



**Portland General Electric Company**  
121 SW Salmon Street • Portland, Oregon 97204

November 1, 2011

*Via Electronic Filing and U.S. Mail*

Oregon Public Utility Commission  
Attention: Filing Center  
550 Capitol Street NE, #215  
PO Box 2148  
Salem OR 97308-2148

**Re: UM 1182**

Attention Filing Center:

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

▪ **PGE COMMENTS ON STRAW PROPOSAL**

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  
Associate General Counsel

VDS:cbm  
Enclosures  
cc: UM 1182 Service List

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1182**

In the Matter of	)	
	)	
PUBLIC UTILITY COMMISSION OF	)	<b>PGE COMMENTS ON STRAW</b>
OREGON,	)	<b>PROPOSAL</b>
	)	
Investigation Regarding Competitive Bidding	)	

In response to Oregon Public Utility Commission (Commission or OPUC) Order No. 11-340 and the September 28, 2011, Prehearing Conference Memorandum issued in this docket, Portland General Electric Company (PGE) submits the following comments on the straw proposal for defining a “major resource” subject to the Commission’s Competitive Bidding Guidelines.

In Order No. 11-340, the Commission determined that the definition of major resource should be modified to address the problem of a utility sizing projects to avoid competitive bidding requirements. Recognizing that criteria need to be adopted to clarify when multiple small projects should be considered a single major resource, the Commission offered a straw proposal for comment. PGE believes the Commission’s straw proposal is a good starting point but that the Commission’s objectives can be accomplished more efficiently if the site, construction and operating characteristics typical of a single generation plant are also considered when the Commission determines whether a project or a set of projects constitutes a major resource. Accordingly we propose the following modifications to the Commission’s proposal:

If multiple small generating projects totaling more than 100 MW ~~or more~~ meet the following criteria, then there is a rebuttable presumption that the multiple projects are a single "major resource" and the competitive bidding guidelines apply:

- (1) The generating plants-projects<sup>1</sup> are located on one or more adjacent parcels of land or on parcels within a five-mile radius of at least one other parcel<sup>2</sup>; and
- (2) Construction of the plants-projects is performed by the same contractor, or under the same contract, or under multiple contracts entered into within two years of each other; and-
- (3) The generating projects share supporting facilities such as operation centers, operation and maintenance facilities, service and storage facilities, other related or supporting facilities, access roads, substations (except those owned by third party utility companies and not constructed specifically to serve the generating plant), transmission lines (except those owned by third party utility companies and not constructed specifically to serve the generating plant), water or discharge lines, perimeter fencing, storage or parking areas; and,
- (4) The generating projects have obtained or made application for siting or land use approval and other applicable permits, licenses or site certificates as a single facility, on a single application, or on applications that are substantially identical except for the site descriptions; and

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<sup>1</sup> At the October 25<sup>th</sup> workshop held in this docket, the Citizens Utility Board (CUB) proposed that “plants” be changed to “projects” to ensure consistency with language used elsewhere in the straw proposal. We agree with CUB’s suggestion.

<sup>2</sup> The parties discussed this change at the October 25<sup>th</sup> workshop.

- (5) The generating projects obtained or share one or more sources of financing, revenue, grants and other financial resources for the development, construction, operation and maintenance of the generating plants and associated equipment; and
- (6) The generating projects are connected to the grid through a single connection; or
- (7) The generating projects have been recognized as a single facility by a federal, state, county, city or local authority including, but not limited to siting council, state or local boards or commissions.

The utility bears the burden of rebutting this presumption. If multiple small projects meet these criteria, but the utility believes that other factors show that each plant is a separate and distinct facility, then the utility may request that the Commission find that the projects do not qualify as a major resource. If the utility proceeds without making this request and without following the competitive bidding guidelines, then the utility may attempt to rebut the presumption that it should have followed the guidelines when the utility seeks recovery of the costs of the project in rates.

The additional criteria we propose are from a petition submitted to the Energy Facility Siting Council (EFSC) and the Oregon Department of Energy by the Oregon Natural Desert Association, Audubon Society of Portland, and Defenders of Wildlife to address EFSC sub-jurisdictional concerns. The petition sought to amend existing regulations to address situations in which contemporaneous development of multiple sites or expansion of existing sites should be considered a single energy facility of sufficient capacity to be subject to the EFSC site

certification requirement. A copy of the petition and EFSC's decision denying the petition is included as Attachment A hereto.

Although the EFSC petition was ultimately denied on jurisdictional grounds, we believe the proposed criteria are worth considering here as they are aimed at a goal similar to that which the OPUC seeks to achieve – clarifying what constitutes a single project or facility<sup>3</sup>. Without the additional criteria, the Commission's straw proposal would encompass projects that are clearly not intended by the Commission to be a single project for RFP purposes. For example, consider a situation where a developer uses a contractor to construct an 80 MW plant on one site and sells the output to PacifiCorp and uses the same contractor to construct a 20 MW plant on an adjacent site and sells the output to PGE. Under the Commission's proposal, the 20 MW project would be considered a major resource and PGE would either have to conduct an RFP to acquire the 20 MW or go through a public process to rebut the presumption or waive the RFP requirement – in either case the acquisition of the 20 MW would be subject to additional regulatory process and uncertainty. We do not believe the Commission intends such a result.

Because the additional criteria we propose are those typically used in a single project to achieve cost savings through the use of joint facilities and economies of scale, it is very unlikely that a utility would structure multiple projects to avoid satisfying these criteria. For example, it would not be prudent for a utility to incur the cost to construct duplicate operation and maintenance facilities or construct separate generation interconnection lines and facilities simply to avoid the application of the competitive bidding guidelines. In any event, any attempt by a utility to forego cost savings in order to avoid the competitive bidding rules will be subject to Commission review when the utility seeks recovery of the costs of the project in rates.

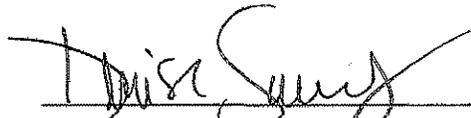
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<sup>3</sup> Similar criteria are used by the Department of Energy to determine if facilities using or producing renewable energy resources, or facilities listed as renewable energy resource are a single facility for purposes of determining eligibility for Business Energy Tax Credits. *See*, OAR 330-090-0120(2) (b) (B).

We recognize that under the Commission's straw proposal, a utility could always use the criteria we propose to rebut the presumption that multiple projects are a major resource; however, applying these criteria "after the fact" is less efficient and would cause unnecessary uncertainty. In addition, the Commission's straw proposal does not define what the process for rebutting a presumption would look like or how long it would take. We are concerned that the process for acquiring resources is already lengthy and cumbersome and that even specific timelines built into the competitive bidding guidelines are difficult to maintain. We believe it benefits all interested parties if additional process and regulatory uncertainty can be avoided by carefully crafting applicable criteria up front. Our proposed changes achieve the Commission's objectives of preventing a utility from sizing projects to avoid competitive bidding guidelines while at the same time avoiding adding additional process and uncertainty to a utility's ability to acquire resources to meet its customers' needs. We respectfully request that the Commission adopt our proposed modifications to its straw proposal.

DATED this 1<sup>st</sup> day of November, 2011.

Respectfully submitted,



✓ Denise Saunders, OSB # 903769

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**BEFORE THE ENERGY FACILITY SITING COUNCIL,  
OREGON DEPARTMENT OF ENERGY,  
STATE OF OREGON**

**PETITION OF OREGON NATURAL DESERT ASSOCIATION, AUDUBON SOCIETY  
OF PORTLAND, AND DEFENDER OF WILDLIFE FOR RULEMAKING PURSUANT  
TO OAR 137-001-0070**

Pursuant to OAR 137-001-0070, the Oregon Natural Desert Association, Audubon Society of Portland, and Defenders of Wildlife (collectively "Petitioners") hereby petition the Energy Facility Siting Council (EFSC) and the Oregon Department of Energy (ODOE) to amend existing regulations. The proposed regulatory amendment would clarify what constitutes a "single energy facility" for application of the EFSC jurisdictional threshold criteria in OAR Chapter 345 and ORS 469.300.

**OAR 137-001-0070(1) Name and address of Petitioners and others interested in the rule**

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Conservation Director  
Audubon Society of Portland  
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Bruce Taylor  
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Names and addresses of persons known to the Petitioners to be interested in the rule:

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**OAR 137-001-0070(1)(a) The rule Petitioners request the agency to adopt, amend or repeal**

Facilities which require site certificates from EFSC are defined in OAR Chapter 345 Division 1. The requirement that a "facility" obtain a site certificate is found in ORS 469.320 and OAR 345-021-0000.

The proposed amendment would amend two sections of OAR Chapter 345. OAR Chapter 345 Division 1 Section 0010, "Definitions," would be amended to add a definition of "Single energy facility" at 345-001-0010(52), to read:

"Single energy facility" means a generating plant or the combination of multiple existing or proposed generating plants, despite the number of applications, owners or construction phases, if three or more of the following apply:

(A) The generating plants are located on one or more adjacent parcels of land or parcels;

(B) The generating plants share supporting facilities such as operation centers, operation and maintenance facilities, service and storage facilities, other related or supporting facilities, access roads, substations (except those owned by third party utility companies and not constructed specifically to serve the generating plant), transmission lines (except those owned by third party utility companies and not constructed specifically to serve the generating plant), water or discharge lines perimeter fencing, storage or parking areas; perimeter fencing, storage or parking areas;

(C) The generating plants have been recognized as a single facility by a federal, state, county, city or local authority including, but not limited to siting council, state or local boards or commissions;

(D) The generating plants have obtained or made application for siting or land use approval and other applicable permits, licenses or site certificates as a single facility, on a single application, or on applications that are substantially identical except for the site descriptions;

(E) When the generating plants are designed to generate energy, the construction of the generating plants are performed under the same contract with a general contractor licensed under ORS 701 or multiple contracts entered into within two years of each other with one or more general contractors licensed under ORS 701. If a facility is composed of generating plants that will be completed in phases over time, the applicant must demonstrate that each of the phases of the facility would independently qualify as a single energy facility and that each phase of the facility are not interdependent in purpose or the manner in which they will be owned, financed, constructed, operated, or maintained or the facilities or phases of the facility will be considered as a single energy facility for the purposes of these rules.

(F) The generating plant owners obtain or share one or more sources of financing, revenue, grants and other financial resources for the development, construction, operation and maintenance of the generating plants and associated equipment;

(G) The generating plant owners share project expenses, personnel, capital investments including generating equipment, or other resources related to the generating plants, demonstrated by an agreement, anticipated agreement, or ownership or personnel common to the owners regardless of the owners' form or forms of business entity;

(H) The generating equipment for the generating plant and the related generating plant was purchased by the same person or persons who own or operate the generating plant or have taken action under any of the above factors;

(I) The generating plants are connected to the grid through a single connection or multiple connections when there is a shared net metering, power purchase or other applicable transmission agreement; or

(J) Other factors or considerations which demonstrate that each generating plant is not a separate and distinct facility based on its construction, operation, maintenance and output.

Current section OAR 345-001-0000(52) would be renumbered to OAR 345-001-0000(53) and all remaining subsections of OAR Chapter 345 Division 001 Section 0000 would be renumbered accordingly.

In addition, a new section OAR 345-021-0000(3) would be added by the proposed amendment, reading:

(3) Any person who has submitted an application for a county or municipal conditional use permit for an electric power generating plant with an average electric generating capacity of less than 35 megawatts from geothermal, solar or wind energy must submit to the Council information demonstrating that the proposed plant is separate and distinct from existing or proposed facilities and that it is not a “single energy facility” as defined in 345-001-0010(52). The burden of proof shall be on the person to show that the proposed electric power generating plant is not a single energy facility.

Current section OAR 345-021-0000(3) would be renumbered to OAR 345-021-0000(4) and all remaining subsections of OAR Chapter 345 Division 021 Section 0000 would be renumbered accordingly.

#### **OAR 137-001-0070(1)(b) Reasons for the request**

Petitioners request that ODOE and EFSC amend existing regulations and adopt rules clarifying the statutory ambiguity regarding EFSC jurisdiction over segmented energy generation projects to limit the impacts and accumulating effects from multiple sites which are, for all practical purposes, and in terms of their effects, a single facility. According to ORS 469.300(11)(a)(J), one of the categories of “energy facility” for which a proponent must obtain site certification from EFSC is:

An electric power generating plant with an average electric generating capacity of 35 megawatts or more if the power is produced from geothermal, solar or wind energy at a single energy facility or within a single energy generation area.

A “facility” subject to site certification under ORS 469.320 is “an energy facility together with any related or supporting facilities.” ORS 469.300(14). However, the statutory term “energy facility” in ORS 469.300 is ambiguous because the term does not contain a definition of “single energy facility,” which is used in ORS 469.300(11)(a)(J) to define the threshold for EFSC jurisdiction over geothermal, solar and wind energy projects. The definition in ORS 469.300(11)(a)(J) thus defines one category of “energy facility” in terms of the generating capacity that is produced at a “single” energy facility, without providing legislative guidance on what constitutes a “single” facility. ODOE and EFSC must clarify this ambiguity to vindicate the legislature’s intent that EFSC have broad jurisdiction over energy development projects that have significant impacts based on their mere size.

Projects with an average generating capacity of less than 35 megawatts (equivalent to a peak generating capacity of 105 megawatts) only require local land use permitting and thereby avoid EFSC jurisdiction and oversight by the State of Oregon. Currently, developers may segment a large development—what would be considered a “single facility” under the new temporary rules governing the Oregon Business Energy Tax Credit (BETC)—by artificially separating development into allegedly separate sites. This loophole within EFSC permitting requires an immediate and permanent fix so that such artificially segmented projects can be evaluated by EFSC and subject to Oregon Department of Fish & Wildlife (ODFW) siting recommendations and mitigation requirements on the same footing as projects for which the proponents forthrightly present the full scope of the project to EFSC for review. Closing this loophole also will ensure that all developers of large-scale industrial energy generation projects are treated equally under Oregon permitting laws and will foreclose an unfair advantage sought by any developer who attempts to creatively segment a project to avoid EFSC jurisdiction.

EFSC provides unique regulatory oversight where accumulating effects from industrial-scale energy development might occur due the size or location of the project. EFSC members not only have valuable expertise and a history of effectively regulating and permitting wind development in Oregon, but they

also draw on the expertise of ODFW and other State agencies such as ODOE and the Oregon Department of Environmental Quality. Amending the regulatory definition of “facility” to ensure a permitting process that objectively evaluates whether allegedly separate projects are in fact one facility will guarantee that Oregon stays at the forefront of responsible energy development and EFSC jurisdiction is not illicitly avoided in favor of local permitting.

When a large project is segmented into smaller projects to avoid EFSC jurisdiction, the impacts of the smaller projects together are equivalent to a single project covering the same area—but the application requirements and permitting standards might be vastly different for local government permitting of the multiple smaller projects, compared to EFSC review if the project were forthrightly represented as a single facility. For example, if the county does not follow ODFW guidelines and mitigation standards, or if the county lacks ODFW’s expertise and mandate for protecting Oregon’s wildlife, this might lead to neglect for accumulating impacts incurred from development and a potential loss of important species. It is the State’s responsibility to support and oversee county and local governance. In the case of wind, solar and geothermal development, the State needs to step in to ensure development is responsible and that local governments issuing conditional use permits are doing so within their limits and responsibilities.

ODFW expertise and recommendations regarding wind development are especially important in Oregon’s high desert where large contiguous areas of sagebrush make up crucial habitat for imperiled sagebrush obligates such as the Greater sage-grouse. According to the US Geological Survey, Oregon is one of 14 states where “fragmentation and loss of sagebrush habitat are the primary threats to Greater sage-grouse.” The population in 2008 of Greater sage-grouse in the state is around 22,000, which is approximately one-eighth of the estimated historical population. A recent study shows that the population is estimated to be at an all-time low in the state —making this an issue of great importance and priority for Oregon’s policy makers.

The proposed Echanis, East Ridge, and West Ridge generation sites in Harney County (see attached map)—a cluster of development proposed by Columbia Energy Partners and in the heart of core sage-grouse habitat on North Steens Mountain—illustrate the need for a clearer definition of what constitutes a “single energy facility” for purposes of EFSC jurisdiction. The concentration of over 200 wind turbines, proposed for three adjoining sites, by a single developer, with common infrastructure, and which would use a single transmission line to export the generated power from the mountain, compel the conclusion the legislature intended that these sites be treated as a “single” 312 megawatt facility subject to EFSC site certification, rather as than three “separate” adjacent projects just under 105 megawatts each.

Petitioners’ request for a regulatory amendment clarifying EFSC’s jurisdiction is essential in the face of rapidly increasing wind, geothermal and solar energy development throughout Oregon. Without explicit language in OAR Chapter 345 Division 1, artificial segmentation of large industrial energy projects is likely to continue and possibly increase as Oregon’s renewable energy resources are developed. Clarification of the statutory ambiguity regarding the scope of EFSC’s jurisdiction to foreclose this practice will allow the State to exercise the legislatively-intended oversight over large-scale energy developments while protecting the natural resources and scenic places all Oregonians enjoy.

The proposed amendment to OAR Chapter 345 Division 21 ensures that all persons who have submitted applications for county or municipal conditional use permits for electric power generating plants are required to present proof to EFSC that their proposed plant is separate and distinct from other facilities and are not required to obtain a site certificate from EFSC.

**OAR 137-001-0070(1)(c) Propositions of law to be asserted**

Not applicable, except to the extent that Petitioner asserts that the definition of “energy facility” in ORS 349.30(11)(a)(J) is ambiguous.

**OAR 137-001-0070(2)(a) Options for achieving the existing rule's substantive goals while reducing the negative economic impact on businesses**

The substantive goal of the existing rule is to require EFSC site certification for facilities that are sufficiently large to meet the state certification threshold established by the legislature. There will be no negative economic impact on businesses by clarifying what constitutes a single energy facility subject to the ORS Chapter 469 site certification requirement, and such clarification will further the substantive goal of that chapter and of OAR Chapter 345.

**OAR 137-001-0070(2)(b) The continued need for the existing rule**

The existing rule defines EFSC's jurisdiction to certify construction of energy facilities in Oregon and therefore continues to be necessary to satisfy ORS Chapter 469. The proposed amendment clarifies what constitutes a single "facility" subject to EFSC jurisdiction.

**OAR 137-001-0070(2)(c) The complexity of the existing rule**

The existing rule is simple but ambiguous, adopting the statutory energy generation capacity threshold in ORS Chapter 469. The rule defining a facility does not address situations in which contemporaneous development of multiple sites or expansion of existing sites should be considered a "single energy facility" of sufficient capacity to be subject to the EFSC site certification requirement.

The current rule provides, in OAR 345-001-0000(20), that

"Facility" as defined in ORS 469.300 or a small generating plant for which an applicant must have a site certificate according to OAR 345-001-0210 together with any related or supporting facilities.

ORS 469.300(14) in turn defines "Facility" to mean "an energy facility together with any related or supporting facilities," and ORS 469.300(11) defines "Energy facility" means any of the following (excluding hydroelectric facilities under ORS 469.300(11)(b)):

(A) An electric power generating plant with a nominal electric generating capacity of 25 megawatts or more, including but not limited to:

- (i) Thermal power; or
- (ii) Combustion turbine power plant.

(B) A nuclear installation as defined in this section.

(C) A high voltage transmission line of more than 10 miles in length with a capacity of 230,000 volts or more to be constructed in more than one city or county in this state, but excluding:

(i) Lines proposed for construction entirely within 500 feet of an existing corridor occupied by high voltage transmission lines with a capacity of 230,000 volts or more; and

(ii) Lines of 57,000 volts or more that are rebuilt and upgraded to 230,000 volts along the same right of way.

(D) A solar collecting facility using more than 100 acres of land.

(E) A pipeline that is:

(i) At least six inches in diameter, and five or more miles in length, used for the transportation of crude petroleum or a derivative thereof, liquefied natural gas, a geothermal energy form in a liquid state or other fossil energy resource, excluding a pipeline conveying natural or synthetic gas;

(ii) At least 16 inches in diameter, and five or more miles in length, used for the transportation of natural or synthetic gas, but excluding:

(I) A pipeline proposed for construction of which less than five miles of the pipeline is more than 50 feet from a public road, as defined in ORS 368.001; or

(II) A parallel or upgraded pipeline up to 24 inches in diameter that is constructed within the same right of way as an existing 16-inch or larger pipeline that has a site certificate, if all studies and necessary mitigation conducted for the existing site certificate meet or are updated to meet current site certificate standards; or

(iii) At least 16 inches in diameter and five or more miles in length used to carry a geothermal energy form in a gaseous state but excluding a pipeline used to distribute heat within a geothermal heating district established under ORS chapter 523.

(F) A synthetic fuel plant which converts a natural resource including, but not limited to, coal or oil to a gas, liquid or solid product intended to be used as a fuel and capable of being burned to produce the equivalent of two billion Btu of heat a day.

(G) A plant which converts biomass to a gas, liquid or solid product, or combination of such products, intended to be used as a fuel and if any one of such products is capable of being burned to produce the equivalent of six billion Btu of heat a day.

(H) A storage facility for liquefied natural gas constructed after September 29, 1991, that is designed to hold at least 70,000 gallons.

(I) A surface facility related to an underground gas storage reservoir that, at design injection or withdrawal rates, will receive or deliver more than 50 million cubic feet of natural or synthetic gas per day, or require more than 4,000 horsepower of natural gas compression to operate, but excluding:

(i) The underground storage reservoir;

(ii) The injection, withdrawal or monitoring wells and individual wellhead equipment; and

(iii) An underground gas storage reservoir into which gas is injected solely for testing or reservoir maintenance purposes or to facilitate the secondary recovery of oil or other hydrocarbons.

(J) An electric power generating plant with an average electric generating capacity of 35 megawatts or more if the power is produced from geothermal, solar or wind energy at a single energy facility or within a single energy generation area.

**OAR 137-001-0070(2)(d) The extent to which the existing rule overlaps, duplicates, or conflicts with other state or federal rules and with local government regulations**

The existing rule establishes exclusive jurisdiction in EFSC for energy facilities defined in ORS 469.300 and concurrent jurisdiction with local governments for electric power generating plants with an average electric generating capacity of less than 35 megawatts from wind energy (OAR 345-021-0000(2)). The existing rule does not conflict or duplicate other state, federal or local government regulation.

**OAR 137-001-0070(2)(e) The degree to which technology, economic conditions, or other factors have changed in the subject area affected by the existing rule, since the agency adopted the rule**

The primary factor that has changed in the area of energy facility site certification is the trend of developers subdividing projects into multiple sites to either claim excessive tax credits through the Business Energy Tax Credit (BETC) program or to attempt to avoid obtaining site certificates from EFSC. Recent revisions to the BETC program have highlighted the need to tighten the State's definition of what constitutes a single facility to prevent evasion of the legislature's intent in promulgating statutes governing energy development funding and siting.

In addition, the Association of Oregon Counties finalized a "Wind Energy Task Force Report and Recommendations" in early January 2010 which contained very weak recommendations for uniform siting guidelines for wind energy projects with average generating capacity of 35 megawatts or less. Rather than the expected "model ordinance," the resulting recommendations are simply "features counties should (may) consider when customizing their own review process and requirements." The complete absence of any recommended substantive criteria for wildlife and other resource protection in this Report and Recommendation makes it particularly critical that EFSC provide a mechanism for asserting jurisdiction over large, artificially subdivided projects.



# Oregon

Theodore R. Kulongoski, Governor



**OREGON DEPARTMENT  
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May 6, 2010

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## Energy Facility Siting Council Denial of Petition for Rulemaking

Gentlemen:

On February 1, 2010, the Oregon Natural Desert Association ("ONDA") submitted a petition for rulemaking to the Energy Facility Siting Council ("EFSC" or "Council") that proposed an amendment to the definition section of the Council's administrative rules. ONDA proposed that the council adopt two new provisions to

"[clarify] the statutory ambiguity regarding EFSC jurisdiction over segmented energy generation projects to limit the impacts and accumulating effects from multiple sites which are, for all practical purposes, and in terms of their effects, a single facility."

ONDA Petition for Rulemaking, p. 4. The proposed rules would amend the definition section of OAR 345 to add a definition of "single energy facility" and would add a provision requiring applicants for county approval of small energy generating plants to seek a Council determination that the facility was not a "small energy facility" as defined in the Council's rules.

The Council received public comments at the March 12, 2010 Council meeting. At that meeting the council directed staff to solicit and collect written comments by April 2, 2010, for presentation to the Council. The Council also determined to allow additional public comments at the April 30th, 2010 council meeting. The notice of the petition was sent to interested persons on March 22, 2010.

Review of a petition for rulemaking is governed by ORS 183.390. Because the petition requested amendment of an existing rule, the considerations listed in ORS 183.380(3) apply to the review of the petition:

In reviewing a petition subject to subsection (2) of this section, the agency shall consider:

Energy Facility Siting Council  
Denial of Petition for Rulemaking  
Page 2 of 2

- (a) The continued need for the rule;
- (b) The nature of complaints or comments received concerning the rule from the public;
- (c) The complexity of the rule;
- (d) The extent to which the rule overlaps, duplicates or conflicts with other state rules or federal regulations and, to the extent feasible, with local government regulations;
- (e) The degree to which technology, economic conditions or other factors have changed in the subject area affected by the rule; and
- (f) The statutory citation or legal basis for the rule.

In addition to the six factors listed above, the notice of the petition invited interested persons to comment "on whether options exist for achieving the rule's substantive goals in a way that reduces the negative economic impact on businesses," as required by ORS 813.390(2).

The Council's staff reviewed the comments and prepared a summary of the comments, which was presented to the Council at its April 30, 2010 meeting. A copy the staff reports is attached to this memo and incorporated into this order by this reference.

In addition to the written comments, several members of the public addressed the Council at the April 30 meeting, including the Deputy Director of the Department of Energy, members of several county planning commissions and county planners, a representative of ONDA and members of the general public. In addition, the Council received legal advice that the rule, as proposed, would likely be held by a court to be outside the Council's authority, although if the Council decided to address the issue and undertake rulemaking, that the final legal analysis would depend on the rule that the Council actually decided to adopt. Verbal comments did not provide substantially new information.

The Council has deliberated on the issues presented by this petition for rulemaking, including the six factors of ORS 183.390(3), and has determined to adopt the staff recommendations in their entirety. The Council recognizes that there is a substantial policy issue raised by the increase in the number of small wind energy facilities proposed in Oregon, but has determined that the rule proposed by ONDA in this petition will not adequately address all of the issues.

Therefore, the Council hereby DENIES the petition for rulemaking submitted by ONDA on February 10, 2010.

Sincerely,



Robert Shiprack  
Chair  
Oregon Energy Facility Siting Council

April 18, 2010

Memo to EFSC Members

RE: Staff Summary of Petition Received to refine definition of Single Energy Facility

**Council members,**

**This memo is to provide an overview of the Oregon Natural Desert Association, the Portland Audubon Society and Defenders of Wildlife petition to modify council rules to clarify the description of a "single energy facility". A copy of the petition is attached for your reference. Staff has reviewed the petition and comments received prior to the April 2, 2010 deadline. The petitioning process proposed by the requestor is outlined in ORS 183.390. The provisions are set out below, followed by a summary of the comments received on each section. In the statutory provisions, the word "Agency" refers to the Energy Facility Siting Council (Council).**

ORS 183.390(1) An interested person may petition an agency requesting the promulgation, amendment or repeal of a rule. The Attorney General shall prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition. Not later than 90 days after the date of submission of a petition, the agency either shall deny the petition in writing or shall initiate rulemaking proceedings in accordance with ORS 183.335.

**Response: The council must take action no later than May 6<sup>th</sup>, 2010 to deny the petition in writing or initiate rulemaking.**

ORS 183.390(2) If a petition requesting the amendment or repeal of a rule is submitted to an agency under this section, the agency shall invite public comment upon the rule, and shall specifically request public comment on whether options exist for achieving the rule's substantive goals in a way that reduces the negative economic impact on businesses.

**Response: Public comments were received at the March Council meeting, and the council further directed staff to solicit and collect written comments by April 2 for presentation to the council. The Council also determined to allow additional public comments at the April 30<sup>th</sup>, 2010 council meeting.**

Numerous comments were received expressing concern over developers avoiding the State's siting process, but did not formally address the six questions found in ORS 183.390(3). Most of the comments focused on the projects' impacts or the counties' review process. Several commenters noted the cost and time required to navigate the State's process would have a negative economic impact on businesses and remove local decision making. Some comments recognized that economic impacts to business could be addressed during the rulemaking process, with the goal of minimizing, and that the petition is a starting point not an end point.

It was noted that counties in Oregon have statutory authority to review and conditionally approve land use, ORS 215.283(2) including commercial utility facilities, but that authority is limited by ORS 469.300 for wind generation projects greater than 105 MW.

Staff Memo to Council

Oregon Natural Desert Association – Petition for Rulemaking  
Add definition of single energy facility to OAR 345 Division 1

ORS 183.390(3) In reviewing a petition subject to subsection (2) of this section, the agency shall consider:

- (a) The continued need for the rule;
- (b) The nature of complaints or comments received concerning the rule from the public;
- (c) The complexity of the rule;
- (d) The extent to which the rule overlaps, duplicates or conflicts with other state rules or federal regulations and, to the extent feasible, with local government regulations;
- (e) The degree to which technology, economic conditions or other factors have changed in the subject area affected by the rule; and
- (f) The statutory citation or legal basis for the rule.

Response to ORS 183.390(3)(a) The continued need for the rule:

The rule proposed in the petition is seeking to clarify the definition of the term single energy facility within the definitions at OAR 345-001-0010. The definition of an energy facility at OAR 345-001-0010(17) refers to the definition provided at ORS 469.300(11) (a)(A through J) and (b). ORS 469.300(11) (a)(J) uses the phrase "single energy facility" without further clarification. ORS 469.300(11)(a)(J) states "An electric power generating plant with an average generating capacity of 35 MW or more if the power is produced from geothermal, solar or wind energy at a single energy facility or within a single energy generation area."

Since the phrase "single energy facility" is not defined, staff anticipates that the Council could provide direction on the terminology and the council could, via rulemaking clarify the definition at OAR 345-001-0010.

Response to ORS 193.390(3) (b) The nature of complaints or comments received concerning the rule from the public:

A compendium of comments has been provided to you for your review. Arguments are presented to support the petition and to deny the petition. As stated the phrase "single energy facility" is not presently defined in statute or rule. As noted, Staff has informally worked with developers and county staff to clarify what is a single energy facility based primarily on business risk tolerance, construction time frame, interconnection and infrastructure proposals, and power purchase agreements. Developers have been advised by both the EFSC staff and county planning staff that pursuant to ORS 469.320(8) they can "opt" into the EFSC process for renewable resource generating facilities of less than 35 megawatts of average generating capacity.

EFSC staff has also worked with concerned stakeholders to develop guidelines to be used by developers and counties in determining impacts. This effort culminated in the Columbia Basin Bird and Bat Guidelines, which has been followed by the Association of Oregon's counties effort to develop guidelines for Oregon counties.

Many comments expressed concern about developers intentionally avoiding the EFSC process, some related to degradation of Steens Mountain, and avoidance of ODFW review.

Response to ORS 193.390(3) (c) The complexity of the rule:

The definition proposed in the petition adopts the criteria used by the Oregon Department of Energy's temporary Business Energy Tax Credit (BETC) program rules to determine eligibility for the tax credit. The BETC Statute was substantially revised by 2010 special session of the Legislature. Under the revisions, the Business Energy tax credit for EFSC jurisdictional wind generating projects will sunset in 2012, indicating the maturation of the industry. The proposed definition is intended to clarify when multiple proposed facilities should be treated as a single facility for siting purposes, by requiring an affirmative response to three of ten questions (or criteria). The petition's triggering questions specifically exclude ownership, construction phases, or applications for county permits, prior to application to the state or local jurisdiction. Additionally, under the proposed rules, a developer who proposes an energy facility not obviously within the Council's jurisdiction would be required to obtain concurrence from EFSC that the facility is not subject to combination with other facilities into a "single energy facility" subject to Council jurisdiction

The proposed rule is complex and would interpose a state decision process as a requirement prior to a developer applying for a County's conditional approval of land use.

It was noted by one commenter that the demarcation between the County comprehensive land use process and the State siting process is clearly defined as 105 MW.

Response to ORS 193.390(3)(d) The extent to which the rule overlaps, duplicates or conflicts with other state rules or federal regulations and, to the extent feasible, with local government regulations:

The proposed decisional process would be new in rulemaking and therefore does not directly overlap other local, state, or federal rules. However, rules exist at the local and state level to permit energy facilities. At the local level, an energy facility can be permitted through the conditional land use process outlined at ORS 215, et seq. If large enough, the proposed facility must be permitted through the states' jurisdictional authority outlined at ORS 469.300, et seq.

Commenters argue that implementation of the proposed rule would be complex; has the practical effect of requiring state oversight of all projects; duplicates the existing county conditional use processes and conflicts with EFSC's own rules on Energy Generation Areas.

Response to ORS 193.390(3) (e) The degree to which technology, economic conditions or other factors have changed in the subject area affected by the rule.

Wind turbine technology has seen dramatic changes over the past decade. Oregon's first commercial wind farm was constructed with 750 kW turbines in 2000 and by 2010 most projects are proposing to use turbines that approach 3 MW in nameplate generating capacity, continuing the trend toward fewer larger turbines in each project.

Economic conditions have become more challenging due to overall economic trends in the United States and decision by Oregon's 2010 legislature to scale back the Business Energy Tax Credit program for large renewable wind energy projects. It was noted that many states are implementing Renewable Portfolio Standards and this will support additional development to meet that demand.

Other factors noted by comments focused primarily on unintended consequences, environmental impacts, and loss of heritage due to the proliferation of wind turbines. We interpret this to be the densification of projects into areas with the best wind resources receiving the most development and that projects could be constructed on adjacent lands but not meet the same general requirements.

Response to ORS 193.390(3)(f) The statutory citation or legal basis for the rule.

EFSC's jurisdiction is defined at ORS 469.300 and County jurisdiction at ORS 197.175 with further clarification at ORS 215.

#### Staff Statement

Staff is concerned on two specific points. First, the rule as proposed might be considered an expansion of council jurisdiction beyond that intended by the legislature. Secondly, the rulemaking establishes a process that asks EFSC to authorize the initiation of the county conditional use permitting, which might be considered an expansion of council jurisdiction beyond that intended by the legislature.

Staff Conclusion – If the Council concurs that management of cumulative impacts is not occurring and that better management of cumulative impacts is required, staff recommends that the council review the definition of energy generation areas, as defined at ORS 469.300(12), and find that multiple energy generation areas should be established, through rule, as part of natural resource development in the state. Staff recommends that the Council not undertake rulemaking to define "single energy facility" at this time.

### CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2010, I filed the attached ONDA DENIAL within on the parties hereto by electronic mail and by first class mail a true, exact and full copy thereof as follows:

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Kathy Stuttaford  
Rulemaking Coordinator

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused **PGE COMMENTS ON STRAW PROPOSAL** to be served by electronic mail to those parties whose email addresses appear on the attached service list from OPUC Docket No. UM 1182.

DATED at Portland, Oregon, this 1<sup>st</sup> day of November, 2011.



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