

**PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
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REGULAR CONSENT EFFECTIVE DATE Upon Approval

DATE: November 21, 2017

TO: Public Utility Commission

FROM: JP Batmale *JPB*

THROUGH: Jason Eisdorfer *JE by JPB*

SUBJECT: PORTLAND GENERAL ELECTRIC: (Docket No. UM 1892) Application for Waiver of Competitive Bidding Guidelines

STAFF RECOMMENDATION:

Commission grant Portland General Electric's (PGE or Company) request to waive all of the Competitive Bidding Guidelines (CBG or Guidelines) for its current bilateral negotiations, as presented in this docket, which PGE has pursued to fill its capacity needs consistent with the Commission's LC 66 (2016 IRP) final order.

DISCUSSION:

Issue

Whether the Commission should grant PGE's request to waive all thirteen of the CBG for the Company's current bilateral negotiations, as presented in this docket.

Applicable Law

The Commission's Guidelines were first established in Docket No. UM 1182, Order No. 06-446, and have since been amended several times. A complete set of the current CBG can be found in Appendix A to Order No. 14-149. Generally, the Guidelines require a utility to issue a Request for Proposal (RFP) for all Major Resource Acquisitions (defined as having a duration of greater than five years and quantities greater than 100 MW) and certain multiple small resource acquisitions, that when taken together, qualify for treatment as a Major Resource Acquisition. However, given that certain circumstances could arise that present compelling reasons to waive the RFP process required by the CBG, the Guidelines allow a utility to file an application

requesting waiver of some, or of all, of the CBG upon a showing of good cause. In particular, Guideline 2 provides three circumstances where a utility is not required to issue an RFP: (2)(a) "Acquisition of a major resource in an emergency or where there is a time-limited resource opportunity of unique value to customers"; (2)(b) "Acknowledged IRP provides for an alternative acquisition method for a Major Resource"; or (2)(c) "Commission waiver on a case-by-case basis."

PGE requests waiver of the RFP requirement pursuant to the third exception in Guideline (2)(c)—Commission waiver on a case-by-case basis. When a utility requests a waiver under this exception, the Commission has explained that it will issue an order addressing the request within 120 days and will take oral and written comments as it finds appropriate under the circumstances.¹

Commission orders indicate that the standard for granting a utility's request for waiver of all of the CBG, or individual guidelines, is "for good cause shown."² However, the Commission has commented on certain Guidelines with more specificity. For example, if a utility seeks waiver of Guideline 13, which requires the utility to seek Commission acknowledgement of the utility's final shortlist of RFP resources, the utility must show that the time required for shortlist acknowledgement will preclude the ability of the utility to successfully complete negotiations with a top bidder, thereby causing harm to its ratepayers.³

Analysis

Background

Through Order No. 17-386 (PGE's 2016 IRP), the Commission directed PGE to pursue bilateral negotiations to address PGE's acknowledged capacity need. As part of this Order, the Commission acknowledged PGE's 2021 capacity need of 561 MW and the following sequential approach to fill this need:

- "(1) Complete bilateral negotiations, with periodic updates to Staff as to status of negotiations and progress toward completing negotiations of key terms and conditions;
- (2) concurrently, work with Staff and stakeholders to scope and launch a regional market study of potentially available resources to be run in parallel with the company's efforts to complete the bilateral negotiations; and
- (3) report to the Commission, within four months (of August 8, 2017), the results of the bilateral negotiations and the need for: (a) completing the

¹ See UM 1182, Order No. 14-149, Appendix A at 2 (April 30, 2014).

² UM 316, Order No. 91-1383 ("a utility may request, and for good cause the Commission may grant, a deviation from, or waiver of, the competitive bidding guidelines . . ."); see also Guideline 13 (discussing that requirement of RFP Acknowledgement "Except upon a showing of good cause.").

³ Order No. 14-149 at 14-15.

market study; (b) re-running models and developing a new preferred portfolio using data from the bilateral contracts, the market study, and any other new analyses; and (c) issuing an initial RFP for specific short- to medium-term resources before proceeding with an all-source RFP.”⁴

Importantly, the due date for the report to the Commission on items 3(a), (b), and (c) immediately above is approximately December 4, 2017. On August 25, 2017, PGE filed an application requesting that the Commission waive the RFP requirement of the CBG (Application).⁵ PGE later clarified in Reply Comments that it “requests waiver of all Guidelines, including Guideline 13.”⁶ If the request for waiver of the RFP requirement is granted, PGE plans to complete bilateral negotiations for medium-term capacity resources to meet its 2021 capacity need.⁷

Current Status of Bilateral Negotiations

PGE’s bilateral negotiation efforts initially resulted in seventeen indicative offers from seven bidders amounting to over 2,450 MW of capacity from a mix of hydro and thermal resources.⁸ PGE then evaluated and scored these indicative offers, using price and non-price criteria, conducted a portfolio analysis of multiple combinations of offers to arrive at a ranked shortlist of eleven indicative offers from five bidders amounting to nearly 1,110 MW of capacity.⁹ This final list of indicative offers amounts to approximately 2.5 times more capacity than PGE’s revised 2021 capacity need of 461 MW.¹⁰ If the Commission grants PGE’s request for a waiver of the CBG, the Company will conclude its bilateral negotiations over the next three to six months and secure 350 to 450 MW of capacity in medium-term contracts lasting between five to seven years.

Overview of PGE’s Waiver Request

PGE has confirmed in Reply Comments that it is requesting a waiver of all 13 guidelines in the CBG.¹¹ The thirteen guidelines are as follows:

1. Request for Proposal (RFP) Requirement
2. Exceptions to RFP Requirement
3. Affiliate Bidding

⁴ LC 66, Order No. 17-386 at 17-18.

⁵ Application, page 1 (“PGE respectfully requests that the Public Utility Commission of Oregon (Commission) waive the Request for Proposals (RFP) requirement in the Competitive Bidding Guidelines (Guidelines) to allow the Company to engage in bilateral negotiations . . .”).

⁶ PGE Reply Comments at 2 (Nov. 13, 2017).

⁷ See LC 66, Order No. 17-386, at 17 (“We acknowledge PGE’s capacity need of 561 MW...”).

⁸ See UM 1892, PGE’s Application for Waiver to CBG at 7 (Aug. 25, 2017).

⁹ *Id.* at 8.

¹⁰ PGE’s 2021 capacity need has been revised down from 561 MW in August 2017 to 451 MW due to the addition of Solar QF contracts. Please see PGE’s response to Staff’s, non-confidential Information Request #1 (Oct. 30, 2017).

¹¹ UM 1892 PGE’s Reply Comments at 2 & 4 (Nov. 13, 2017).

4. Utility Ownership Options
5. Independent Evaluator (IE)
6. RFP Design
7. RFP Approval
8. Benchmark Resource Score
9. Bid Scoring & Evaluation Criteria
10. Utility & IE Roles in RFP Process
11. IE Closing Report
12. Confidential Treatment of Bid & Score Information
13. RFP Acknowledgement (Final Shortlist)

PGE seeks waiver of the RFP requirement based on two express exceptions found in Guidelines 2(b) and 2(c). Specifically the exceptions provide that a utility does not have to issue an RFP under the following circumstances:

2(b) Acknowledged IRP provides for an alternative acquisition method for a Major Resource.

2(c) Commission waiver on a case-by-case basis.

With regard to CBG 2(b), PGE states that the IRP acknowledgement Order No. 17-386 explicitly provides for PGE to pursue an alternative acquisition method.¹² As noted previously, the Commission does direct PGE in its final LC 66 order to complete bilateral negotiations and report back with results in four months.¹³

With regard to CBG 2(c), PGE states there are four reasons why the Commission should grant the Company's request:¹⁴

- 1.) Bilateral negotiations may be the best method for acquiring medium-term capacity from existing Pacific Northwest resources, especially with regard to hydro resources.¹⁵
- 2.) The process of developing the current, final list of ranked indicative offers largely mirrors the processes detailed in the Commission's CBG. PGE notes that all resources currently on PGE's shortlist scored higher than its reference resource, indicating that continuing with the current process will yield low-cost resources for customers.¹⁶

¹² See UM 1892 PGE's Application for Waiver to CBG at 4 and 5 (Aug. 25, 2017).

¹³ See LC 66 Order No. 17-386 at 17 and 22 (Aug. 8, 2017).

¹⁴ See UM 1892 PGE's Application for Waiver to CBG at 4 (Aug. 25, 2017).

¹⁵ As noted by PGE and by Staff in LC 66, owners of hydro resources are particularly reluctant to participate in traditional RFP processes. See UM 1892 PGE's Application for Waiver to CBG at 4, 6, and 25 (Aug. 25, 2017).

¹⁶ *Id.* at 11-12.

- 3.) Nearly every indicative offer on PGE's final ranking scored higher than the "reference point," generic capacity, high-efficiency gas plant used in LC 66.
- 4.) In using staff's five criteria for evaluating waiver requests set forth in UM 1773, the Company feels its application for waiver passes all five criteria.

Stakeholder Comments

Only National Grid and Staff filed comments in response to PGE's CBG waiver request. National Grid supported granting a portion of PGE's waiver request to allow bilateral negotiations with hydroelectric generating resources. However, National Grid felt that PGE had not provided sufficient evidence that a waiver from the CBG should be granted for thermal resources.¹⁷ Staff's Comments sought clarification from PGE on the specifics of its waiver request, discussed the standards for a waiver to the CBG, and shared its initial impressions and concerns around PGE's waiver application.

Staff's Review Framework

Past Commission orders have indicated that the applicable standard for granting a waiver of the CBG is "for good cause shown."¹⁸

To frame Staff's review of whether to recommend waiver of the CGB for good cause shown, Staff highlights the importance of the Guidelines to promote a fair and transparent process for bidders, and to ensure that the ultimate selection of resources is beneficial for customers. Therefore, even when certain circumstances preclude a utility from following all of the CBG, Staff believes it is important that the procurement process used is fair and transparent. To achieve this goal and assist with review of a waiver application, Staff suggests applying five criteria to the waiver request. These five criteria were applied by Staff in the past when evaluating the merits of a waiver request.¹⁹ Although Staff applied the criteria in a case where exception 2(a)²⁰ applied, which is not the applicable RFP exception here, Staff believes the five criteria will improve its review of the waiver request in this case as well. The five suggested criteria are:

1. *There is a need for procurement.*

Explanation: Is the justification of the need for the waiver warranted? A waiver of the Guidelines should only be granted if the Company can establish a need for the

¹⁷ See UM 1892, National Grid's Comments (Sept. 14, 2017).

¹⁸ Order No. 91-1383 ("a utility may request, and for good cause the Commission may grant, a deviation from, or waiver of, the competitive bidding guidelines . . ."); see also Guideline 13 (discussing that requirement of RFP Acknowledgement "Except upon a showing of good cause...").

¹⁹ See UM 1773, Order No. 16-221, Appendix A at 11 (June 8, 2016).

²⁰ Guideline 2(a)'s expectation to the RFP requirement applies in circumstances where there is a resource acquisition opportunity of a time-limited nature and that represents a unique value to customers.

procurement. The need can be clearly demonstrated if a resource allocation is identified in the company's acknowledged IRP. However, there can be other avenues toward establishing a need for the resource, such as compliance with regulatory mandates.²¹

2. Functions of an Independent Evaluator (IE) are replicated.

Explanation: Is an Independent Evaluator used in the process? The CBG dictate the use of an IE in order to preserve fairness in the process. The Commission designates several roles and tasks to the IE in the CBG. Primarily, the CBG provides:

- Review of and help in revising the RFP design;
- An interactive website for bidders, or another means to clearly and transparently allow for documented communication between the Company and bidders and to allow easy dissemination of documents;
- A written assessment of the final RFP to the Commission;
- Oversight of the bid evaluation to ensure conducted fairly;
- A closing report with shortlist application for Commission; and
- Ongoing interaction with PUC staff throughout the process.²²

3. Processes for sufficient stakeholder involvement existed.

Explanation: Were stakeholders engaged throughout the process? To maintain fairness in the process, the Commission believes all stakeholders should be engaged in the RFP reasoning and design, with ample time to comment and suggest improvements to the RFP. The company should be able to demonstrate that its process allowed for sufficient stakeholder involvement.²³

4. Fairness of competitive bidding guidelines were preserved.

Explanation: Was fairness of the process preserved? In the absence of a complete RFP process as described in the CBG, the Commission still expects the company to take certain actions to preserve fairness. Among these considerations are:

- Will the utility request that the Commission acknowledge the final shortlist of RFP resources?
- Was the RFP open to diversity of ownership and contracting arrangements?
- Was the scoring process fair and transparent?
- Are non-price criteria based on clearly described characteristics?
- Was utility bias further limited by having no benchmark resource being offered?
- Did the company communicate clearly with stakeholders regarding deadlines and proposal requirements?

²¹ Order No. 16-221, Appendix A at 9.

²² *Id.*

²³ *Id.* Appendix A at 10.

- Was the company clear about the products they are seeking?²⁴

5. The process was clear and transparent.

Explanation: As a whole, was the RFP process clear and transparent? The company should be able to demonstrate that transparency and fairness were a part of the process from the beginning. Some evidence of this transparency could be:

- Providing a clear communication of the schedule indicating process deadlines and milestones;
- Clear communication of products the utility is seeking at the commencement of the RFP;
- Open scoring system with all scored traits clearly identified and all alternative submission options outlined; and
- Clear indication of reasons a submission could be rejected or deemed nonconforming.²⁵

Finally, Staff understands that the effect of a Commission decision to waive all of the Guidelines as requested by PGE does not constitute acknowledgment.²⁶ This view is based on the understanding that when a utility's procurement process follows the standard RFP process outlined in the CBG, the last step required by Guideline 13 is for the utility to return to the Commission with its final shortlist of RFP-produced resources for the purpose of requesting Commission acknowledgement.²⁷ In that instance, where the typical RFP process outlined in the CBG was followed (including use of an IE) and the utility has come in for acknowledgement of its shortlist, that Commission has stated that "RFP acknowledgment will have the same legal force and effect as IRP acknowledgment in any future cost recovery proceeding."²⁸ Which the Commission further explained is simply "a conclusion that the final short-list seems reasonable, based on the information provided to the Commission at that time," but "will not [] provide a guarantee of favorable ratemaking treatment during rate recovery."²⁹

Given that PGE has expressly clarified that it is requesting "waiver of all Guidelines, including Guideline 13,"³⁰ in this docket, the Commission is being asked to waive all of the CBG for the specific bilateral negotiations presented in this filing. Therefore, in

²⁴ *Id.*

²⁵ *Id.*

²⁶ Further, Staff has expressed in other CBG waiver dockets that a Commission decision to waive the Guidelines offers no assurance to the utility of future cost recovery for any capital investment or expense associated with acquisition of the subject resource. See UM 1374, Order No. 08-376 (July 17, 2008).

²⁷ Order No. 14-149, Appendix A at 5 (Guideline 13. RFP Acknowledgement).

²⁸ *Id.*

²⁹ UM 1182, Order No. 06-446 at 14-15 (Aug. 10, 2006).

³⁰ PGE Reply Comments at 2 (Nov. 13, 2017).

Staff's view, the granting of a waiver in this docket does not constitute acknowledgement, nor offer assurance of cost recovery in future ratemaking proceedings. Further, if PGE's request to waive all of the Guidelines is granted by the Commission as Staff recommends below, Staff would not expect PGE to return to the Commission for acknowledgement of its final shortlist given that the Commission would have granted a waiver from following the standard CBG process.

Staff Recommendations Using Review Framework

Staff finds that the standard of good cause is met in UM 1892 for the following reasons:

First, PGE established in its latest IRP that it does have a capacity need in 2021 and the Commission directed PGE in its IRP order to complete bilateral negotiations and then undertake subsequent activities to meet this acknowledged capacity need.

Second, believes PGE's assertion that many of indicative offers made during the first portion of the bilateral negotiation are of a time-sensitive nature.³¹

Third, Staff believes that PGE's application for a waiver passes the five criteria set forth by Staff in UM 1773. Namely:

Criteria #1: Is the justification of the need for the waiver warranted?

The need for the procurement of capacity resources was identified by Staff and stakeholders in the LC 66 docket, and subsequently acknowledged in the Commission's IRP Order No. 17-386.

Criteria #2: Is an Independent Evaluator used?

An Independent Evaluator (IE) was not used by the Company to establish fairness in the bilateral negotiation process. However, Staff generally finds that PGE was able to demonstrate, in the documents it shared, that its processes adequately replicated the functions of an IE, especially given the shortened timeframe and confidentiality constraints.

PGE shared its the product term sheets, an assessment of the final products offered, insights and data regarding the evaluation of indicative offers, a report on its shortlist of bids and was generally available to Staff throughout the application review process. The greatest areas of concern for Staff regarding Criterion #2 were around how bidders were contacted and what PGE described as its capacity need. Given that there were over fifteen initial indicative offers from seven bidders, with a range of product lifespans, ownership options, and five different term sheets developed eventually, and that nearly

³¹ See UM 1892 PGE's Application for Waiver to CBG at 3 (Aug. 25, 2017).

all of the indicative offers on the shortlist scored better than the “point of reference” gas plant, Staff is satisfied that the products as designed by PGE in the term sheets were fair and a reasonable number of bidders contacted.

With regard to transparent communications, Staff is unaware of how PGE could have conducted the communications around the bilateral negotiations any differently for bidders. Given the public nature of PGE’s announcements about launching and conducting bilateral negotiations for short- to medium- term capacity product, as part of LC 66, Staff suspects that potential bidders not initially contacted by PGE were likely aware of an ongoing and fast-paced process to acquire capacity resources and that hydro operators who expressed reluctance to participate in standard RFPs were contacted. In other words, this method, though imperfect, resulted in a good outcome for customers and is consistent with what Staff, stakeholders, and the Commission directed.

Criteria #3: Were stakeholders engaged throughout the process?

From the perspective of stakeholders, all parties involved in LC 66 had an opportunity to provide guidance to PGE and eventually receive all information on scoring and indicative offer evaluation. Staff believes the process allowed for sufficient stakeholder involvement and transparency if parties were willing to join the protective orders.

Criteria #4: Was fairness of the process preserved?

For the most part, the structure of PGE’s approach to conducting bilateral negotiations and evaluating indicative offers preserved fairness among the bidders. When PGE filed its waiver application, the Commission was made aware of the Company’s shortlist of ranked indicative offers. Given that there were both hydro and thermal resources being offered by seven different entities under a variety of contracting and/or sales arrangements, Staff believes that the bilateral negotiations were open to a diversity of ownership and contracting arrangements, PGE was clear about the products they were seeking, and the Company was clear about deadlines.

Staff notes that, while the diversity of ownership and contracting arrangements that are represented by the list of indicative offers provided with PGE’s waiver application speaks well to the inclusiveness of PGE’s process, Staff contends that if PGE were to pursue an ownership option, such a direction would not be in line with the rationale behind the Commission’s direction to pursue bilateral negotiations. Staff understands that the Commission encouraged PGE to pursue bilateral negotiations in an effort to identify and possibly secure cost-effective, short- to medium- term resources that allow the Company to maintain resource optionality in a period of tremendous uncertainty in the electricity market. Staff believes that an ownership option would not be consistent with this intent.

Importantly, Staff found that PGE's scoring process was well documented and was consistent with the Guidelines. Staff also found that PGE's decision to update the scoring design to better incorporate flexibility and capacity values, as well as to quantify risk, was reflective of how PGE approached its capacity need in the IRP and was logical. Additionally, the price and non-price criteria were clear. Although Staff felt that the price and non-price criteria should have been weighted equally, as they were in the IRP, PGE explained to Staff that the weighting scheme they chose to apply in this docket – 60 price / 40 non-price – was reflective of past practices in other RFPs. During its analysis, Staff switched the scoring to 50 price / 50 non-price to review the impact on rankings and recognized that it did not impact the top performers.

However, the change in weighting did impact the rankings of several of the lower scored indicative offers. Staff recommends that PGE re-run its ranking and portfolio analysis using the 50 price / 50 non-price weighting scheme, and consider reconstituting its shortlist based on the results because the 50 price / 50 non-price is more reflective of the analysis used in the IRP. Importantly, Staff recommends that PGE agree that if the bilateral negotiations for any of the top 5 ranked indicative offers as presented in this waiver application do not result in a successfully executed contract, PGE update the Commission and seek guidance before moving forward with any offers below the top 5 ranked indicative offers given how much this would impact the composition and characteristics of the final portfolio.

Per Guideline 9(b),³² PGE modeled the top 5 ranked indicative offers together and other combinations from the final shortlist across 27 different futures, using the same data and framework as the IRP, to determine cost and risks and to establish relative Net Present Value Revenue Requirements (NPVRR). Staff supports this approach as it mirrors some aspects of the IRP process.

Criteria #5: As a whole, was the RFP clear and transparent?

PGE was clear about the products they were seeking in the bilateral negotiations, based on the five term sheets PGE used as templates and shared with all potential bidders. Further the scoring system was shared with all bidders and the methodology behind the system was shared as well.

Staff also finds generally that PGE's bilateral negotiations:

³² Guideline 9(b) explains that the selection of the final shortlist of bids should be based, in part, on the results of modeling the effect of candidate resources on overall system costs and risks. Further, the portfolio modeling and decision criteria used to select the final shortlist of bids must be consistent with that used to develop the utility's acknowledged IRP Action Plan.

- Could result in contracts that limit long-term energy costs for PGE;
- Were based on Commission direction;
- Complemented PGE's acknowledged IRP;
- Were flexible and negotiated mutually beneficial agreements;
- And, were conducted in a manner that was sufficiently transparent, understandable, and fair under the circumstances of this particular filing.

Recommendations

Staff recommends that the Commission grant PGE's request for a waiver of the CBG because the Company has demonstrated good cause and met all five of Staff's reasonableness criteria. However, the waiver request should be granted with the following conditions, requiring PGE to:

1. Re-run its ranking and portfolio analysis using the 50 price / 50 non-price weighting scheme and reconstitute its shortlist based on the results.
2. If the bilateral negotiations for any of the top 5 ranked indicative offers as presented in this waiver application do not result in a successfully executed contract, PGE update the Commission and seek guidance before moving forward with any offers below the top 5 ranked indicative offers.
3. Not conduct any bilateral negotiations for ownership of indicative offers. If PGE wants to pursue ownership of an existing asset it must go through the standard RFP process set forth in the CBG.
4. Regularly update Staff and the Commission on the status of the bilateral negotiations and upon completion, re-run the Company's models to determine PGE's remaining capacity and energy needs to inform any other procurement steps outlined in Order No. 17-386 and the one-year IRP update.

Conclusion

PGE's process for conducting the bilateral negotiations, as requested by the Commission in Order No. 17-386, meets Staff's five criteria for reasonableness of a waiver request, as detailed in Order No. 16-221. Therefore, Guideline #2(c) that provides an exception to the RFP requirement based on "Commission waiver on a case-by-case basis" applies in this instance and the Company's request should be granted for good cause shown. Further, Guideline #2b, which allows a company to not

issue an RFP for a Major Resource when its acknowledged IRP provides for an alternative acquisition method could also apply in this case.

PROPOSED COMMISSION MOTION:

Grant PGE's request to waive all of the CBG for PGE's current, bilateral negotiations as presented in this docket, subject to the four conditions recommended by Staff in this Staff Report.