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3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF DESCHUTES

6 NEWSUN ENERGY LLC, a Delaware
7 limited liability company,

8 Petitioner,

9 v.

10 OREGON PUBLIC UTILITY
11 COMMISSION, an agency of the
12 State of Oregon,

13 Respondent.

Case No. 22CV37061

**PETITION FOR JUDICIAL REVIEW OR
IN THE ALTERNATIVE TO COMPEL
AGENCY ACTION PURSUANT TO
ORS 183.484 AND 183.490**

**ALTERNATIVE COMPLAINT FOR
DECLARATORY RELIEF PURSUANT
TO ORS 183.480(3) AND ORS
CHAPTER 28**

(Oregon Administrative Procedures Act, ORS
183.310-183.690)

Statutory Fee: ORS 21.135(2)(a), (e)

16 Petitioner NewSun Energy LLC (“NewSun”) petitions for judicial review of a final order
17 in other than contested case pursuant to ORS 183.484, an order compelling agency action
18 pursuant to ORS 183.490, declaratory relief, and alleges as follows:

19 **OVERVIEW OF THE CASE**

20 1.

21 This Petition arises out of the Oregon Public Utility Commission’s (the “PUC” or the
22 “Commission”) Order No. 22-315 (the “Final Order”) in *In the Matter of Portland General*
23 *Electric, 2021 All-Source Request for Proposals*, Docket No. UM 2166 (“UM 2166”). In the
24 Final Order, issued on August 31, 2022, the PUC acknowledged with conditions Portland
25 General Electric’s (“PGE” or the “Company”) final shortlist (“Final Shortlist Acknowledgment”)
26 for its 2022 All-Source Request for Proposals (“RFP”). This Final Shortlist Acknowledgment is

1 the culmination of PGE’s resource procurement process and is the Company’s first
2 acknowledged shortlist since the passage of HB 2021.

3 2.

4 HB 2021 requires retail electricity providers like PGE to deliver 100% clean energy to
5 Oregon consumers by 2040 and directs the Commission to exercise continual oversight to ensure
6 its regulated utilities, like PGE, hit that target. HB 2021 mandates Commission oversight in
7 several ways. First, it directs regulated utilities to create “clean energy plans” pursuant to
8 statutory requirements outlined in ORS 469A.415. Regulated utilities must submit those clean
9 energy plans either within their first Integrated Resource Planning (“IRP”) docket in 2022 or
10 soon thereafter. Then, pursuant to ORS 469A.420, the Commission must approve a clean energy
11 plan but only if the Commission “finds the plan to be in the public interest and consistent with”
12 clean energy targets.

13 3.

14 In addition to the specific requirements of clean energy plans submitted in IRPs after
15 2022, the Commission also must “ensure that an electric company . . . is taking actions *as soon*
16 *as practicable* that facilitate rapid reduction of greenhouse gas emissions at reasonable costs to
17 retail electricity consumers.” ORS 469A.415(6). This obligation does not take effect only after a
18 regulated utility has submitted its first clean energy plan—it represents an immediate, ongoing
19 duty of the Commission. Such immediate oversight makes sense in light of HB 2021’s
20 aggressive emissions reduction targets.

21 4.

22 Unfortunately, despite HB 2021’s clear mandate to the Commission to ensure that its
23 regulated utilities are taking actions “as soon as practicable” to reduce emissions, the Final Order
24 does little to implement the requirements of HB 2021. The Final Order acknowledges the
25 passage of HB 2021, and the Commission notes that it required PGE to run an analysis in which
26 it would procure “*one-third* of the estimated renewables needed to meet the 2030 target [80%

1 below baseline emissions] set forth in HB 2021.” See Order No. 22-315 at 2, attached to Petition
2 as Exhibit 1. However, taking actions related to only *one-third* of PGE’s compliance obligation
3 does not meet the standard set by the Oregon legislature.

4 5.

5 NewSun acknowledges that this is its fourth petition for judicial review of a PUC order
6 filed this year. In February, NewSun petitioned for review of the Commission’s approval of
7 PGE’s 2021 RFP. In that case, the Commission joined with its regulated entity to argue that,
8 despite the fact that the Commission had identified the challenged order as “final order,” the
9 court lacked jurisdiction because the order at issue was not, in fact, a “final order.”¹ NewSun is
10 currently appealing that decision. Next, in June, NewSun petitioned for review of the
11 Commission’s approval of PacifiCorp’s 2022 RFP.² Again, the Commission joined with its
12 regulated entity to argue that the court lacked jurisdiction over NewSun’s petition because the
13 order at issue was not a “final order.” A hearing on PacifiCorp’s motion to dismiss in that case is
14 set for November. Then, NewSun petitioned for review of the Commission’s approval of
15 PacifiCorp’s 2021 IRP.³ Neither the Commission nor PacifiCorp has filed any responsive
16 pleading in that case.

17 6.

18 At the heart of NewSun’s petitions has been the determination of what Commission
19 orders approving or acknowledging utility resource procurement decisions are “final orders”
20 reviewable under the Oregon Administrative Procedures Act (“APA”). Under ORS 183.480,
21 Oregon courts have jurisdiction to review only “final orders.” A “final order” is “the complete
22 statement of the agency’s decision on the matter before it.” *Grobovsky v. Bd. of Med. Examiners*,
23 213 Or App 136, 143 (2007).

24 ///

25 _____
26 ¹ See *NewSun Energy, LLC v. OPUC*, Marion County Circuit Court Case No. 22CV05442.
² See *NewSun Energy, LLC v. OPUC*, Deschutes County Circuit Court Case No. 22CV21264.
³ See *NewSun Energy, LLC v. OPUC*, Deschutes County Circuit Court Case No. 22CV24304.

1 7.

2 In the context of resource procurement, there are several major touchpoints where the
3 Commission oversees utility actions. There is the filing of a utility’s IRP, which guides resource
4 procurement decisions and must be submitted to the Commission every two years. There is also a
5 utility’s RFP filing, which sets out the criteria whereby a utility may actually acquire resources.
6 Within an RFP docket, there are additional major Commission orders, including the approval of
7 an independent evaluator, approval of the form and contents of the RFP, and approval of the
8 “final shortlist” of bidders that responded to the RFP.

9 8.

10 NewSun argues that, in order to ensure that Oregon’s public utilities acquire resources
11 consistent with Oregon law, there must be *some* decision by the Commission that is reviewable
12 by courts. However, the Commission and its regulated utilities have repeatedly argued that the
13 *only* time a court may review a Commission order related to resource procurement is when the
14 Commission approves rates in a general rate case. In order to give meaningful effect to HB 2021
15 and execute its obligations as an agency and regulator of the regulated utilities effectively, this
16 cannot be the case.

17 9.

18 A utility files a general rate case to seek reimbursement, and profit from, investments it
19 has made. The filing of a general rate case is at the discretion of the utility and may not occur for
20 years after it has made resource procurement decisions or has put into service new generating
21 assets. In short, a general rate case looks *backwards* to determine whether a utility’s investments
22 were reasonable and in the public interest, thus entitling it to recover those costs and earn a profit
23 through rates. On the other hand, the Commission orders outlined above are holistic, *forward-*
24 *looking* decisions that control and guide utility resource procurement. Those orders inform the
25 overall market, serve to protect competition, and prevent abuses of the privilege and power held
26 by the regulated utilities. NewSun believes that it simply cannot be the case that the Oregon

1 legislature that passed HB 2021, which requires Oregon utilities to *eliminate their emissions in*
2 *just eighteen years*, understood that the Commission was essentially powerless to ensure utilities
3 met that goal outside of what may be only a handful of rate cases. In other words, if courts are
4 not able to ensure that these legislative goals are met *now*, then *when*?

5 10.

6 Through its failure to ensure that PGE is taking actions as soon as practicable to meet its
7 clean energy targets, the Commission has failed to implement its express obligations under HB
8 2021. By this Petition, NewSun seeks judicial review of the Final Order, a determination that the
9 Final Order was invalid because it failed to give effect to key provisions of the new law, thereby
10 exceeding the statutory authority granted to the PUC, and a declaration from the Court clarifying
11 the Commission’s obligation to implement those key provisions of the law. NewSun also
12 petitions this Court to compel the Commission to take action to implement the requirements of
13 HB 2021.

14 **HB 2021**

15 11.

16 HB 2021, which took effect on September 25, 2021, after the Oregon Legislature passed
17 the bill in June 2021, is an act “[r]elating to clean energy; creating new provisions; amending
18 ORS 469A.005, 469A.205, 469A.210, 757.247, 757.603, 757.646 and 757.649; repealing ORS
19 469A.062; and prescribing an effective date.” Among other provisions, HB 2021 sets deadlines
20 for when Oregon’s retail electricity providers must reduce or eliminate greenhouse gas emissions
21 and submit plans to do so.

22 12.

23 ORS 469A.405(2) states “[i]t is the policy of the State of Oregon: * * * That electricity
24 generated in a manner that produces zero greenhouse gas emissions also be generated, *to the*
25 *maximum extent practicable*, in a manner that provides additional *direct benefits to communities*
26

1 *in this state in the forms of creating and sustaining meaningful living wage jobs, promoting*
2 *workforce equity and increasing energy security and resiliency.”* (emphasis added).

3 13.

4 ORS 469A.415(6) states: “The commission shall ensure that an electric company
5 demonstrates continual progress as described in subsection (4)(e) of this section and is taking
6 actions as soon as practicable that facilitate rapid reduction of greenhouse gas emissions at
7 reasonable costs to retail electricity consumers.”

8 14.

9 Complying with this law will require a massive transformation of the electric generation
10 capacity serving Oregon. In just eight years, electric companies must ensure that their
11 greenhouse gas emissions are **80 percent** below baseline levels and **100 percent** below baseline
12 in just eighteen years. In addition, electric companies must demonstrate “continual progress”
13 toward meeting those clean energy targets. ORS 459A.415(4)(e). As a result, virtually all
14 significant power procurement by Oregon’s two affected regulated utilities, PacifiCorp and PGE,
15 and in particular all development of new electric generation facilities, necessarily will be geared
16 toward meeting electric utilities’ obligations under HB 2021.

17 15.

18 Significantly, in enacting HB 2021, the Oregon Legislature clearly identified state
19 policies and priorities relating to the development of this new generation capacity. Section 2,
20 paragraph 2 of HB 2021, codified at ORS 469A.405(2) requires “[t]hat electricity generated in a
21 manner that produces zero greenhouse gas emissions also be generated, *to the maximum extent*
22 *practicable*, in a manner that provides additional direct benefits to communities in this state in
23 the forms of creating and sustaining meaningful living wage jobs, promoting workforce equity
24 and increasing energy security and resiliency[.]” The phrase “to the maximum extent
25 practicable” could mean that *as much as 100%* of the new generation capacity needed should be
26 sited in Oregon in order to benefit state, county, and community economic opportunities that

1 could result in billions of dollars of investment and hundreds of millions of dollars in county and
2 state tax revenue over the next two decades,⁴ in addition to the creation of local jobs targeted by
3 this Policy.

4 16.

5 As part of the compliance obligations to achieve such a significant reduction in
6 greenhouse gas emissions so quickly, ORS 469A.415 directs electric companies to develop
7 “clean energy plans.” A clean energy plan must incorporate emissions goals and demonstrate that
8 an electric company is making continual progress towards meeting those goals. ORS
9 469A.415(4). An electric company must develop a clean energy plan concurrent with its IRP,
10 typically submitted every two years to the Commission, although a clean energy plan could be
11 prepared separately from an IRP. ORS 469A.415(1); OAR 860-027-0400. ORS 469A.420(2)
12 directs the Commission to acknowledge a clean energy plan if it is in the public interest,
13 considering any reduction in greenhouse gas emissions, the economic and technical feasibility of
14 the plan, costs and risks to customers, and any other relevant factors determined by the
15 Commission.

16 17.

17 However, in addition to its duty to acknowledge clean energy plans within the IRP
18 process, ORS 469A.415(6) directs the Commission to ensure that electric companies are taking a
19 *holistic* approach to rapidly reducing greenhouse gas emissions. ORS 469A.415(6) reads:

20 “The commission shall ensure that an electric company demonstrates continual progress
21 as described in subsection (4)(e) of this section and is taking actions as soon as
22 practicable that facilitate rapid reduction of greenhouse gas emissions at reasonable costs
23 to retail electricity consumers.”

24 ⁴ A few *small* projects in Harney and Lake County, some of which were developed by NewSun, already pay over
25 \$1MM per year in property taxes to these two counties. Similarly, in Crook County, hundreds of thousands per year
26 of property taxes are paid by just over 100 MW of recently developed solar projects. For context, many thousands
of MW of solar and wind will be required to reach 100% emissions reductions, comprising potentially tens of
millions *per year* of Oregon county property taxes at risk relative to proper implementation of this policy. Wind
projects in Morrow, Sherman, and Gilliam Counties also already pay millions in revenue to those counties.

1 18.

2 Outside of acknowledgment of clean energy plans, ORS 4649A.415(6) requires the
3 Commission to accomplish two additional goals regarding its oversight of electric companies. It
4 must ensure that an electric company 1) “demonstrates continual progress [within the planning
5 period towards meeting its clean energy targets]” and 2) “is taking actions *as soon as practicable*
6 that facilitate *rapid reduction* of greenhouse gas emissions at reasonable costs to retail electricity
7 consumers.” (emphasis added).

8 19.

9 Inherent in the Commission’s obligation to ensure electric companies are taking actions
10 “as soon as practicable that facilitate rapid reduction of greenhouse gas emissions” is the
11 requirement of ORS 469A.405 that such zero-emission generation is generated “in a manner that
12 provides direct benefits to communities *in this state . . .*” (emphasis added).

13 20.

14 HB 2021 requires utilities to achieve 100% emissions reductions by 2040, only eighteen
15 years away. ORS 469A.410(1)(c). To achieve this, HB 2021 recognizes that the Commission
16 will have to exercise additional oversight and control over its regulated utilities, ensuring utilities
17 are making “continual progress” and taking actions “as soon as practicable” to meet those goals.
18 The final shortlist acknowledgment is a natural venue for the Commission to exercise this
19 oversight because the final shortlist contains the actual bidders that a utility will procure
20 resources from. Acknowledgment of a final shortlist is a “final order” because it definitively
21 outlines which bidders the utility may negotiate with and which bidders it may not.
22 Consequently, the Commission must ensure that resources provided by these bidders will result
23 in a utility achieving HB 2021’s emissions reduction targets.

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26 ///

1 **IRPs, RFPs, and RATEMAKING AS APPLIED TO HB 2021**

2 21.

3 Often, where a utility argues that new generation is needed to serve customers, upon
4 receiving the PUC’s acknowledgement of its IRP, the utility may choose to proceed with certain
5 proposed new generation resource acquisition(s) through an RFP process. The cost of such
6 resource acquisition *may* eventually be recovered in the utility's electric rates when the resource
7 is used and useful if the expenditure is reasonable and prudent, but that occurs through a
8 *separate regulatory process*, often referred to as a “rates case.” This is a process of reviewing
9 various items the utility requests its regulator approve permission to charge its customers (*i.e.*,
10 “recovery” of costs and profits through rates). *See* ORS 757.210. A procurement that aligns with
11 a commission-approved IRP and RFP provides strong evidence that the expenditure was
12 reasonable and prudent, but a utility may still acquire unacknowledged resources. *See* ORS
13 757.210; OAR 860-027-0400.

14 22.

15 These procurements decisions, guided by the utility’s IRP, will be reviewed during a
16 utility’s general rate case. Assets that end up being owned by the utility that are approved in the
17 rates case will earn an approved profit by the utility; by contrast, generation output from
18 resources *not* owned by the utility are generally pass-throughs (reimbursed by customers) and
19 not marked up for a utility’s profit. This difference in treatment is critical to understanding utility
20 behavior and provides critical context for the regulatory constructs that protect ratepayers from
21 utility abuses. In essence, the conflicted position in which utilities operate is the reason why the
22 Commission has developed the IRP, RFP, and general rate case processes.

23 23.

24 Utilities are generally engaged in approval of such rates applicable to generation
25 resources acquired *after* such resources are procured and, often, already operational. Thus, the
26 final shortlist acknowledgment plays a very significant role in the regulatory process, strongly

1 signaling the likelihood of future rate recovery treatment. But this retrospective ratemaking
2 review of procurement costs may not occur for several *years* after the resource acquisition
3 decision was made. And by then it will be too late to ensure that a utility has complied with HB
4 2021. The resource procurement decision likely cannot be undone or redone. The only likely
5 adverse outcome to the utility is that some portion of the resource costs may be borne by
6 shareholders rather than ratepayers, and further stymieing review is the fact that the PUC is
7 incentivized to approve a ratemaking to fulfill its statutory obligations. *See* ORS 469A.120.

8 24.

9 While the speculative threat of future ratemaking scrutiny may influence current utility
10 actions, it is not the direct regulation of present utility procurement behavior contemplated in HB
11 2021. In HB 2021, the legislature specifically addressed utility resource procurement decisions,
12 not retroactive utility ratemaking. Relying on ratemaking to regulate utility procurement is akin
13 to granting a developer approval to build a skyscraper—and then performing the engineering and
14 design review on the fully constructed building.

15 25.

16 This Final Shortlist Acknowledgment is PGE’s first since the enactment of HB 2021.
17 Consequently, the Commission is *statutorily obligated* to ensure that PGE “is taking actions as
18 soon as practicable that facilitate rapid reduction of greenhouse gas emissions” And, per
19 ORS 469A.405, the generation associated with those reductions must provide *direct benefits* to
20 Oregon residents. The Final Order fails to even attempt to address these requirements, let alone
21 ensure they are met, resulting in the approval of resource acquisitions that ensures *no* direct
22 benefits to Oregonians.

23 26.

24 The intent of the legislature in enacting HB 2021 could not be clearer. Reducing
25 greenhouse gas emissions for the benefit of Oregon citizens is an immediate concern, and
26 Oregon citizens should directly reap any associated economic and resiliency benefits thereof.

1 ORS 469A.405. The legislature has set aggressive, quickly approaching emissions targets. ORS
2 469A.410. To achieve those goals, it has directed electric companies to develop clean energy
3 plans and provided the Commission guidance on how and when to officially acknowledge those
4 plans. But in addition to clean energy plans, typically developed only every two years within or
5 shortly after the IRP process, achieving significant emissions reduction requires *expedient* action,
6 which is why the legislature has directed the Commission to ensure that electric companies are
7 also making “continual progress” and “taking actions *as soon as practicable* that facilitate rapid
8 reduction of greenhouse gas emissions” ORS 469A.415(6) (emphasis added). Resource
9 procurement guided by a final shortlist acknowledgement can result in the execution of contracts
10 that provide energy for several years, sometimes *decades*. Therefore, the Final Shortlist
11 Acknowledgment is the natural venue for the Commission to implement HB 2021. And the
12 Commission is the sole authority responsible for ensuring that the state policy is implemented.

13 27.

14 Petitioner challenges the PUC’s Final Order as invalid because it is an agency action that
15 failed to effectuate legislative policy, is outside the range of discretion delegated to the PUC by
16 law, and exceeds the statutory authority of the PUC. Additionally, the Commission has
17 unlawfully refused to act and unreasonably delayed implementing HB 2021.

18 28.

19 Petitioner is entitled to an Order from the Court providing that the PUC is obligated to
20 administer and enforce the provisions of ORS 469A.405(2). Petitioner is also entitled to an Order
21 from the Court setting aside the Final Order and modifying the Final Shortlist Acknowledgment
22 to give effect to and meaningfully implement the obligations set forth in ORS 469A.405(2) to
23 provide the specified direct additional benefits to Oregon communities “to the maximum extent
24 practicable,” or, alternatively, an Order from the Court remanding the Final Order to the PUC
25 with instructions to consider and meaningfully give effect to ORS 469A.405(2) “to the maximum
26 extent practicable.” Alternatively, Petitioner is entitled to an Order remanding the Final Order to

1 the PUC for further proceedings because the PUC’s exercise of discretion is outside the range of
2 discretion delegated to the agency by law and is in violation of ORS 469A.405(2). Additionally,
3 Petitioner is entitled to an Order from the Court compelling the PUC to ensure that the Final
4 Shortlist Acknowledgment will “facilitate rapid reduction of greenhouse gas emissions” for the
5 benefit of Oregon residents as expressly required by ORS 469A.415(6) and ORS 469A.405(2).

6 29.

7 This is a serious and urgent matter in light of HB 2021, which will entail billions of
8 dollars of new infrastructure procurement, hundreds of millions of dollars of tax revenue, and
9 decisions that soon will be made regarding the location and siting of that infrastructure—
10 meaning whether construction, operation, and management of such infrastructure benefits
11 Oregonians, or whether it is sited by the utilities in remote locations out-of-state that do not
12 achieve the legislative directive of HB 2021 and expose ratepayers to diminished grid reliability.
13 Now is the time to address these issues, so that—as new infrastructure is developed—Oregonians
14 may reap the benefit of the policies adopted by the Legislature. The deadline for PGE and
15 Oregon’s other regulated utilities to meet their first emissions goal is looming. Oregon’s
16 communities cannot wait to reap the benefits of HB 2021. The Commission, as directed by the
17 legislature, must act *now*.

18 30.

19 Petitioner also seeks, and is entitled to, an injunction staying the Final Order and
20 consequently PGE’s ability to begin negotiations with bidders. Significant procurement of new
21 electric generation capacity necessary to comply with HB 2021 should not move forward until
22 this Court clarifies the Commission’s responsibility to implement and enforce the obligations set
23 forth in ORS 469A.405(2) and 469A.415(6).

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25 ///

26 ///

1 **THE PARTES**

2 31.

3 Petitioner NewSun Energy, LLC is a Delaware limited liability company that invests in
4 and has and manages affiliates engaged in the development of renewable energy and non-
5 emitting generation and capacity facilities, including small power production qualifying facilities
6 and related activities, in Oregon and throughout the Pacific Northwest. New Sun’s principal
7 place of business is in Bend, Oregon.

8 32.

9 Respondent Oregon Public Utility Commission is an administrative agency of the State of
10 Oregon, with the power and jurisdiction to supervise and regulate public utilities and
11 telecommunications utilities in this state, and with regulatory authority over the resource
12 procurement of retail electricity providers.

13 **STANDING, JURISDICTION, AND VENUE**

14 33.

15 NewSun has standing pursuant to ORS 183.480(1). That statute provides that “any person
16 adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to
17 judicial review of a final order, whether such order is affirmative or negative in form.” ORS
18 183.480(1). Under ORS 183.310(7), a “party” includes “[e]ach person or agency named by the
19 agency to be a party” and “[a]ny person requesting to participate before the agency as a party or
20 in a limited party status which the agency determines either has an interest in the outcome of the
21 agency’s proceeding or represents a public interest in such result.” Under ORS 183.310(8),
22 “[p]erson’ means any individual, partnership, corporation, association, governmental
23 subdivision or public or private organization of any character other than an agency.”

24 34.

25 NewSun has standing as a party to the agency proceeding at issue because it is an
26 intervenor in UM 2166.

1 35.

2 NewSun also is a person adversely affected or aggrieved by the Final Order. As a
3 company whose business activities provide direct benefits to communities in Oregon in the
4 forms of creating and sustaining meaningful living wage jobs, promoting workforce equity, and
5 increasing energy security and resiliency, NewSun’s activities further the interests that the
6 legislature expressly wished to have considered in the implementation of HB 2021.

7 36.

8 The Court has jurisdiction pursuant to ORS 183.484.

9 37.

10 Petitioner’s petition for review is timely. ORS 183.484(2) provides:

11 “Petitions for review shall be filed within 60 days only following the date the order is
12 served, or if a petition for reconsideration or rehearing has been filed, then within 60 days
13 only following the date the order denying such petition is served. If the agency does not
14 otherwise act, a petition for rehearing or reconsideration shall be deemed denied the 60th
15 day following the date the petition was filed, and in such case petition for judicial review
shall be filed within 60 days only following such date. Date of service shall be the date on
which the agency delivered or mailed its order in accordance with ORS 183.470.”

16 38.

17 The Final Order was served on August 23, 2022. Petitioner’s petition for review,
18 appealing from the Final Order, was filed within 60 days of that date.

19 39.

20 Venue is proper in Deschutes County under ORS 183.484(1), which provides
21 “[p]roceedings for review under this section shall be instituted by filing a petition in the Circuit
22 Court for Marion County or the circuit court for the county in which the petitioner resides or has
23 a principal business office.” NewSun’s principal place of business is in Bend, Oregon, where it
24 maintains its offices and its Principal and CEO Jake Stephens maintains his primary office and
25 conducts the business of the company.

26 ///

1 40.

2 The Court also has jurisdiction under ORS 183.490, which provides:

3 “The court may, upon petition as described in ORS 183.484, compel an agency to
4 act where it has unlawfully refused to act or make a decision or unreasonably
5 delayed taking action or making a decision.”

6 The Court’s jurisdiction over NewSun’s ORS 183.490 claim is akin to its jurisdiction
7 under ORS 183.480 to 183.484. *Bay River, Inc. v. Env’tl. Quality Comm’n*, 26 Or App 717, 722
8 (1976).

9 41.

10 ORS 469A.415 directs the commission to ensure that “an electric company . . . is taking
11 actions as soon as practicable that facilitate rapid reduction of greenhouse gas emissions at
12 reasonable costs to retail electricity consumers.” The Final Shortlist Acknowledgment fails to
13 issue an order on the merits of this requirement, and the court therefore has jurisdiction to require
14 the Commission to act with more expediency.

15 **UM 2166 AND THE FINAL SHORTLIST ACKNOWLEDGEMENT**

16 42.

17 On April 28, 2021, PGE filed a request that the PUC appoint an Independent Evaluator to
18 oversee the RFP and request that the PUC open a docket for that purpose. The PUC did so,
19 opening Docket No. UM 2166.

20 43.

21 Several parties moved to intervene and were granted intervenor status in UM 2166,
22 including Oregon Solar+ Storage Industries Association (“OSSIA”) and NewSun.

23 44.

24 PGE filed its Proposed All-Source RFP Scoring and Modeling Methodology on June 15,
25 2021. In response, OSSIA filed comments on August 23, 2021, after HB 2021 was signed into
26 law in July 2021, requesting that the PUC ensure the RFP “scoring and modeling reflect how the

1 procurement will provide direct benefits in Oregon” in order to comply with Section 2,
2 paragraph 2 of HB 2021. OSSIA commented that “PGE’s scoring and modeling methodology
3 should reflect HB 2021’s clear preferences for new energy facilities to be built and operated in
4 Oregon.”

5 45.

6 Despite these comments, PGE’s 2021 All-Source RFP - Final Draft, filed on October 15,
7 2021, also did not address compliance with Section 2, paragraph 2 of HB 2021, and did not
8 include any changes, much less make a meaningful attempt, to require any scoring criteria,
9 implement any preferences, or take other measures related to in-state siting or other pertinent
10 criteria to comply with Section 2, paragraph 2 of HB 2021.

11 46.

12 NewSun filed comments in response to PGE’s 2021 All-Source RFP – Final Draft on
13 November 24, 2021. In its comments, NewSun set forth why, in order to comply with Section 2,
14 paragraph 2 of HB 2021, “procurement must incorporate scoring, preferences, and other
15 measures to achieve the policy ‘to the maximum extent practicable,’” and that “some amount of
16 the procurement in this PGE RFP effectively must be in-state, as the only reasonable safe harbor
17 to complying with the policy.” NewSun made clear that, while there may be various ways to
18 comply with Section 2, paragraph 2 of HB 2021, that doing nothing was not appropriate.

19 47.

20 OSSIA also filed comments in response to PGE’s 2021 All-Source RFP – Final Draft on
21 November 24, 2021. In its comments, OSSIA noted that “there would be no measurable way for
22 the state to comply with this in-state policy requirement without some scoring criteria related to
23 it” and recommended that the PUC work with PGE “to determine what further analysis could
24 inform how the current RFP might be maximized for HB 2021 compliance.”

25 48.

26 The PUC approved the RFP with modifications on December 10, 2021.

1 49.

2 In the final RFP, PGE stated, in a section entitled “Purpose and Scope,” that “[t]he recent
3 passage of HB 2021 by the Oregon State Legislature mandates and reinforces PGE’s
4 commitment to further decarbonize PGE’s portfolio. PGE is committed to reduce our emissions
5 by 80% by 2030 and procurements resulting from this 2021 All-Source RFP will provide
6 necessary progress to meet this imperative.” The Final RFP does not mention Section 2,
7 paragraph 2 of HB 2021.

8 50.

9 On August 31, 2022, the Commission issued Order No. 22-315, acknowledging PGE’s
10 Final Shortlist subject to certain conditions.

11 51.

12 Petitioner challenges the PUC’s Final Order as invalid because it is based on an
13 erroneous interpretation of the law, is outside the range of discretion delegated to the PUC by
14 law, and exceeds the statutory authority of the PUC.

15 52.

16 Petitioner also challenges the Commission’s unlawful failure to act as expressly required
17 by ORS 469A.415(6).

18 **FIRST CLAIM FOR RELIEF**

19 **(ORS 183.484—Judicial Review of an Order in Other Than a Contested Case)**

20 53.

21 Petitioner realleges and incorporates by reference paragraphs 1–52 as if fully stated
22 herein.

23 54.

24 The PUC’s decision in the Final Order to require zero in-state preferences in the Final
25 Order and to require no measures whatsoever—no bidder criteria or scoring or ranking, or any
26 other measure—to favor projects that provide meaningful living wage jobs, workforce equity,

1 and increased energy security and resiliency to Oregon communities is based on an erroneous
2 interpretation of ORS 469A.405(2), which expressly states a policy to implement HB 2021 in a
3 manner that provides additional direct benefits to communities in this state “to the maximum
4 extent practicable.” Zero cannot be the maximum extent practicable and conflicts with ORS
5 469A.405(2).

6 55.

7 The Final Order is outside the range of discretion delegated to the PUC because the
8 Commission did not have discretion to fail to consider the effects of ORS 469A.405(2) when
9 expressly required to ensure PGE’s compliance with emissions targets as required under ORS
10 469A.415(6).

11 56.

12 The Final Order exceeds the statutory authority of the PUC, because ORS 469A.405(2)
13 “embodies a complete legislative policy” to promote in-state siting and hiring, and the Final
14 Order’s failure to even consider the effects of ORS 469A.405(2) conflicts with that policy.

15 57.

16 Pursuant to ORS 183.484(5)(a), Petitioner is entitled to an Order setting aside the Final
17 Order and modifying the final shortlist to give effect to and meaningfully implement the
18 obligations set forth in ORS 469A.405(2). Alternatively, Petitioner is entitled to an Order from
19 the Court remanding the Final Order to the PUC with instructions to issue a final order that
20 considers the effects of ORS 469A.405(2) on the final shortlist and orders modifications to the
21 final shortlist to give effect to and meaningfully implement the obligations set forth in ORS
22 469A.405(2) “to the maximum extent practicable.”

23 58.

24 Alternatively, pursuant to ORS 183.484(5)(b), Petitioner is entitled to an Order
25 remanding the Final Order to the PUC because the PUC’s exercise of discretion is outside the
26 range of discretion delegated to the agency by law and is in violation of ORS 469A.405(2).

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59.

Pursuant to ORS 183.486 and the Court’s inherent authority, Petitioner also seeks, and is entitled to, an injunction staying the Final Order and PGE’s commencement of negotiations with bidders per the Final Shortlist Acknowledgment.

SECOND CLAIM FOR RELIEF
(ORS 183.490—Compel Agency Action)

60.

Petitioner realleges and incorporates by reference paragraphs 1–59 as if fully stated herein.

61.

ORS 469A.415(6) explicitly direct the Commission to “ensure that an electric company . . . is taking actions as soon as practicable that facilitate rapid reduction of greenhouse gas emissions at reasonable costs to retail electricity consumers.”

62.

A utility’s final shortlist acknowledgment sets in motion several years of resource procurement.

63.

As such, PGE’s Final Shortlist Acknowledgment is the natural venue to ensure its HB 2021 obligations are on track to be met, and the Commission’s failure to exercise such oversight amounts to a dereliction of its explicit obligations under ORS 469A.415(6).

64.

Accordingly, Petitioner asks the Court to compel the Commission to act as required by ORS 469A.415(6).

///
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///

1 **COMPLAINT FOR DECLARATORY RELIEF**
2 **(DECLARATORY JUDGMENT)**

3 65.

4 Petitioner realleges and incorporates by reference paragraphs 1–64 as if fully stated
5 herein.

6 66.

7 This Court has jurisdiction under Oregon’s Declaratory Judgments Act, ORS 28.010–
8 160.

9 67.

10 A present and actual controversy exists between the parties because the parties disagree
11 as to whether HB 2021 requires the Commission to consider the statute’s goals and purpose in its
12 final shortlist acknowledgment orders.

13 68.

14 By failing to implement the requirements of HB 2021 within this final shortlist
15 acknowledgment, the Commission is proceeding without probable cause. ORS 183.480(3).

16 69.

17 Petitioner will suffer substantial and irreparable harm if relief is not granted. ORS
18 183.480(3).

19 70.

20 Petitioner seeks a declaration from the Court that:

21 1. ORS 469A405(2) requires the Commission to include, to the maximum extent
22 practicable, a preference for in-state, non-emitting resources in its final shortlist
23 acknowledgments;

24 2. ORS 469A.415(6) requires the Commission to exercise oversight of utility
25 emissions reduction efforts within the final shortlist acknowledgment; and
26

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Petitioner prays for relief as follows:

3 1. A declaration from the Court providing that Oregon Public Utility Commission is
4 obligated to administer and enforce the provisions of ORS 469A.405(2) and 469A.415(6).

5 2. An Order from the Court setting aside the Final Order and modifying the Final
6 Shortlist Acknowledgment to give effect to and meaningfully implement the obligations set
7 forth in ORS 469A.405(2) to provide the specified direct additional benefits to Oregon
8 communities “to the maximum extent practicable.”

9 3. Alternatively, an Order from the Court remanding the Final Order to the PUC
10 with instructions to issue a final order that considers the effects of ORS 469A.405(2) on the
11 Final Shortlist Acknowledgment and order modifications to give effect to and meaningfully
12 implement the obligations set forth in ORS 469A.405(2) “to the maximum extent
13 practicable.”

14 4. Alternatively, an Order from the Court remanding the Final Order to the PUC for
15 further proceedings.

16 5. An Order from the Court compelling the Commission to act as expressly required
17 by ORS 469A.415(6).

18 6. A declaration from the Court that the Commission must implement the
19 requirements of ORS 469A.405(2) and 469A.415(6) in a final shortlist acknowledgment.

20 7. An injunction staying the Final Order and PGE’s commencement of negotiations
21 with bidders pursuant to the Final Shortlist Acknowledgment.

22 8. Special findings of fact based on the evidence in the record and conclusions of
23 law indicating clearly all aspects in which the agency’s order is erroneous.

24 9. Such other relief as the Court deems just and proper.

25 ///

26 ///

1 DATED: October 28, 2022.

2
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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2166

In the Matter of

PORTLAND GENERAL ELECTRIC
COMPANY,

2021 All-Source Request for Proposals.

ORDER

DISPOSITION: SHORTLIST ACKNOWLEDGED

This order memorializes our decision, made and effective at our July 14, 2022 Special Public Meeting, to acknowledge the final shortlist for Portland General Electric Company's (PGE) 2021 All-Source Request for Proposals (RFP) subject to several conditions. As explained below, some of the conditions we adopt were proposed by Staff, and some include modifications to conditions proposed by Staff.

I. BACKGROUND

On May 6, 2020, we acknowledged with conditions PGE's 2019 Integrated Resource Plan (IRP), which included an RFP seeking up to 150 average megawatts (MWa) of new Renewable Portfolio Standard (RPS) eligible resources that contribute to meeting PGE's capacity needs by the end of 2024 and non-emitting resources to meet remaining capacity needs.¹

On April 28, 2021, PGE filed a request to open a docket to select an Independent Evaluator (IE) to comply with the requirements of OAR 860-089-0200. We approved Bates White as the IE at the July 13, 2021 Public Meeting. Subsequently, on September 25, 2021, House Bill 2021 (HB 2021) went into effect, establishing target greenhouse gas emissions reductions associated with electricity sold to Oregon consumers. HB 2021 established a target to reduce greenhouse gas emissions from each retail electricity provider by 80 percent below baseline emissions levels by 2030, by 90 percent below

¹ *In the Matter of Portland General Electric Company*, Docket No. LC 73, Order No. 21-129 (May 3, 2021). Additionally, PGE later filed an update to its IRP that stated it intended to conduct a single RFP solicitation rather than the two originally proposed. The Commission acknowledged this update at the April 20, 2021 Special Public Meeting.

baseline emissions levels by 2035, and by 100 percent below baseline emissions levels by 2040 and each subsequent year.

On October 5, 2021, we approved PGE's Scoring and Modeling Methodology for its RFP subject to several conditions.² In particular, we required PGE to run an analysis of its alternative procurement scenario for the RFP in which it would procure one-third of the estimated renewables needed to meet the 2030 target set forth in HB 2021, and to work with Staff to determine additional analysis that could be provided over the course of the RFP timeline to better understand where the RFP fits into HB 2021 compliance.

PGE filed its final shortlist on May 5, 2022, which includes the IE's Closing Report and procurement volumes necessary to comply with the targets in HB 2021. In the final shortlist, PGE presented analysis for three maximum procurement volume scenarios; the scenarios were entitled, respectively, 180 MWa, 250 MWa, and 400 MWa.³ PGE states that while the analysis showed that the 400 MWa scenario was the least cost, least risk option, it intends to procure from the Final Shortlist based on the 180 MWa scenario, which matched the level of procurement identified in its 2019 IRP action plan. This 180 MWa scenario included 150 MWa of renewables, 100 MW of resources for its Green Future Impact program (GFI), and non-emitting dispatchable capacity to meet PGE's remaining 2025 capacity needs.⁴ The final shortlist includes up to 1,131 MW of effective load carrying capacity (ELCC), including 604 unique MWa or 594 MW ELCC in renewables.⁵ PGE states that it used the portfolio analysis to inform the relative ranking of the projects and the priority of negotiations, rather than to further narrow the final shortlist.⁶ Specifically, to inform its actions, PGE identified the best performing portfolios and defined an "efficient frontier," dividing those portfolios from the remaining portfolios. These best performing portfolios are predominantly at the 400 MWa procurement level.⁷ PGE states that it may consider procuring additional resources on the final shortlist in excess of the 180 MWa scenario if additional resources are available.⁸

On June 29, 2022, Staff filed its report on PGE's final shortlist, which is attached to this Order as Appendix A. Staff's report recommended that the Commission acknowledge

² Order No. 21-320 (Oct 6, 2021).

³ PGE Final Shortlist at 36-42 (May 5, 2022); Errata to PGE's Final Shortlist (May 12, 2022); Second Errata to PGE's Final Shortlist (Jun 7, 2022).

⁴ PGE's Reply Comments at 1-2 (Jun 15, 2022).

⁵ Staff Report on Final Shortlist at 3; Errata to the IE's Closing Report at 31 (Jun 7, 2022).

⁶ PGE's Reply Comments at 12-13; Staff Report on the Final Shortlist at 4.

⁷ Staff Report on Final Shortlist at 29.

⁸ PGE's Reply Comments at 2.

the final shortlist subject to five conditions. PGE filed comments in response to the Staff Report, largely objecting to or seeking clarification on the proposed conditions.

II. DISCUSSION

A. Significance of Conditions on Acknowledgment

During the Special Public Meeting, PGE raised concerns that attaching conditions to acknowledgement could be problematic for several reasons. For example, PGE noted that conditions could imply that the acknowledgement could be reversed or revoked in the future, based upon information that is not known or available at the time of the acknowledgement. The discussion with PGE on this topic raised important issues around the purpose of acknowledging a final shortlist before procurement and the consequences of conditioning acknowledgment.

We clarify here the intent of the conditions that we attach to our acknowledgement. Acknowledgement of the final shortlist is a finding by the Commission that an electric company's final shortlist of bid responses appears reasonable at the time of acknowledgement, based on what is known or knowable at the time, and was determined in a manner consistent with the resource procurement rules.⁹ A core purpose of the final shortlist acknowledgement is to promote transparency.¹⁰ The requirement to file the final shortlist ensures that the Commission and stakeholders receive better explanations of PGE's procurement process and are able to see that the decisions leading to the shortlist are based on the factors that are most significant to customer outcomes. Acknowledgment of a shortlist, therefore, is highly dependent on the context in which the acknowledgment decision is made—the factors and circumstances that exist at the time of the acknowledgment.

In this instance, there is highly important context around our review of PGE's shortlist. For example and for various reasons explored in this docket, PGE has asked for acknowledgment of a shortlist that contains many more projects than it seemingly intends to procure. Additionally, PGE has not provided total clarity (and argues that it is unable to provide total clarity) around the level of resources it intends to procure. Finally, there are unique developments that may limit the viability of resources on the shortlist due to the U.S. Department of Commerce's investigation into solar tariffs, and recent developments with respect to that investigation, the consequences of which are not yet fully known. All of this means that we are asked to acknowledge a shortlist within a

⁹ OAR 860-089-500(1).

¹⁰ See *In the Matter of Public Utility Commission of Oregon Investigation Regarding Competitive Bidding*, Docket No. UM 1182, Order No. 14-149 at 14 (Apr 30, 2014) (requiring utilities to file a shortlist acknowledgment application, finding that it promoted transparency in the utility procurement process).

context in which future developments and analysis will bear heavily on PGE's ultimate procurement decision. We determine that, in certain instances, it is important to identify this context within our order as "conditions" of acknowledgment, so that the acknowledgment decision can be understood in the future in an appropriate light, after circumstances may have changed, and more analysis and facts have come to light.

We fully recognize that circumstances may change as PGE's procurement process goes on. Therefore, we understand and expect that PGE's ultimate decisions about resource acquisitions may be different than they were contemplated to be at the time of acknowledgement. But the RFP and final shortlist process do provide important information regarding the least cost, least risk resource options, how different bids perform together in a portfolio, and what PGE understands to be the ideal procurement shortlist at the time acknowledgement is requested.

As explained more below, we find that certain conditions are required on our acknowledgment in order to identify why we find the shortlist reasonable, despite the length of the list, and the ambiguity that PGE presents around its intended acquisitions. In other instances, we intend the conditions to impose requirements on PGE to take certain specific actions.

B. Bates White as Independent Evaluator

Staff Condition 1 proposes to direct PGE to ensure that Bates White will continue to serve as the IE through the final resource selection, monitor contract negotiations, and file a closing report with the Commission no later than 30 days after final resource selection. In its comments, PGE proposed to modify Staff's language to direct Bates White to continue to serve as IE rather than directing PGE, stating that it had to confirm availability and interest from Bates White. At the Special Public Meeting, PGE stated that it had since confirmed Bates White was available and that it supported the condition.

We adopt Staff Condition 1 with modifications. We direct PGE to ensure that Bates White shall continue to serve as IE through final resource selection, in order to monitor all contract negotiations, file a final resource selection closing report with the Commission no later than 30 days after final resource selection, and respond to any Staff or Commission questions on the final IE report. We may modify this directive in response to the report that, below, we direct PGE to submit in the event that the period for negotiations under this RFP is expected to persist beyond December 31, 2022.

C. Procurement Target

Staff Condition 2 proposes that the Commission acknowledge the final shortlist to the extent that it is used to procure at the 250 MWa level. Staff argues that the analysis generally supports a higher procurement volume as the least cost, least risk path and supports the 250 MWa volume over the 180 MWa volume proposed in the final shortlist.¹¹ Staff notes that while the 400 MWa procurement scenario reduces the most emissions and is the least cost procurement option in a number of cases, it is the riskier option from a cost standpoint and is the more expensive option in certain scenarios. The 250 MWa procurement volume, however, outperformed the 180 MWa in emissions, as well as costs, with the exception of the “worst case scenario” in which the 250 MWa and 180 MWa procurement levels had nearly equivalent costs.¹²

PGE proposes to modify this condition to state that the final short list is acknowledged to the extent that it is used to procure “up to approximately 250 MWa” of renewable resources, with a total procurement volume (renewable resources and non-emitting dispatchable capacity) consistent with the identified 2025 system capacity need of 388 MW. Further, PGE argues that the Commission should clarify that this is not a condition of acknowledgement but instead is a statement of policy. PGE states that while it appreciates the flexibility to procure beyond the 150 MWa volume in its 2019 IRP action plan, and that it is open to procuring at the 250 MWa volume, its ability to procure 250 MWa should not be a condition of acknowledgement.¹³ PGE argues that it may not be able to procure to the 250 MWa scenario given the potentially significant barriers to executing commercial agreements, including ongoing implications from the U.S. Department of Commerce solar tariff investigation. At the Special Public Meeting, PGE stated that it was concerned Staff’s condition as written could result in acknowledgement being revoked if it was unable to procure exactly 250 MWa.

The Oregon Citizens’ Utility Board (CUB) raised concerns around the integrity of the IRP process and the potential impacts on customers from the procurement, as well as upcoming distribution investments. CUB stated that it supported the procurement level established in PGE’s most recent IRP.

At the Special Public Meeting, Staff and PGE clarified the intended meaning of “250 MWa,” in reference to the scenario under discussion for acknowledgment. PGE and Staff agreed that references to “250 MWa” were intended to include approximately 215 MWa in renewable resources, 100 MW nameplate for PGE’s GFI program, and

¹¹ Staff Report on Final Shortlist at 16.

¹² *Id.* at 20-21.

¹³ PGE’s Comments on Staff Report at 6-7 (Jul 7, 2022).

sufficient non-emitting dispatchable capacity to meet PGE's remaining 2025 capacity needs.

We conclude that the analysis supports 250 MWa as the least cost, least risk procurement scenario for this RFP, but we decline to adopt either the language proposed by Staff or PGE. As described above, the context in which our acknowledgment is issued is important to document, given the ambiguities around PGE's proposed acquisition amounts, and the unique circumstances that exist from the U.S. Department of Commerce's investigation and subsequent events. We therefore adopt a condition that makes clear that at the time of our acknowledgement, and based on the best information and analysis available at that time, the most reasonable course of action would appear to be an acquisition at the 250 MWa level, with the clarifying detail described above about what the individual components of that acquisition would be. This condition is made with a full understanding that certain future developments or analysis may indicate a different course is reasonable, or that an acquisition at that level is not possible. We will, of course, take those developments into account in any future review of the reasonableness of PGE's actions in making actual acquisitions. And, they should not be viewed as somehow invalidating or reversing our acknowledgement here. Rather, the condition will simply make clear the state of evaluation at the time of acknowledgment, which we expect will be useful in determining the reasonableness of PGE's subsequent actions, given any new developments.

We understand PGE's concerns with deviating from the IRP, as well as CUB's concerns with the integrity of the IRP process. However, the analysis performed for the final shortlist reflects the significant changes in the environment since the last IRP, including the passage of HB 2021. The analysis also demonstrates that the economies of scale at play in some bids create opportunities that the 180 MWa constraint may arbitrarily eliminate. We determine that it is not contrary to our IRP process to incorporate updated analysis and circumstances prior to an actual resource acquisition, and that providing for such flexibility is an important part of ensuring that customer interests are best served.

D. Preferred Portfolio

Staff Condition 3 proposes to require PGE to file, within one week of the acknowledgement decision, a designation of its preferred portfolio for the 250 MW procurement level. The designation would include the specific projects, the total MWa expected from those projects, how the portfolio analysis and sensitivities support the presented preferred portfolio, and any other relevant data to support the preferred portfolio. Staff states the purpose of designating a preferred portfolio is to facilitate future discussions around PGE's selections and decision-making process in the final resource acquisition.

PGE states that it is willing to provide a top performing portfolio for the 250 MWa procurement level as proposed by Staff but seeks clarification that its procurement is not limited to this specific preferred portfolio.¹⁴ PGE proposes to add the following language to Staff Condition 3: “PGE is not limited to procure exclusively from the preferred portfolio and its associated projects.” At the Special Public Meeting, Staff clarified that the purpose of Condition 3 was to establish a benchmark to assist the IE’s review of the procurement. Further, Staff argued that PGE’s additional language was unnecessary because PGE is always free to make its own decisions, but it must defend and explain its approach in prudence. At the Special Public Meeting, PGE also clarified that it had already provided the information Staff requests through filings over the course of this proceeding, but that it is comfortable with the filing requirement to make a more specific filing. PGE stated that its concern with the language is that the concept of a preferred portfolio is being conflated with the final shortlist in the RFP, and that it has a responsibility to procure the best resources for customers based on the knowledge it has at the time of the decision. PGE states that it is possible that the 250 MWa portfolio will no longer be the prudent selection at the time.

We adopt Staff Condition 3. The purpose of Condition 3 is not to conflate the preferred portfolio with the final shortlist, but to provide some baseline understanding of how the foundational analysis related to the ultimate procurement. PGE’s final shortlist includes a total amount of MWa well in excess of its proposed procurement of 180 MWa, as well as the 250 MWa level. Further, PGE’s proposed final shortlist including their approach to prioritizing negotiations, as described in the public meeting, appeared to be based on the 400 MWa procurement level. We appreciate PGE’s stated need for flexibility with respect to its actual acquisitions, but the final shortlist included 50 different portfolios and no clear indication regarding PGE’s intended procurement portfolio or strategy. Condition 3 is intended to address areas where the final shortlist was unclear, to inform the IE’s oversight of the procurement, and to assist with a future prudence review. We decline to adopt PGE’s additional language but reiterate that this condition is not a directive to procure certain resources and that PGE can and should make reasonable and prudent decisions informed by actual negotiations and based on the circumstances at the time the decision is made, even if they deviate from the modeled preferred portfolio.

E. Primary Rank Order

Staff Condition 4 proposes to require PGE to use the 250 MWa efficient frontier portfolio results as the primary rank order for which to pursue resources in the procurement. Similar to Condition 3, Staff states that the purpose of this condition is to address

¹⁴ PGE’s Comments on Staff Report at 7.

benchmarking and assist with future review. Staff agrees with PGE's decision to focus on the efficient frontier portfolios but argues that it seems like a mismatch to use the portfolios closer to a 400 MWh procurement level for a smaller portfolio size. Staff notes that the 250 MWh procurement level has more bids that show up in the efficient frontier portfolios.¹⁵

As with Condition 3, PGE argues that it is willing to provide a top performing portfolio for the 250 MWh procurement level as proposed by Staff but seeks clarification that is not limited to procuring this specific preferred portfolio. PGE proposes to add the following language to Condition 4: "PGE is not limited to procure exclusively from the 250 MWh efficient frontier portfolio results and its associated projects as the primary rank order for negotiations."¹⁶

We adopt Staff Condition 4. One of the important intentions of our competitive bidding rules is to ensure that, when utility-owned resources are selected, they are objectively demonstrated to be the best projects in a competitive solicitation. It is important for us to be aware of where shareholders may be less aligned with customer interests and pay special attention when benchmark resources are present—and is particularly important in this RFP given the significant flexibility that PGE wishes to preserve by maintaining a shortlist much larger than its expected procurement level. Differences in ranking depending on the portfolio size to be procured also heighten our need to understand, based on objective criteria, PGE's reasoning in the event a benchmark resource is selected. There are clear differences in the types of benefits and risks presented by utility-owned and PPA resources. Understanding the relative risks, costs, and benefits of a selected project necessarily includes some evaluation of the other resource options that were available, including rejected bids, in order to appropriately allocate the unique risks, costs, and benefits between customers and the utility.

We adopt Staff's recommended Condition 4 because it would align PGE's primary rank order in pursuing projects with the acquisition strategy that seemed most reasonable at the time of our acknowledgement, as explained in Condition 2. Again, we intend Condition 4 to be, like Condition 2, a statement of the important context that exists at the time of our acknowledgment. And, it would serve as an important safeguard in monitoring against potential utility bias by aligning the utility's acquisition strategy with the portfolio size determined to be most beneficial to customers. We recognize, however, that if circumstances change, and if the most beneficial and achievable acquisition target is reasonably modified, then the procurement strategy and rank order should be modified to reflect those changes as well.

¹⁵ Staff Report on Final Shortlist at 31.

¹⁶ PGE's Comments on Staff Report at 7.

F. Deadline to Complete Final Resource Selection

Staff Condition 5 proposes to direct PGE to complete its final resource selection by the end of calendar year 2022. Staff notes that since the start of the RFP process, PGE has stated that it intended to wrap up procurement by the end of the year and that the schedule for the proceeding was designed to accommodate an end-of-year deadline and timelines associated with Production Tax Credits. Further, the RFP only required bidders to hold bids for 250 days, which will expire in September 2022, well before the proposed end-of-year deadline. Additionally, Staff argues that an indefinite timeline would exacerbate its concerns with the size of the final shortlist, because PGE could wait out certain bidders and disrupt the overall order of procurement.¹⁷ Staff also states that PGE's proposal to continue contracting after the end of 2022 raises concerns regarding the integrity of the IRP and RFP planning cycles, and an ongoing final shortlist could undermine the planning efforts for the 2023 IRP.

PGE objects to Staff Condition 5, arguing that it is outside the scope of the acknowledgement and would shift risk onto customers by constraining commercial negotiation timelines.¹⁸ In particular, PGE argues the deadline could provide bidders with leverage to force PGE into granting concessions. PGE also maintains that it intends to complete all negotiations by the end of 2022 to the extent possible, but that there are some projects with a commercial operation date of 2024 or later that do not necessitate completion by the end of 2022. PGE also recommends that, to the extent contract negotiations extend past the end of 2022, the IE should continue to provide oversight and reporting to the Commission regarding negotiation progress and any appropriate next steps for the Commission.

We decline to adopt Staff Condition 5. If PGE expects procurement to extend past the end of 2022, we direct PGE to file a status report no later than December 1, 2022, that addresses the costs and benefits of the IE's engagement past December 31, 2022, and explains why it is in customers' interest for PGE to continue rather than conclude the procurement and begin a new planning and procurement cycle. We appreciate Staff's concerns that the process was designed around completing procurement by the end of 2022. We agree that the value of our acknowledgement decision diminishes as time elapses between the analysis that supported acknowledgment and the procurement, and circumstances continue to change. Additionally, we appreciate Staff's concerns that a lack of a firm end date further exacerbates the lack of specificity in PGE's final shortlist and undermines some of the significance of an acknowledgment of the final shortlist. We agree with Staff's concerns that the approach taken here departs, in some ways from the

¹⁷ Staff Report on Final Shortlist at 32.

¹⁸ PGE Comments on Staff Report at 8.

robust engagement with our competitive bidding rules that were intended to ensure customer benefit through a diversity of resource types and ownership and deal structures. We find, however, that it is not necessary to establish a hard deadline, and the status report will provide adequate insight into the procurement process. This report process will also provide adequate opportunity for us to direct a change to the IE's role if continuation is not in customers' best interests and will give further insights into the ongoing significance of our acknowledgment order here.


III. ORDER

IT IS ORDERED that Portland General Electric Company's final shortlist for its 2022 All-Source Request for Proposals is acknowledged as described within this order, subject to the conditions proposed by Staff and modified by the discussion above. We note that PGE filed the analysis required by Conditions 3 and 4 before this order issued.

Made, entered, and effective Aug 31 2022.



Megan W. Decker
Chair



Letha Tawney
Commissioner



Mark R. Thompson
Commissioner

