ORDER NO. 18 324

ENTERED AUG 30 2018

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 600

In the Matter of Rulemaking Regarding Allowances for Diverse Ownership of Renewable Energy Resources.	ORDER

DISPOSITION: NEW RULES ADOPTED

In this order we adopt competitive bidding rules that allow for diverse ownership of resources, consistent with Section 6 of 2016 Senate Bill 1547.[1] These rules are the culmination of two years of engagement between Staff, stakeholders and this Commission, building on decades of direct experience with competitive bidding guidelines in Oregon.

I. INTRODUCTION

Senate Bill 1547 Section 6 amends ORS 469A.075, requiring that 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."[2] In Order No. 16-188, we opened this permanent rulemaking docket to implement this requirement.

In May 2016, Staff began efforts to work informally with stakeholders to further define the scope and purpose of the rulemaking, and to develop proposed rules. Staff held seven workshops and sponsored several rounds of informal comments. On January 18, 2018, Staff presented its proposed rules at a public meeting, and we adopted the recommendation to proceed to formal rulemaking and to provide policy guidance. We held a workshop on March 6, 2018, to consider policy questions, and on March 19, 2018, we provided guidance in Order No. 18-087.

On April 18, 2018, we filed a Notice of Proposed Rulemaking Hearing and Statement of Need and Fiscal Impact for this rulemaking with the Secretary of State, and we provided

[1] Codified in Oregon Laws 2016, Chapter 28, Section 6.
[2] Senate Bill 1547 (2016) at Section 6.

notice to all interested persons on the service lists established under OAR 860-001-0030(1)(b) and to legislators specified in ORS 183.335(1)(d). Notice of the rulemaking was published in the May 2018 Oregon Bulletin, setting a hearing date of May 16, 2018.

We held a rulemaking hearing on May 16, 2018. Prior to the hearing, written comments were filed by the Joint Utilities (PacifiCorp, dba Pacific Power; Idaho Power Company; and Portland General Electric Company (PGE)). At the hearing, Staff, PGE, PacifiCorp, the Alliance of Western Energy Consumers (AWEC), the Northwest and Intermountain Power Producers Coalition (NIPPC), and Idaho Power offered comments on the proposed rules. Post-hearing written comments were filed by NIPPC, the Joint Utilities, Staff, AWEC, and Renewable Northwest. We closed the comment period on June 15, 2018.

We discussed the proposed rules at our Regular Public Meeting on August 28, 2018, and adopted the rules attached as Appendix A and made the decisions reflected in this order during that meeting.

II. DISCUSSION

Below, we address significant issues we considered in adopting these rules. In this discussion, we summarize comments from stakeholders and electric companies, as well as Staff. We provide our decision and where appropriate clarify some of the implications of the adopted rules.

A. Applicability of the Rules and Waivers – OAR 860-089-0010

a. Comments

The Joint Utilities seek two changes to the proposed rules regarding resources acquired outside the competitive bidding process. First, the proposed rules require an electric company to file a waiver if it intends to acquire a resource outside of the rules. According to the rules, that waiver request is to be made at the time of the resource acquisition, which is defined as:

> [A] process for the purpose of acquiring energy, 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.

The Joint Utilities argue that a resource acquisition may be abandoned after studies or negotiations, and so the filing of a waiver could be a waste of resources if a utility is in an exploration phase.

Second, the Joint Utilities also request that the proposed rules be amended to remove language that preclude acknowledgement of a resource if it is acquired before a waiver is filed. Staff opposes this change.

b. Resolution

We modify the resource acquisition definition to apply to the communication of a "final" offer, or receipt of a "final" offer. Although the resource acquisition language proposed in rules does not trigger a waiver in the case of study or negotiation, but rather only upon the circulation of an RFP or the communication of an offer, we acknowledge that general offers may be made very early in the resource acquisition process. Accordingly, we make changes to reflect the reality that offers made early in a negotiation are not analogous to final offers. This language is intended to apply our competitive bidding rules before a utility is contractually bound to a resource, but should also leave utilities with ample flexibility to engage in negotiations without triggering the rules.

We decline to remove rule language that precludes acknowledgement of a resource if it is acquired before a waiver is filed. We believe that an RFP conducted consistent with the rules is more likely to result in a low-cost, low-risk resource acquisition than an RFP conducted outside of the rules. Despite this presumption, these rules preserve the province of utility management to make its own resource decisions, including a decision to secure a resource outside our competitive bidding rules, with or without a waiver. If a utility secures a resource outside the rules, we see little value to an after-the-fact Commission acknowledgment. In this way, our clear preference for an RFP conducted within the confines of the rules is expressed, but utility management judgement is preserved. A utility that fails to act within these rules, or fails to seek or secure an applicable waiver, will need to justify that decision during a subsequent rate proceeding.

B. Express Purpose of Rules – OAR 860-089-0015

a. Comments

The Joint Utilities want to add the minimization of risks to the minimization of energy costs in the purpose statement of the rules. Staff opposes this change.

b. Resolution

We accept the proposal of the Joint Utilities to include risk in the purpose statement in the rules. It is our longstanding policy to analyze resource acquisition in the context of both cost and risk. The inclusion of risk in the purpose statement will align these rules with that policy. For simplicity, we also incorporate the policy statement with the applicability statement for these rules in OAR 860-089-0010.

C. Definition of Emergency – OAR 860-089-0100(3)(a)

a. Comments

The Joint Utilities propose to expand language that defines an "emergency" for purposes of allowing the acquisition outside the competitive bidding process under certain circumstances. Staff opposes this change arguing the Joint Utilities' definition is too expansive.

b. Resolution

We make no changes to the proposed definition of emergency, which includes the terms "catastrophe" and "unusual and unexpected." We decline the Joint Utilities' proposal to modify the definition to expand this exception to situations beyond what we believe to be a common understanding of an "emergency."

D. Impartiality of the IE - OAR 860-089-0200

a. Comments

The Joint Utilities seek to add language to the definition of an independent evaluator (IE), which would require IE independence from utilities and bidders.

b. Resolution

We adopt the change supported by the Joint Utilities. We expect that the IE will be independent from utilities and bidders, but clarify that "independence" should not be defined so narrowly as to prevent the hiring of an IE that has previously contracted with a potential or anticipated bidder in an unrelated matter.

E. Size and Applicability Threshold – OAR 860-089-0100(1)(a)

a. Comments

The Joint Utilities oppose the proposal to lower the applicability standard for competitive bidding requirements from the current 100 megawatt (MW) threshold to 50 MW, both for general resources and for storage resources. They oppose the definition for several reasons, including cost and inconsistency with PURPA's 80 MW threshold. The Joint Utilities suggest a retaining the 100 MW threshold, including for storage resources. In the alternative, the Joint Utilities suggest a 60 MW threshold for storage resources.

b. Resolution:

We adopt an applicability threshold of 80 MW, which is higher than Staff's proposed 50 MW threshold but lower than the Joint Utilities threshold proposal of 100 MW. We find that this 80 MW level aligns with the applicability of PURPA requirements for utilities, and provides a natural dividing line between large projects that are the intended focus of these rules, and smaller projects that are implicated by a wide variety of Commission rules and procedures including PURPA enforcement and community solar legislation.

We also note that the adopted rules are applicable to aggregate acquisitions that are equal to or greater than 80 MW, not just single resources of 80 MW or greater. This language is intended to capture acquisitions that have a large system impact, but are accomplished on a smaller individual or distributed scale. As utilities and the Commission move towards more innovative and distributed solutions to system needs, we expect this language to apply competitive bidding requirements to those distributed solutions where they reach an 80 MW aggregate target.

We also eliminate previous references to a separate storage threshold. We find that the main justification for a separate, lower storage applicability threshold is not justified. A separate storage threshold has been supported by the argument that storage may be more costly on a per MW or megawatt-hour (MWh) basis than other resources. This justification has been overtaken by the rapidly falling costs of storage resources. We expect that storage resources will become increasingly competitive in future RFPs.

We recognize, however, that since storage represents an important emerging resource on which we and the state have placed special emphasis, we may wish to require in the future that a smaller storage resource acquisition should be subject to these competitive bidding requirements. Accordingly, we have included language in these rules that allows

the Commission to apply competitive bidding rules at our discretion, regardless of resource acquisition size, on a case-by-case basis.

Finally, to clarify the applicability of these rules, we modify language in proposed OAR 860-089-0100(1) to state that an electric company "must comply with the rules in this division when it seeks to acquire generating or storage resources or to contract for energy or capacity" if any of the identified criteria apply.

F. Applicability to Undefined Resource Acquisitions – OAR 860-089-0100(1)(b)

a. Comments

The Joint Utilities are concerned that the requirement that an all-source, undefined capacity RFP will limit some of the activities that utilities may engage in, including requests for interest (RFIs) and preliminary explorations of options. They propose language that would allow all such activity up until the time that it becomes "reasonably likely that a transaction" will emerge.

b. Resolution

We make no changes to this part of the rule. We find that the changes we have made to the resource acquisition definition, which include references to final offers, adequately addresses the concerns expressed by the Joint Utilities.

G. Applicability to Transmission Acquisitions – OAR 860-089-0100(3)(d)

a. Comments

The proposed rules clarify that transmission assets are not subject to the rules. The Joint Utilities want to ensure that they also do not apply to transmission rights.

b. Resolution

We revise the rules to clarify that the competitive bidding requirements do not generally apply where a utility is seeking to exclusively acquire transmission assets or rights.

H. IE Requirement in the Case of No Possibility of Utility Ownership – OAR 860-089-0200

a. Comments

One of the central points of disagreement in Staff's proposed rules is the language in the applicability section allowing the Commission to drop the IE requirement if utility ownership of resources is not contemplated in the RFP. Joint Utilities propose to eliminate this language, and instead allow a case-by-case exemption. NIPPC and Staff argue in favor of the rule. NIPPC argues that the provision should be more explicitly tied to the ownership structure proposed.

b. Resolution

The adopted rules eliminate any separate treatment between RFPs that contemplate utility ownership of resources and those that do not. While we recognize the position of Staff and some stakeholders arguing that competitive bidding rules largely serve to protect against the well-recognized utility bias in favor of ownership of resources, we find that the application of the rules and the involvement of the IE will have intrinsic value in any RFP circumstance. As we have previously held:

> We conclude that an IE should be used for all RFPs. While an IE's role is not as involved for an RFP without ownership options of Affiliate Bidding, we find that using an IE has value.[3]

Our decision is bolstered by the IE cost data provided by Staff in this proceeding. In the context of a large resource investment of 80 MW or more, an average cost of $254,000-$329,000 is a meaningful amount, but justified by the fact the IE involvement is likely to lead to more competitive RFPs, and lower-cost, lower-risk resource decisions.[4] While impossible to quantify, we anticipate that the costs of the IE over the long term will more than be outweighed by the savings to ratepayers that are likely to result from higher-quality, more competitive RFP processes. Should IE costs increase, or should resource costs or our rule applicability threshold change to such a degree that IE costs become a more significant cost as compared to anticipated resource costs, we will re-evaluate this decision.

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[3] See Docket UM 1182, *In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Investigation Regarding Competitive Bidding*, Order No. 06-446 at 6.
[4] Staff's Initial Comments at 2, June 11 2018.

Finally, we note that the value in a proceeding created by IE is dependent on the level of engagement that the Commission and Commission Staff provide to the IE. Staff brings a detailed and extensive understanding of RFP and resource selection standards to the process, while the IE brings detailed technical, financial, and transactional knowledge and experience. In working together, we are confident that the engagement of an IE with active management from Staff will help lead to better procurements in partnership with utilities.

I. Design of Requests for Proposals – OAR 860-089-0250

a. Comments

The proposed rules require that the scoring and methodologies used in the RFP be consistent with those from the IRP. Where they are not, the utility is required to file alternative scoring prior to the filing of the RFP and support the change from the IRP. The Joint Utilities oppose a separate filing, and suggest that if a utility chooses to change its scoring, the Commission may impose a longer review time frame.

b. Resolution

We retain the requirement for a separate filing when a utility chooses to deviate from the scoring methodology identified in the acknowledged IRP. Clearly expressing the system needs associated with a resource acquisition is an important objective reflected in these rules. Presenting those needs in detail and the scoring associated with an acquisition in the IRP will allow notice to prospective bidders and the opportunity for stakeholders to understand and, where necessary, for utilities and the Commission to improve the acquisition process. If a utility chooses to deviate from the scoring proposed in the RFP, the same sort of notice and review should be available to all stakeholders.

Additionally, we add language that clarifies how the RFP should be aligned with the IRP. Specifically, the RFP should be aligned with the need identified in the IRP to be addressed by the resource, rather than the specific resource alone.

J. QF Limitations - OAR 860-089-0250

a. Comments

The Joint Utilities seek new language in the rules that would act to limit qualifying facility (QF) participation in RFPs to those that have not yet executed a power purchase agreement, arguing that allowing this would upset resource planning assumptions.

b. Resolution

We decline to adopt the Joint Utilities' proposal. Where final offers from active or potential QFs are lower than avoided cost prices, the utility consumer will experience a net savings associated with the selection of a QF resource that has been bid into an RFP at a lower cost than currently or previously available or contracted avoided cost prices. If QF resources acquired in this way result in planning challenges and the need for additional resources, the utility would be justified in expanding the RFP to include those needed resources.

K. Review Period – OAR 860-089-0250(6)

a. Comments

The proposed rules allow for a possible 100-day RFP review period, but note that we may set a shorter period where appropriate. Joint Utilities propose to set the review at 60 days, reverting to current guidelines.

b. Resolution

We adopt an 80-day review period. The rules provide for a possible, but not required 100-day review period, and clearly contemplate that a utility may seek a shorter review period for good cause shown. A central objective of these rules is clarity, transparency, and notice for stakeholders in expression by the utility of system needs in an RFP. If a utility has clearly identified system needs, described scoring, methodologies, and other relevant details in advance of the RFP proceeding through the IRP process, as these rules encourage and contemplate, then good cause for a shorter review period could be justified upon request. However, we find that an 80-day review period is an appropriate starting point, and that 100 days will likely be excessive in most cases.

L. Resource Ownership – OAR 860-089-0300

a. Comments

The proposed rules wall off utility personnel who work to develop the RFP from those who work to develop the response to the RFP. Initially, the Joint Utilities sought to loosen this restriction, and only wall off personnel who *significantly* participate in the development of the RFP. Subsequently, the Joint Utilities proposed a wholesale revision to the rule that would require utilities to create a benchmark or affiliate team. The Joint

Utilities' proposal would prevent members of this team from participating in scoring of bids. The Joint Utilities' proposal would also allow any supporter of a team to provide support to any other team.

b. Resolution

We find that the Joint Utilities' proposal is overly complicated and would prove difficult to effectively enforce. In a competitive solicitation, it is not appropriate for those with internal perspective in the development of an RFP to participate in the development of a response to that RFP. However, we understand the Joint Utilities' concern that limited shared resources may necessitate some limited cross-over of roles. Accordingly, we note here that a utility may demonstrate that this provision should be waived for good cause shown.

M. Third Party Access to Benchmark Bid Resources – OAR 860-089-0300

a. Comments

The proposed rules encourage the opening of utility owned assets to third parties. The Joint Utilities seek to restrict this language to ensure that all utility assets that may be utilized by third parties are fully compensated by the third parties. The Joint Utilities also seek to limit the encouragement to only those assets that are already included in customer rates, which effectively exempts all utility assets that the utility intends to include in rates, but has not yet done so.

NIPPC argues for expansion of Staff's proposal and to make any utility decision not to offer important benchmark resources de-facto imprudent. NIPPC references recent RFPs in which transmission capacity constraints have effectively prevented or limited bidders and the number of viable bids as evidence of the need for this provision.

b. Resolution

We eliminate Staff's encouragement requirement in rule and instead require utilities to provide us with information that may be utilized in a subsequent prudence determination. The ultimate goal of a competitive bidding process is the identification of the lowest cost, lowest risk resource. More bids and more ownership options provide the opportunity to identify the lowest cost, lowest risk resource. We believe that the use of utility owned resources by third parties to develop additional or better, more efficient bids will help facilitate the objective of more and better proposal options. Though we eliminate the

encouragement provision in rule, we re-emphasize here that utilities are encouraged to offer elements of benchmark bids to third-party bidders.

The adopted rules do not require that a utility offer benchmark or utility owned resources to third-party bidders as part of the RFP. The decision whether or not to offer elements of a benchmark or utility owned resource to other parties in an RFP remains with utility management. The adopted rule requires that a filed analysis of the decision be provided to the Commission at the time of RFP development, as well in a subsequent prudence determination. We understand that there may be practical impediments to offering elements in certain circumstances. The required explanation will provide an early opportunity for the utility to begin to demonstrate that its decision not to offer elements is reasonable and prudent.

We add clarification in the rules to ensure that adequate protection is given to utilities offering resource elements. Full compensation will be provided for any utility resource element used by a third party bidder. This portion of the rule will ensure that the utility and its shareholders are not economically disadvantaged in any way when resource elements are offered to third parties.

Finally, we clarify that separate utility affiliates need not offer any resource elements to their other bidders nor explain their decision not to offer such elements. A separate affiliate, like a private third party bidding on an RFP, operates in a higher-risk highly competitive environment and it should not be obligated to provide access to its proprietary assets to other competitive entities.

N. Benchmark Resource Score – OAR 860-089-0350

a. Comments

This section in the proposed rules contains numerous references to the submission of benchmark score information to the IE and "Commission Staff." The Joint Utilities recommend eliminating references to Commission Staff to reflect current practice.

b. Resolution

We eliminate references to Commission Staff, and replace them with the Commission, which is inclusive of Commission Staff. This change does not limit Staff's access to information in any way. Where access to information is referenced, we make clear in this order that the term "Commission" includes its Staff.

O. Bid Scoring – OAR 860-089-0400

a. Comments

The Joint Utilities raise four points with regard to rules governing bid scoring. First, the Joint Utilities argue that the requirement that bids be subject to self-scoring may not be practical in some circumstances and recommend language to provide for more utility deviation from this standard. Second, the Joint Utilities object to the requirement that non-price scoring factors that are effectively minimum thresholds or standards be converted into such. Third, the Joint Utilities recommend we eliminate references to "generic fill" in the rules. Finally, the Joint Utilities do not want production cost and risk models made available to Commission Staff or any parties.

b. Resolution

We make only one substantive change to the proposed rules and remove the language referencing generic fill because it is an illustrative example. We clarify, however, that the provisions of OAR 860-089-0400(5) are specifically designed to address such issues as the use of generic fill.

In the context of an RFP, it is important to understand when utility assumptions embedded in generic fill, or other IRP values, become the determinative or dominant factor in a resource decision. For example, when a resource is lowest cost and lowest risk in the near term, but because of a short term length it is not selected due to the assumptions associated with "generic fill," that decision should be subject to greater scrutiny. Importantly, the rule does not eliminate the possibility of a resource decision heavily influenced by generic fill, but it does provide for a sensitivity analysis necessary to effectively examine such a decision. In this way, utility management discretion to rely on generic fill as an important factor in bid scoring is retained.

We make no other significant changes to Staff's bid scoring proposal. Effectively, Staff's language allows utilities two options when reviewing non-price attributes: convert the attribute into a characteristic that can be objectively scored, or make the attribute a minimum threshold.

In the interests of clarity to bidders and the Commission, if the utility has identified a minimum standard, the RFP should clearly designate that standard. The rules require that minimum standards are not to be buried in complicated scoring criteria, but are spelled out clearly in the RFP. Thus, bidders who cannot meet the standard do not waste time and resources attempting to respond, and utilities and the IE are not forced to assess

proposals with no chance of selection due to the failure to achieve a minimum standard that was not clearly identified in the RFP.

P. Independent Evaluator Duties – OAR 860-089-0450

a. Comments

The Joint Utilities raise three issues with proposed language governing an IE's duties. First, they argue that the proposed rules lack symmetry in the evaluation of utility and non-utility owned resources in that they require IE analysis of certain utility owned issues and factors but leave analysis of the same factors optional for non-utility owned assets. Second, the Joint Utilities object to the proposal to require the IE and the utility to report scores to the Commission Staff before reconciliation, arguing it is inconsistent with current practice. Third, the Joint Parties oppose the requirement that the IE, as part of the IE report, provide a review of the process and finding on whether or not it allowed the "opportunity for diverse ownership." The Joint Utilities object to this provision, arguing that it is too nebulous and should be stricken.

b. Resolution

We adopt the Joint Utilities suggestion to eliminate a reporting requirement on the "opportunity for diverse ownership." Although we agree with Staff that this is an essential question, we leave it to our Staff or ourselves, on a case-by-case basis, to ask this question of the IE as part of the reporting process.

We decline to adopt the Joint Utilities suggestion to change the IE review of issues related to ownership. "May" in this part of the rule refers to the fact that many of the attributes to be examined are not applicable to common third-party owned contract structures, such as PPAs. For example, construction cost overruns are not significant issues in the context of a PPA. In a PPA, an owner agrees to deliver energy or capacity at a specific quantity, time, and price. Whether or not the project is completed on budget is not a risk borne by the ratepayer under such a contract. If on the other hand, the PPA agreement contained provisions that added some risk to ratepayers for construction cost overruns, then it would be appropriate for the IE to evaluate that aspect of the proposal. Accordingly, the "may" language in the rule is appropriately flexible.

Finally, we add language to the rule consistent with our revision to OAR 860-089-0300 on resource ownership, which will help us build a record for prudence review. This language requires the IE to review the utility rationale for offering or declining to offer benchmark elements to third parties as part of the reporting requirement.

Q. Final Shortlist Acknowledgement – OAR 860-089-0500

a. Comments

The Joint Utilities seek two changes to rules governing the Commission's review of the final short-list. First, they proposed language to require a Commission decision within 60 days, rather than the proposed "generally" within 60 days. Second, they oppose the requirement that a utility file a non-confidential filing of average bid score and average price of a resource on the final shortlist. The Joint Utilities contend this requirement would "chill bidder participation and reduce competition."

b. Resolution

We decline to remove the word "generally" from the final shortlist acknowledgement rule. We find that in unusual circumstances where a shortlist needs special examination due to complicated issues, we may need more than 60 days to rule on acknowledgement. Additionally, we find that the publication of average bid score information and pricing will not chill participation. The entities representing bidders have not objected to this provision, and it eliminates reference to a particular score by utilizing an average. However, we recognize that there may be circumstances where it is appropriate to waive this requirement; such as where a shortlist is unusually limited.

R. Protected Information – OAR 860-089-0550

a. Comments

The Joint Utilities seek to eliminate access to non-bidding parties, even under protective order – because non-bidding parties may disclose information that would distort markets and damage competition.

b. Resolution

At this time, absent any specific demonstration of examples of protected information disclosure, we will not automatically eliminate access to protected information to a class of parties. We trust in the professional standards of the energy bar in Oregon, and expect all parties, individuals, and organizations trusted with protected information to strictly adhere to the letter and spirit of our protective orders. It is our conclusion that in practice, this has occurred and will continue to occur. However, this trust can and will be revoked if professional standards break down and information is disclosed improperly.

S. Applicability of Rules

a. Comments

The Joint Utilities request that any adopted rules are applied prospectively, and not to procurements currently underway.

b. Resolution

We agree with the Joint Utilities. The adopted rules will apply only to RFPs filed after the rules become effective when filed with the Secretary of State.

T. NIPPC due diligence language

a. Comments

Throughout this rulemaking, NIPPC has argued for the inclusion of language in this rule that would require a separate examination of the prospective of a benchmark or utility owned bid to acquire private financing. NIPPC contends that private financing entities impose higher standards and test project assumptions with more rigor than is imposed by the utility on its own bids. According to NIPPC this type of review, conducted by an independent financial analysis firm, would yield important information as part of shortlist review.

The Joint Utilities oppose inclusion of this language. First, they argue that the language developed by NIPPC is complicated, and that it is not clear that the analysis would yield any useful information. Second, they contend that the language introduces bias against utility owned resource into the rules, in that it does not require analysis for non-benchmark proposals.

Staff found enough potential value from the language to make it part of initial draft rules submitted to us. We ordered Staff to remove it, because we decided that the language lacked clarity, and we invited proponents to make the case for the language and propose improvements.

b. Resolution

We decline to adopt NIPPC's revised due diligence proposal. We appreciate the way NIPPC has responded to our request, working to improve their proposal. NIPPC's

revised language submitted in comments presents a much clearer provision. Ultimately, however, we are not persuaded that the value of this exercise will justify its cost.

We determine that the adopted rule, which in many ways adds transparency and clarity to the process, will provide a more level playing field to third-party bidders, and that the additional language proposed by NIPPC may be obviated by the many provisions in adopted rules that strengthen the fairness of treatment between third-party owned proposals and utility owned proposals.

ORDER

IT IS ORDERED that:

1. OAR 860-089-0010 through 860-089-0550 are adopted as set forth in Appendix A to this order.
2. The new rules will be effective upon filing with the Secretary of State.

Made, entered, and effective AUG 30 2018.

Megan W. Decker
Chair

Stephen M. Bloom
Commissioner

Letha Tawney
Commissioner

A person may petition the Commission for the amendment or repeal of a rule under ORS 184.390. A person may petition the Court of Appeals to determine the validity of a rule under ORS 183.400.

DIVISION 089
Resource Procurement for Electric Companies

860-089-0010
Applicability and Purpose of Division 089

(1) The rules contained in this Division apply to electric companies, and are intended to provide an opportunity to minimize long-term energy costs and risks, complement the integrated resource planning (IRP) 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.

(2) Upon request or its own motion, the Commission may waive any 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 resource acquisition.

(a) In addition to the filing requirements in OAR Chapter 860, Division 001, an electric company filing a request for waiver under this section must serve the request on all parties to the electric company's most recent general rate case, request for proposal (RPF) filing, and IRP docket.

(b) If a request for waiver is filed by an electric company after it acquires a resource, granting, if any, of the waiver request does not result in or equate to the Commission's acknowledgment of the resource acquisition.

Stat. Auth.: ORS Ch. 183, 756, 758, 2016 OL Ch. 28
Stats. Implemented: ORS 756.040, 758.060, 2016 OL Ch. 28. Sect. 6
Hist.: NEW

860-089-0020
Definitions

For purposes of this Division, unless the context requires otherwise:

(1) "Benchmark resource" is a resource identified in an electric company's response to its own request for proposals.

(2) "Commission-acknowledged IRP" means an IRP for which the Commission has acknowledged the electric company's action item to procure the resource subject to the rules in this division.

(3) "Electric company" has the meaning given that term in ORS 757.600.

(4) "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 during that process. The IE must be independent of the utility and bidders, and also be experienced and competent to perform all IE functions identified in these Division 089 rules.

(5) "Integrated resource plan" or "IRP" has the meaning given that term in OAR 860-027-0400.

(6) "IRP Update" means an update to an acknowledged IRP that is filed in accordance with OAR 860-027-0400(9).

(7) "Qualifying facility" refers to qualifying facilities under 16 USC § 796(17) and (18) (2012) and ORS 758.505(8).

(8) "Request for proposals" or "RFP" means all documents, whether attached or incorporated by reference, used for soliciting proposals from prospective bidders.

(9) "Resource acquisition" refers to a process for the purpose of acquiring energy, 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 a final offer or receipt of a final offer in a two-party negotiation.

Stat. Auth.: ORS Ch. 183, 756, 758, 2016 OL Ch. 28
Stats. Implemented: ORS 756.040, 758.060, 2016 OL Ch. 28, Sect. 6
Hist.: NEW

860-089-0100
Applicability of Competitive Bidding Requirements

(1) An electric company must comply with the rules in this division when it seeks to acquire generating or storage resources or to contract for energy or capacity if any of the following apply:

(a) The acquisition is of a resource or a contract for more than an aggregate of 80 megawatts and five years in length;

(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;

(c) The acquisition is of multiple resources more than five years in length that in aggregate provide the electric company with more than an aggregate of 80 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; or

(d) As directed by the Commission.

(2) An electric company may request that the Commission find that resources presumed to be subject to subsection (1)(c) of this rule should not be considered in the aggregate. The electric company may make this request before acquiring the resources. The electric company bears the burden of rebutting the presumption that the acquisition is subject to these rules by showing each resource is separate and distinct.

(3) An electric company is not required to comply with the competitive bidding requirements to acquire a resource otherwise subject to section (1) of this rule when:

(a) There is an emergency; meaning a human-caused or natural catastrophe resulting from an unusual and unexpected event, including but not limited to earthquake, flood, war, or a catastrophic energy plant failure, that requires an electric company to take immediate action;

(b) There is a time-limited opportunity to acquire a resource of unique value to the electric company's customers;

(c) An alternative acquisition method was proposed by the electric company in the IRP and explicitly acknowledged by the Commission; or

(d) Seeking to exclusively acquire transmission assets or rights.

(4) Within 30 days of seeking to acquire a resource under section (3) of this rule, the electric company must file a report with the Commission explaining the relevant circumstances. The report must be served on all the parties to the electric company's most recent rate case, RFP, and IRP dockets.

Stat. Auth.: ORS Ch. 183, 756, 758, 2016 OL Ch. 28
Stats. Implemented: ORS 756.040, 758.060, 2016 OL Ch. 28, Sect. 6
Hist.: NEW

860-089-0200
Engaging an Independent Evaluator

(1) Prior to issuing an RFP, an electric company must engage the services of an IE to oversee the competitive bidding process. The electric company must notify all parties to the electric company's most recent general rate case, RFP, and IRP dockets of its need for an IE, and solicit input from these parties and interested persons regarding potential IE candidates.

(2) The electric company must file a request for Commission approval to engage an IE. The Commission Staff will review the request and recommend an IE to the Commission based in part on the consideration of:

(a) Input received from the electric company and interested, non-bidding parties;

(b) Review of the degree to which the IE is independent of the electric company and potential bidders;

(c) The degree to which the cost of the services to be provided is reasonable;

(d) The experience and competence of the IE; and

(e) The public interest.

(3) The electric company is responsible for engaging the services of the IE and is responsible for all fees and expenses associated with engaging the IE's services. The electric company may request recovery of fees and expenses associated with engaging an IE in customer rates.

(4) The electric company's contract with the IE must require that the IE fulfills its duties under these rules and that the IE confers as necessary with the Commission and Commission Staff on the IE's duties.

Stat. Auth.: ORS Ch. 183, 756, 758, 2016 OL Ch. 28
Stats. Implemented: ORS 756.040, 758.060, 2016 OL Ch. 28, Sect. 6
Hist.: NEW

860-089-0250
Design of Requests for Proposals

(1) For each resource acquisition, the electric company must prepare a draft request for proposals for review and approval with the Commission, and provide copies of the draft to all parties to the IE selection docket. Prior to filing the draft RFP with the Commission, the electric company must consult with the IE in preparing the RFP and must conduct bidder and stakeholder workshops.

(2) The draft RFP must reflect any 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.

(a) Unless the electric company intends to use an RFP whose design, scoring methodology, and associated modeling process were included as part of the Commission-acknowledged IRP, the electric company must, prior to preparing a draft RFP, develop and file for approval in the electric company's IE selection docket, a proposal for scoring and any associated modeling.

(b) In preparing its proposal, the electric company must consider resource diversity *(e.g.* with respect to technology, fuel type, resource size, and resource duration).

(3) At a minimum, the draft RFP must include:

(a) Any minimum bidder requirements for credit and capability;

(b) Standard form contracts to be used in acquisition of resources;

(c) Bid evaluation and scoring criteria that are consistent with section (2) of this rule and with OAR 860-089-0400;

(d) Language to allow bidders to negotiate mutually agreeable final contract terms that are different from the standard form contracts;

(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;

(f) Bid evaluation and scoring criteria for selection of the initial shortlist of bidders and for selection of the final shortlist of bidders consistent with the requirements of OAR 860-089-0400.

(g) The alignment of the electric company's resource need addressed by the RFP with an identified need in an acknowledged IRP or subsequently identified need or change in circumstances with good cause shown; and

(h) The impact of any applicable multi-state regulation on RFP development, including the requirements imposed by other states for the RFP process; and

(4) 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.

(5) The Commission may approve the RFP with any conditions it deems necessary, upon a finding that the electric company has complied with the provisions of these rules and that the draft RFP will result in a fair and competitive bidding process.

(6) The Commission will generally issue a decision approving or disapproving the draft RFP within 80 days after the draft RFP is filed. An electric company may request an alternative review period when it files the draft RFP for approval including a request for expedited review upon a showing of good cause. Any person may request an extension of the review period of up to 30 days upon a showing of good cause.

Stat. Auth.: ORS Ch. 183, 756, 758, 2016 OL Ch. 28
Stats. Implemented: ORS 756.040, 758.060, 2016 OL Ch. 28, Sect. 6
Hist.: NEW

860-089-0300
Resource Ownership

(1) An electric company may submit or allow its affiliates to submit bids in response to the electric company's request for proposals.

(a) Electric company and affiliate bids must be treated in the same manner as other bids.

(b) Any individual who 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.

(2) An electric company may propose a benchmark bid in response to its RFP to provide a potential cost-based alternative for customers. The electric company may make elements of the

benchmark resource owned or secured by the electric company (*e.g.,* site, transmission rights, or fuel arrangements) available for use in third-party bids.

(3) If benchmark bid elements secured by the electric company are not made available to all bidders, it must provide analysis explaining that decision when seeking RFP acknowledgement and recovery of the costs of the resource in rates.

(a) If electric company resources are offered and made available for use in third-party bids, then the RFP may provide for appropriate compensation of electric company resources by third-party bidders.

(b) Separate electric company affiliate bids are not subject to this section of this rule, and no information on any decision to offer the use of separate electric company affiliate-owned elements to third-parties is required to be supplied to the Commission.

(4) An electric company may consider ownership transfers within an RFP solicitation.

(5) The electric company issuing the RFP must allow independent power producers to submit bids with and without an option to renew, and may not require that bids include an option for transferring ownership of the resource.

Stat. Auth.: ORS Ch. 183, 756, 758, 2016 OL Ch. 28
Stats. Implemented: ORS 756.040, 758.060, 2016 OL Ch. 28, Sect. 6
Hist.: NEW

860-089-0350
Benchmark Resource Score

(1) Prior to the opening of bidding on an approved RFP, the electric company must file with the Commission and submit to 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.

(2) If, during the course of the RFP process, the Commission or the IE determines that it is appropriate to update any bids, the electric company must also make the equivalent update to the score of the benchmark resource.

(3) Before the IE provides the electric company an opportunity to score other bids, the electric company must file with the Commission and submit via a method that protects confidentiality the following information:

(a) The final benchmark resource score developed in consultation with the IE, and

(b) Cost information and other related information shared under this rule.

Stat. Auth.: ORS Ch. 183, 756, 758, 2016 OL Ch. 28
Stats. Implemented: ORS 756.040, 758.060, 2016 OL Ch. 28, Sect. 6
Hist.: NEW

860-089-0400
Bid Scoring and Evaluation by Electric Company

(1) To help ensure that the electric company engages in a transparent bid-scoring process using objective scoring criteria and metrics, the electric company must provide all proposed and final scoring criteria and metrics in the draft and final RFPs filed with the Commission.

(2) The electric company must base the scoring of bids and selection of an initial shortlist on price and, as appropriate, non-price factors. Non-price factors must be converted to price factors where practicable. Unless otherwise directed by the Commission, the electric company must use the following approach to develop price and non-price scores:

(a) Price scores must be based on the prices submitted by bidders and calculated using units that are appropriate for the product sought and technologies anticipated to be employed in responsive bids using real-levelized or annuity methods. The IE may authorize adjustments to price scores on review of information submitted by bidders.

(b) Non-price scores must, 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. Non-price scoring criteria must be objective and reasonably subject to self-scoring analysis by bidders.

(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.

(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.

(4) The electric company may select an initial shortlist of bids after it has scored the bids and identified the bids with top scores. Following selection of an initial shortlist of bids, the electric company may select a final shortlist of bids.

(5) Unless an alternative method is approved by the Commission under OAR 860-089-0250(2)(a), selection of the final shortlist of bids must be based on bid scores and the results of modeling the effect of candidate resources on overall system costs and risks using modeling methods that are consistent with those used in the Commission-acknowledged IRP.

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

(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:

(A) Changes in non-price scores; and

(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.

(6) The electric company must provide the IE and Commission with full access to its production cost and risk models and sensitivity analyses. When the IE and Commission 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.

Stat. Auth.: ORS Ch. 183, 756, 758, 2016 OL Ch. 28
Stats. Implemented: ORS 756.040, 758.060, 2016 OL Ch. 28, Sect 6
Hist.: NEW

860-089-0450
Independent Evaluator Duties

(1) The IE will oversee the competitive bidding process to ensure that it is conducted fairly, transparently, and properly.

(2) The IE must be available and responsive to the Commission throughout the process, and must provide the Commission with the IE's notes of all conversations and the full text of written communications between the IE and the electric company and any third-party that are related to the IE's execution of its duties.

(3) The IE must consult with the electric company on preparation of the draft RFP and submit its assessment of the final draft RFP to the Commission when the company files the final draft for approval.

(4) The IE must check whether the electric company's scoring of the bids and selection of the initial and final shortlists are reasonable.

(5) To determine if the electric company's selections for the initial and final shortlists are reasonable, when 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. When the IE does not score all bids, and 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.

(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, 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);

(b) Reasonableness of forced outage rates;

(c) Reasonableness of any proposal or absence of a proposal to offer electric company owned or benchmark resource elements (e.g., site, transmission rights or fuel arrangements) to third-party bidders as part of the draft and final RFP;

(d) End effect values;

(e) Environmental emissions costs;

(f) Reasonableness of operation and maintenance costs;

(g) Adequacy of capital additions costs;

(h) Reasonableness of performance assumptions for output, heat rate, and power curve; and

(i) Specificity of construction schedules or risk of construction delays.

(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 file their scores with the Commission. The IE and electric company must compare results and attempt to reconcile and resolve any scoring differences. If the electric company and IE are unable to resolve scoring differences, the IE must explain the differences in its closing report to the Commission.

(8) The IE must review the electric company's sensitivity analysis of the bid rankings required under OAR 860-089-0400 and file a written assessment with the Commission prior to the electric company requesting acknowledgment of the final short list.

(9) The IE must file a closing report with 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 the least-cost, least-risk acquisition of resources. The Commission may request that the IE include additional analysis in its closing report.

(10) Unless the Commission directs otherwise, the IE must participate in the final short list acknowledgment proceeding initiated by the electric company, and must continue to participate if, at the time of acknowledgment of the electric company's final shortlist, the Commission chooses to require IE involvement through final resource selection. In addition to making a decision on acknowledgment, the Commission, on its own motion or at the request of other parties, including bidders, may require expanded IE involvement. Upon such a request or its own motion, the Commission may require an IE to be involved in the competitive bidding process through final resource selection.

Stat. Auth.: ORS Ch. 183, 756, 758, 2016 OL Ch. 28
Stats. Implemented: ORS 756.040, 758.060, 2016 OL Ch. 28, Sect. 6
Hist.: NEW

860-089-0500
Final Short List Acknowledgement and Result Publication

(1) For the purposes of this section, "acknowledgment" is a finding by the Commission that an electric company's final shortlist of bid responses appears reasonable at the time of acknowledgment and was determined in a manner consistent with the rules in this division.

(2) An electric company must request that the Commission acknowledge the electric company's final shortlist of bids before it may begin negotiations. Acknowledgment of a shortlist has the same legal force and effect as a Commission-acknowledged IRP in any future cost recovery proceeding.

(3) A request for acknowledgement must include, at a minimum, the IE's closing report, the electric company's final shortlist of responsive bids, all sensitivity analyses performed, and a discussion of the consistency between the final shortlist and the electric company's last-acknowledged IRP Action Plan or acknowledged IRP Update.

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

(5) The electric company must make a publicly available filing in the RFP docket providing the average bid score and the average price of a resource on its final shortlist.

(6) Following execution of all contracts resulting from an RFP or cancellation of the RFP, the electric company must provide information, on request, to a bidder about the bidder's bid score.

Stat. Auth.: ORS Ch. 183, 756, 758, 2016 OL Ch. 28
Stats. Implemented: ORS 756.040, 758.060, 2016 OL Ch. 28, Sect. 6
Hist.: NEW

860-089-0550
Protected Information

The electric company may request a protective order be issued prior to making available protected information required to be shared under the rules in this Division. 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, 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.

Stat. Auth.: ORS Ch. 183, 756, 758, 2016 OL Ch. 28
Stats. Implemented: ORS 756.040, 758.060, 2016 OL Ch. 28, Sect. 6
Hist.: NEW