BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of: PORTLAND GENERAL ELECTRIC COMPANY Application for Approval of an Affiliated Interest Transaction with Portland Renewable Resource Company	)	**UI 461** COMMENTS OF THE NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION

The Northwest and Intermountain Power Producers Coalition ("**NIPPC**")[1] respectfully submits these comments on Portland General Electric Company's ("**PGE**") application for approval of an Affiliated Interest Transaction with Portland Renewable Resource Company ("**PRR**") and the Staff Report filed December 8, 2021[2] for consideration by the Oregon Public Utility Commission (the "**Commission**"). NIPPC urges the Commission reject PGE's application. If the Commission does not reject PGE's application, then NIPPC urges the Commission to require strict separation of functions between PGE and PRR, place significant restrictions on the activities PRR can engage, and ensure any RFP bids in PGE's upcoming RFP docket be treated as a Benchmark Resource.

I. INTRODUCTION AND SUMMARY

In this Docket, PGE seeks approval to operate PRR, a nominally "independent" power developer, without any operational separation of function from the utility itself.[3] This is an extraordinary proposal: as far as NIPPC is aware, the majority of relevant state jurisdictions as

[1] NIPPC is a membership-based advocacy group representing electricity market participants in the Pacific Northwest. NIPPC members include independent power producers ("IPPs"), electricity service suppliers, and transmission companies. NIPPC's current member list can be found at http://nippc.org/about/members/.

[2] Available at https://edocs.puc.state.or.us/efdocs/HAU/ui461hau181440.pdf

[3] *See* PGE Application for Affiliated Interest Transaction, filed September 10, 2021, available at https://edocs.puc.state.or.us/efdocs/HAA/haa162819.pdf (PGE's "**Affiliate Application**")

well the Federal Energy Regulatory Commission ("**FERC**") proscribe such anticompetitive activity. PGE suggests that its need to operate PRR on an integrated functional basis is in order to take advantage of certain tax credits not available to utilities, but PGE also has made it clear that it plans to use this affiliate for a broad range of other activities as well, such as serving PGE's VRET program,[4] and PGE has opposed proposals urged by Commission Staff and others to limit use of PRR for bidding into PGE's RFP and building subsequent successful bids for cost of service customers.[5] PGE has also identified a different regulatory structure - use of a holding company[6] - that appears to provide all of the benefits PGE seeks, without the significant downsides Staff and interested parties have identified.

NIPPC submits that the Commission must reject PGE's proposal because it does not meet the "no harm" standard[7] and is not in the public interest.[8] To the extent the Commission does allow PGE to proceed, NIPPC urges that the Commission apply the following conditions,[9] as a minimum, to mitigate the significant legal and competitive concerns created by PGE's novel proposal:

(**1**) Adopt all of the Staff's recommended restrictions (as adjusted per NIPPC's comments below);

(**2**) Require and adopt appropriate standards of conduct and ensure completely separate managerial and operational employees and separation of operational functions *prior to* allowing PRR to participate in any affiliated RFP; and

(**3**) Treat any affiliated RFP bid in the upcoming RFP as a Benchmark Resource.

[4] *See, e.g.,* PGE Response to CUB DR-008, Highly Confidential Information Redacted, at P. 3 (indicating PGE intends to use the affiliate for its Green Tariff program (available on Huddle).

[5] *See, e.g.,* PGE's opposition to Staff Condition 1 as referenced in the Staff Report at p. 10.

[6] *See, e.g.,* PGE Data response to Staff 4.

[7] *See, e.g.,* In the Matter of Portland General Electric Co. Application for Approval to Sell its 2.5 Percent Ownership Share of the Centralia Steam Electric Generating to Avista Corporation (UP 165), Order No. 00-152 (Order on Reconsideration March 12, 2000).

[8] *See* ORS 757.511(3).

[9] *See* ORS 757.511(4). ("The commission may condition an order authorizing the acquisition upon the applicant's satisfactory performance or adherence to specific requirements. The commission otherwise shall issue an order denying the application.")

II. DISCUSSION:

A. PGE's proposal must be rejected because it is not fair and reasonable, is contrary to the public interest,[10] and does not meet the "no harm" standard.[11]

NIPPC submits that the Commission should reject PGE's application outright. In considering the arguments raised herein, NIPPC asks the Commission to evaluate – and to provide a reasoned basis for its decisions regarding -- the following specific points, each of which NIPPC believes provide independent grounds for rejection of PGE's proposal.

1. **Allowing PGE to operate an affiliate that may bid into its RFP will do nothing to decarbonize Oregon's electric system**. [12]

Allowing PGE to operate PRR as it proposes, and allowing this integrated, non-independent affiliate to bid into PGE's RFP, will not increase the amount of carbon-free power on PGE's system in any way. The winner of the RFP will, by the terms of the RFP, be a renewable resource, a renewable resource plus storage, or an otherwise non-emitting dispatchable resource. This will be true whether or not such entity is affiliated with PGE. In any case involving a third party, whether its own affiliate or not, PGE will enter into a power purchase agreement ("**PPA**") or other formal agreement with the winning bidder, bringing an identical amount of carbon-free capacity onto PGE's system.

NIPPC emphasizes that PGE has simply asserted, but in no way has demonstrated, that the lack of an integrated affiliate's bid is somehow leading to higher prices in RFPs in Oregon. This extraordinary claim carries a burden proof that PGE has simply ignored.[13] In fact, bids from dozens of IPPs in recent Oregon RFPs suggests the opposite economic logic: fierce competition among IPPs—including among NIPPC's own members—is driving prices lower and benefiting ratepayers. The Commission should not accept PGE's illogical claim.

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[10] *See* ORS 757.495(3)

[11] *See, e.g.*, In the Matter of Portland General Electric Co. Application for Approval to Sell its 2.5 Percent Ownership Share of the Centralia Steam Electric Generating to Avista Corporation (UP 165), Order No. 00-152 (Order on Reconsideration March 12, 2000).

[12] PGE claims that its proposal "will help support PGE's decarbonization efforts that align with the recently enacted policy objectives in House Bill (HB) 2021". PGE Affiliate Application at p. 2. NIPPC submits that this is not true, as any renewable PPA PGE enters pursuant to its RFP would provide the same carbon reduction.

[13] *See* ORS 757.511(4) ("the applicant shall bear the burden of showing that granting the application is in the public interest").

By contrast, the anticompetitive effects of PGE's proposal could chill the competitive landscape and drive potential renewable power developers from the market, reducing the potential development of low carbon power for the state and reducing, rather than increasing, the potential price benefits from robust competition. As a result, PGE's proposal offers no furtherance of Oregon's carbon reduction goals, and instead causes likely harm.

- *To the extent that the Commission evaluates PGE's claim that allowing its affiliate to bid into its RFP will support decarbonization in Oregon, NIPPC asks the Commission to expressly explain in its order how an affiliate PPA would create a different decarbonization outcome as compared to a third party PPA. NIPPC submits that the decarbonization outcome will be no different.*

2. PGE's intentional delay in submitting this affiliated resource application to run contemporaneously with the RFP evaluation is a fatal flaw, as PGE itself has recognized.

PGE has been planning this affiliate filing since at least early 2020, if not before. In an internal presentation from March 2020, PGE identified the following regulatory steps it would need to take in order to move forward. Specifically, PGE's presentation states that its necessary regulatory steps were to:

- Create an affiliate company and draft contracts that will be used to address ITC normalization
- ***Submit an affiliated interest application*** to request approval of the agreements and proposed transactions, including:
  - Addendum to Master Service Agreement
  - Request for waiver of lower-of-cost-or-market requirements
- Identify and propose an affiliate-owned solar resource in an IRP/RFP process
- Develop the solar resource and request recovery of the affiliate's costs as a PPA in PGE's power costs in the next applicable GRC or AUT filing.
- ***The listed filings would need to run in sequence rather than contemporaneously***

See PGE response to CUB data response 8, Attachment A (Confidential Information Redacted) (emphasis supplied).[14] Despite PGE's evident understanding that these filings "***need to run sequentially***," PGE did not file its affiliate application until September 10, 2021. Given PRR's desire to participate in PGE's upcoming RFP in January, it is clear that PRR already has identified a proposed resource. It is now too late to impose appropriate separation of function requirements on PRR, as the resource development to which this separation would apply must

[14] Data Response available on non-confidential section of Huddle.

have already occurred. It was PGE's choice not to file its affiliate application on a timely basis sufficient to allow the Commission to consider appropriate separation of function requirements before the fact. Approving the application at this stage is clear harm and does not meet the legal standard for approving affiliate transactions.

This timing issue is exacerbated by arguments raised in the various dockets that should have been handled sequentially. PGE has, at various times, argued at the same time that (**1**) the Commission should not evaluate the affiliate proposal in the RFP docket, as it is a part of this docket; (**2**) the Commission should not consider RFP issues in the affiliate docket; and (**3**) PGE is creating the affiliate solely to address Investment Tax Credit ("**ITC**") normalization issues for use in the RFP, so the Commission does not need to consider restrictions on PGE's use of this affiliate for other competitive power programs, such as PGE's VRET – all while still arguing that PGE should not be constrained from using its affiliate for such other programs. These are complex issues that require careful consideration. NIPPC further submits that concerns raised in this docket about the use of an integrated affiliate for other programs cannot be cured by an after-the-fact filing for approval of specific transactions entered into by the affiliate and third parties or PGE, once specific commercial commitments have been executed pending regulatory approval – these issues must be addressed at the forefront. PGE itself created the time crunch the Commission and interested parties face in evaluating PGE's proposal and structuring any standard of conduct and/or separation requirements. PGE's failure to file its affiliate docket for sequential consideration with other dockets – as PGE recognized should be necessary – does not justify approval of a proposal that has not been fully vetted and is not in the public interest. It bears repeating that PGE bears the burden of showing that granting the application is in the public interest, and PGE has not done so.

- *To the extent that the Commission approves PGE's application, NIPPC asks that the Commission explicitly limit PGE's use of PRR for the purposes of bidding into PGE's RFP as described in Staff Condition 1 and require PGE to treat PRR's bid as a benchmark resource, as addressed in Section II.C herein.*

3. ***PGE's proposal is contrary to Oregon law ORS 757.646***

Oregon law ORS 757.646 specifically requires the Commission to design policies to mitigate vertical and horizontal market power of incumbent utilities "***and prohibit preferential treatment, or the appearance of such treatment by the incumbent electric companies toward***

generation or market affiliates."[15] The statute goes on to specifically require that the Commission "***shall establish by rule a code of conduct for electric companies and their affiliates to protect against market abuses and anticompetitive practices***," and "***Minimize cross-subsidization between competitive operations and regulated operations, including the use of electric company personnel and other resources***," and "***require fair treatment of all competitors by a distribution utility***." (Emphasis supplied.) PGE's proposal is fundamentally inconsistent with this law.

In this docket, PGE is seeking to preserve and expand its vertical market power by creation of an affiliate – wholly integrated and operated by the utility -- to compete with independent power developers bidding into PGE's RFP, and potentially for supplying service under PGE's green tariff and other opportunities. PRR is, by any definition, a "*generation or market affiliate."* PGE is further proposing to use its monopoly power to benefit its affiliate, including offering full credit support[16] and management. PGE is not offering to provide similar services to third parties. It appears incontrovertible that PGE is offering preferential treatment to its generation affiliate, and therefore approval of PGE's proposal is inconsistent with Oregon law. It appears incontrovertible that PGE is proposing to use – and in fact has already used – "electric company personnel and other resources" for development of PRR's RFP bid, and therefore approval of PGE's proposal is inconsistent with Oregon law. It appears incontrovertible that PGE's proposal to provide credit support for its affiliate is a cross-subsidization inconsistent with Oregon law.[17]

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[15] *See* ORS 757.646(1)).

[16] *See* PGE Affiliate Application, p. 2

[17] NIPPC is mindful of ORS 757.646(4), a new section of Oregon's Direct Access statute that reiterates the Commission's duties to ensure policies are developed to mitigate the vertical and horizontal market power of incumbent electric utilities set forth in Section 757.646(1), provided they do not limit or delay electric companies from offering programs or making investments in furtherance of clean energy targets. However, as addressed herein, approval of PGE's affiliate proposal will not further clean energy targets as compared to requiring PGE to enter into a PPA with a third party and/or through a holding company structure. Further, the provisions of new section ORS 757.646(4) do not apply to ORS 757.646(2) or 757.646(3), which specify:

> "(2) The commission shall establish by rule a code of conduct for electric companies and their affiliates to protect against market abuses and anticompetitive practices. The code shall, at a minimum:
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> (a) Require an electric company and any affiliate that shares the same name and logo to disclose to all consumers the relationship between the company and affiliate and to clarify that the affiliate is not the same as the electric company and that in order to receive service from the company a consumer does not have to purchase the services of the affiliate;

- *To the extent that the Commission approves PGE's application, NIPPC asks the Commission to clearly articulate for the record how PGE's operation of a generation or market affiliate, including management operations, technical information, credit support, and other issues, is consistent with the Commission's statutory responsibilities set out in ORS 757.646(2). NIPPC submits that an articulation of consistency with Oregon law cannot be made.*

4. PGE's proposal is inconsistent with longstanding utility governance policies as imposed by FERC and other states.

NIPPC submits that PGE's proposal to operate a generation affiliate without any separation of function requirements is clearly inconsistent with the public interest. If PRR develops a generation facility, PRR will be a FERC-jurisdictional utility.[18] Operational separation is a fundamental principle of FERC's market-based rate rules for wholesale power sales. FERC has explained: "Under the separation of functions requirement in the market-based rate affiliate restrictions, employees of market-regulated power sales affiliates must operate separately, to the maximum extent practical, from employees of affiliated franchised utilities with captive customers."[19] With limited exceptions, "franchised public utilities with captive customers are prohibited from sharing employees that engage in resource planning or fuel procurement with their market-regulated power sales affiliates."[20]

NIPPC understands similar separation of function requirements have been imposed by most,

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(b) Prohibit preferential access by an electric company affiliate to confidential consumer information;

(c) Minimize cross-subsidization between competitive operations and regulated operations, including the use of electric company personnel and other resources;

(d) Prohibit joint marketing activities and exclusive referral arrangements between an electric company and its affiliates;

(e) Provide the commission with all necessary access to books and records; (f) Require electric companies to make regular compliance filings; and

(g) Require fair treatment of all competitors by a distribution utility.

(3) An electric company shall provide the commission access to all books and records necessary for the commission to monitor the electric company and its affiliate relationships. The Commission shall require an electric company biannually to file a report detailing compliance with this sub- section."

[18] See 16 USC 824(e).

[19] *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity, Ancillary Serv. By Public Utilities*, 131 FERC ¶ 61,021, 61,151 (April 15, 2010) (citing 18 CFR § 35.39).

[20] *Id.* at 61,159.

if not all, jurisdictions that have considered this issue, and urges the Commission to consider, in particular, the examples of how regulatory agencies in California, New York, Massachusetts, and Maryland have evaluated these issues, as further outlined in the comments filed in this docket by Calpine Solutions.[21] NIPPC adopts and supports Calpine Solutions' comments on this topic and will not burden the record with repetition.

- *To the extent that the Commission nonetheless approves PGE's application, NIPPC asks the Commission to clearly articulate for the record its specific rationale for creating a regulatory regime inconsistent with FERC, California, and other states that have considered this issue. In the absence of a clearly articulated rationale for rejecting standard regulatory policy, NIPPC submits that the Commission must reject this application.*

5. **PGE itself has identified a feasible alternative with essentially no downsides**.

As noted above, PGE claims that the primary purpose of its request to operate a generation affiliate without any separation of function is based on the desire to take advantage of ITC tax opportunities unavailable to regulated utilities.[22] NIPPC, Staff, and other parties have identified significant concerns with this approach. At the same time, ***PGE itself has identified an alternative that provides all of the commercial benefits of its proposal with respect to the ITC***, and none of the downsides: adoption of a holding company structure.[23] *See, e.g.*, PGE Data response to Staff Data Request No. 4. PGE's stated rationales for rejecting this approach was that it would require separation of functions – which should be required in any event -- and could be confusing to shareholders, which, NIPPC submits, is not a reasonable basis for rejecting this approach in favor of PGE's flawed approach. Notably, PGE did not suggest that it would impose any costs or harms to ratepayers.

NIPPC welcomes competition in the generation market and would not oppose PGE participating through a properly designed holding company structure. In fact, many independent power developers, including NIPPC members, are or were affiliated with, but functionally

[21] NIPPC supports the comments filed in this docket on December 10, 2021 by Calpine Energy Solutions, LLC ("**Calpine Solutions**") (available at https://edocs.puc.state.or.us/efdocs/HAC/ui461hac15942.pdf) outlining the strict separation of functions requirements adopted by a variety of jurisdictions, including California, New York, Maryland, and FERC, and will not burden the record with repetition herein.

[22] It bears repeating that PGE refuses to limit use of the affiliate for this purpose.

[23] PGE has also identified tax equity options including a sale leaseback option and a partnership flip option.

separated from, regulated utilities, and there is a long history of utilities spinning off independent power developers.[24] In Oregon itself, the entity that has become Avangrid Renewables was originally spun off from PacifiCorp as PacifiCorp Power Marketing. There is no basis to grant PGE the extraordinary relief it seeks given the negative consequences already identified when a reasonable, fair, and widely adopted alternative is available.

- *To the extent that the Commission nonetheless approves PGE's application, NIPPC asks the Commission to clearly articulate for the record its specific rationale why PGE should not be required to operate its affiliate through a holding company structure in lieu of PGE's approach. In the absence of a clearly articulated rationale for rejecting standard regulatory policy, NIPPC submits that the Commission must reject this application.*

6. **PGE's proposal may be unnecessary given potential Federal action, and PGE's premise for its proposal misconstrues existing federal policy.**

As PGE notes in its application, it has been working with Federal elected officials to secure changes in tax legislation that would allow PGE either to opt out of normalizing the ITC or to take a production tax credit ("**PTC**") for solar generation -- which would provide a similar outcome in avoiding normalization – without creation of a new utility affiliate. This legislation is currently pending in Congress, and, as the Staff Report notes, has a chance of passing. It is plausible that we will know where this legislation stands within a matter of weeks. Given the potential harms from creation of an integrated affiliate, and PGE's failure to timely bring this application forward, NIPPC submits that it would be in the best interest of Oregon to allow the federal legislative process to play out before adopting PGE's extraordinary, and harmful, request.

NIPPC also is concerned about the impression left with the Commission by PGE's premise that the federal requirement to normalize investment tax credits is somehow a policy gap created inadvertently by Congress. The Commission should recognize that normalization is a tax

[24] For example, NIPPC member Calpine Solutions was originally spun off from San Diego Gas & Electric. NIPPC member Constellation Energy is an independent affiliate of Exelon. NIPPC member NextEra Energy was originally spun off from the Florida Power & Light utility. NIPPC Member NRG Energy was originally spun off from the Northern States Power utility. NIPPC member TransAlta Energy Marketing was originally spun off from Canadian utility TransAlta. NIPPC has no opposition whatsoever to a utility creating a separate, independent power developer to compete in the market. By contrast, *NIPPC opposes PGE's proposal to use is its ratepayer-funded resources to support an integrated affiliate, as opposed to a separate, independent affiliate, and to provide that affiliate with competitive advantages not available to other parties.*

accounting policy that Congress, with support from utilities, deliberately (and deliberatively) first established over 50 years ago for a wide range of utility investments that benefit from upfront federal tax incentives.[25] The normalization requirement is not some accidental consequence or inefficiency in the tax code, but rather an intentional structured benefit for utilities and for capital investments favored by Congress. PGE is, and utilities in general have been, seeking ways to obtain a limited exception from normalization for only categories of investments in which they actually face competition. Neither PGE, nor utilities in general appear to be, for example, advocating to move away from normalizing accelerated depreciation.

To be clear, NIPPC does not take a position on whether normalization is the right public policy in general for regulated utilities, but NIPPC does believe that there should be consistent treatment of like investments in the federal tax code. NIPPC does not oppose utilities structuring investments into ITC-eligible property in ways that the IRS has deemed permissible for flow-through (as opposed to normalized) accounting in existing private letter rulings (options that PGE has investigated and rejected). Nor does NIPPC oppose giving utilities and IPPs the option to select either an ITC or a PTC for clean energy generation, as the Build Back Better legislation currently pending in the U.S. Senate does.[26] This optionality should render moot PGE's expressed reason for creating this affiliate (to capture the value of the solar ITC) by letting PGE access a PTC for solar investments. NIPPC notes that this point (the option to elect a PTC) has not been discussed in this docket.

While NIPPC does not oppose Congress undertaking a fundamental re-assessment of how normalization should apply to all classes of utility investments, NIPPC does oppose PGE's attempt to create what amounts to a shell company, otherwise undifferentiated from the utility, whose raison d'être is to escape the very tax accounting otherwise embraced by utilities. NIPPC also opposes Congress allowing utilities to turn normalization on or off, at their discretion, for a

[25] *See* section 441 of the Tax Reform Act of 1969 (P.L. 91-172).

[26] *See* sections 136801 and 136802 of H.R. 5376 as passed by the House of Representatives on November 19 (an amendment in the nature of a substitute consisting of the text of Rules Committee Print 117-18, modified by the amendment printed in House Report 117-173).

discrete set of assets that happen to face competition from companies with fundamentally different business models.

NIPPC notes that this is not a matter of parity in tax treatment between IPPs and utilities. Parity is a red herring. These two different types of businesses have different exposure to market forces and economic regulation. And this difference is the *very reason* that regulated utilities have been subject to a normalization requirement for the past half century. Utilities continue to receive effectively guaranteed returns on after-tax capital, subject to state regulatory review, just as they did fifty years ago, albeit for a wider range of services than some utilities do today. By contrast, IPPs operate like most nonutility businesses, with a return on capital fully exposed to market forces, including through price competition with one another, and with no recourse to nor adjustment by a state economic regulator. The competitive business environment in which IPPs operate has helped drive transformational declines in the price of renewable energy projects in the past decade. Enacting a normalization opt-out for clean energy tax credits will not level the playing field between utilities and IPPs. Instead, a cherry-picked exception for the rare types of utility investments in which market competition actually exists will create a gross inconsistency in federal law.

In summary, in NIPPC's view, both legislated exceptions to normalization and the integrated affiliate proposed by PGE in this docket are bad public policy. Instead, PGE's appropriate recourse to address its desire to avoid normalizing federal ITCs in the future is to select a PTC instead (where permitted), establish a holding company with a functionally separate affiliate, or pursue tax equity alternatives.

B. TO THE EXTENT THE COMMISSION CHOOSES TO ALLOW PGE TO OPERATE AN AFFILIATE, PGE'S ACTIONS SHOULD BE HIGHLY PRESCRIBED AND LIMITED.

To the extent the Commission determines it appropriate to allow PGE to operate PRR, as opposed to requiring PRR to be a fully independent affiliate, NIPPC believes such operation must be strictly limited. NIPPC generally supports the conditions outlined in the Staff report, as adjusted below.

Staff Condition 1: "PRR's sole and exclusive purpose shall be limited to bidding into PGE's RFP and building any subsequent successful bids for cost-of-service customers ~~unless otherwise approved by the Commission.~~"

NIPPC Response: NIPPC agrees that Staff Condition 1 is ***critical.*** PGE submits that the purpose of the affiliate is expressly to avoid certain ITC tax issues for bidding into the RFP. PGE's late filing of this proposal has not allowed time for vetting any other use of the affiliate, nor is any other use appropriate. NIPPC further requests that the clause "unless otherwise approved by the Commission" be removed. This clause is unnecessary, as the Commission always has the ability to approve something else in the future, but NIPPC is concerned it will leave the door open to PGE making changes after the fact, and seeking approval after commercial arrangements are in place, making it difficult for interested parties to have a fair opportunity to contest the changes.

Staff Condition 2*: "*PGE employees working on a PGE RFP shall enter into a Code-of-Conduct agreement whose text and terms preclude the availability of any competitive advantage vis-à-vis any non-PGE RFP bid participant. The Code-of-Conduct shall include generation and transmission operations and information other than what is publicly available."

NIPPC Response. NIPPC believes that (1) any code of conduct must be in place *before* approval of this docket (it is not the Commission's nor interested parties' fault that PGE did not file this docket last year); (2) the code of conduct should provide for complete separation of functions, similar to the California requirements for separation of a regulated utility's market-based affiliate and FERC's requirements with respect to FERC-regulated wholesale market affiliates of a public utility with captive retail customers. NIPPC believes a requirement for use of separate managerial and operational employees, as part of a complete and total separation of operational functions, is necessary and appropriate. Additional detail about the FERC requirements (with which PGE will need to comply) are set out in 18 C.F.R. § 35.39. Among other things, this section provides:

> **(2)** (i) ***To the maximum extent practical***, the employees of a market-regulated power sales affiliate ***must operate separately*** from the employees of any affiliated franchised public utility with captive customers.
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> **(ii)** Franchised public utilities with captive customers are permitted to share support employees, and field and maintenance employees with their market-regulated power sales affiliates. Franchised public utilities with captive customers are also permitted to share senior officers and boards of directors with their market-regulated power sales affiliates; provided, however, that the shared officers and boards of directors must not participate in directing, organizing or executing generation or market functions.
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> (iii) Notwithstanding any other restrictions in this section, in emergency circumstances affecting system reliability, a market-regulated power sales affiliate and a franchised public utility with captive customers may take steps necessary to keep the bulk power system in operation. A franchised public utility with captive customers or the market-regulated power sales affiliate must report to the Commission and disclose to the public on its Web site, each emergency that resulted in any deviation from the restrictions of section 35.39, within 24 hours of such deviation.

Staff Condition 3: Any PRR bid into a PGE RFP shall exclude explicit recovery of any decommissioning costs, but such costs shall be recovered implicitly through the pricing regime.

NIPPC Response: This item should be retained.

Staff Condition 4: PGE and PRR will submit any amendments or changes to the following documents to the Commission for approval:

A. PRR's Articles of Incorporation

B. PRR's Bylaws

C. Any parental guaranty from PGE on behalf of PRR

NIPPC Response: NIPPC believes this item should be retained, but believes that issuance of a parental guarantee from PGE on behalf of PRR should not be permitted. Among other reasons:

a. PGE's high investment grade credit rating is supported by ratepayers – and by transition costs paid by ESSs – and it would be fundamentally anticompetitive to use PGE's credit to support PRR.

b. A parent guarantee on a PGE-PRR PPA should not be allowed in the RFP. Fundamentally, ***you cannot both be the guaranteed party AND the guarantor***. A parental guarantee by the utility under the PPP between the utility and its affiliate – even with adequate separations – is essentially a commitment that the utility will step in and cure any default in the event of a breach by the affiliate. But there is an irreconcilable conflict of interest if PGE is both the counterparty on the PPA, with the right and discretion to enforce or not enforce the PPA's requirements, and the guarantor party ensuring PRR's performance to PGE under the PPA. PGE would have a disincentive to enforce any breach, meaning that the affiliate will be guaranteed favorable treatment unavailable to non-affiliated entities. Stated differently, a guarantee by PGE for the obligations of its affiliate that the affiliate owes to PGE is equivalent to not having a guarantee at all. Thus, in the RFP, the affiliate must secure credit and performance assurance from sources other than its parent utility, such as obtaining a letter of credit or liquid cash assurance if it is not adequately capitalized to meet the same investment grade credit requirements applied to other bidders.

Staff Condition 5: PGE utility customers shall be held harmless from any adverse rate impacts that may be caused by PRR. PGE bears the burden of demonstrating that its ratepayers are held harmless. These adverse impacts include but are not limited to:

D. Flow through of tax benefits

E. Startup costs associated with PRR

F. Operational costs associated with PRR or any PRR projects

G. Changes in PGE's cost of capital or cost of long-term debt associated with PRR

H. Production problems, poor performance, or cost overruns with PRR projects

NIPPC response: NIPPC fully supports the concept that utility customers must be held harmless, but notes that the Commission's statutory obligations also extend to protection of the competitive marketplace, as discussed above. The Commission must address these adverse impacts as well.

Staff Condition 6: PGE agrees to report to the Commission, any event that materially impacts the operations and cost structure of any PRR project within 10 business days of becoming aware of such an event.

NIPPC Response: NIPPC supports this condition. As noted at a recent workshop in this docket, NIPPC opposes PGE's suggestion that it only need to report items that affect PRR's ability to "maintain contractual obligations." A party can clearly be underperforming its obligations, or even be in clear default, without running afoul of "contractual obligations." This is particular true if the counterparty is an affiliate, and the counterparty has a specific incentive to waive various timelines, etc. For example, PPA's involving asset construction often require the developer to meet certain construction milestones, unless such milestones are extended or waived by the utility, and/or if failure to meet a given milestone is not cured within a certain number of days after notice by the counterparty. In these circumstances, a utility would have an incentive not to issue notice of the missed milestone to the counterparty, meaning the affiliate would not have "failed to meet its contractual obligations," despite a clear and problematic delay.

Staff Condition 7: PGE and PRR will not comingle any assets, cash flows or financial accounts and shall explicitly identify assets, cash flows and financial accounts by company.

NIPPC response: NIPPC generally supports this condition, but believes it needs to be extended to require separation of managerial and operational employees as well.

Staff Condition 8: PRR will maintain separate financial books and records from PGE and maintain robust systems to track time employees spent on PRR business.

NIPPC response: NIPPC generally supports this condition.

Staff Condition 9: Any earnings from PRR will be reported in PGE's annual Results of Operations and positive earnings from PRR will count towards any earnings tests conducted by the Commission.

NIPPC response: NIPPC supports this condition. NIPPC expressly disagrees with PGE's rationale that this proposal is not "symmetrical." By contrast, this proposal removes the incentive for PGE to artificially segregate the potentially most lucrative projects for the benefit of its affiliate to the detriment of ratepayers, and maintains an even playing field with independent developers that must bear any losses themselves.

Staff Condition 10: The Commission shall be given unrestricted access to any documents, internal communications, meeting minutes, financial statements, books, and records from PGE and PRR.

> *NIPPC response*: NIPPC supports this condition. NIPPC expressly disagrees with PGE's request that it should maintain any privilege from the Commission regarding its affiliate dealings. PGE is a regulated utility. PGE is free to form a holding company and have a non-regulated affiliate that is separate from utility operations. But, as long as PGE seeks to comingle personal, information, and assets with its affiliate, the Commission must have insight into all material without restriction.

Staff Condition 11: In the event that laws are relaxed to no longer require that regulated utilities normalize ITC benefits, PRR shall no longer be allowed to submit bids into any PGE RFP. PRR shall still be allowed to operate any existing facilities for the duration of any existing PPA.

> *NIPPC response*: NIPPC agrees with Staff that this condition is fundamental to any approval of PGE's affiliate proposal. PGE submitted its proposal expressly on the desire to take advantage of ITC benefits, and should not be allowed to use PRR for other purposes. NIPPC also recommends that the condition be extended to cover the eventuality that Congress changes normalization requirements after bids (including a PRR bid) are submitted into PGE's upcoming RFP. In that eventuality, PRR bids should no longer be allowed to be included on a Final Shortlist for evaluation by the Commission.

C. Affiliate RFP Bids Must Be Treated as a Benchmark Resource.

PGE has, thus far, operated PRR as an integrated part of its utility. To the extent that PRR and/or PGE have identified a resource that PRR proposes to bid into PGE's upcoming RFP, the affiliate proposal must be treated like a benchmark resource under the bidding rules. That would include: (**1**) the affiliate bids' project assets be shared; (**2**) the affiliate bid be scored before competitive bids; (**3**) that the team that works on the affiliate be identified and be restricted from the RFP team, and also not be allowed to have been on the IRP development team to prevent an unfair informational advantage in the RFP for the affiliate, and (**4**) contingency price adders be included in the affiliate's price score because it is not likely to be a truly arms-length PPA that PGE would strictly enforce. This same treatment should apply to any future PRR bids unless and until full and complete separation of resources is achieved.

Based on PGE's prior representations in the RFP, the Commission would need to take two further actions at this time. First, the Commission should proscribe the affiliate from employing PGE employees who worked on the IRP, particularly those having access to any confidential modeling information or other resource needs assessments. This is consistent with FERC's

requirements that "franchised public utilities with captive customers are prohibited from sharing employees that engage in resource planning or fuel procurement with their market-regulated power sales affiliates[,]"[27] as well as the Commission's own bidding rules that assume the affiliate will be "separate" from the regulated utility.[28] While the Commission's bidding rules do not specifically restrict those who worked on the IRP from participating in the benchmark bid, NIPPC submits such separation is appropriate in this case for a market-based affiliate, and consistent with FERC precedent. Second, the Commission should instruct the independent evaluator and PGE to ensure that appropriate contingency adders are included in the price scores for any affiliate bids, similar to other utility-owned bids, due to the increased risk to ratepayers that PGE may not enforce the PGE-PRR PPA as strictly as it would for truly *independent* bidders who may succeed in the RFP. Additionally, further transparency as to the commercial structure of the affiliate bid is necessary to make meaningful evaluation and recommendations for the affiliate's treatment, and any conditions imposed at this time should be without prejudice to development of further conditions based on information that may become available in the future.

II. CONCLUSION

NIPPC respectfully requests that the Commission reject PGE's affiliate application. As more fully addressed herein:

- PGE's proposal would cause substantial competitive harm without providing any decarbonization benefits for the state.
- PGE's proposal would likely increase, rather than decrease, energy costs in Oregon.
- PGE's proposal is inconsistent with the Commission's obligations under Oregon law ORS 757.646.
- PGE's proposal is inconsistent with federal separation of function requirements as well as regulatory structures applied by other states that have evaluated allowing utilities to form generation affiliates.
- PGE's proposal may be rendered moot by federal legislation anticipated to be finalized within a matter of weeks.

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[27] *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity, Ancillary Serv. By Public Utilities*, 131 FERC ¶ 61,021, 61,159 (April 15, 2010).

[28] OAR 860-089-0300(3)(b) (emphasis added); *see also* Docket No. AR 600, Order No. 18-324 at 11 (Aug. 30, 2018) (discussing "*separate* utility affiliates" (emphasis added)).

- PGE itself has identified an alternative structure that provides the ITC benefits PGE seeks without the harms identified – formation of a holding company - but chose not to pursue that option.
- PGE has provided no basis or support for its clear intent to use an integrated affiliate for purposes other than ITC relief.
- PGE's intentional failure to file its affiliate docket on a sequential basis prior to its RFP development, and development of PRRs generation proposal on an integrated basis with utility resources, is a fatal flaw to PRR's participation in the RFP except as a benchmark resource.

NIPPC reiterates that the statutory burden to demonstrate that approval of the application is in the public interest is on PGE – not NIPPC, Staff, or the Commission.[29] PGE has not met this burden.

To the extent that the Commission nevertheless determines it appropriate to approve PGE's application, NIPPC requests that the Commission:

- Impose all of the conditions identified in the Staff report, as further addressed by NIPPC above;
- Require and adopt appropriate standards of conduct and ensure completely separate managerial and operational employees and separation of operational functions *prior to* allowing PRR to participate in any affiliated RFP; and
- Require that any affiliated RFP bids be treated as a benchmark resource in the upcoming RFP.

Respectfully submitted this 12th day of December, 2021.

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[29] *See* ORS 757.511(4) ("the applicant shall bear the burden of showing that granting the application is in the public interest").