

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

**UM 1182
Phase I**

In the Matter of)	
)	
PUBLIC UTILITY COMMISSION OF)	
OREGON)	CLOSING COMMENTS OF INDUSTRIAL
)	CUSTOMERS OF NORTHWEST UTILITIES
Investigation Regarding Competitive)	
Bidding.)	
_____)	

I. INTRODUCTION

Pursuant to Administrative Law Judge Wallace’s Prehearing Conference Memorandum, the Industrial Customers of Northwest Utilities (“ICNU”) submits these Closing Comments in the first phase of the reopened Oregon Public Utility Commission (“OPUC” or the “Commission”) investigation regarding competitive bidding. ICNU supports in principle extending the role of the Oregon independent evaluator (“IE”) through the negotiating process, if it can be done in a narrowly tailored manner that does not unnecessarily lengthen the process, harm the negotiations, or increase costs to ratepayers. ICNU also supports developing criteria to better define the 100 megawatt (“MW”) threshold for ascertaining whether multiple projects actually constitute a single generating resource. With minor modifications, ICNU supports Staff’s proposed criteria for determining what constitutes a single resource.

The comments of the other parties provide a compelling argument that expanding the role of the IE could add value to many requests for proposals (“RFPs”), increase bidder confidence in the process, and serve as a tool to reduce the utility bias toward selecting resources

that provide a return on their investment. The need to protect against self bias is best demonstrated by the Comments in Opposition to extending the role of the IE by PacifiCorp, Portland General Electric Company (“PGE”), and Idaho Power Company (“Idaho Power”) (jointly, the “Utilities”). The Utilities appear to disagree that protection is even necessary to prevent self bias during the negotiation process, and some of their arguments appear to be reflexive over-reactions to the possibility that their negotiations may be subject to contemporaneous review by an independent third party. The Utilities and Staff, however, raise legitimate concerns regarding the scope, impact and value of retaining the IE through the negotiation process that must be addressed to ensure that an expanded IE does not harm the negotiation process or unnecessarily increase costs. ICNU does not believe these concerns are insurmountable or that they cannot be satisfactorily resolved.

II. COMMENTS

1. Extending the Role of the Oregon IE Could Help Reduce Utility Bias

The parties have presented the Commission with dramatically different visions of the impact of retaining the Oregon IE through the negotiation process. The Utilities generally argue that the Oregon IE will add significant costs, damage the bi-lateral negotiations, unnecessarily lengthen the process, not assure fairness, and “open a Pandora’s Box of issues.” Idaho Power Comments at 3-4; PGE Comments 2-10; PacifiCorp Comments at 5-8. PGE and PacifiCorp also opine that extended participation of an IE will be disfavored by potential bidders who are frustrated with the length of the RFP process and who will be unwilling to freely negotiate in the presence of an IE. PGE Comments at 7-8; PacifiCorp Comments at 7. Staff is less emphatic, but generally believes that extending the role of the IE may harm the negotiating

process, and that the IEs have not added much value when they were retained through the end of the negotiations in the past. Staff Comments at 2-3. In contrast, the Northwest and Intermountain Power Producers Coalition (“NIPPC”) and Renewable Northwest Project (“RNP”) paint a different picture, arguing that the presence of the Oregon IE can reduce utility bias, will increase the number of viable bids, and instill more confidence that the process is fair. NIPPC Comments 11-13; RNP Comments at 2-6. In addition, they argue that the inclusion of IEs in the negotiating process in previous Oregon and California RFPs has not been burdensome or costly. Id.

While Staff and the Utilities have raised legitimate concerns about the potential risks associated with retaining the IE through the negotiation process, ICNU believes that NIPPC, RNP and the Utilities’ own comments establish that including the IE in the negotiation process can add value and reduce utility bias. For example, the Commission should give more credence to the assertions by NIPPC that bidders would welcome the IE’s involvement in the negotiation process, than contrary statements by the Utilities. As explained by NIPPC, the Commission should be mindful that the Utilities have resisted, sought to evade or obtain waiver of even the most innocuous competitive bidding requirements. NIPPC Comments at 7-10.

The Utilities argue that an IE will not help assure a fair process and that the presence of an IE in the negotiations will not affect any utility bias because the utility’s benchmark bid is not part of the negotiations. These arguments defy common sense and only serve to discredit the Utilities. If a benchmark resource is on the short-list, then the Utilities have a bias not to negotiate fairly with the other short-list bidders, regardless of the fact that the utility is not directly negotiating with itself regarding the benchmark resource. The risk is that the

Utilities will somehow harm the negotiating process with the third party bidders to increase the likelihood that its own benchmark resource is ultimately selected. In addition, if the shortlist includes both a purchased power agreement and an option that allows the utility to earn return on its capital investment, then the utility has a bias regardless of whether or not there is a viable benchmark option.

The Utilities have raised legitimate concerns about the scope and role of the IE. Discussion of the IE's impact on the competitive bidding process in this proceeding has been hampered by the fact that no party understands exactly what role the IE would have in the negotiation process. ICNU agrees that an open-ended and ill-defined role for the IE could result in unintended consequences. In addition, a future rate proceeding is the appropriate forum for addressing ultimate prudence issues. While it may be difficult for an IE to report on the overall fairness of the negotiation process, and this information may not be useful until a later ratemaking proceeding, this does not mean that the IE cannot help ensure a fairer process. The mere presence of an independent third party can serve to reduce both the appearance of bias and the possibility that any party will act unfairly. The IE may also be able to identify egregious attempts by a utility to harm the negotiation process.

ICNU agrees with the Utilities and Staff that extending the role of the IE has the potential of prolonging the RFP process unnecessarily and increasing costs, but believes that these problems can be resolved. In addition, history demonstrates that the presence of an IE will not substantially harm the negotiating process. RNP provided persuasive evidence that IEs have been included in the California competitive bidding process without harming the process. RNP Comments 2-6. Other than the increase in costs, Staff and PacifiCorp did not identify any

PAGE 4 – CLOSING COMMENTS OF ICNU

legitimate problems with including the IE in PacifiCorp's previous negotiations. Staff Comments at 2-3; PacifiCorp Comment at 7-8. The Commission can address the concerns regarding length and costs by narrowly defining the role of the IE and ensuring that bidders pay for the extra costs. Specifically, ICNU supports NIPPC's proposal to allocate the costs of the IE to the shareholders of the final selected resource; however, other options including a bid fee on each of the bidders or short-listed resources could also be appropriate.

Staff's opposition to extending the role of the IE was based in part on past experience in RFPs in which the Oregon IE participated in the negotiating process. Staff explained that the IE's reports were "informative" but did not provide much additional information that Staff would not otherwise obtain in a future prudence review. Staff Comments at 2-3. ICNU does not have sufficient information to dispute the usefulness of the information provided by IEs in the two Oregon RFPs in which their role was extended; however, ICNU would like to point out that the thoroughness of Staff's review of the prudence of utility resource decisions has varied. While ICNU agrees that an IE will have only limited access to information and should not be considered qualified to opine on all aspects of the process, ICNU believes that in many circumstances an IE's contemporaneous, third-party review may provide valuable information to benefit all parties in future prudence reviews.

ICNU's primary concerns are not that the IE will opine inappropriately on issues relevant to a future prudence review, but that the IE may not be fully capable of spotting and identifying utility bias in the negotiating process. While some of the Oregon IEs have been willing to identify or challenge some of the worst abuses in the competitive bidding process, ICNU has been disappointed that they have been unable to identify or unwilling to criticize

aspects of the recent RFPs that bias the bidding process. Thus, if the Commission extends the role of the IE through the negotiating process, ICNU strongly recommends that the Commission not assume that the IE's conclusions provide a presumption that negotiations were fair. An IE may not identify inappropriate actions for many reasons, including the inherent difficulty in identifying utility bias and the natural reluctance of IEs to accuse the Utilities' of wrongdoing without overwhelming evidence.

ICNU also strongly disagrees with Staff's ultimate conclusion "that the utilities self-build bias has been significantly mitigated with the adoption of the current guidelines," which appears to drive its recommendation in this case. Staff Comments at 3. ICNU agrees that the Commission's current competitive bidding guidelines have mitigated the Utilities' bias toward ownership options, with the best evidence being that all the Utilities have sought to avoid the requirements or exempt themselves and are resisting the expanded role of the IE. ICNU does not believe, however, that the Utilities' self-build bias has been "significantly" mitigated, and the best proof of this is the limited number of purchased power agreements that have been entered into through the RFP process. In fact, while the participation of IEs, Staff and intervenors has thwarted some of the most egregious abuses, ICNU is concerned that the current RFP process remains biased in favor of utility resources. Ratepayers may end up with the worst of all worlds if the Utilities are able to select their own higher cost resources, while their ratepayers have limited ability to challenge and review the utility resource decisions which have been further legitimized by an approved RFP.

Finally, ICNU makes a slight revision of its position regarding whether the IE should be included in the negotiating process when a utility ownership option is not included in

the short list. ICNU's original comments recommended that the IE never be retained in these circumstances. NIPPC pointed out that there may be unique circumstances in which the IE is needed to prevent utility bias, even when there is no ownership option in the RFP. NIPPC Comments at 14. ICNU supports NIPPC's recommendation that the IE normally be retained through the negotiation process only when there is a utility ownership option, but that the Commission retain the discretion to extend the role of the IE in other RFPs on a case-by-case basis.

2. ICNU Generally Supports Staff's Proposed Criteria for Defining a Single Major Resource

Staff has proposed that specific criteria be utilized to determine whether a utility has artificially separated a resource to avoid the 100 MW threshold for following the competitive bidding requirements. Staff Comments at 4-5. Staff's primary considerations are that the plants: 1) be within 5 miles; 2) the projects be constructed under the same general contractor or contract; and/or 3) the utility must demonstrate that separate phases of project would independently qualify as a single facility. Id. Staff's factors are non-exhaustive and would allow the Commission to consider other factors based on construction, operation, on-line data or maintenance agreements. Id.

ICNU generally supports Staff's recommended criteria as being both reasonably comprehensive, yet flexible enough to recognize that the Commission cannot contemplate all the ways in which a utility may seek to evade the competitive bidding requirements. Staff's criteria would appear to capture PacifiCorp's previous artificial separation of its wind facilities, but may not capture future attempts to avoid the competitive bidding requirements. ICNU recommends

that Staff's second criterion be expanded to include projects under the same utility ownership, even if there are different general contractors or contracts.

Idaho Power and PGE also agree that specific criteria should be developed, with Idaho Power recommending that the following three factors be satisfied for a multiple projects to be considered a single project: 1) common or the same ownership; 2) common location; and 3) the project is recognized as a single project for licensing or permitting purposes. Idaho Power Comments at 5; PGE Comments at 12. Although ICNU does not support all of the criteria, Idaho Power's approach, proposing specific criteria that parties and the Commission can consider, should be commended. Noticeably, PacifiCorp, the utility responsible for attempting to circumvent the competitive bidding guidelines via creatively sized projects, does not support any changes in the definition of a major resource. PacifiCorp Comments at 8.

Idaho Power's first two criteria are similar to Staff's, but ICNU is opposed to Idaho Power's recommendation that the projects have a single license or permit from a government body, including a county, city or local authority. ICNU is concerned that the Utilities could manipulate the permitting or licensing process so that some government body does not view the project as a single project, even though the generating resources should still be considered a single project for the purposes of the Commission's competitive bidding requirements. ICNU is not opposed to considering licensing or permitting as a relevant factor, but the fact that another government agency considers the project as multiple projects should not be dispositive.

III. CONCLUSION

ICNU recommends that the Commission extend the role of IE through the negotiations process. The Commission should clearly define the appropriate role for the IE to ensure that the IE does not burden the negotiations or increase costs unnecessarily, and all additional costs associated with the IE should be borne by the bidders. Finally, the Commission should adopt a slightly modified version of Staff's recommended criteria for determining if a project meets the 100 MW threshold.

Dated this 22nd day of April, 2011.

Respectfully submitted,

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/s/ Irion Sanger

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Northwest Utilities

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III. CONCLUSION

ICNU recommends that the Commission extend the role of IE through the negotiations process. The Commission should clearly define the appropriate role for the IE to ensure that the IE does not burden the negotiations or increase costs unnecessarily, and all additional costs associated with the IE should be borne by the bidders. Finally, the Commission should adopt a slightly modified version of Staff's recommended criteria for determining if a project meets the 100 MW threshold.

Dated this 22nd day of April, 2011.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Irion Sanger

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April 22, 2011

Via Electronic and U.S. Mail

Public Utility Commission
Attn: Filing Center
550 Capitol St. NE #215
P.O. Box 2148
Salem, OR 97308-2148

Re: In the Matter of Public Utility Commission of Oregon Investigation
Regarding Competitive Bidding.
Docket No. UM 1182

Dear Filing Center:

Enclosed please find the original and six copies of the Closing Comments of the Industrial Customers of Northwest Utilities in the above-referenced docket.

Please return one file-stamped copy of the document in the self-addressed, stamped envelope provided.

Thank you for your assistance, and please do not hesitate to contact our office if you have any additional questions.

Sincerely yours,

/s/ Sarah A. Kohler
Sarah A. Kohler

Enclosures

cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing change of service request on behalf of the Industrial Customers of Northwest Utilities upon the parties, on the service list, by causing the same to be deposited in the U.S. Mail, postage-prepaid, where paper service has not been waived.

Dated at Portland, Oregon, this 22nd day of April, 2011.

/s/ Sarah A. Kohler

Sarah A. Kohler

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