

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 2274**

In the Matter of  
  
PUBLIC UTILITY COMMISSION OF  
OREGON,

COMMENTS OF NEWSUN  
ENERGY LLC ON PGE  
SUPPLEMENTAL FILING

2023 All-Source Request for Proposals.

**I. INTRODUCTION**

NewSun Energy LLC (“NewSun”) submits these comments on Portland General Electric’s (“PGE”) supplemental filing in this docket concerning the approval and use of PGE’s affiliate in the 2023 Request for Proposals process (“Supplemental Filing”). PGE’s Supplemental Filing is intended to address the Commission’s observation that: “Given the potential for PRR projects to have risks associated with performance, default, and other factors that are not the same as those implicated in traditional PPAs, the RFP process must review and consider these unique risks and ensure that they are addressed.”<sup>1</sup> While PGE has provided some information to satisfy the Commission’s requirement, the affiliate structure and RFP do not go far enough to protect against potential risks and abuse.

PGE’s intentions with respect to the role of its affiliate Portland Renewable Resources (“PRR”) have been a moving target both in this docket and in the companion affiliated interest docket, UI 489. In its Supplemental Filing, PGE represents that PRR

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<sup>1</sup> Docket No. UI, 489, Order No. 23-294, p. 2.

will not submit a bid in the 2023 RFP. PGE intends to use PRR only “as a vehicle to realize tax benefits for either a benchmark sponsored resource or a traditional third-party developed resource if selected on the final shortlist and ultimately acquired through a build and transfer agreement.”<sup>2</sup> PGE states that no members of PGE’s benchmark teams will see third-party bids at any point, regardless of PRR’s role in the procurement process.<sup>3</sup> PGE further represents in the Supplemental Filing that any transaction between PGE and PRR will use the form power purchase agreement (“PPA”) approved in this docket without negotiation.

While the representations made in PGE’s Supplemental Filing would result in an improvement over PGE’s prior proposals and practices, NewSun cautions that these improvements remain imperfect and are only as good as the enforcement of them. NewSun urges the Public Utility Commission of Oregon (“Commission”) to require that there are no shared employees between PRR and the PGE benchmark team. Service by an employee to one should categorically exclude service to the other, not just in the 2023 RFP, but also in any PGE RFPs conducted in the foreseeable future. The Commission should implement meaningful safeguards around the sharing of information—be it formal or informal—between PRR and the PGE benchmark team members within the friendly confines of PGE’s offices. Finally, the Commission has previously recognized certain contract terms, although symmetrical on the surface, may actually impose asymmetrical risks and costs to third-party bidders. The proposed form PPA approved in this docket

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<sup>2</sup> UM 2274, PGE Supplemental Filing, p. 1.

<sup>3</sup> UM 2274, PGE Affiliate Services Overview, p. 5.

therefore needs to be carefully scrutinized to ensure that it actually levels the playing field, rather than tilting it in favor of PGE’s benchmark bid or affiliate bids in future RFPs.

## **II. THE GOAL OF THE RFP PROCESS IS TO MITIGATE UTILITY BIAS IN RESOURCE PROCUREMENT: HOW IS THAT WORKING?**

PGE has historically designed and implemented its RFPs to favor PGE-owned resources. As a regulated investor-owned utility, PGE earns a rate of return on the capital investments it makes. Consequently, PGE is incentivized to build or acquire its own generating assets at ratepayer expense, as opposed to purchasing energy or capacity owned by third-party owners. Doing so generates the greatest possible profits for its shareholders, potentially to the detriment of its ratepayers.

Oregon law requires the Commission to establish RFP rules that mitigate this systemic bias in favor of utility-owned assets. ORS 469A.075(4)(d) states that “[t]he commission shall adopt rules [p]roviding for the evaluation of competitive bidding processes that allow for diverse ownership of renewable energy resources that generate qualifying electricity.” Pursuant to this statutory mandate, the Commission adopted OAR 860-089-0010. (“The [RFP] rules . . . are intended to . . . establish a fair, objective, and transparent competitive bidding process . . .”). Thus, the Commission has a legal duty to ensure that regulated utilities acquire resources pursuant to procurement rules and processes that are “fair” to third-party owners and that will result in “diverse ownership” of resources.

A review of prior RFP’s shows that the design of prior PGEs RFPs has *not* accomplished the legal directives of fairness or diverse ownership. In its most recent

RFP, for example, PGE was the overwhelming winner of one of the largest resource acquisitions in the utility's history: three power plants totaling over \$1 billion in investment.<sup>4</sup> Although PGE has not publicly disclosed the full details of the contracts that it has executed, PGE appears to have a direct ownership interest in three of the four resources it will acquire through that RFP.

This is by no means a new phenomenon. In 2013 PGE awarded a bid to its own remote Carty Generating Station over a third-party bid that was not only cheaper but also located directly on PGE's system. The international firm that PGE hired to construct Carty Generating Station had no experience with that type of resource. What could go wrong? After incurring significant delays and cost-overruns, PGE eventually had to fire the unqualified general contractor and assume control of the project's final construction.<sup>5</sup>

These outcomes are as avoidable as they are predictable. While the Commission may not dictate the outcome of an RFP, the Commission can and should ensure that third-party bidders at least have a fair chance. If potential bidders view the outcome of an RFP as a *fait accompli* in favor of utility-owned resources, then they will not waste their time and money to bid. It is incredibly important for this RFP—and every RFP—to attract broad participation for the benefit of ratepayers. This is the only way for the utility and the Commission to gather real data on resource price and risk.

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<sup>4</sup> Sickinger, Ted, *In Portland General Electric's \$1.3 Billion Investment Plan, Winning Bidder is PGE*, THE OREGONIAN (Jun 15, 2023), [https://www.oregonlive.com/business/2013/06/pges\\_1\\_billion\\_aquisition\\_plan.html](https://www.oregonlive.com/business/2013/06/pges_1_billion_aquisition_plan.html).

<sup>5</sup> Plaven, George, *PGE Takes Over Construction of Carty*, EAST OREGONIAN (Dec 21, 2015), [https://www.eastoregonian.com/news/local/boardman-pge-takes-over-construction-of-carty/article\\_22b280a9-ba81-58bf-a464-657e74a1bb2f.html](https://www.eastoregonian.com/news/local/boardman-pge-takes-over-construction-of-carty/article_22b280a9-ba81-58bf-a464-657e74a1bb2f.html).

### **III. ADDRESSING AFFILIATE ROLES**

NewSun understands that PGE will be using PRR “as a vehicle to realize tax benefits for either a benchmark sponsored resource or a traditional third-party developed resource if selected on the final shortlist and ultimately acquired through a build and transfer agreement,”<sup>6</sup> and that PGE has agreed that “PRR will not be a bidding entity in the RFP.”<sup>7</sup> Even if PRR will not be submitting its own bid, it will still be participating in the RFP either through a BTA or APA. Further protections need to be in place to prevent the potential for anticompetitive conduct.

The representation made by PGE regarding PRR not making a bid in the 2023 RFP only applies to this RFP. The protections, safeguards and restrictions adopted for PRR and PGE employees in this docket may have significant implications in future RFPs—where PRR may be submitting its own bid. This is particularly important because PGE’s “need for new resources is currently expected to be constant through the end of the decade,” and PGE desires “a pathway to accelerating the procurement process within the existing framework.”<sup>8</sup>

NewSun remains concerned about the potential use and dissemination of confidential and highly confidential bidder information by the various PGE teams (RFP development team, RFP evaluation team, benchmark team and PRR employees). Further, NewSun is concerned with PGE employee access to highly confidential bidder

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<sup>6</sup> UM 2274, PGE Supplemental Filing, p. 1

<sup>7</sup> UM 2274, PGE Supplemental Filing, p. 2.

<sup>8</sup> UM 2274, PGE’s Planning and Procurement Forecast, page 1-2.

information from other dockets such as integrated resource plans, previous RFPs, rate cases, and other dockets.

PRR employees should not have access to confidential or highly confidential information, and they should be subject to the protections provided in OAR 860-089-0300(1)(b). Typically, an affiliate is a separate legal entity, would not share employees, and would not have access to confidential or highly confidential information in the possession of PGE. Here, PGE employees working for the affiliate may have unfair and anticompetitive access to confidential or highly confidential information from prior positions and roles at PGE. Further, it remains unclear what information the PRR team will have access to, and whether the PRR team is independent and screened from the PGE RFP evaluation team. What is clear, however, is that PRR will be involved in the RFP through a BTA or APA and will enter into a PPA with PGE.

PGE should be required to provide and maintain a list of PGE employees that are and that have been on each team to ensure transparency and separation of functions. PGE has represented that “No Benchmark Team member has seen any third-party bids” from the original Benchmark bid submittal to contract execution.<sup>9</sup> Without knowing the names and titles of PGE employees on the various teams, however, this representation will be impossible to verify. PGE should also be required to describe PGE’s training and protocols to ensure that employees understand and follow the confidentiality obligations and competitive bidding rules.

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<sup>9</sup> UM 2274, PGE Affiliate Services Overview, p. 5.

An employee list is necessary to determine if PGE is complying with OAR 860-089-0300(1)(b):

(b) Any individual who participates in the development of the RFP or the evaluation or scoring of bids on behalf of the electric company may not participate in the preparation of an electric company or affiliate bid and must be screened from that process.

While this rule provides some protections against potential abuse, the rule does not address a case where RFPs may happen in quick succession, or where affiliate would share employees and office space with the utility. Accordingly, employees that have access to confidential and highly confidential bidder information in this docket should not be allowed to work on the RFP or benchmark bid that takes place for a reasonable period of time after this RFP is concluded.

#### **IV. SYMETRICAL CONTRACT TERMS CAN HAVE A ASSYMETRICAL IMPACT ON THIRD-PARTY BIDDERS**

PGE highlights in its Supplemental Filing that any transaction between PGE and PRR will be conducted pursuant to a form PPA that is approved in this docket. This is intended to give the appearance of fairness and impartiality. While this sounds good on the surface, it actually raises a number of questions and has the potential to accentuate rather than mitigate the utility's ownership bias.

First, the affiliate services overview filed by PGE in this docket on October 30, 2023 ("October 30 Memo") indicates that the critical contract path for BTA or APA bids would not be the PPA between PGE and PRR, rather it would be the BTA or APA between PGE and bidders. In other words, the most important leg of the transaction in PGE's proposed affiliate process is the contract to be negotiated and executed between PGE's RFP Evaluation Team and the bidder. In such case, PGE's commitment to use a

standard form PPA between PGE and PRR does little to eliminate the potential for abuse by PGE in negotiating with bidders. It leaves the door open for PGE—acting by and through PRR—to impose BTA or APA terms on third-party bidders that are more onerous than terms imposed on the benchmark bid.

PGE’s Supplemental Filing also is silent as to the PPA terms to be negotiated between PGE and third-party bidders with PPA bids. While it may be implied that PGE will use the same PPA form with respect to third-party bidders that it will use with PRR, the Stipulated Filing is silent regarding third party PPAs. NewSun urges the Commission to expressly limit PGE’s ability to negotiate less favorable PPA terms with third-party bidders than it does with PRR.

Finally, even if PGE and PRR were to commit to using standard contract terms in its negotiations with bidders across the board, the Commission should be wary of the asymmetry between the impact of “standard” terms on third-parties as compared to utility-owned resources. In Order 22-130, the Commission previously said:

We acknowledge . . . that stakeholders have raised serious issues for PPA resources, particularly regarding the issue of third-party financiers being unwilling to support the performance guarantee. We also recognize that utility-owned resources are based upon utility forecasts of expected performance, but a utility can later request recovery of actual costs of performance and, absent ratepayer protections, customers could be at risk for paying more than forecasted. On the other hand, PPA performance guarantees mean that the PPA asset owners carry the risk of underperformance. *This dynamic could mean that the performance risks are treated differently for the two types of assets and that customers could bear more risk of utility asset underperformance than PPA asset underperformance.* We direct the IE to examine the issue of the performance guarantee versus the availability guarantee and report on the impact of this requirement, particularly as it relates to a potential advantage for owned resources. We reserve the right to judge the reasonableness of PacifiCorp’s position on this issue during negotiations, if it is determined that insistence on this provision significantly limited



resource choice or tilted the field inappropriately in the favor of utility-owned resources. (Emphasis added).

NewSun notes that PGE's proposed form PPA in this docket also includes such a performance guarantee that the Commission has previously found problematic.

Moreover, the Commission's reasoning in Order No. 22-130 is not limited to PPA performance guarantees. It applies with equal force to virtually any event of default, termination event, obligation to post financial security, or similar terms in any type of agreement between the purchasing utility and the bidder. At the end of the day, the utility has discretion as to whether and how to implement contract terms that could impose additional costs or risks on the bidder, or even to terminate the contract altogether. What may be a contractual death sentence for a third-party bidder may simply be waived for a utility or affiliate owned resource. This allows utility-owned resources to make contractual commitments without fear of repercussions that would be unfinanceable to third-party bidders. This gives utility and affiliate-owned resources a nearly insurmountable advantage in contract negotiations and subsequent performance.

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## V. CONCLUSION

NewSun appreciates the opportunity to provide comments on PGE's Supplemental Filing and looks forward to working with PGE, Staff and other Stakeholders in the remainder of the docket.

Dated this 17<sup>th</sup> day of November 2023.

Respectfully submitted,

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