

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2166

In the Matter of

PORTLAND GENERAL ELECTRIC
COMPANY

Application for Approval of an
Independent Evaluator for 2021 All-
source Request for Proposals

NORTHWEST &
INTERMOUNTAIN POWER
PRODUCERS COALITION’S
MOTION FOR CLARIFICATION
OR, IN THE ALTERNATIVE,
APPLICATION FOR
RECONSIDERATION OF ORDER
NO. 21-460

I. INTRODUCTION AND SUMMARY

The Northwest & Intermountain Power Producers Coalition (“NIPPC”)¹ respectfully moves the Oregon Public Utility Commission (the “Commission”) to clarify, or in the alternative to reconsider, the determination in Order No. 21-460 (“the Order”) with respect to Portland General Electric Company’s (“PGE’s”) proposal to submit an affiliate bid into its request for proposals (“RFP”). As explained below, the Commission’s tentative approval of PGE’s proposed participation of an affiliate in this RFP was premised on the expectation that PGE would successfully receive approval of the proposed affiliate transaction and structure in Docket No. UI 461 and agree to abide by any conditions placed on the affiliate in the final order in that docket. But PGE declined to agree to meaningful conditions in Docket No. UI 461, and the

¹ NIPPC is a membership-based advocacy group representing electricity market participants in the Pacific Northwest. NIPPC members include independent power producers (“IPPs”), electricity service suppliers, and transmission companies. NIPPC’s current member list can be found at <http://nippc.org/about/members/>.

Commission ultimately rejected PGE's affiliate transaction. Yet PGE has apparently misunderstood the intent of the Commission's orders at issue and expressed its intent to nevertheless bid its affiliate into the RFP even though the Commission found the affiliate to not be in the public interest. Thus, the Commission should now clarify that PGE's proposed use of the rejected affiliate in this RFP is not approved. In the alternative, to the extent necessary, the Commission should reconsider Order No. 21-460 in light of new facts – i.e., the rejection of PGE's proposed affiliate in Docket No. UI 461 – and revise the Order to reject PGE's proposed use of the affiliate in the RFP.

NIPPC stresses that the Commission should act now while there is still time to preserve the remaining integrity of the RFP process and assure independent bidders that the Commission's directives will not be ignored by PGE. The Commission has now found that PGE's affiliate proposal is not in the public interest, and it is unfair to allow PGE to nevertheless submit an affiliate bid into the RFP before fully vetting and correcting the serious defects with the affiliate proposal.

II. BACKGROUND

PGE included within its RFP a proposal that it would submit an affiliate bid. PGE characterized the affiliate bid as a power purchase agreement (“PPA”) bid that would be treated the same as other PPA bids, even though PGE's affiliate bid did not involve two distinct contracting parties or a truly arm's length transaction. To NIPPC's knowledge, this was the first time a utility has proposed an affiliate bid in an Oregon RFP. Thus, PGE's novel affiliate proposal presented a host of complicated issues.

NIPPC filed comments expressing concern regarding the lack of separation between PGE's regulated operations and its proposed affiliate because PGE proposed its affiliate would utilize PGE employees and share PGE's office and computer systems.² NIPPC explained that, under similar circumstances, the Federal Energy Regulatory Commission ("FERC") and other states that have addressed the issue require that an affiliate of a regulated utility must have separate managerial and operational employees, as part of a separation of operational functions, to protect the competitive market and to prevent cross subsidization and harm to captive retail customers.³

To illustrate just one obvious but very significant problem, PGE suggested the affiliate bid would rely on a parental guarantee from PGE to support the affiliate's creditworthiness and to back its obligations under the affiliate PPA. But, as NIPPC explained, PGE *cannot both be the guaranteed party AND the guarantor*. A parental guarantee by the utility under the PPA between the utility and its affiliate – even with adequate separations – is essentially a commitment that the utility will step in and cure any default in the event of a breach by the affiliate. But there is an irreconcilable conflict of interest if PGE is both the counterparty on the PPA, with the right and discretion to enforce or not enforce the PPA's requirements, and the guarantor party ensuring the affiliate's performance to PGE under the PPA. PGE would have a disincentive to enforce any breach, meaning that the affiliate will be guaranteed favorable treatment unavailable to non-affiliated entities. Stated differently, a guarantee by PGE for the obligations of its affiliate that the affiliate owes to PGE is equivalent to not having a guarantee at

² NIPPC's Comments on the Staff Report at 3, 11-17.

³ *See, e.g.*, 18 C.F.R. § 35.39.

all. Thus, the proposal in the RFP was entirely unreasonable and needed extensive revisions that PGE appeared to be unwilling to make.

NIPPC also expressed concern that the RFP was set to be approved before meaningful conditions could be developed on the affiliate in the affiliate docket, Docket No. UI 461. The draft RFP was scheduled to be approved at the public meeting on December 2, 2021, with bids due in early January 2022, while the affiliate application docket was scheduled to be approved at the public meeting on December 14, 2021.

Staff took a different approach from NIPPC. Staff stated that an affiliate that bids into RFPs need not necessarily have any separation from the utility's regulated operations under the RFP rules or the resource planning rules.⁴ But Staff concluded those issues could be better addressed in developing conditions for an affiliate in the affiliated transactions proceeding, Docket No. UI 461, as part of the "public interest" and "no harm" tests in the affiliate transaction statute.⁵

The Commission's Order No. 21-460, dated December 10, 2021, approved the RFP's proposed use of an affiliate bid in reliance on the expectation that PGE would subsequently obtain the Commission's approval of the proposed affiliate transaction in parallel Docket No. UI 461. The order stated:

Staff offered one additional recommendation at the public meeting. Staff's memo stated that PGE should note the conditional nature of the affiliate bid in the RFP and that it will depend on the Commission's review of the affiliate in docket UI 461. At the public meeting Staff provided an update that the affiliate docket will be taken up at the Commission's December 14, 2021 Regular Public Meeting.

⁴ Staff Report at 30 (Nov. 19, 2021).

⁵ *See In re PGE Application for Approval of an Affiliated Interest Transaction with Portland Renewable Resource Company*, Docket No. UI 461, Staff Report at 2 (Dec. 4, 2021) (quoting ORS 757.495(3)).

Given this, Staff recommended that PGE mark the affiliate bid as tentative in nature. Staff also recommended that PGE be directed to notify the Commission on December 17, 2021, if PGE is going forward with an affiliate bid.

* * * *

Staff's position is that under the competitive bidding rules affiliate bids are permissible and treated according to the rules, assuming the affiliate is approved in the other proceeding.

* * * *

We declined to adopt any additional changes to the RFP on the affiliate bid, other than Staff's recommended change described above to have the affiliate bid marked as tentative until December 17, 2021 when PGE will indicate if it is moving forward with an affiliate bid. We will review the appropriateness of the affiliate separately. We found that the competitive bidding rules sufficiently address treatment of affiliate bids as the IE is required to independently score affiliate bids similar to benchmark bids.⁶

Thus, the Commission's approval of PGE's proposed use of the affiliate in the RFP was "tentative" and premised on approval of the affiliate in Docket No. UI 461, and PGE's agreement to conditions in that affiliate docket. If PGE agreed to comply with conditions developed in Docket No. UI 461, PGE would communicate its intent to bid the affiliate into this RFP through a notice filed in the RFP docket by December 17, 2021.

However, in Docket No. UI 461, the Commission denied PGE's application to approve the affiliate transaction at the public meeting on December 14, 2021.⁷ Staff had proposed that the Commission approve the transaction subject to "no less" than a series of conditions appended to the Staff Report to protect customers and competitors against affiliate abuses, or, in the alternative, to reject the application.⁸ Staff explained that PGE's proposal did not meet "the 'no

⁶ Order No. 21-460 at 4 & 7-8.

⁷ Docket No. UI 461, Order No. 21-482 at 1.

⁸ Docket No. UI 461, Order No. 21-482, App. A at 1-14.

harm’ standard without proper controls” and that “Staff’s broad concerns are largely related to the competitive process and ratepayer risk and benefit.”⁹ The Citizens Utility Board (“CUB”) and NIPPC proposed other more restrictive conditions. But PGE was not even willing to agree to all of Staff’s conditions.

At the public meeting December 14, 2021, the Commission extensively considered the proposed affiliate structure and the risk that participation in the RFP without extensive conditions would harm the competitive market, and ultimately PGE’s customers. The Commissioners considered rejecting the proposal without prejudice so that PGE could work with stakeholders to develop conditions that adequately took into account stakeholder concerns in time to bid the affiliate into this RFP.¹⁰ But the Commissioners ultimately determined that PGE and stakeholders appeared to be too far apart, and it was unfair to other stakeholders to expect conditions to be developed over the holidays in time for the RFP bids due by January 11, 2022, and thus the Commissioners opted to deny PGE’s application.¹¹ At the conclusion of deliberations, Chair Megan Decker stated the outcome would surely be “disappointing” to PGE for purposes of this RFP, but “this is an important lesson in how seriously the Company needs to take the regulatory community, the competitive community – as seriously as you take your own business concerns”¹² Chair Decker also stated that the rejection was without prejudice for PGE to make a filing over the holidays – if it wished – to move to amend the RFP to “change

⁹ Docket No. UI 461, Order No. 21-482, App. A at 7.

¹⁰ Recording, Dec. 14, 2021 Public Meeting, at 2:49:00-3:03:35
https://oregonpuc.granicus.com/MediaPlayer.php?view_id=2&clip_id=875

¹¹ *Id.*

¹² *Id.* at 3:01:50-3:02:20.

everything” to include the affiliate in a way that was acceptable.¹³ NIPPC understood this guidance to mean that should PGE decide to re-file its affiliate it would need to get approval of the affiliate before bidding it into any RFPs. PGE did not follow this guidance.

Remarkably, however, PGE submitted a Notice of Intent to Submit Affiliate Bid in this RFP docket just three days later on December 17, 2021 (hereafter “PGE’s December 17th Notice”).¹⁴ This filing was surprising to NIPPC because the Commission had not approved the affiliate in Docket No. UI 461. Yet PGE’s December 17th Notice asserted that in the affiliate docket the “Commission invited PGE to re-file the application with modifications, including controls to address potential customer harms.”¹⁵ Citing “forthcoming engagement” with stakeholders, PGE’s December 17th Notice appears to assume that PGE will eventually gain Commission agreement to its proposed affiliate in a new affiliated transaction docket. PGE has not yet attempted to engage with NIPPC. PGE’s December 17th Notice further appears to suggest PGE thinks that it has cured stakeholder concerns with the affiliate by committing to treat the affiliate bid as a benchmark and implementing some unspecified level of “separation” between PGE employees submitting the affiliate bid and other PGE employees – even though it is impossible to unwind the lack of separation that has existed up until now.¹⁶ Nevertheless, PGE indicated it would move forward with submitting the affiliate bid now *in this RFP* by the deadline for benchmark bids on January 4, 2022. However, PGE never proposed, and the Commission never approved, any changes to the RFP or otherwise developed any new

¹³ *Id.* at 3:02:20-3:02:45.

¹⁴ PGE’s Notice of Intent to Submit Affiliate Bid at 1-2(Dec. 17, 2021).

¹⁵ *Id.* at 1.

¹⁶ *Id.*

conditions with stakeholders prior to that date.

III. MOTION FOR CLARIFICATION

The Commission should clarify Order No. 21-460 by stating that PGE's proposal to submit an affiliate bid into the RFP is not approved by the Commission because PGE did not secure approval of the affiliated transaction proposal in Docket No. UI 461.

A. Standard of Law

The Commission may clarify a final order. The Commission has done so in the past where, *inter alia*, the scope and effect of the order is unclear.¹⁷

B. The Commission Should Clarify that It Did Not Approve PGE's Use of an Unauthorized Affiliate in the RFP, and PGE's RFP Is Therefore Unapproved If PGE Moves Forward with the Affiliate Bid.

Clarification is necessary because PGE apparently misunderstood the Commission's intent in rejecting its affiliate proposal. The Commission should clarify that PGE's RFP is not approved by the Commission if PGE moves forward with the affiliate bid.

As explained above, the Commission's approval of PGE's proposed use of the affiliate in the RFP was "tentative" and premised on approval of the affiliate in Docket No. UI 461, as well as PGE's agreement to conditions in that affiliate docket.¹⁸ However, PGE appears to have misunderstood Order No. 21-460 on this point to suggest that PGE was authorized to move forward with the affiliate in the RFP even if PGE did not receive approval of the affiliate in Docket No. UI 461. To avoid further confusion on PGE's part and reassert the Commission's authority over this RFP, the Commission should unambiguously clarify that rejection of the

¹⁷ See *In re Investigation into the Use of Virtual NPA/NXX Calling Patterns*, Docket No. UM 1058, Order No. 04-704 (2004) (clarifying the scope and effect of a final order).

¹⁸ Order No. 21-460 at 4 & 7-8.

affiliate proposal in Docket No. UI 461 meant that PGE could not bid the affiliate into this RFP.

Although the Commissioners suggested at the public meeting on December 14, 2021 that PGE may be able to rewrite the RFP in a manner that would mitigate the harms of the affiliate and somehow obtain stakeholder buy-in before the deadline for bids, PGE did not do so. PGE's December 17th Notice has not amended the RFP. NIPPC does not agree that the difficult affiliate issues are resolved by PGE's statement that it will treat the affiliate as a benchmark resource and adopt after-the-fact separation protections. None of the conditions Staff, CUB, and NIPPC proposed in Docket No. UI 461 will apply to the affiliate because the affiliate was not approved. The affiliated transaction docket was not an optional proceeding under which PGE could seek approval and then proceed as planned even if the Commission denied approval. The premise of approval of the RFP was that PGE would secure such approval and conditions on its affiliate *before* bidding into the RFP. Any other arrangement taints this RFP as unfair.

As a practical matter, it is difficult to understand how the affiliate could meet the unambiguous requirements of the RFP given that the Commission denied a critical regulatory approval for the affiliate. For example, among other minimum bid requirements, the RFP requires "entities must be authorized under the law to sell power, and able to schedule power and operate under industry standards established by the Federal Energy Regulatory Commission (FERC), Western Electricity Coordinating Council (WECC), and the North American Energy Reliability Council (NERC), or other applicable regulatory body or government agency."¹⁹ PGE's affiliate model was rejected by the Commission and thus cannot possibly meet this minimum bidding requirement. If any other bidder had its proposed business structure expressly

¹⁹ 2021 Draft All-Source RFP at 13 (Oct. 15, 2021).

rejected by the Commission, PGE would not allow the bidder to participate in the RFP. It is unfair to give PGE special treatment by allowing it to submit a bid from an entity whose business structure was expressly rejected by the Commission as contrary to the public interest. The expectation that PGE may be able to sort out the complicated affiliate issues later is not sufficient – especially given PGE’s recalcitrance towards considering or accepting stakeholder-proposed conditions on its initial submittal.

In sum, the Commission should clarify that the affiliate question is over for purposes of this RFP, and if PGE wants to rely on the Commission’s approval of the RFP in Order No. 21-460, PGE cannot include the affiliate bid.

IV. APPLICATION FOR RECONSIDERATION

In the alternative, the Commission should reconsider Order No. 21-460 based on new facts developed since its issuance – i.e., the Commission’s rejection of the affiliate in Docket No. UI 461 – and should accordingly reject PGE’s proposed use of the affiliate in this RFP without prejudice for the affiliate to bid into a future RFP after the Commission approves its structure and develops appropriate conditions.

A. Standard of Law

ORS 756.561(1) authorizes a party to request reconsideration or rehearing by the Commission of any order “if sufficient reason therefor is made to appear.”²⁰ The Commission’s administrative rules further provide that reconsideration is warranted if, *inter alia*, the applicant shows that there is “(a) [n]ew evidence that is essential to the decision and that was unavailable and not reasonably discoverable before issuance of the order” or “(d) [g]ood cause for further

²⁰ ORS 756.561(1).

examination of an issue essential to the decision.”²¹

B. The Commission Should Reconsider and Correct the Order’s Assumption that PGE Would Receive Approval of the Affiliate and Should Reject Use of the Affiliate in this RFP.

As explained below, the requirements of OAR 860-001-0720(2) are met to grant reconsideration or rehearing of Order No. 21-460’s approval of PGE’s use of an affiliate in this RFP.

1. OAR 860-001-0720(2) (a): The portion of the challenged order that the applicant contends is erroneous or incomplete.

The portions of Order No. 21-460 that are erroneous or incomplete are the discussion of the affiliate on pages 4 and 7-8 (quoted above) that assumed PGE would secure the Commission’s approval of the affiliate in Docket No. UI 461 and would agree to any conditions imposed on the affiliate in that docket. As discussed above, it is now clear that PGE did not receive such approval and has agreed to no conditions on its affiliate in time to bid the affiliate into this RFP. These new facts became apparent only after Order No. 21-460, and result in the Order being premised on incorrect assumptions.

2. OAR 860-001-0720(2) (b): The portion of the record, laws, rules, or policy relied upon to support the application.

The Commission’s findings and conclusions must have credible factual support.²² The Commission’s final orders must also be rational.²³ And, as noted above, the Commission expressed a clear policy in Docket No. UI 461 that it expects PGE’s proposed affiliate to be

²¹ OAR 860-001-0720(3).

²² ORS 183.482(8)(c).

²³ *Util. Reform Project v. Or. Pub. Util. Com’n*, 215 Or App 360, 372-73, 170 P3d 1074, 1080-81 (2007).

designed in a manner that does not harm the competitive market or captive retail customers *before* being bid into an RFP – an expectation that the Commission expressly found was not met for PGE’s current affiliate proposal with respect to this RFP.²⁴

Therefore, Order No. 21-460 is inconsistent with law and policy because it is now clear that the affiliate was rejected in Docket No. UI 461. There is no factual basis to assume the affiliate will be approved in any affiliate transaction docket in time to bid in this RFP – a time that has already passed – and Order No. 21-460’s assumption on that point proved to be incorrect. Additionally, Order No. 21-460 relied on Staff’s expectation that adequate conditions would be developed and applied to the affiliate in Docket No. UI 461 to ensure the integrity of the RFP, but PGE failed to meet that expectation. No conditions have been applied to the affiliate.

3. OAR 860-001-0720(2) (c): The change in the order that the Commission is requested to make.

The Commission should revise Order No. 21-460 by expressly rejecting use of the affiliate in this RFP because the reasoning for approving the affiliate proved to be incorrect shortly after issuance of the Order.

4. OAR 860-001-0720(2) (d): How the applicant’s requested change in the order will alter the outcome.

The requested change to the Order would reverse the outcome in the Order. Instead of PGE receiving approval to bid the affiliate into the RFP subject to conditions approved in the Docket No. UI 461, PGE would be prohibited from bidding the affiliate into the RFP.

²⁴ Recording, Dec. 14, 2021 Public Meeting, at 2:49:00-3:03:35
https://oregonpuc.granicus.com/MediaPlayer.php?view_id=2&clip_id=875.

Specifically, to protect the integrity of the RFP process, the Commission should unambiguously state that PGE's RFP is *not approved by the Commission* if PGE elects to move forward with an affiliate bid. Under the Commission's rules, that means PGE cannot receive acknowledgement of the final shortlist in this RFP under OAR 860-089-0500 because PGE did not comply with the applicable rules and policies.

5. OAR 860-001-0720(2) (e): One or more of the grounds for rehearing or reconsideration in section (3) of this rule.

In accordance with OAR 860-001-0720(3), the reasons set forth above describe both "(a) [n]ew evidence that is essential to the decision and that was unavailable and not reasonably discoverable before issuance of the order" and "(d) [g]ood cause for further examination of an issue essential to the decision." New evidence demonstrates PGE did not receive approval of its affiliate or agree to any conditions on use and operation of its affiliate prior to bidding into the RFP, and therefore good cause exists to reconsider Order No. 21-460, which tentatively approved use of the affiliate based on the expectation such approval and conditions would be secured. Thus, the Commission should unambiguously state that PGE's proposal to use an affiliate bid in this RFP is not approved.

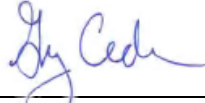
V. CONCLUSION

For the reasons set forth above, the Commission should clarify, or in the alternative grant reconsideration, to state that PGE's use of the affiliate in this RFP is not approved because the affiliate was rejected in Docket No. UI 461.

Dated this 21st day of January 2022.

Respectfully submitted,

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