ORDER NO. 01-073

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 390

In the Matter of a Proposed Rulemaking to Implement the Code of Conduct, Aggregation, and Allocation of Funds to Education Service District Provisions of SB 1149.	))))	ORDER

DISPOSITION: RULES ADOPTED/AMENDED

On July 23, 1999, the Governor signed SB 1149, the electric industry restructuring bill passed by the 1999 Oregon Legislative Assembly. On February 14, 2000, the Public Utility Commission of Oregon opened a rulemaking proceeding, docket AR 380, to develop rules to implement a substantial portion of the provisions of SB 1149. An order was issued in that docket on September 28, 2000. *See* Order No. 00-596.

The Commission decided to address the rules regarding code of conduct, aggregation, and allocation of funds to education service districts (ESD) in a separate docket. On August 8, 2000, this rulemaking proceeding, docket AR 390, was opened to develop rules to implement those provisions. Notice of the rulemaking and a statement of the fiscal impact were filed with the Oregon Secretary of State in August 2000. Notice of the rulemaking was published in the Oregon Bulletin on September 1, 2000.

On September 22, 2000, a public hearing and workshop were held, during which a schedule was adopted for completing this proceeding. The Commission Staff (Staff) and interested persons held workshops and informal discussions during the month of October. Opening comments were filed by October 16, 2000, and reply comments by November 3, 2000. PacifiCorp, Portland General Electric (PGE), PG&E National Energy Group, Electric Power Supply Association (EPSA), Oregon State Association of Electrical Workers, The Fair and Clean Energy Coalition (FCEC), Pacific Northwest Generating Cooperative (PNGC), Industrial Customers of Northwest Utilities (ICNU), and Staff filed written comments.

On December 18, 2000, the Commission deliberated on this matter at a special public meeting in Salem, Oregon. The Commission entered the decisions set out in this order.

Format of Order

This order has four sections:

(1) The scope and definitional changes in OAR 860-038-0001 and 860-038-0005;
(2) The aggregation provisions;
(3) An amendment to the public purposes rule and two minor amendments to OAR 860-029-0001 and 860-030-0000; and
(4) The new code of conduct rules.

The rules as adopted are set out in Appendix A and incorporated herein by reference.

I. Scope and Applicability of Rules; Definitions

Staff's proposed amendments to OAR 860-038-0001 are housekeeping measures that address the entities to which the rules apply. There was little discussion in the comments, and the participants did not have any disputes with the rule as finally proposed by Staff. We adopt the proposed language as set forth in Staff's reply comments received November 3, 2000. That rule, as amended, now reads:[1]

> (1) The rules contained in this division apply to electric companies and electricity service suppliers, except that these rules do not apply to an electric company serving fewer than 25,000 consumers in this state unless the electric company:
> (a) Offers direct access to any of its retail electricity consumers in this state; or
> (b) Offers to sell electricity services available under direct access to more than one retail electricity consumer of another electric **company** in this state.
> (2) Except as otherwise provided in these rules, an electric company must comply with all other divisions of OAR Chapter 860.
> **(3) OAR 860-038-0380, sections (1) through (9), apply to aggregators; section (10) applies to electric companies.**

As for OAR 860-038-0005, Staff proposed adding new definitions to this rule. Participants agreed that subsection (10), Confidential Information, did not need to be included. Participants agreed on the language of subsection (25), Fully Distributed Cost, set out below, which we adopt:

[1] Text in **boldface** is new text in the rules.

(25) "Fully distributed cost" means the cost of an electric company good or service calculated in accordance with the procedures set forth in OAR 860-038-0200.

We address each of the remaining definitions in turn.

(3) Affiliate

Staff proposed to define "affiliate" by reference to ORS 757.015. Staff's proposed language, while technically correct, becomes confusing when read with the cited statute. Staff's recommended language alludes to the use of the term "affiliate" in the statutory language. However, the statute contains no mention of the word "affiliate," only the words "affiliated interest."

PGE suggested narrowing the definition to define an affiliate as a company providing electricity under direct access in Oregon that has an affiliated interest with an electric company. This recommended language is too narrow and limits the determination of an affiliate much more than anticipated by the statute.

Commission Disposition

To clarify the meaning of this definition, we incorporate the definition included in ORS 757.015. Therefore, we adopt the following language:

(3) "Affiliate" means a corporation or person who has an affiliated interest, as defined in ORS 757.015, with a public utility.

~~**(6) Arm's length transaction**~~

Staff proposed the following definition:

"Arm's length transaction" means the standard of conduct under which unrelated parties, each acting in its own best interest, would carry out a particular transaction. Applied to related parties, a transaction is at arm's length if the transaction mirrors the terms and conditions that a disinterested third party could expect in a bargained transaction.

The only comment was made by PGE, who recommended deleting the definition because it recommended striking the sentence in which the term was used in proposed OAR 860-038-0500.

In reviewing the comments and language, it is not clear from this definition how one determines whether parties are "related" or "unrelated." It is possible to clarify this issue by changing the words to "affiliated" and "nonaffiliated" as those terms are defined by both statute and these rules. It is also possible to adopt the statutory

definition found in ORS 321.257, a forestland and privilege tax statute, which defines the term as "a transaction made in the open market where there is no duress, where each party is independent of the other and where there are no trades or hidden considerations involved." The difficulty with using this statutory language is that affiliates, as that term is defined in this rule, are not independent of each other, and therefore transactions between affiliated parties would violate the definitional language.

We find that it is not necessary to define this phrase. First, there is a common meaning attached to these words. Second, this phrase is used only once in the rules, and then only in the "purpose" section of the rule. If at some point in the future it becomes necessary to define this term, we will do so.

Commission Disposition

Based on the above discussion, we decline to add any language defining "arm's length transaction."

(8) Competitive operation

PGE initially commented, as noted above, that the code of conduct should apply only to the provision of electricity services. Based on this comment, Staff modified its proposed definition of "competitive operation" by restricting it to activities related to providing electricity services rather than the sale of any goods or services by the electric company.

Interestingly, PGE's reply comments suggested an expansion of the definition of "competitive operation" to include not only the sale of goods and services for which there *are* reasonable alternatives, but the sale of goods and services for which there *could be* reasonable alternatives.

Commission Disposition

Although there was very little comment on this rule, we find Staff's proposed rule to be reasonable. The rule covers *any* activity, not solely the sale of goods and services, that is related to the provision of electricity services by the company's nonregulated operation or its affiliate. Staff's proposed rule as set forth in its November 3, 2000, comments is adopted. The subsection reads:

> **(8) "Competitive operation" means any activities related to the provision of electricity services conducted by the electric company's nonregulated operation or the electric company's affiliate.**

(18) Electric company operational information

Staff did not propose this definition in its initial draft of the rules, but a large portion of the definition was found in the definitional rule concerning confidential information. As previously noted, the parties agreed to delete the definition of confidential information. The portion of the rule regarding company operational information was placed in this proposed definitional rule. As noted by Staff, these disclosure issues relate to the dissemination of information to competitors and are not specific to confidential information.

PGE objected to Staff's language. PGE proposed to eliminate the clause regarding "information relating to the interconnection of customers to an electric company's transmission or distribution systems, trade secrets, [and] competitive information relating to internal processes" along with deleting the phrase regarding "plans for expansion." PGE believes these issues should be addressed in each electric company's tariffs or by a separate rulemaking. PGE believes adoption of these rules is premature. PacifiCorp supports PGE in its position.

Commission Disposition

This definition relates to the main issues involving the code of conduct and access that are addressed in Section IV of this order. We reserve further comment on the merits of the arguments until then. Based on our decision in that section, however, we adopt Staff's proposed rule as found in the November 3, 2000, reply comments. The subsection reads:

> **(18) "Electric company operational information" means information relating to the interconnection of customers to an electric company's transmission or distribution systems, trade secrets, competitive information relating to internal processes, market analysis reports, market forecasts, and information about an electric company's transmission or distribution system, operations, or plans or strategies for expansion.**
>
> **(27) Joint marketing**

This definition went through several drafts in the course of deliberations. PGE and PacifiCorp support eliminating this rule, while Staff supports a somewhat modified version of its initial proposal. The rule, as currently proposed, defines joint marketing as the offering of retail electricity services by an electric company in conjunction with its competitive operation to consumers. The electric company, its affiliate, or a consumer can initiate contact.

Commission Disposition

Generally, we support defining terms and phrases in administrative rules. This allows the parties in a proceeding to know the Commission's frame of reference for decision making. Further, it aids the parties in making a determination about the applicability, or lack thereof, of a rule to a particular set of facts. The definition of this rule, as proposed by Staff, is straightforward. The remaining issues involving marketing, which are the backdrop for PGE's objection, will be addressed later in this order. We adopt Staff's recommendation as set forth in its November 3, 2000, reply comments. The subsection reads:

> **(27) "Joint marketing" means the offering (including marketing, promotion, and/or advertising) of retail electric services by an electric company in conjunction with its competitive operation to consumers either through contact initiated by the electric company, its affiliate, or through contact initiated by the consumer.**
>
> **(46) Proprietary consumer information**

There is considerable dispute about how to define this term. As stated earlier, these definitional differences among the participants concern the extent of Commission involvement in implementing SB 1149. Again, these arguments will be addressed in greater detail in Section IV.

PGE, in essence, wishes to make Staff's proposed rule less specific and reduce it to addressing distribution and transmission services to consumers. Staff's proposal sets forth the ways that proprietary consumer information could be identified.

Commission Disposition

The inherent difficulty with enumerating situations that can be construed as divulging consumer information is that one cannot anticipate all possible situations. It appears that the dispute in this rule centers more on the format than the content, although there are a few contextual differences. Nevertheless, we find as we venture into this area that more explanation is better than less. Staff's proposal attempts to outline the myriad ways that an electric company could compile proprietary consumer information. We adopt Staff's proposed rule as set forth in its reply comments, with the caveat that this list is not exhaustive. That subsection reads:

> **(46) "Proprietary consumer information" means any information compiled by an electric company on a consumer in the normal course of providing electric service that makes possible the identification of any individual consumer by matching such information with the consumer's name, address, account number, type or classification of service, historical electricity usage, expected patterns of use, types of**

facilities used in providing service, individual contract terms and conditions, price, current charges, billing records, or any other information that the consumer has expressly requested not be disclosed. Information that is redacted or organized in such a way as to make it impossible to identify the consumer to whom the information relates does not constitute proprietary consumer information.

(57) Site

ORS 757.600(31) defines the term "site."[2] The Commission adopted this language in Order No. 00-596, docket AR 380, and is currently found at subsection (57).

Subsequent to adoption of this definition, the participants differed as to how to measure 1,000 feet and how to define "contiguous." The need for further clarification was raised by ORS 757.612(5)(a), which provides that "a retail electricity consumer that uses more than one average megawatt of electricity at any *site* in the prior year shall receive a credit against public purpose charges billed by an electric company for that *site*" (emphasis added). Some participants believed that without further definition, it was unclear who qualified for self-direction of the public purposes charges. The participants were unable to reach any consensus on defining the term "site" as used in this context.

Participants raised two main issues. First, should the 1,000 foot criterion apply to all facilities within 1,000 feet of each other, or could facilities stretch out 1,000 feet from one to the next in a chain? Second, is land contiguous if there is an intervening right of way? The situations discussed were areas such as Oregon State University or a company facility such as Hewlett-Packard, which stretches several miles with intervening public rights of way.

Many of the participants agreed that entities such as Hewlett-Packard and Oregon State University should be considered single sites. The concern arose, however, in making the definition too broad. Staff and others did not want such facilities as street lights or other groups of facilities not commonly considered a single site to qualify as such.

PGE and PacifiCorp wanted the statutory definition to remain in the rules without further modification. The Industrial Customers of Northwest Utilities (ICNU) supported Staff's final proposal as set forth in the November 3, 2000, reply comments. The Fair and Clean Energy Coalition (FCEC) believes that Staff's proposal goes beyond

[2]That subsection reads:

> "Site" means a single contiguous area of land containing buildings or other structures that are separated by not more than 1,000 feet, or buildings and related structures that are interconnected by facilities owned by a single retail electricity consumer and that are served through a single electric meter.

the original intent of the bill, particularly considering the negotiated agreements reached between ICNU and FCEC during the legislative process that led to SB 1149.

FCEC argues that all the facilities should be within 1,000 feet of each other. While understanding the situations discussed by the participants as to Hewlett-Packard and Oregon State University, FCEC believes allowing a "chain" designation raises more issues than it resolves. It is also not the definition contemplated by the statutory language. FCEC further argues that the inclusion of rights of way within the definition of contiguous land undermines common sense. According to FCEC, there was an intent to balance ICNU's desire to have the term "site" defined with FCEC's desire to limit the definition to avoid unreasonable results during the legislative process.

Commission Disposition

We appreciate the issues raised by the participants regarding the interpretation of this language. We believe that Staff's proposed rule respects legislative intent and defines the term "site" in such a way that abuses of the definition are unlikely to occur. Still, out of caution, we note that Staff's November 3, 2000, reply comments promised to monitor consumer requests to qualify as single sites and request rule changes as necessary. As we proceed to implement this legislation, these types of issues will become more defined by the facts and circumstances of each situation. At that point, if necessary, we can revisit this issue.

We amend the definition of "site" to read:

(57) "Site" means:
(a) Buildings and related structures that are interconnected by facilities owned by a single retail electricity consumer and that are served through a single electric meter; or
(b) A single contiguous area of land containing buildings or other structures that are separated by not more than 1,000 feet, such that:
(A) Each building or structure included in the site is no more than 1,000 feet from at least one other building or structure in the site;
(B) Buildings and structures in the site, and land containing and connecting buildings and structures in the site, are owned by a single retail electricity consumer who is billed for electricity use at the buildings and structures; and
(C) Land shall be considered to be contiguous even if there is an intervening public or railroad right of way, provided that rights of way land, on which municipal infrastructure facilities exist (such as street lighting, sewerage transmission, and roadway controls), shall not be considered contiguous.

II. Aggregation Provisions, OAR 860-038-0380

Staff has proposed one new rule in this section. Initially, the proposed rule required aggregators to provide information about their owners, to identify the services to be offered, and to identify the targeted customer classes. Additionally, the rule included a process for revoking an aggregator's registration. After comments from the participants and advice from legal counsel, the information required of aggregators was limited and the process for revoking an aggregator's registration was eliminated. The participants reached consensus on the final proposed rule. We adopt the rule as proposed by Staff in its November 3, 2000, reply comments. The rule now reads:

> **Aggregation**
> **(1) For purposes of ensuring compliance with Commission standards for consumer protection, an aggregator must be registered by the Commission to combine retail electricity consumers in the service territory of an electric company into a buying group for the purchase of electricity and related services.**
> **(2) The initial registration fee is $50.**
> **(3) The annual renewal fee is $25.**
> **(4) At a minimum, the aggregator must supply the following information:**
> **(a) Name of aggregator;**
> **(b) Name, address, and phone number of the aggregator's regulatory contact; and**
> **(c) A signed statement from an authorized representative of the aggregator declaring that all information provided is true and correct.**
> **(5) At a minimum, the aggregator must attest that it will:**
> **(a) Furnish to consumers a toll-free number or local number that is staffed during normal business hours to enable a consumer to resolve complaints or billing disputes and a statement of the aggregator's terms and conditions that detail the consumer's rights and responsibilities;**
> **(b) Comply with all applicable state and federal laws, rules, and Commission orders applicable to aggregators; and**
> **(c) Adequately respond to Commission information requests applicable to aggregators and related to the provisions of this rule within 10 business days.**
> **(6) An aggregator must take all reasonable steps, including corrective actions, to ensure that persons or agents hired by the aggregator, including but not limited to officers, directors, agents, employees, representatives, successors, and assigns adhere at all times to the terms of all state and federal laws, rules, and Commission orders applicable to aggregators.**
> **(7) Annually, 30 days prior to expiration, a registered aggregator must notify the Commission that it will not be renewing its**

registration or it must renew its registration by submitting an application for renewal that includes an update of information specified in section (4) of this rule. The aggregator must state that it continues to attest that it will meet the requirements of section (5) of this rule. The authorized representative of the aggregator must state that all information provided is true and correct and sign the renewal application. The renewal is granted for a period of one year from the expiration date of the prior registration.
(8) No aggregator may make material misrepresentations in consumer solicitations, agreements, or in the administration of consumer contracts. Aggregators may not engage in dishonesty, fraud, or deceit that benefits the aggregator or disadvantages consumers.
(9) An aggregator must promptly report to the Commission any circumstances or events that materially alter information provided to the Commission in the registration process.
(10) The electric company must allow aggregation of electricity loads, pursuant to ORS 757, which may include aggregation of demand for other services available under direct access.

III. Public Purposes Provisions

OAR 860-029-0001, Purpose; OAR 860-030-0000, Exemptions

Staff proposed two minor amendments to these rules. The participants agreed on these amendments, and they are reasonable in light of the requirements of SB 1149. We adopt those amendments to the rules. The following sentence was added to OAR 860-029-0001: **The rules contained in this Division do not apply to public utilities that satisfy their public purpose obligations under ORS 757.612.**

OAR 860-030-0000 now reads:

Exemptions
(1) Except as provided in section (2) of this rule, the rules contained in this Division do not apply to unincorporated associations and cooperative corporations or to investor-owned electric utilities that satisfy their public purpose obligations under ORS 757.612.
(2) These rules apply to investor-owned electric utilities to the extent required by ORS 469.860 through 469.900.

OAR 860-038-0480, Public Purposes

As previously noted, AR 380 addressed many areas of SB 1149, including public purposes. Before the Commission took action on AR 380, Staff, responding to legislatively imposed time constraints, filed proposed rules in this docket with the assumption that the public purposes rule set forth in AR 380 would be adopted.

However, the public purposes portion of the rule in AR 380 was not adopted in August 2000. We chose instead to remove the public purposes section of the rule due to potential legal issues and address it at a later time. The parties have agreed to the rule change in Section (15) of OAR 860-038-0480. The remaining sections of the rule were adopted in the same public meeting.

Commission Disposition

The proposed amendment to OAR 860-038-0480(15) is adopted. That subsection now reads:

> **(15) Each electric company will determine by July 15 of each year the allocation of public purpose funds for schools to the Education Service Districts according to the following methodology:**
> **(a) From the Department of Education, collect current total weighted average daily membership (ADMw) as defined in ORS 327.013 and average daily membership (ADM) for each Education Service District that contains schools served by the electric company;**
> **(b) For each of the Education Service Districts, compute the ratio of ADM in schools served by the electric company to total ADM;**
> **(c) For each Education Service District, multiply its total ADMw by the ratio of ADM in schools served by the electric company to total ADM. The result is an estimate of ADMw in schools served by the electric company;**
> **(d) Add the estimates of ADMw for each Education Service District; and**
> **(e) Compute the percentage of the total ADMw represented by each Education Service District. These are the percentages that will be used to allocate the public purpose funds for schools to Education Service Districts for the 12-month period beginning in September of each year.**

IV. Code of Conduct Provisions

These rules were the focus of much debate. Some progress was made in reaching agreement, but participants still differ about the type of Commission involvement necessary to implement and enforce a code of conduct.

PGE argued three principles to support changes to Staff's proposed rules. As set forth in its opening comments of October 16, 2000, PGE states that: (1) the code should apply only to the provision of electric services, and not to any other business, service, or commodity; (2) the code should not prohibit PGE or affiliate activities, but, rather, should delineate conditions under which PGE and affiliates may participate; and (3) the code should simply require "fair treatment of all competitors by the distribution utility," citing ORS 757.646(3)(g), and not attempt to establish ratemaking treatment.

PGE further requested that the rules contain a provision that the Code of Conduct rules expire on June 30, 2002. PacifiCorp's opening comments supported PGE's position.

The Oregon State Association of Electrical Workers wanted a clear focus on the issue of protecting contractors and workers from affiliates subsidized by utilities. This included strengthening certain provisions of the rules and making certain that compliance procedures with penalties were adopted.

The Electric Power Supply Association (ESPA) did not supply language changes in its opening comments of October 16, 2000. Instead, ESPA set as goals for the rulemaking the avoidance of cross-subsidization and cost-shifting, the assurance of nondiscriminatory access to utility services and information, the presence of safeguards for commercially sensitive information, and the prohibition on utilities taking unfair advantage of their incumbency in the market.

PG&E National Energy Group's opening comments addressed the inadequacy of the Federal Energy Regulatory Commission's (FERC) affiliate transaction rules, set forth anticompetitive behavior problems encountered in other states, and suggested specific modifications to the transmission access rules.

Staff also suggested changes to the proposed rules in its opening comments filed October 16, 2000. Some of the changes were based on legal advice and some resulted from discussions with the participants. Staff recognized that the release of consumer information needed to be safeguarded and fairly treated, whether the release is to an affiliate or another entity. Staff incorporated changes into the definitions and code of conduct rules to meet these needs. Staff also eliminated language about pricing restrictions in the cross-subsidization rule.

The participants' reply comments by the participants set forth the remaining disputes. One dispute is the extent of Commission regulation in preventing cross-subsidization between a utility and its affiliates, and, in particular, the treatment by a utility of its own in-house operations during the development, offering, and scheduling of a nonresidential standard offer. Another area of contention is the amount of monitoring and compliance enforcement to be performed by the Commission, including how often audits should be filed by the electric companies and penalties for failure to comply with the code. Finally, the participants are divided not only on the breadth and content of the transmission and distribution access rules, but also about whether they should even be included in this rulemaking. One suggestion was to either hold a separate rulemaking or determine these procedures within the context of the current rate cases (Dockets UE 115 and UE 116).

With this background, we will address each proposed rule separately.

OAR 860-038-0500, Code of Conduct Purpose

Staff's reply comments propose mission language for this section, describing the intent and purpose of the following rules rather than establishing specific requirements. There is one proposed sentence, however, that is specific: "All transactions between utilities and their competitive affiliates must be at arm's length." PGE requested that this language be stricken.

Earlier in this order we set forth our decision to eliminate the definition of "arm's length." However, it is not appropriate for the phrase to be removed from the rules. The parties need to understand how the Commission will view transactions between entities and that we need to make certain that "sweetheart" deals based on inside information do not compromise the fair treatment requirements of SB 1149.

Commission Disposition

Staff and PGE agreed to replace "affiliates" in the first sentence with "affiliates engaged in competitive operations." In the sentence beginning "All transactions" Staff and PGE agreed to replace the term "competitive affiliates" with "affiliates." Apart from those changes, the rule reflects Staff's November 3, 2000, reply comments. The Commission adopted the rule as modified. That rule reads:

> **Code of Conduct Purpose**
> **The provisions of this section, addressing code of conduct, establish the safeguards to govern the interactions/transactions between electric companies and their affiliates engaged in competitive operations, both during the transition to and after the introduction of competition, to avoid potential market power abuses and cross-subsidization between regulated and unregulated activities. All transactions between utilities and their affiliates shall be at arm's length. These rules also address activities conducted within the electric company that are subject to competition and other electric company practices in the competitive market.**

OAR 860-038-0520, Electric Company Name and Logo

Staff's proposed rule sets forth the use of the electric company's name and logo by an affiliate, along with the format of the disclaimer that must be used by an affiliate. PGE's attempt to simplify the language is useful, but we prefer more explanation, rather than less, at the beginning stage of change. As there was little discussion surrounding this issue in the reply comments, we find that the participants have agreed in concept to Staff's proposal.

Commission Disposition

Staff and PGE agreed to the following changes from Staff's proposed rule submitted in its November 3, 2000, reply comments. In the first paragraph, after "affiliate," insert "engaged in competitive operations." In subsection (a), after the first use of the word "affiliate," insert "engaged in competitive operations." In subsection (b), after the first use of the word "affiliate," insert "engaged in competitive operations." We adopt the proposed rule as modified. The rule now reads:

> **Electric Company Name and Logo**
> **Unless the affiliate engaged in competitive operations includes a disclaimer with its use of the electric company's corporate name, trademark, brand, or logo:**
> **(a) An electric company shall not allow the use of its corporate name, trademark, brand, or logo by an affiliate engaged in competitive operations, on the affiliate's employee business cards, or in any written or auditory advertisements of specific services to existing or potential consumers located within the electric company's service area. This would apply whether use is through radio, television, the Internet, or other publicly accessible electronic format.**
> **(b) Such disclaimer of the corporate name, trademark, brand, or logo in the material distributed must be written in a bold and conspicuous manner or clearly audible, as appropriate for the communication medium. The disclaimer shall state the following: '{Name of affiliate engaged in competitive operations} is not the same company as {name of electric company} and is not regulated by the Public Utility Commission of Oregon, and you do not have to buy {name of affiliate}'s products to continue to receive quality regulated services from {name of electric company}.'**

OAR 860-038-0540, Consumer Information

PGE proposed to rename the rule "Disclosure of Information" and focus the rule on making consumer and operational information available to all market participants on a comparable basis. While PGE's stated intent has merit, the issue concerning other participants, including Staff, is the privacy and protection of consumer information. We find that it is more logical to draft the rule, in this circumstance, to address these concerns rather than to implement a rule making all information available to everyone on a comparable basis. However, as we work our way through this process, if we need to modify the rule to implement PGE's method, we can take such action. The rule proposed by Staff, and accepted by most of the participants, addresses the main concern of the involved parties.

Commission Disposition

We adopt the proposed rule submitted by Staff in its November 3, 2000, reply comments. The rule reads:

> **Consumer Information**
> **(1) An electric company shall implement adequate safeguards precluding employees of its competitive operation, ESS, or other entity from gaining access to information in a manner that would:**
> **(a) Allow or provide a means to transfer proprietary consumer information from an electric company to its competitive operation, ESS, or other entity without the written consent of the customer;**
> **(b) Create an opportunity for preferential treatment or unfair competitive advantage;**
> **(c) Lead to consumer confusion; or**
> **(d) Create significant opportunities for cross-subsidization of its competitive operations.**
> **(2) An electric company must determine the types of proprietary consumer information that will be made available to its competitive operations, ESSs, and other entities. An electric company shall file the types of information, and the prices, terms, and conditions associated with the dissemination of such information, with the Commission for approval. An electric company shall only disseminate proprietary consumer information under tariff.**

OAR 860-038-0560, Treatment of Competitors

The participants disagree about the breadth of this rule in subsection (1). PGE proposed the following alternative to Staff's proposal, with support from PacifiCorp:

> An electric company, in its provision of regulated transmission, distribution, and ancillary services shall treat its competitors fairly in all respects and in a manner consistent with the treatment it affords any of its affiliates.

PGE's alternative rule focuses on the electric company's provision of regulated transmission, distribution, and ancillary services. PGE and PacifiCorp do not want the Commission involved in attempting to establish ratemaking treatment for these functions during this rules process. Further, PGE and PacifiCorp are concerned that the Commission is overstepping its bounds by specifically naming the various functions, as Staff's proposed rule does.

We disagree with both contentions. It is necessary to be explicit in setting out the functions to give guidance to the parties as to what type of treatments this Commission will review. Further, we need to ensure that competitors are treated fairly. This function is part of the Commission's responsibility in implementing the provisions of SB 1149. We are not intruding into an area that exceeds our authority.

Finally, we will not delete the word "competitive" from the last line of subsection 1 of the rules. However, we want to make clear that we are looking at fair treatment of all competitors, whether or not they are affiliates of an electric company.

Commission Disposition

Staff and PGE agreed to replace "competitive affiliates" in subsection (1) with "competitive operations" in Staff's proposed rule from its November 3, 2000, reply comments. We adopt the proposed rule as modified. The rule now reads:

> **Treatment of Competitors**
> **(1) An electric company, in its provision of supply, capacity, services, or information; offering of discounts; tariff discretion; and processing requests for services shall treat its competitors fairly in all respects and in a manner consistent with the treatment it affords any of its competitive operations.**
> **(2) An electric company shall not condition or otherwise tie the provision of any regulated services provided by the electric company, nor the availability of discounts of rates or other charges or fees, rebates, or waivers of terms and conditions of any regulated services provided by the electric company, to the taking of any goods or services from its affiliates.**
> **(3) An electric company shall not assign consumers to which it currently provides services to any of its affiliates, whether by default, direct assignment, option, or by any other means, unless that means is equally available to all competitors.**

OAR 860-038-0580, Prevention of Cross-subsidization Between Competitive Operations and Regulated Operations

A major goal of SB 1149 is that competitors are to be treated fairly by a distribution utility. The participants' comments expressed the importance of eliminating opportunities for cross-subsidization and cost shifting between regulated and competitive operations so that market participants can compete on a level playing field. The participants agreed to remove a clause that detailed a process for determining the price of goods and services sold by an electric company to an unaffiliated party. The removal of this clause meets one of PGE's requirements that these rules should not attempt to establish ratemaking treatment.

PGE's remaining comments involve simplifying and consolidating Staff's text. In particular, PGE recommended eliminating subsection (1) of Staff's October 16 proposed rule, indicating that this language was included within the context of another rule (OAR 860-038-0540, Consumer Information). While these two rules overlap, the section included in this rule contains a prohibition not found in OAR 860-038-0540. Specifically, Staff's proposed language states:

> Other than information that is routinely made public by an electric company, an electric company must not provide electric company operations information to its competitive operations unless it makes such information available to ESSs and other entities on identical terms and conditions.

A clear statement that information cannot be provided to the competitive operations unless it is available to other entities is useful in the context of this rule. We find that it is appropriate to retain the statement of this prohibition in this rule.

PGE's other recommended changes were not substantive, but merely an attempt to simplify the language. We choose not to adopt those changes as they do not significantly affect the content of the rule and because other participants indicated their agreement with Staff's proposed language.

Commission Disposition

We adopt the proposed rule submitted by Staff in the November 3, 2000, reply comments. That rule now reads:

> **Prevention of Cross-subsidization Between Competitive Operations and Regulated Operations**
> **(1) Other than information that is routinely made public by an electric company, an electric company must not provide electric company operational information to its competitive operations unless it makes such information available to ESSs and other entities on identical terms and conditions.**
> **(2) Any goods or services provided by an electric company's utility operation to its competitive operations or provided by an electric company's competitive operations to its utility operation must be provided in accordance with the Commission's transfer pricing policy. The electric company must maintain its books and records consistent with the Commission's transfer pricing policy. For purposes of this rule, "utility" or "regulated" and "nonutility" or "nonregulated" have the meaning given in the Uniform System of Accounts prescribed for Public Utilities and Licensees by the Federal Energy Regulatory Commission.**

(3) For purposes of this rule, "goods or services" means a transfer of assets, including any tangible or intangible property of an electric company or other right, entitlement, business opportunity, or other thing of value; a sale of supplies; or a sale of services.
(4) The Public Utility Commission of Oregon transfer pricing policy is:
(a) When an asset is transferred to regulated accounts from nonregulated accounts, the transfer shall be recorded in regulated accounts at the lower of net book value or fair market value;
(b) When an asset is transferred from regulated accounts to nonregulated accounts, the transfer shall be recorded (except as provided for in OAR 860-038-0100 and OAR 860-038-0120) in regulated accounts at the tariff rate if an appropriate tariff is on file with the Commission. If no tariff is applicable, proceeds from the transfer shall be recorded in regulated accounts at the higher of net book value or fair market value;
(c) When an asset is transferred from regulated accounts to nonregulated accounts at a fair market value that is greater than net book value, the difference shall be considered a gain to the regulated activity. The electric company shall record the gain in a manner that will enable the Commission to determine the proper disposition of the gain in a subsequent rate proceeding;
(d) When services or supplies are sold by a regulated activity to a nonregulated activity, sales shall be recorded in regulated revenue accounts at tariffed rates if an applicable tariff is on file with the Commission. Tariffed rates shall be established whenever possible. If services or supplies are not sold pursuant to a tariff, sales shall be recorded in regulated accounts at the electric company's fully distributed cost; and
(e) When services or supplies (except for generation) are sold to a regulated activity by a nonregulated activity, sales shall be recorded in regulated accounts at the nonregulated activity's fully distributed cost or the market rate, whichever is lower. The nonregulated activity's cost shall be calculated using the electric company's most recently authorized rate of return. Then, for generation, when services or supplies are sold to a regulated activity, by a nonregulated activity, sales shall be recorded in regulated accounts at the market rate.

OAR 860-038-0590 – Transmission and Distribution Access

The participants engaged in extensive discussion and comment about this rule. They struggled with the requirements of Federal Energy Regulatory Commission (FERC) Orders No. 888 and No. 2000 and the jurisdictional interplay between this Commission and FERC. PGE and PacifiCorp contend that Staff's draft rule intrudes on

FERC's exclusive jurisdiction. Pacific Northwest Generating Cooperative concurs with PGE and PacifiCorp and agrees that Staff's language in subsection (2) requiring implementation of FERC Order No. 2000 is vague and most likely unenforceable. Even if Staff's proposed rule does not conflict with federal jurisdiction, PGE and PacifiCorp believe that the details of how to provide access should be dealt with in the pending rate proceedings rather than by rule. Finally, PGE and PacifiCorp request additional workshops in an attempt to reach some consensus regarding this rule.

At the Commission's December 18, 2000, public meeting to consider these rules, Legislative Advocates, Inc., appeared and also asked for additional time for meetings between participants and Staff. Staff legal counsel advised the Commission that SB 1149, which sets a deadline of January 1, 2001, for adoption of certain implementing rules, does not cover transmission and distribution access. Thus, the Commission has discretion to defer this rule. The Commission determined to defer adoption of the proposed OAR 860-038-0590 until the first public meeting in February 2001, to allow participants and Staff to negotiate a mutually acceptable compromise.

If participants reach an acceptable solution, they will present a consensus rule to the Commission for adoption at the first February 2001 public meeting. If they cannot reach consensus, the Commission would proceed to consider the rule as proposed in Staff's reply comments of November 3, 2000.

Commission Disposition

We will defer a decision on the Transmission and Distribution Access rule until the first public meeting in February 2001.

OAR 860-038-0600 – Joint Marketing and Referral Arrangements

The participants' disputes about this rule center on the approach of the rule rather than its actual content. PGE and PacifiCorp want this rule, along with others previously discussed, to focus on comparable treatment of competitors rather than restrictions on electric company activities. The electric companies would prefer broader and more general purpose statements rather than a list of "shall nots."

Staff's proposed rule of November 3, 2000, eliminates a section involving market analysis reports and replaces the term "affiliates" with the newly defined term "competitive operations." The remainder of the rule sets forth what may and shall not be done by an electric company regarding joint marketing and referral arrangements.

Again, we appreciate the perspective from which PGE and PacifiCorp want us to view the rules. In theory, we do not disagree with this perspective. But we need to make certain that along with the comparable treatment of competitors, companies know what activity is or is not allowed.

PGE and PacifiCorp recommended adding the following language in subsection (4):

> (4) Whenever electric company personnel provide information about the nonregulated service of the electric company or affiliate in the course of a consumer contact involving regulated services, the electric company shall advise the consumer in an unbiased manner that similar nonregulated service may be available before taking an order for a nonregulated service.

This language competes with Staff's proposed language in subsection (3) of the rule, which states:

> (3) The electric company shall not listen to, view, or otherwise participate in any way in a sales discussion between a consumer and a competitive affiliate or an unaffiliated electric or energy services supplier.

PGE's language appears reasonable, but its application would be difficult to monitor. Further, many participants are concerned that the electric companies have an advantage during this transition phase. While we may later be able to address this issue in a manner similar to the one PGE proposes, the climate is not yet ripe for this approach.

Commission Disposition

Staff and PGE agreed that in subsection (1)(d), "competitive retail services" should be replaced with "goods or services of its competitive operations." With that change, we adopt the proposed rule submitted by Staff in its November 3, 2000, reply comments. The rule now reads:

> **Joint Marketing and Referral Arrangements**
> **(1) For joint marketing, advertising, and promotional activities an electric company shall not:**
> **(a) Provide or acquire leads on behalf of its competitive operations;**
> **(b) Solicit business or acquire information on behalf of its competitive operations;**
> **(c) Give the appearance of speaking or acting on behalf of its competitive operations;**
> **(d) Represent to consumers or potential consumers that it can offer goods or services of its competitive operations bundled or packaged with its tariffed services; or**
> **(e) Request authorization from its consumers to pass on information exclusively to its competitive operations.**
> **(2) An electric company shall not engage in joint marketing, advertising, or promotional activities of its products or services with**

those of its competitive operations in a manner that favors the competitive operations. Such joint marketing, advertising, or promotional activities include, but are not limited to, the following activities:
(a) Acting or appearing to act on behalf of its competitive operations in any communications and contacts with any existing or potential consumers;
(b) Joint sales calls;
(c) Joint proposals, either as requests for proposals or responses to requests for proposals;
(d) Joint promotional communications or correspondence, except that an electric company may allow its competitive operations access to consumer bill advertising inserts according to the terms of a Commission approved tariff, so long as access to such inserts is made available on the same terms and conditions to nonaffiliates offering similar services as the competitive operations that use bill inserts;
(e) Joint presentations at trade shows, conferences, or other marketing events within the state of Oregon; and
(f) Providing links from an electric company's internet web site to a competitive operations' internet web site.
(3) At a consumer's unsolicited request, an electric company may participate in meetings with its competitive operations to discuss technical or operational subjects regarding the electric company's provision of transmission or distribution services to the consumer; but only in the same manner and to the same extent the electric company participates in such meetings with unaffiliated electric or energy services suppliers and their consumers. The electric company shall not listen to, view, or otherwise participate in any way in a sales discussion between a consumer and its competitive operations or an unaffiliated electric or energy services supplier.

OAR 860-038-0620, Access to Books and Records

Staff's proposed rule replaces the word "affiliates" with "competitive operations," as that term is defined in OAR 860-038-0005. Staff also responded to PacifiCorp's concern regarding unconsolidated financial statements by stating that such statements shall be prepared "whenever possible."

PGE contends that the Commission's access to affiliates' books and records should be limited to a review of those affiliates from which the electric company is purchasing goods and services. This issue is addressed in part by the changes made by Staff, but Staff's final version is still broader than PGE's and PacifiCorp's language.

The language proposed by Staff allows full access in order to "review *all transactions* related to the provision of electricity services between an electric company and its competitive operations." (Emphasis added.) While understanding that the electric utilities want such transactions to be limited to the purchase of goods and services, we find that Staff's proposed language allows the Commission greater latitude to fulfill its appropriate role of monitoring compliance with SB 1149.

Commission Disposition

We adopt the proposed rule submitted by Staff in its November 3, 2000, reply comments:

> **Access to Books and Records**
> **(1) The Public Utility Commission of Oregon shall have full access to all books and records of an electric company and its affiliates in order to review all transactions related to the provision of electricity services between an electric company and its competitive operations.**
> **(2) An electric company and its affiliates shall maintain separate books and records, and, whenever possible, prepare unconsolidated financial statements.**
> **(3) An electric company and its competitive operations shall maintain sufficient records to allow for an audit of the transactions between an electric company and its competitive operations. At its discretion, the Commission may require an electric company to initiate, at the electric company's expense, an audit of the transactions between an electric company and its competitive operations performed by an independent third party.**

OAR 860-038-0640, Compliance Filings

One area of contention in this rule is the timing for preparing audits to be filed with the Commission. Staff proposed that the first audit should be prepared no later than one year after unbundling, under ORS 757.603, and subsequent audits at a minimum of every second year thereafter. PG&E National Energy Group and the Oregon State Association of Electrical Workers want the time periods reduced to six months and annually, respectively. The second area of contention, raised by PGE, is whether an independent auditor should prepare the audit and whether the audit must be filed within one month of its completion.

Addressing the issue of independence of the auditor, we find at this time that an outside party rather than company staff should complete the audit. This is common business practice, and it makes sense to require the auditor to be independent of the entity that it is auditing.

The time frames outlined by Staff as to the preparation of the audit are reasonable. It will take time for the electric companies to complete that initial audit. Further, there is nothing that prevents this Commission from asking for more frequent audits if we deem such audits to be necessary. Finally, to ensure the timeliness of the information presented in the audit, we believe that it should be filed within one month of its completion. We suspect that implementation of this rule will result in specific due dates for each electric company after the unbundling has occurred.

Commission Disposition

We adopt the proposed rule submitted by Staff in its November 3, 2000, reply comments. The rule now reads:

> **Compliance Filings**
> **No later than one year after an electric company has unbundled pursuant to ORS 757.603, and at a minimum of every second year thereafter, an electric company shall have an audit prepared by an independent auditor that verifies that the electric company is in compliance with OAR 860-038-0500 through 860-038-0620. The electric company shall file the results of each audit with the Commission within one month of the audit's completion.**

ORDER

IT IS ORDERED that:

1. The rules set out in Appendix A, attached to and made part of this order, are adopted.

2. The rules shall become effective January 1, 2001.

Made, entered, and effective _____.

Ron Eachus	**Roger Hamilton**
Chairman	Commissioner

Commissioner Smith concurs in part and dissents on the following issue:

I write to dissent from the adoption of OAR 860-038-0520 in AR 390. The disclaimer is long and cumbersome. There is nothing on the record that persuades me that such a disclaimer will be efficacious. Under SB 1149 only the largest customers have direct access to the power markets. One would assume these customers are sophisticated enough to know with whom they are dealing.

I do not believe I am precluded from objection because of the unsubstantiated assumption that little discussion among the parties means agreement, as the order seems to suggest.

Instead, I would propose that the disclaimer "a nonregulated subsidiary of [utility]" should suffice.

At the least, I object to requiring the rule's disclaimer to be displayed on business cards.

_____

Joan H. Smith
Commissioner

A person may petition the Commission for the amendment or repeal of a rule pursuant to ORS 183.390. A person may petition the Court of Appeals to determine the validity of a rule pursuant to ORS 183.400.

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