP.

Subpart 9: The Proposed Rule would extend the timeline for review of the RFP from 60 to 100 days. The Joint Utilities urge the Commission to retain the existing 60 day target for review and to allow for a 100 day review in cases in which the utility did not include information about RFP scoring and associated modeling in its IRP filing (see also comments on Subpart 2(a)).

> (9) Subject to the provisions of subsections (a) and (b) of this section, the Commission will generally issue a decision approving or disapproving the RFP within 60 days after the final draft RFP is filed. If the utility is also presenting information about RFP scoring and design that was not included in the utility's Commission-acknowledged IRP, the Commission will generally issue a decision approving or disapproving the RFP within 100 days after the final draft RFP is filed.
> (a) An electric company may request an alternative review period when it files the final draft RFP for approval. If the accompanying request is for an alternative review period shorter than ~~100~~ 60 days, the electric company must demonstrate good cause for the alternative review period.
> (b) Any person may request an extension of the review period of up to 30 days per request upon a showing of good cause.

Proposed OAR 860-089-0300—Resource Ownership

Subpart 1: This subpart provides that a utility or its affiliate submit bids, and that those bids should be treated the same as other bids. While subpart 1 is based on Guideline 3 of the current Guidelines, it requires clarification and changes. The second sentence requiring that utility and affiliate bids be treated in the same manner as other bids is problematic and should be removed. *Proposed* OAR 860-089-0350 governing benchmark bids calls for substantially different treatment for such bids as compared to non-utility bids, including for example the requirement that the benchmark resource score by sealed. Accordingly, the Joint Utilities propose deleting the second sentence of the Proposed Rule.

> (1) An electric company may submit or allow its affiliates to submit bids in response to the electric company's request for proposals. ~~Electric company and affiliate bids must be treated in the same manner as other bids.~~

Subparts 1(a) and (b): These subparts provide for screening at the utility between utility personnel involved in RFP design and scoring and those involved in preparing benchmark or affiliate bids. However, the rule language as drafted is overbroad and may include personnel that only had insignificant involvement in activities on one side of the screen—either bid preparation or RFP design/scoring. Accordingly, the Joint Utilities propose revising subparts 1(a) and 1(b) to clarify that only those utility personnel that are significantly involved in RFP or bid preparation activities should be screened:

(1)(a) Any individual who significantly participates in the preparation of an electric company or affiliate bid may not participate in the development of the RFP or the evaluation or scoring of bids on behalf of the electric company and must be screened from that process.
(b) Any individual who significantly participates in the development of the RFP or the evaluation or scoring of bids on behalf of the electric company may not participate in the preparation of an electric company or affiliate bid and must be screened from that process.

Subparts 2 and 3: In earlier versions of the rules, Staff has proposed that the utility be required to provide an explanation if it declined to make elements of its benchmark bid available to third-party bidders. The Commission directed Staff to delete this provision and instead clarify that the Commission encourages utilities to make elements of their benchmark bids (or build transfer options) available to third parties. The Joint Utilities believe that the revised rule language is an improvement over the earlier versions, but are concerned that the rule language is overbroad. To the extent that the Commission adopts a rule providing that it will "encourage" utilities to make certain property available to third parties, the Joint Utilities understand that the Commission is not imposing any *requirement* that utility property be made available to third parties, and that there would be no consequence if a utility declined to do so. Second, to the extent that the Commission is encouraging certain property to be made available to third parties, the rule should be revised to exclude property that has been funded by shareholders. Finally, to the extent that a utility *does* make certain property available to third parties, the Joint Utilities believe the rule language should make clear that those parties will provide compensation for use of such property. Accordingly, the Joint Utilities propose the following revisions.

(2) An electric company may propose a benchmark resource in response to its RFP to provide a potential cost-based alternative for customers. The Commission encourages the electric company to make elements of the benchmark resource ~~owned or secured by the electric company~~ that are utility property the cost of which has been included in customers' rates (e.g. site, transmission or fuel arrangements) available for use in third-party bids provided that third party bids fully compensate the electric company's customers for the cost and risk of use such elements. In determining whether to make such utility property available to third parties, the electric company may consider safety, reliability, and contractual issues that may militate against such use by third-parties of utility property.

(3) If the acquisition may result in ownership of a generation resource by the electric company, the Commission encourages the electric company to make elements ~~secured by the electric company~~ of the generation resource that are utility property the cost of which has been included in customers' rates (e.g. site, transmission or fuel arrangements) available for use in third-party bids for resources to be owned by the electric company or owned by third parties after construction provided that third party bids fully compensate the electric company's customers for the cost and risk of use such elements. In determining whether to make such utility property available to third parties, the electric company may consider safety, reliability, and contractual issues that may militate against such use by third-parties of utility property.

Proposed OAR 860-089-0350—Benchmark Resource Score

Subparts 1 and 3: As written, OAR 860-089-0350 codifies Guideline 8 and describes the IE process for scoring a benchmark resource. Given that fact, it would be helpful to confirm that the current practices will be allowed under the new section. For instance, under current practices the benchmark bid will be submitted by utility's benchmark team. This bid will contain the "supporting cost information, any transmission arrangements and all other information necessary to score the benchmark resource." The information will be locked down and held by the IE, with the utility unable to alter it once the benchmark bid is submitted.

Following submittal, the RFP Scoring team will score the benchmark bid. Note there are safeguards established in conjunction with the IE to keep utility benchmark and RFP Scoring teams separated. After the RFP scoring team and the IE have scored the benchmark bid they will compare scores, and resolve any differences. This is the score that will be used for comparison to other bids in development of the initial short list, assuming no IE-authorized updates. The IE will not release the other bids to the utility prior to completion of benchmark scoring. Throughout this process Staff has real-time, access to all of the information, if they are so inclined to review it. However, the utility does not make a Commission filing of the score and documentation.

The Joint Utilities suggest modifications to OAR 860-089-0350 to reflect these current practices. We propose eliminating the phrase "the Commission Staff" in subpart (1). Typically, the IE is the conduit for information—the utility provides information to the IE, and the IE provides the information to Staff. Thus, Staff typically has access to the data and can review it at its option. Additionally, the Joint Utilities propose revising the phrase "opening of bidding on an approved RFP" to "review and scoring of non-benchmark bids" to be consistent with and clearly explain current practices. The Joint Utilities propose revising the rules as follows.

> (1) Prior to the ~~opening of bidding on an approved RFP~~ review and scoring of non-benchmark bids, the electric company must submit to ~~Commission Staff and~~ the IE for review and comment a detailed score for any benchmark resource with supporting cost information, any transmission arrangements and all other information necessary to score the benchmark resource. The electric company must apply the same assumptions and bid scoring and evaluation criteria to the benchmark bid that are used to score other bids.
>
> (3) Before the IE provides the electric company an opportunity to evaluate and score other bids, the electric company must submit the final benchmark resource score developed in consultation with the IE, cost information and other related information shared under this section, either in hard copy in a sealed envelope or a digital copy on electronic media, to the IE ~~and Commission Staff~~.

Proposed OAR 860-089-0400—Bid Scoring and Evaluation by Electric Company

Subpart 1: Subpart 1 is a new statement of purpose for the bid scoring rules. The Joint Utilities are concerned that the purpose statement in subpart 1 for a 'transparent bid-scoring process' is unclear. If the requirement is intended to mean that compliance with the rules is required, then it should be deleted because it is unnecessary. If it is intended to provide

additional requirements, then it should be revised to clarify the nature of any additional requirements. To address this issue, the Joint Utilities recommend revising the rule as follows:

> (1) The purpose of this rule is to ~~ensure that the electric company engages in~~ promote transparen~~t~~cy in the bid-scoring process using objective scoring criteria and metrics.

Subpart 3(b): Subpart 3(b) requires that non-price scoring criteria should relate to resource characteristics identified in the utility's IRP, and must be objective and subject to self-scoring analysis. The Joint Utilities believe the requirement that non-price scoring criteria be objective is too rigid and does not allow for needed flexibility in establishing non-price scoring criteria.

Additionally, self-scoring analysis by bidders for non-price attributes is problematic, at least for some metrics. As explained above, utilities use proprietary credit modeling that the bidders may not access, making self-scoring not possible. Staff's Proposed Rules would tie the hands of both the utility and Commission going forward when there may be good reason to allow non-price criteria that bidders would not be able to self-score.

Accordingly, the Joint Utilities propose revising this rule language:

> (3)(b) Non-price scores should, when practicable, primarily relate to resource characteristics identified in the electric company's most recent acknowledged IRP Action Plan or IRP Update and may be based on conformance to standard form contracts. To the extent practicable, ~~N~~non-price scoring criteria ~~must~~ should be objective, clearly defined, and subject to self- scoring analysis by bidders.

Subpart 3(c): Subpart 3(c), which states that "[n]on-price score criteria that seek to identify minimum thresholds for a successful bid and that may readily be converted into minimum bidder requirements must be converted into minimum bidder requirements criteria", should be deleted or significantly revised. First, it is unclear exactly what non-price criteria would be permitted under this rule language. The proposed rule language appears to allow non-price criteria that do not "seek to identify minimum thresholds" and that cannot be "readily converted into minimum bidder requirements"—but both of these qualifiers are unclear and subjective. Additionally, with respect to the first qualifier "that seek to identify minimum thresholds for a successful bid"—it seems that the proposed rule language is circular and essentially requires that minimum bidder requirements must be minimum bidder requirements.

The Joint Utilities are concerned that, without any clarification as to what non-price criteria are permissible, this proposed rule would potentially convert all non-price criteria into eligibility thresholds which will severely limit the ability to distinguish between bids and would limit the bidding pool itself. Current practices allow for lower thresholds for bidders and proposals coupled with non-price points that are based on risks or benefits of the bidder and proposal. Two examples should help illustrate the benefits of this practice. First, utilities often use a low credit threshold, in conjunction with non-price credit scoring. Bidders with low credit scores may bid in, while bidders with higher credit scores will be allowed to bid, and receive additional non-price points. If credit were restricted to strictly threshold criteria, utilities would likely raise the threshold, limiting the pool of bidders. If the Commission decided that was inappropriate, the utilities would not be allowed to distinguish between bidders with low credit ratings as compared to those with high credit ratings, a perverse outcome.

Another example of criteria with both a threshold and non-price point allocation is transmission. In the past, a utility might require bidders to have a plan to acquire transmission in order to bid into an RFP. Then, bidders further along in acquiring transmission would receive more non-price points. There are differences in risk levels of projects that are in BPA's transmission queue versus those with firm rights to the utility's system. These different risks levels are reflected in the award of non-price points. Subpart 3(c) as written does not account for such risk differential, and should be deleted from the proposed rules given that it runs counter to accurate scoring of bids.

For the foregoing reasons, the Joint Utilities propose deleting (3)(c).

> ~~(3)(c) Non-price score criteria that seek to identify minimum thresholds for a successful bid and that may readily be converted into minimum bidder requirements must be converted into minimum bidder requirements.~~

Subpart 3(d): The Joint Utilities also have concerns regarding section 3(d), which states that "[s]coring criteria may not be based on renewal or ownership options, except insofar as these options affect costs, revenues, benefits or prices." First, the prohibition in the first clause is essentially meaningless, because in ***all*** cases, renewal or ownership options will necessarily affect costs, revenues, benefits or prices. To address this issue, the Joint Utilities propose deleting the first sentence:

> (3)(d) ~~Scoring criteria may not be based on renewal or ownership options, except insofar as these options affect costs, revenues, benefits or prices.~~ Any criteria based on renewal or ownership options must be explained in sufficient detail in the draft RFP to allow for public comment and Commission review of the justification for the proposed criteria.

Subpart 5(a): Subpart 5(a) requires the use of a third-party expert to review and validate site-critical performance factors for wind and solar resources. The Joint Utilities believe the rule language should be revised to refer to "variable" resources instead of "wind and solar" resources to include additional technologies such as wave, tidal, or run of river hydropower, for which production may vary based on site-critical performance factors.

> (5)(a) The electric company must use a qualified and independent third-party expert to review site-specific critical performance factors for ~~wind and solar~~ variable resources on the initial shortlist before modeling the effects of such resources.

Subpart 5(b)(B): Subpart 5(b)(B) requires that the utility conduct a sensitivity analysis demonstrating the degree to which bid rankings are sensitive to changes in assumptions used to compare bids, such as assumptions used to compare shorter bids with longer bids. The second sentence of subpart 5(b)(B) provides a detailed example of how the utility might compare assumptions, and the Joint Utilities believe the concept behind the example is adequately explained by the prior sentence, and that a detailed example is out of place in rules of general applicability. Accordingly, the Joint Utilities propose deleting the second sentence of subpart 5(b)(B):

> (5)(b) In addition, the electric company must conduct, and consider the results in selecting a final short list, a sensitivity analysis of its bid rankings that demonstrates the degree to which the rankings are sensitive to:

(B) Changes in assumptions used to compare bids or portfolios of bids, such as assumptions used to extend shorter bids for comparison with longer bids, or assumptions used to compare smaller bids or portfolios with larger ones. ~~For example, the electric company may assume that shorter bids will continue to be available with the same characteristics after the bid term rather than adding "generic fill" assumptions to the end of these bids to extend them for comparison with others.~~

Subpart 6: Subpart 6 requires that the utility provide the IE and Staff with full access to its production cost and risk models and sensitivity analyses, and also provide that information to non-bidding interested stakeholders. The Joint Utilities have several concerns with this requirement.

- ***First***, the Joint Utilities use proprietary models which are developed to reflect the utility's internal risk appetite, and may be used for all parties contracting with the utilities, within or without an RFP. Releasing the models to the non-bidding interested stakeholders could damage a utility's negotiation position with other counterparties, expose utility sensitive information to abuse by the market, and potentially result in financial harm to utility customers. Even if access is restricted to "non-bidding stakeholders," it is important to remember that those parties and their representatives may include potential future wholesale market participants or individuals who will represent such market participants in the future. For example, consultants including lawyers who represent non-bidders frequently represent wholesale market participants who routinely negotiate with utilities and could use such information to manipulate wholesale transactions. It would be detrimental to utilities and their customers if these persons had full access to all modeling.

- ***Second***, the Joint Utilities are often *unable* to provide such a proprietary model to an IE, Staff, or any other external party. The mechanical pricing of bids relies on several proprietary models. Production cost models (such as AURORAxmp, Planning and Risk, System Optimizer) are used in bid evaluation. Providing access to production cost models would be cost prohibitive and require payment of licensing fees for each user as well as supplying hardware set up to run the models. Furthermore, the output of such models may be governed by confidentiality provisions.

- ***Third***, it is not clear why Staff has proposed that it also have access to the models and sensitivity analysis, unless Staff also intends to perform to duplicate the IE's review. Unless Staff clarifies the purpose of its review, the Joint Utilities propose limiting review to the IE only.

To address these concerns, the Joint Utilities propose revising Subpart 6 as follows:

(6) The electric company must ~~provide the IE and Commission Staff with full access to~~ make its production cost and risk models and sensitivity analyses available for review by the IE. ~~When the IE and Commission Staff concur that appropriate protections for protected information are in place, the electric company must provide access to such information to non-bidding interested parties that request the information in the final short list acknowledgment proceeding.~~

Proposed OAR 860-089-0450—Independent Evaluator Duties

Subpart 5: Subpart 5 implements the Commission's direction in Order 18-087 to maintain the existing provision from the Guidelines requiring that the IE independently score *all or a sample* of bids on the initial and final shortlists,[2] and to clarify that a party may request that the Commission require scoring of all bids where appropriate.[3] The Joint Utilities believe this proposed rule is an improvement over the previous version, which required that the IE score *all* bids on the initial and final shortlists, but believe the rule should be further refined. The Joint Utilities are concerned that a bidder who was not selected to the initial or final shortlist may request that Commission order the IE to score the remaining bids—even if there is no legitimate reason to question the reasonableness of the bid scoring results. To address this issue, the Joint Utilities recommend adding a clarification that prior to directing the IE to score all or a broader sample of the remaining bids, the Commission must determine that there is good cause to require the IE to do so. Accordingly, the Joint Utilities propose revising the rule as follows:

> (5) If the RFP allows bidding by the issuing electric company or an affiliate of the company, or includes resource ownership options for the electric company, the IE must independently score the affiliate bids and bids with ownership characteristics or options, if any, and all or a sample of the remaining bids as the IE, in consultation with Commission Staff, finds appropriate to determine whether the company's selections for the initial and final shortlists are reasonable. When the IE does not score all bids, and while a request for acknowledgment of a final shortlist is pending before the Commission, as provided in OAR 860-089-0500, a participant in the acknowledgment proceeding may request that the Commission direct the IE to score all remaining bids or a broader sample. The Commission may grant such a request upon a determination that good cause exists to require the IE to score all remaining bids or a broader sample.

Subpart 6: Subpart 6 incorporates existing Guideline 10(d) into the Proposed Rules, and requires an assessment of the unique risks and advantages associated with utility-owned resources. The rule provides that certain risks and advantages *must* be considered for the utility-owned resource, and *may* be considered for third-party bids. Consistent with the Joint Utilities' comments urging even-handed application of the rules, the Joint Utilities recommend revising the rule language to provide that the risks and advantages must also be considered for third-party bids to the extent applicable. The Joint Utilities recommend revising the rule as follows:

> (6) The IE must also evaluate the unique risks and advantages associated with any company-owned resources (including but not limited to the electric company's benchmark), and ~~may~~ apply the same evaluation to third-party bids to the extent applicable, including an evaluation of the following issues:
> (a) Construction cost over-runs (considering contractual guarantees, cost and prudence of guarantees, remaining exposure to ratepayers for cost over-runs, and potential benefits of cost under-runs);

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[2] Order No. 14-149, App. A at 4.
[3] Order No. 18-087 at 2 ("Revisions to revert proposed bid scoring language in OAR 860-0XX-0450(5) to reflect our current guidelines, while adding flexibility for parties to request that we require the scoring of all bids where appropriate. The current draft provision requires the independent evaluator (IE) to score all bids, while our existing guideline 10 (d) permits the IE to score all or a sample of submitted bids.").

(b) Reasonableness of forced outage rates;
(c) End effect values;
(d) Environmental emissions costs;
(e) Reasonableness of operation and maintenance costs;
(f) Adequacy of capital additions costs;
(g) Reasonableness of performance assumptions for output, heat rate, and power curve; and
(h) Specificity of construction schedules or risk of construction delays.

Subpart 7: Subpart 7 requires the IE to review the reasonableness of the benchmark resource bid score, and provides a process for addressing reconciliation of any differences between utility and IE scoring of bids. The rule also requires that the utility and the IE report the scores to the Commission Staff before any reconciliation. The Joint Utilities believe this new interim score reporting requirement, which is a new requirement that is additional to the closing report, is unnecessary and is inconsistent with current practices.

(7) The IE must review the reasonableness of any score submitted by the electric company for a benchmark resource. Once the electric company and the IE have both scored and evaluated the competing bids and any benchmark resource, the IE and the electric company must compare results and attempt to reconcile and resolve any scoring differences. If the electric company and IE are unable to do so, the IE must explain the differences in its closing report to the Commission. ~~The electric company and the IE must both report their scores to Commission Staff before any reconciliation.~~

Subpart 9: Subpart 9 describes the requirement that the IE file a closing report and describes the evaluation to be contained therein. Specifically, the rule requires that the closing report include "an evaluation of the applicable competitive bidding processes in selecting for the least-cost, least-risk acquisition of resources and allowing for the opportunity for diverse ownership." The Joint Utilities are concerned that, without further criteria or metrics, the evaluation of the applicable competitive bidding processes in "allowing for the opportunity for diverse ownership" may be too nebulous or subjective to provide for a meaningful evaluation. The Joint Utilities recommend that the rule language be stricken or clarified to include greater specificity.

(9) The IE must prepare a closing report for the Commission after the electric company has selected its final shortlist. The IE's closing report must include an evaluation of the applicable competitive bidding processes in selecting for the least-cost, least-risk acquisition of resources ~~and allowing for the opportunity for diverse ownership~~.

Proposed OAR 860-089-0500—Final Short List Acknowledgement and Result Publication

Subpart 3: Subpart 3 describes shortlist acknowledgement as "generally" occurring within 60 days. This rule should be revised to make more definite the review time for a decision on a request for acknowledgment, consistent with the guidance provided in Order No. 14-149 which adopted mandatory shortlist acknowledgement. In making acknowledgement mandatory, the Commission recognized that a lengthy process could impede negotiations and signing of definitive agreements:

> To ensure acknowledgement does not cause delays, we modify Guideline 13 to also include an expedited schedule for our review. That schedule will provide that, once the shortlist acknowledgment application is filed, the Commission will consider the matter at a public meeting within 60 days of receiving the utility's application. By adopting this deadline the utility can plan ahead and negotiate bids that extend to cover this time.[4]

Accordingly, the Joint Utilities propose revising subpart 3 to remove the "generally" qualifier and make issuance of the final order acknowledging the shortlist within 60 days of the filing.

> (3) The Commission will ~~generally~~ issue a decision on the request for acknowledgment within 60 days of receipt of the electric company's filing.

Subpart 4: Subpart 4 requires the utility to make a non-confidential filing in the RFP docket providing the average bid score and average price of a resource on its final shortlist. The Joint Utilities have serious concerns about this making this information available non-confidentially. The average bid score and average price information will be derived from extremely confidential and commercially sensitive material, and if the final short list includes few bidders, this will be extremely concerning to counterparties. Generally, bidders do not want their information shared publicly, and the proposal to use an average will provide little comfort if there are few bidders on the final shortlist. In such cases, publicly sharing such information would provide their competitors with a distinct advantage going forward. Additionally, such disclosure could be in conflict with non-disclosure agreements with counterparties, which generally do not require or permit publicly providing this level of bidder information.

Additionally, it is unclear why this type of information needs to be provided on a non-confidential basis other than to simply help market participants. See also discussion below regarding the protection of commercially sensitive bid information. The Joint Utilities recommend that subpart 4 should be removed from the proposed rules given that it would likely chill bidder participation and reduce competition.

> ~~(4) The electric company must make a non-confidential filing in the RFP docket providing the average bid score and the average price of a resource on its final shortlist.~~

Subpart 5: Subpart 5 requires the utility to provide information to a bidder about the bidder's score upon request. The Joint Utilities believe that the intent of this rule is to provide the bidder with feedback about the bidder's score, which should not include any information that would compromise the confidentiality of other bidders' scores and bid information. Accordingly, the Joint Utilities propose revising the rule as follows:

> (5) Following execution of all contracts resulting from an RFP or cancellation of the RFP, the electric company must provide ~~information~~ feedback, on request, to a bidder about the bidder's bid score which does not compromise other bidders' scores or bid information.

[4] Order No. 14-149 at 14.

Proposed OAR 860-089-0550—Protected Information

The language in this section provides that the electric company may request a protective order be issued under OAR 860-001-0080 in order to "make available protected information" which "may include, but is not limited to, RFP-related and bidding information, such as a company's modeling, cost support for any benchmark resource and detailed bid scoring and evaluation results" for use in "RFP review and approval, final shortlist acknowledgement and cost-recovery proceedings." The proposed rule is unclear in several key respects.

To the extent the rule is intended to suggest that electric utilities must provide detailed bid scoring and evaluation results, to non-bidding parties (in addition to the Commission, Commission Staff, the IE) the utilities have significant concerns. Detailed bid scoring and evaluation results are extremely commercially sensitive because they show the identities of counterparties and details about the bids. Any public disclosure of such information—even if inadvertent—could damage and distort the utility's negotiation process and hinder efforts to acquire for its customers the most cost-effective power. More broadly, the release of this commercially sensitive information to market participants could hamper future resource acquisition efforts by revealing which terms, conditions, and prices might be acceptable to the utility.

As explained previously, non-bidding parties and their representatives may include potential future wholesale market participants or individuals who will represent such market participants in the future. For example, consultants including lawyers and trade associations members who represent non-bidders, frequently represent wholesale market participants who routinely negotiate with utilities and could use such information to manipulate wholesale transactions. It would be incredibly harmful to utilities and their customers if these persons had access to every detail regarding bids and the associated scoring.

These concerns have been addressed in the past by limiting access to this type of detailed information, generally to the Commission, Staff, and the IE. A recently issued Commission modified protective order addressed these concerns by limiting disclosure of detailed bid information and associated scoring to the Commission, Staff and CUB (and subject to agreement from the utility, other parties). UM 1892, Order No. 17-343. The proposed rule should be clarified so that it is consistent with these concerns, past practice, and recent Commission orders.

> The electric company may request a protective order be issued under OAR 860-001-0080 in order to make available protected information required to be shared under this Division. Such protected information may include, but is not limited to, RFP-related and bidding information, such as a company's modeling, cost support for any benchmark resource and detailed bid scoring and evaluation results. Protected information may then be provided to the Commission, Commission Staff, and the IE ~~and non-bidding parties~~, as appropriate under the terms of the protective order. Information shared under the terms of a protective order issued under this rule may be used in RFP review and approval, final shortlist acknowledgement and cost-recovery proceedings.