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March 31, 2011

Via Electronic Filing and U.S. Mail

Oregon Public Utility Commission

Attention: Filing Center

550 Capitol Street NE, #215

PO Box 2148

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Re: UM 1182

Attention Filing Center:

Enclosed for filing in the captioned docket are an original and five copies of:

- **OPENING COMMENTS OF PORTLAND GENERAL ELECTRIC**

This is being filed by electronic mail with the Filing Center.

An extra copy of the cover letter is enclosed. Please date stamp the extra copy and return to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,

V. DENISE SAUNDERS
Assistant General Counsel

VDS:cbm
Enclosures

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1182

In the Matter of)	
)	
PUBLIC UTILITY COMMISSION OF OREGON,)	OPENING COMMENTS OF
)	PORTLAND GENERAL ELECTRIC
Investigation Regarding Competitive Bidding)	

Pursuant to Commission Order No. 11-001 and the Prehearing Conference Memorandum issued in this docket on January 26, 2011, Portland General Electric Company (PGE) comments on (1) whether the role of the independent evaluator (IE) in the competitive bidding process should be expanded by retaining the independent evaluator through negotiations and final resource selection; and (2) whether the threshold for a “major resource” should be lowered to include more projects in the competitive bidding process. As discussed below, PGE believes retention of the IE through negotiations and final resource selection is likely to extend and encumber an already lengthy and complicated process at additional cost to customers and no discernable benefit. PGE believes the current threshold for a “major resource” captures the vast majority of commercial projects that are likely to bid into a Request for Proposals (RFP). PGE would not object however to clarifying the definition of “major resource” to delineate what is considered to be a single resource or project.

I. Background

This docket was reopened at the direction of the Commission to investigate whether certain proposed changes to the Commission’s competitive bidding guidelines might help further ensure that a perceived utility self-build bias does not result in the acquisition of higher cost utility-owned resources. *See, An Investigation Regarding Performance-Based Ratemaking, Docket UM 1276*, Order No. 11-001 at 6 (2011). The Commission acknowledged that the

competitive bidding guidelines adopted in Order No. 06-446 have greatly increased confidence that the utility RFP process is being conducted fairly and properly. *Id.* However, the Commission stated its belief that further improvements are needed to fully address what it perceives to be a utility self-build bias. *Id.* The Commission identified three issues to be addressed (1) whether the role of the independent evaluator should be expanded by retaining the independent evaluator through negotiations and final resource selection (Guideline 11); (2) whether the threshold for a “major resource” should be lowered to include more projects in the competitive bidding process (Guideline 1); and (3) determination of the appropriate analytic framework and methodologies to use to evaluate and compare resource ownership to purchasing power from an independent power producer (Guideline 10(d)). *Id.* At a procedural conference on January 26, 2011, the parties agreed to divide the proceedings into two phases addressing the first two issues in Phase I and the third issue in Phase II.¹ These comments address the first two issues.

II. The Role of the IE should not be Expanded

The Commission’s competitive bidding guidelines already include a number of provisions to preclude against a utility self-bias during the RFP process.² It is not clear to PGE that additional process requirements will address the issues raised by the Commission in its Order reopening this docket. In particular, we believe that expanding the role of the IE by retaining the IE through the utility’s negotiations and final resource selections will have no

¹ According to the Prehearing Conference Memorandum, the parties also may request the opportunity to raise other issues in Phase II.

² For example, Guideline 1 requires the utility to blind all RFP bids and treat affiliate bids the same as all other bids. Guideline 5 requires an IE to be used in all RFPs. Guideline 6 ensures there is no opportunity for bias in the construction of the RFP by requiring review and comment by stakeholders, Commission Staff, the IE and, ultimately, review and approval by the Commission itself. Guideline 8 requires the utility to submit its scoring for the Benchmark Resource prior to the opening of bidding. Guideline 10 requires the IE to independently score the Benchmark Resource and all or a sample of the bids. Guideline 10 also requires the IE to evaluate the unique risks and advantages associated with the Benchmark Resource.

bearing on any perceived utility self-build bias; nor would such a requirement be reasonable in terms of either cost or implementation. Moreover, such a requirement would not be consistent with the Commission's competitive bidding goals.

A. Retention of the IE through the Negotiation Process Will Have No Effect on Any Perceived Utility Self-Build Bias

1. An IE cannot compare treatment of PPAs and benchmark resources during negotiations because benchmark resources are not part of the negotiations

The Commission does not explain how retaining the IE through the negotiation process would address any perceived bias for utility-owned projects or what role the IE would play during the negotiation process. Under the Commission's competitive bidding guidelines, a utility's benchmark bid is submitted prior to the negotiation phase of the RFP. Because benchmark resources are not part of the negotiations, the presence of the IE in negotiations would not affect any bias that utilities might have for such resources. Moreover, many issues involved in negotiations with third-party developers – such as credit, performance assurances, liability provisions, liquidated damages, step-in rights, cover standards, dispute resolution mechanisms, choice of law/venue, etc. – simply aren't a consideration when a utility is building its own resource. Simply put, an IE's involvement in negotiations would have no bearing on any perceived preference for benchmark resources because the bids for the benchmark resources are not part of the negotiations.

2. An IE is not needed to assure fairness

If negotiations have no bearing on a preference for benchmark resources, it is unclear what role the IE would play during the PPA negotiation process. Would the IE evaluate the fairness of one PPA negotiation against another? Would the IE opine on whether the utility was being fair in any given negotiation? There is no need for the IE to assume either role. Any

requirement that an IE be used to evaluate the fairness of PPA negotiations assumes that one party is at a commercial disadvantage vis-à-vis the other. In PGE's experience, all of the counterparties participating in utility RFPs tend to be experienced and sophisticated players in the energy market. While the inherent nature of any negotiation is that neither party gets everything it wants, both parties should be free to negotiate the best terms and conditions possible for their respective stakeholders. Moreover, we are not aware that the Commission, bidders or customers have raised any concerns with regard to the fairness of any negotiation in a RFP involving a benchmark resource that has been conducted under the Commission's competitive bidding guidelines.

In addition to being unnecessary, requiring an IE to evaluate the fairness of a PPA negotiation is likely to open a Pandora's Box of issues. For example, it is unclear how an IE would evaluate fairness in a PPA negotiation in which the objective of the utility is to obtain the best deal for its customers and the objective of the developer is to obtain the best deal for itself. This is particularly problematic to the extent the IE evaluation can be used in a subsequent prudency review. Should the utility negotiate aggressively so that the IE will advise the Commission that it believed the utility obtained the best deal for customers? Or, is the Commission interested in the utility negotiating less aggressively to alleviate any concerns about perceptions of unfairness? If the IE is expected to assess the fairness of the negotiation, will it be expected to opine on the reasonableness of the utility's negotiating strategies? PGE believes that neither the bidders nor the utility should be expected to "sub-optimize" negotiations or be willing to accept terms and conditions that are less attractive than what they could otherwise achieve through a concerted and unconstrained negotiation effort. In PGE's case, acceptance of terms in a negotiation that are less favorable based on a subjective "fairness standard" applied by

a third party could potentially lead to the acquisition of a resource or contract that is either more costly or more risky for customers than otherwise could have been achieved if both parties were free to press for the best possible terms.

We further question whether an IE would have sufficient expertise to assess the complicated and local issues that are often raised in a PPA negotiation process. Without considerable time spent by the IE and the utility educating IE staff on issues such as credit risk, indemnification, insurance requirements, local market structure, regional transmission and interconnection risks and policies, among others, it would be difficult for an IE to reasonably assess whether the demands of either the utility or the bidder were reasonable and customary. In order to ensure fairness, the IE will also need to spend time with the developer to understand the same issues from its perspective. Because an assessment of the fairness of any given negotiation is ultimately a subjective determination with potential consequences beyond the RFP process itself, retaining an IE through the negotiation process is only likely to add uncertainty to the competitive bidding process.

3. There is insufficient evidence to support a requirement to retain the IE in negotiations.

When the Commission first adopted competitive bidding rules, it recognized the advisability of allowing negotiations to proceed as free as possible from government interference. *In the Matter of an Investigation into Competitive Bidding by Investor-Owned Electric Utility Companies*, Docket UM 316, Order No. 91-1383, at 17 (1991) (“Order No. 91-1383”) (emphasis added). In addressing the question of whether parties should be permitted to negotiate issues related to the levelization of prices, the Commission stated:

Issues relating to levelization should be decided between a utility and a project sponsor as they negotiate the terms of a specific project. The bidding process adopted in this order allows the

utilities to determine their need-for-power requirements, evaluate and select projects to meet their power requirements, and negotiate to fine-tune the proposed project to the power requirements. *Market forces will be allowed to operate as free as possible from government restraints.* The Commission will be better able to test the success of the bidding process in the marketplace if the marketplace operates in an unfettered manner.

Id. There is no evidence that the Commission needs to deviate from this policy. As discussed above, there does not appear to be any nexus between the presence of an IE in a PPA negotiation and the perceived bias of a utility for a self-build project that is not part of the negotiation. Nor is PGE aware of any RFP involving a self-build resource in which there was any allegation that the negotiations were unfair. Any order by this Commission that would require regulatory oversight of commercial negotiations is a fairly drastic step and can only be taken if it is supported by substantial evidence in the record. *See, ICNU v. OPUC*, 240 Or.App. 147 (2010). Here there simply seems to be no evidence that expanding the IE's role would achieve the result the Commission desires.

B. Expansion of the Role of the IE is not Reasonable in Terms of Implementation or Costs

1. Expansion of the IE's role will lengthen the RFP process

As a practical matter, including the IE in PPA negotiations will slow down the RFP process. Negotiating a PPA is a fluid and somewhat unpredictable process that requires counterparties to be flexible and available at a moment's notice. It is impossible to predict at the outset of the process how long or what form the negotiations will take. Parties need to be available to address issues as they develop. Negotiations typically do not transpire at a pre-scheduled time in a conference room. Often parties negotiate in unscheduled phone calls during all hours of the day and sometimes late into the evening. Trying to insert an IE (who may not have an office in Oregon or even on the West Coast) in this process would be challenging. It

would essentially eliminate the ability for the principal negotiator for one party to pick up the phone and make a proposal to, or ask a question of, the principal negotiator for the other party. Requiring an IE to participate in the process means that a three-way call or meeting will need to be scheduled for every question and issue that arises. This will undoubtedly have an adverse affect on both the length and fluidity of the negotiation process.

The current RFP process is already long and unwieldy. On several occasions in the past PGE has received complaints from wholesale market participants that RFPs move too slowly, making it difficult for generation developers to either advance their projects due to lack of certainty or maintain the price conditions of their proposals. In PGE's experience, RFPs generally take twelve to eighteen months (or longer). In PGE's current RFP process for example, we will have spent three months completing the necessary procedural steps to select an IE before we can even issue a draft RFP for resources. While we do not dispute that an IE can add value to the bid scoring and selection process, the Commission cannot ignore the fact that IE involvement adds time to the resource acquisition process. PGE believes that the Commission should be looking at ways to streamline and shorten the competitive bidding process, not lengthen and encumber it. In particular, it should not be adding additional process when there is no demonstrable benefit.

2. Expansion of the IE's role will be costly

Including the IE through negotiations is also likely to be costly for PGE customers. PGE estimates that negotiations with one counterparty can take a year or more (particularly for larger and more complex resources/contracts). We would expect approximately four to six counterparties on the final shortlist (depending on bid sizes relative to our resource need). Therefore, we would expect the amount of time spent by the IE to increase considerably for the

negotiations process. IE costs could easily double or triple for each RFP if short-list negotiations were complicated and protracted. In addition, as discussed above, if the IE is expected to review the reasonableness of negotiating positions, considerable time will be needed to educate the IE on the parties' experience and risk philosophy with regard to a number of complex issues. Finally, additional time will be needed for the IE to review and evaluate the final resource selections, complete a report and, if required, present oral comments to the Commission.

C. Inclusion of the IE in PPA Negotiations will have a Chilling Effect on the Negotiations

PGE is concerned that retention of an IE in the negotiating process could have a chilling effect on negotiations. Both bidders and utilities may be reluctant to negotiate aggressively with a government-sponsored IE evaluating the negotiations. If the IE has no relevant experience with commercial negotiations, then its involvement would add limited value. If on the other hand the IE has negotiation experience obtained through prior consulting engagements, the utility and the short-listed bidders might be reluctant to negotiate in earnest. Bidders, in particular, may be reluctant to expose their negotiating strategy to an IE when that IE may be retained to evaluate future negotiations between it and a different utility in other RFP proceedings.

D. Expansion of the IE Role into PPA Negotiations is Inconsistent with the Commission's Competitive Bidding Goals

In Order No. 06-446, the Commission made only slight modifications to its 1991 competitive bidding goals, noting that the goals have guided the Commission well over the years.

The restated goals are:

1. Provide the opportunity to minimize long-term energy costs, subject to economic, legal and institutional constraints;

2. Complement Oregon's integrated resource planning process;
3. Not unduly constrain utility management's prerogative to acquire new resources;
4. Be flexible, allowing the contracting parties to negotiate mutually beneficial exchange agreements; and
5. Be understandable and fair.

In the Matter of an Investigation Regarding Competitive Bidding, Docket UM 1182, Order No. 06-446 at 2 (2006) ("Order No. 06-446"). Expanding the role of the IE would frustrate the latter three goals.

As discussed above, requiring the IE to evaluate PPA negotiations will lengthen and encumber the competitive bidding process and is likely to have a chilling effect on the negotiations. This constrains utility management's ability to acquire new resources in a timely manner and at the best cost and risk for customers and is therefore inconsistent with the Commission's third competitive bidding goal.

The Commission's fourth competitive bidding goal is frustrated by inserting the IE into the PPA negotiating process. As discussed above, contracting parties may be reluctant to freely negotiate mutually beneficial agreements when a government-sponsored IE is overseeing those negotiations. The Commission has earlier recognized the importance of allowing negotiations to proceed unfettered from government constraints. Order No. 91-1383 at 17. We urge the Commission not to deviate from this policy by expanding the role of the IE into the negotiating process.

The Commission's fifth competitive bidding goal is that the process be understandable and fair. We discuss above why the expansion of the IE's role is not necessary to achieve fairness. In addition, we discuss some of the uncertainty and confusion that is likely to arise if

the IE is to play a role in evaluating negotiations. If the parties do not understand what the IE is evaluating, for what purpose and what criteria it is using for such evaluation, the Commission will not achieve its fifth competitive bidding goal.

E. Any Requirement to Expand the Role of the IE Should be Applied Prospectively

If the Commission were to adopt new competitive bidding guidelines expanding the role of the IE, it should make such requirements applicable to RFPs for which no IE has been selected. As discussed above, the inclusion of the IE in the negotiating and final bid selection process is likely to require significant additional time and services from the IE. Accordingly, any RFP for an IE and any resulting bids will need to be written to account for such additional time and services. Further, the qualifications necessary for an IE who is evaluating PPA negotiations may be different from one who is not. For example, in order for an IE to understand and evaluate negotiations related to commercial risk in Oregon, it would be useful to have an IE that is experienced in and understands the intricacies of the Pacific Northwest energy system and market.

By the time the Commission issues its ruling in Phase I of this proceeding, PGE expects it will have retained an IE for its 2011 energy, capacity and renewables RFPs. PGE did not inform IE bidders of, or solicit bids from prospective IEs based on, the possibility of an expanded IE role. Moreover, neither PGE, Commission Staff nor Stakeholders evaluated IE bids based on the costs, time or experience that might be needed of an IE serving in an expanded role. As a matter of both fairness and efficiency, the Commission should not impose any new requirements on the role of an IE on any competitive bidding process for which an IE has already been selected.

F. Conclusion

We urge the Commission not to expand the role of the IE by retaining it through negotiations and final bid selection. Such a requirement is inconsistent with the Commission's competitive bidding goals and would lengthen and encumber RFPs with no clear benefit to the parties or the process. Any requirement to expand the role of the IE should not be applied to any RFPs for which an IE has already been selected.

III. Lowering the Threshold for a Major Resource

Currently, the Commission's Competitive Bidding Guidelines require utilities to issue an RFP for all Major Resources acquisitions identified in the utility's last acknowledged IRP. Order No. 06-446, Guideline 1. Major Resources are defined as resources with duration greater than 5 years and quantities greater than 100 MW. *Id.* The Commission has asked for comment on whether the threshold for a major resource should be lowered to include more projects in the competitive bidding process in order to further mitigate utility self-build bias.

A. Lowering the Threshold for a Major Resource Will Not Necessarily Capture More Viable Projects

The commercial scale of the vast majority of wind and baseload energy projects in the industry today is above 100 MW. Therefore, we do not believe that lowering the threshold for a Major Resource is likely to capture any more viable projects than what is currently permitted under the Commission's guidelines. PGE found that to be the case in its 2007 renewables RFP. In that RFP, PGE lowered the threshold for bids to 2 MW. However, PGE did not get any commercial scale wind projects below 100 MW. PGE did receive several bids for solar projects for less than 5 MW. Although we ended up executing contracts for 2.8 MW of solar, we found that the time required to evaluate those proposals significantly slowed down the RFP process. We believe that projects of this size (10 MW or less) can be developed and acquired more

efficiently outside of the RFP process. In addition, the utility has a separate legislative mandate to acquire both small size and utility scale solar projects. Accordingly, it is not necessary to drive smaller-sized solar projects through a more cumbersome RFP process to ensure that they are given consideration.

We would also point out that Guideline 6 allows a utility to set a minimum resource size but requires a utility to allow Qualifying Facilities (QFs) larger than 10 MW to participate. While we believe this requirement is unnecessary given that utilities are legally required to contract with QFs outside of the RFP process, we note that it does provide a means for smaller scale QFs to bid into a RFP if they so desire.

B. PGE has no Objection to Clarifying the Definition of “Major Resource” to Delineate what is Considered to be a Single Resource or Project

PGE would not object to clarifying the definition of a Major Resource in order to better define what is considered to be a single resource or project. Any such clarification however must be clearly understood and reasonable.

IV. Conclusion

For the reasons discussed above, PGE urges the Commission not to adopt a requirement to expand the IE role by retaining the IE through negotiations and final resource selection. Such a requirement is not likely to have any impact on the perceived bias for utility self-build generation projects and would extend and encumber an already lengthy and involved process at additional cost to customers. Any requirement to expand the role of the IE should not be applied to any RFPs for which an IE has already been selected.

PGE also believes that it is unnecessary to change the current threshold for a Major Resource as the current threshold captures the vast majority of commercial projects that are

likely to bid into a RFP. PGE would not object, however, to clarifying the definition of Major Resource to delineate what is considered to be a single resource or project.

DATED this 31st day of March, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Denise Saunders", written over a horizontal line.

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DATED at Portland, Oregon, this 31st day of March, 2011.



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