



**Portland General Electric**  
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January 16, 2018

Via: Electronic Filing

**Re: AR 600 – UM 1776 Portland General Electric Comments on Staff Report**

Filing Center:

Enclosed for filing in the above captioned docket are PGE's Comments on the Staff Report.

If you have any questions, please call Stefan Brown at (503) 464-7805. Please direct all formal correspondence, questions, or requests to the following email address:

[pge.opuc.filings@pgn.com](mailto:pge.opuc.filings@pgn.com).

Thank you,

A handwritten signature in black ink, appearing to read "Stefan Brown", is written over the typed name.

Stefan Brown  
Manager, Revenue Requirement

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**AR 600/UM 1776**

In the Matter of:

Rulemaking Regarding Allowances for  
Diverse Ownership of Renewable Energy  
Resources.

PORTLAND GENERAL  
ELECTRIC COMPANY  
COMMENTS ON STAFF  
REPORT

Portland General Electric Company (PGE) submits these comments in response to the Staff Report issued on January 11, 2018 in this docket.

**I. INTRODUCTION**

PGE files these comments to register its concerns about the Draft Rules distributed by Staff in AR 600 on January 4, 2018 (Draft Rules), and to ask the Commission to refrain from initiating formal rulemaking at this time. PGE recognizes that Staff has worked hard during the informal process to craft proposed rules that address many stakeholder concerns and to reconcile divergent positions. Nevertheless PGE believes that the Draft Rules suffer from fundamental problems that should be remedied before they are published with the Secretary of State. Specifically, PGE believes that the Draft Rules:

- **Exceed the scope of the rulemaking established by the Commission and Senate Bill (SB) 1547;**
- **Fail to ensure a “level playing field” and instead introduce anti-utility bias;**
- **Inappropriately expand the independent evaluator’s (IE) role;**

- **Imply that utilities must provide bidders with access to utility property, without legal basis; and**
- **Introduce new policy concepts that have not yet been discussed or vetted with stakeholders.**

Staff distributed the Draft Rules less than two weeks ago, and they contain new and controversial rule proposals that go well beyond a narrow “update” and conversion of the competitive bidding guidelines into rules. To allow the parties more time to review and comment, PGE urges the Commission to allow for continued informal process. Additionally, PGE believes that the informal process would benefit from Commission input and direction on key disputed policy issues. To this end, PGE requests that the Commission:

- **Reaffirm the limited scope of this rulemaking;**
- **Provide policy direction to Staff and stakeholders on disputed policy issues; and**
- **Direct further informal process before initiating formal rulemaking.**

## II. BACKGROUND

Since the inception of the Commission’s competitive bidding policies, the Commission has consistently focused on ensuring that the solicitation processes are fair and transparent, and serve the fundamental purpose of identifying the least-cost resource for the benefit of customers.<sup>1</sup> The Commission’s long history of resource procurement decisions are reflected in the competitive bidding guidelines (Guidelines), which were updated most recently in 2014.<sup>2</sup> In the 2014 proceeding, the Commission made adjustments to the Guidelines to address perceived bias

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<sup>1</sup> *In the Matter of an Investigation into Competitive Bidding by Investor-Owned Electric Utility Companies*, Docket No. UM 316, Order No. 91-1383 (Oct. 18, 1991); *In the Matter of an Investigation Regarding Competitive Bidding*, Docket No. UM 1182, Order No. 06-446 (Aug. 10, 2006); *In the Matter of Pub. Util. Comm’n of Or. Investigation Regarding Competitive Bidding*, Docket No. UM 1182, Order No. 14-149 (Apr. 30, 2014); *see also In the Matter of Pub. Util. Comm’n of Or. an Investigation Regarding Performance-Based Ratemaking Mechanisms to Address Potential Build-vs.-Buy Bias*, Docket No. UM 1276, Order No. 11-001 (Jan 3, 2011).

<sup>2</sup> Order No. 14-149.

in the request for proposals (RFP) process, but refused to adopt requirements that would favor third-party owned resources over utility-owned resources.<sup>3</sup>

In its 2016 session, the Oregon legislature directed the Commission to adopt rules providing for the evaluation of competitive bidding processes *that allow for* diverse ownership of renewable energy sources,<sup>4</sup> and the Commission subsequently initiated this proceeding. Initially there was a wide gap between stakeholders' views of the appropriate scope of this proceeding, and certain parties urged the Commission to undertake a broad review of the Guidelines, including consideration of rules that would discriminate against or prohibit utility ownership.<sup>5</sup> Ultimately, the Commission rejected the view that this docket should encompass a wholesale revision of its longstanding policies, and instead limited review to five discrete subjects.<sup>6</sup> Additionally, during the scoping deliberations, Staff and the Commission indicated that parties seeking the inclusion of new concepts (such as “project finance due diligence” by the IE) would bear the burden of persuading the Commission to adopt the proposed change.<sup>7</sup>

Following the clarification in the scoping order, Staff held a workshop on July 12, 2017, and circulated an initial draft of the rules on August 21, 2017. On September 22, 2017, PGE (along with PacifiCorp and Idaho Power, collectively Joint Utilities) provided informal comments—including both high-level objections to the significant policy changes proposed by Staff, and detailed comments recommending changes to specific aspects of the rule language.

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<sup>3</sup> *Id.* at 16.

<sup>4</sup> 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”).

<sup>5</sup> See *In the Matter of Rulemaking Regarding Allowances for Diverse Ownership of Renewable Energy Resources*, Docket No. AR 600, Order No. 17-173, App. A at 17-18 (May 16, 2017); see also *In the Matter of the Nw. and Intermountain Power Producers Coalition Petition for Temporary Rulemaking and Investigations into PacifiCorp’s 2016 Requests for Proposal*, Docket Nos. AR 598 and UM 1771, Order No. 16-188 at 2 (May 19, 2016) (rejecting a proposal to prohibit utility ownership of renewable resources and concluding “we lack the authority to adopt rules that prohibit utility ownership of generating resources”).

<sup>6</sup> Order No. 17-173 at 1-2.

<sup>7</sup> See May 16, 2017 Public Meeting, archived video at 44:57-47:15; 53:47-54:15 (available at [http://oregonpuc.granicus.com/MediaPlayer.php?view\\_id=1&clip\\_id=185](http://oregonpuc.granicus.com/MediaPlayer.php?view_id=1&clip_id=185)).

PGE also met with Staff and stakeholders again for workshops on October 26, 2017 and November 20, 2017. Most recently, Staff issued the Draft Rules on January 4, 2018 and now proposes to conclude the informal portion of this proceeding and initiate formal rulemaking.

### III. DISCUSSION

#### A. **The Draft Rules improperly include policy concepts outside the scope of this proceeding.**

Through its Order No. 17-173, the Commission defined a narrow scope for this proceeding. Specifically, the Commission indicated that it would consider five discrete topics: the RFP development process; methodologies used to compare resources; the Commission's and bidder's access to information; the activities subject to competitive bidding; and third-party due diligence review of top performing bids.<sup>8</sup> In so doing, the Commission implicitly rejected the idea that it would entertain proposals that undermine the Commission's long-standing goal to adopt fair and even-handed competitive bidding policies. PGE believes that this approach is consistent with the legislature's direction in SB 1547 directing the Commission to evaluate its competitive bidding processes to "*allow for*" diverse ownership.<sup>9</sup>

Accordingly, any changes to the Commission's competitive bidding policies should be limited to those that further the objective of increasing fairness and transparency. Introducing new policies with anti-utility bias and a redefined, and significantly expanded role of the IE is contrary to the purpose of least-cost resource procurement. More importantly, these provisions may increase RFP costs, decrease competition, and negatively impact the ability of a utility to identify the least-cost, least-risk resource. While these changes may benefit certain developers

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<sup>8</sup> Order No. 17-173 at 1-2.

<sup>9</sup> 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"). At the May 2017 Public Meeting the Commission declined provide its interpretation of the legislature's mandate.

by erecting barriers to utility ownership alternatives, they will certainly harm our customers who benefit from robust competition among all potential bidders, utility-owned and independent power producers alike.

Because the Draft Rules depart from the Commission's direction in the scoping order and the legislative intent of SB 1547, PGE believes it is necessary that the Commission redirect Staff and stakeholders toward proposed rules that appropriately implement SB 1547 and comply with the spirit of the Commission's scoping order.

*PGE requests that the Commission reaffirm the limited scope of this proceeding as specified in Order No. 17-173 and direct Staff to eliminate from the Draft Rules policy concepts beyond this limited scope. PGE also recommends that the Commission provide an interpretation of SB 1547 clarifying that adopting rules that allow for diverse ownership of renewable energy sources does not equate to providing an advantage for non-utility owned bids or diminish the utility's role and responsibility to identify the best resources for customers.*

**B. The Draft Rules go beyond ensuring a "level playing field" and introduce anti-utility bias.**

To promote least-cost resource acquisition, the Commission has adopted a number of goals for competitive bidding, including that the process is to "be understandable and fair."<sup>10</sup> Fairness and transparency are essential to promoting the level of competition necessary to ensure the selection of the least-cost resource for customers.<sup>11</sup> In stark contrast to the goal of fairness, the Draft Rules repeatedly introduce bias in favor of non-utility owned resources, which, if

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<sup>10</sup> See Order No. 91-1383 at 6; see also Order 06-446 at 2.

<sup>11</sup> As explained by one independent evaluator (IE) approved by the Commission: "The point of [the fairness and transparency requirements] is to make sure . . . the winner will simply be the bidder who offers the best deal for ratepayers." *In the Matter of PacifiCorp, dba Pac. Power, Request for Proposals of an Independent Evaluator to Oversee the Request for Proposal Process*, Docket No. UM 1845, Independent Evaluator's Assessment of PacifiCorp's Final Draft 2017R Request for Proposals at 23 (Aug. 10, 2017).

adopted, will inhibit competition and potentially result in the selection of more expensive and riskier resources. This approach is clearly inconsistent with the intent of SB 1547 and outside the limited scope of this rulemaking proceeding.

**1. An IE may not be required if an RFP includes no possibility of resource ownership, resulting in bias against utility-owned resources.**

The Draft Rules unambiguously discriminate against utility ownership by providing that 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.”*<sup>12</sup> This approach not only establishes explicit bias within the Commission’s rules, but also incorrectly implies that the primary purpose of IE participation is to scrutinize the utility’s proposal for a utility-owned resource. On the contrary, an IE’s oversight and participation is valuable in all RFPs, irrespective of potential ownership outcomes.

*PGE requests that the Commission provide policy direction to Staff that the unequal standard for IE participation should be removed from the Draft Rules, and that an IE should be required to participate in all RFPs to help ensure a fair and transparent process.*

**2. The proposed “project finance due diligence review” is undefined and applied unevenly, resulting in anti-utility bias.**

Staff’s Draft Rules also create an unequal standard for the application of third-party review of financial information. Specifically, the Draft Rules provide that the IE will conduct a “project finance due diligence review” on any bids on the final shortlist that provide for the possibility of utility or affiliate ownership of the resource; on the other hand, the same type of

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<sup>12</sup> OAR 860-0XX-0200(7).

due diligence review will be conducted on a bid without a utility ownership options only if that bid is selected for final contract negotiations.<sup>13</sup>

At the time the Commission determined that this issue would be included in the scope of this proceeding, the Commission indicated that it would be incumbent on the entity proposing this concept, the Northwest and Intermountain Power Producers Coalition (NIPPC), to explain and support the proposal.<sup>14</sup> Yet to date, no party has provided any legitimate justification or detailed the scope for this new proposed requirement, much less its unequal application. The Draft Rules as proposed do not specify what additional analysis the IE should perform and remain exceptionally vague on what standards the IE should apply. Nor were such details discussed during the informal process, and stakeholders have no information about the anticipated cost or timing needed to complete such a review. NIPPC has failed to support its proposal, and has provided no basis for the unequal application of the requirement. Accordingly, this provision should be removed from Draft Rules. If an independent financial due diligence review of final shortlisted bidders is ultimately deemed necessary and appropriate by the Commission, the review should be applied evenly to all shortlisted bidders.

***The “project finance” due diligence requirements should not be included in the rules, and PGE recommends the Commission direct Staff to strike this proposal. If the Commission wishes to carry this concept forward, however, PGE requests that the Commission provide policy direction that any additional “project finance due diligence review” should be applied even-handedly to any bids on the final short list, and that the Commission direct parties to participate in additional informal process to consider the appropriate components of “project finance due diligence,” and resolve details around cost and timing of such review.***

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<sup>13</sup> OAR 860-0XX-0400(5)(b).

<sup>14</sup> See May 16, 2017 Public Meeting, archived video at 44:57-47:15; 53:47-54:15 (available at [http://oregonpuc.granicus.com/MediaPlayer.php?view\\_id=1&clip\\_id=185](http://oregonpuc.granicus.com/MediaPlayer.php?view_id=1&clip_id=185)).



**C. The Draft Rules inappropriately expand the independent evaluator's role.**

The Draft Rules require that the IE independently score *all bids* if affiliate or utility ownership is an option,<sup>15</sup> whereas the existing Guidelines<sup>16</sup> require independent scoring for only a sample of bids.<sup>17</sup> The Commission's current policy is appropriate and consistent with the IE's role as an independent auditor of the RFP process. In contrast, the proposed provision redefines the role of the IE and would essentially require the IE to conduct a parallel assessment of the RFP, unnecessarily duplicating the utility's efforts and substantially increasing the cost of the IE's participation in the RFP process.

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

Finally, this proposal is clearly outside the intended scope of this proceeding. In the Staff Scoping Memo, Staff explained that certain parties were interested in developing rules that would significantly expand the role of the IE.<sup>18</sup> The Commission declined to include fundamental changes to the role of the IE within the scope of this proceeding, instead directing

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<sup>15</sup> OAR 860-0XX-0450(5).

<sup>16</sup> Guideline 10(d).

<sup>17</sup> Order No. 14-149.

<sup>18</sup> Order No. 17-173, App. A at 8-9.

the focus of the IE's role to be limited to communications between the IE, utility, and bidders, and bidders' access to information.<sup>19</sup>

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

**D. The Draft Rules incorrectly and without legal basis imply that utilities must make utility property or resources available to third party bidders.**

The Draft Rules encourage actions that exceed the Commission's authority by requiring the utility to provide an "explanation" if it declines to offer elements of a benchmark resource to third party bidders.<sup>20</sup> Although the Commission has encouraged utilities to make elements of their bids available to third-party bidders on a case-by-case basis, it has repeatedly rejected proposals to require utilities to do so.<sup>21</sup> PGE (and the Joint Utilities) have indicated in informal comments and workshops that they believe this concept has no legal basis and should be eliminated, and even pointed out that the Commission has previously expressed concern regarding the legality of requiring utilities to offer elements of a benchmark resource to third-party bidders.<sup>22</sup> Yet, despite the questionable legal basis for the proposal, Staff expanded the

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<sup>19</sup> Order No. 17-173 at 1.

<sup>20</sup> OAR 860-0XX-0300(2).

<sup>21</sup> See also Order No. 06-446 at 5-6 (rejecting proposal to mandate third party access to benchmark resource sites); *In the Matter of Portland Gen. Elec. Co.*, Docket No. UM 1535, Order No. 11-371 at 6 (Sep. 27, 2011) (rejecting proposal that PGE be required to allow third parties to submit bids for projects at the utility-owned Port Westward site).

<sup>22</sup> The Commission previously considered whether to require utilities to permit third-party access to benchmark resource sites in Docket No. UM 1182, and declined to include such a requirement in the Guidelines. The Commission adopted Staff's recommendation that utilities should not be directed to offer their sites to third party developers, but encouraged the utilities to do so, and referenced Staff comments questioning whether the Commission had the legal authority to require utilities to offer their benchmark resource sites to third party

concept and included an additional provision requiring the utility to provide an explanation of its refusal to offer elements secured by the utility (such as site, transmission, or fuel) even if there is no benchmark resource, but utility ownership is a possibility.<sup>23</sup>

Moreover, the text of the Draft Rules, which requires an explanation of “why it would not be in the interests of . . . customers to make such elements available for use in third party bids,”<sup>24</sup> suggests that certain legitimate explanations for why elements of the benchmark resource may not be made available to third-parties—including limitations prescribed in property rights, contract terms, or authority to assign certain rights—would be deemed an insufficient explanation. Finally, the Draft Rules fail to specify how the IE or the Commission would evaluate or use such an explanation.

*For the reasons described above, this rule infringes on the utility’s discretion to dispose of its property and resources, and is simply unworkable and well beyond the scope of this rulemaking as articulated by the Commission and SB 1547. PGE requests the Commission provide policy direction to Staff to specifically exclude this concept from the scope of this proceeding and to strike these provisions.*

**E. The Draft Rules include new concepts that have not been vetted with stakeholders.**

Since Staff last circulated rules in August 2017, Staff and stakeholders spent four months reviewing and commenting on the proposal. Nevertheless, Staff’s January Draft Rules introduce *for the first time* significant policy changes—including entirely new concepts that have not yet been discussed or vetted with stakeholders. Parties require a reasonable amount of time to review and analyze the significant new proposals, including further informal discussion, before

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developers. Staff’s comments noted that the Oregon Department of Justice had advised Staff that there may be legal impediments to implementing a proposal requiring utilities to make benchmark resource sites available to bidders. Order No. 06-446 at 5-6.

<sup>23</sup> OAR 860-0XX-0300(3).

<sup>24</sup> OAR 860-0XX-0300(2).

the rules can be appropriately considered and refined in a formal rulemaking. In particular, PGE is concerned that there has not been an opportunity to address the following major issues in the Draft Rules:

- **Reducing the threshold for competitive bidding from 100 MW to 50 MW for all RFPs.** There has been no stakeholder discussion or input regarding this change, and Staff has provided no justification for the lowered threshold. It is unclear how or why Staff selected this threshold, but notably it is less than the 80 MW threshold for which PGE has an obligation to purchase without competitive bidding under PURPA. PGE believes the existing standard of 100 MW is appropriate, but in any event, the standard should not be below 80 MW. Importantly, the expanded timeframes and expense for RFP proceedings proposed in the Draft Rules seem even more unreasonable and disproportionate when applied to all resources of 50 MW or greater.
- **Creating a storage specific eligibility requirement.** The Draft Rules include a revised 25 MWh threshold for energy storage resources that was only recently shared with stakeholders—but without explanation for the proposed threshold. The rules continue to lack any justification for a distinct standard for energy storage resources. To include a unique standard for energy storage resources is not consistent with SB 1547’s requirement for rules allowing for diverse ownership of renewable energy sources that *generate* qualifying energy.<sup>25</sup> Energy storage resources do not generate energy. PGE believes that a unique standard for energy storage resources is unwarranted, and clearly not called for by SB 1547.

Furthermore, the size of this threshold will include resources that the Commission has not considered a major resource. For example, a 25 MWh threshold is likely to include a 6 MW battery resource that PGE may consider for the purposes of deferring distribution upgrade investments. Given the rapid maturation of energy storage resources, PGE believes that any reduced standard for energy storage will quickly become outdated, and that it is more appropriate to apply the same threshold to all resources.

- **New filing requirement.** The Draft Rules propose an additional docketed process between the IRP and the RFP. This is a new idea that if implemented would significantly extend an already lengthy planning and procurement process.

PGE recognizes that there will be additional opportunities for comment if the Commission elects to initiate formal rulemaking, but is concerned that it will not be possible to make big-picture policy changes and fundamentally restructure the proposed rules after formal

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<sup>25</sup> 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”).

rulemaking has been initiated, and the focus is instead on refining the rule language. In PGE's experience, it often takes several iterations to get both the policy and the rule language right, and moving these rules into a formal rulemaking process will not provide adequate opportunity to draft workable and sustainable rules. PGE believes it will be more efficient to work on the new policy concepts through continued informal process instead of initiating a formal process before the concepts are fully developed and vetted with stakeholders.

***PGE requests the Commission direct additional informal process for further discussion and development of these policy concepts.***

#### **IV. CONCLUSION**

While stakeholders have worked together and made progress, there are still significant disagreements about important policy issues, the scope of this proceeding, and new rule concepts that have not been fully vetted. Accordingly, the Draft Rules are not yet ready for the fine-tuning that would normally occur in a formal rulemaking process. For these reasons, PGE asks the Commission to (1) reaffirm the limited scope of this proceeding; (2) provide policy direction on disputed policy issues, and (3) direct further informal process before initiating formal rulemaking. There are several options available to the Commission for providing this important policy direction:

- Provide policy direction at the January 17, 2018 Public Meeting;
- Schedule an all-day Commissioner workshop to allow stakeholders to address their concerns, and then provide direction to Staff; or
- Invite comments from stakeholders regarding policy issues and issue a revised scoping order.

PGE looks forward to continuing to work collaboratively with parties in this proceeding and to answering any questions the Commissioners may have at the January 17 Public Meeting.

DATED this 16th day of January, 2018.

Respectfully submitted,



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