

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 390

In the Matter of a Proposed Rulemaking to Implement the Code of Conduct, Aggregation, and Allocation of Funds to Education Service Districts Provisions of SB 1149)))))	PGE’s Comments on Proposed Order
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Portland General Electric Company (PGE) requests the Commission to reject the proposed rules relating to the Code of Conduct in this docket. PGE requests that the Commission either (1) adopt the Code of Conduct rules proposed by PGE on May 30, 2000, as a placeholder for a more detailed set of rules or, alternatively, (2) adopt the Code of Conduct rules proposed by PGE on November 3, 2000. In support of this Motion, PGE states:

INTRODUCTION

1. Section 6 of Senate Bill 1149 (SB 1149), as codified in ORS 757.646, is entitled **“Commission policies to eliminate barriers to competitive retail market structures, to provide incentives for divestiture and to establish Code of Conduct for electric companies.”** Subsection(3) of that statute details the minimum requirements for a Code of Conduct. Pursuant to Section 16 of SB 1149, “The Public Utility Commission shall adopt final rules . . . not later than January 1, 2001.”

2. This legislatively-mandated deadline has complicated this rulemaking proceeding and has directly led to a proposed set of rules that has both technical and policy-related problems. Unlike the AR 380 process, this rulemaking has not resulted in a consensus rule. Because of the rushed nature of the docket, the parties never had the opportunity to go through the proposals on a detailed, rule-by-rule basis.

PGE and the other parties filed comments and different drafts of proposed rules, but the schedule simply did not allow a thorough airing of problems with the drafts.

3. Therefore, PGE proposes that the Commission adopt a course of action that will allow for further discussions. Specifically, the Commission should adopt a placeholder set of rules with the understanding that the parties will continue discussions and come back to the Commission with either a consensus rule or, at a minimum, with one or more sets of proposed rules that are ready for adoption.

THE COMMISSION CAN AND SHOULD ADOPT A
PLACEHOLDER CODE OF CONDUCT

4. Section 16 of SB 1149 requires that the Commission adopt “final rules” relating to a Code of Conduct by January 1, 2001. Nowhere does the legislation require that those “final rules” never be changed. Thus the Commission has the authority to adopt a placeholder set of rules to satisfy the legislative requirement and may then adopt a substantive Code of Conduct later. The only real deadline the Commission faces is October 1, 2001, when direct access goes into effect. Practically speaking, the parties will need some time to prepare for that date, so the Code of Conduct should be adopted several months in advance of that date. But that schedule means the parties still have several weeks or months to reconvene and try to go through these proposed rules in the same level of detail as we did the AR 380 rules.

5. In our initial filing in this docket, PGE proposed a skeleton set of rules. In fact, we simply parroted the statute. That draft Code of Conduct is attached to this filing as Appendix A. PGE filed that draft as a “starter” to discussions. We do not believe that the Commission should adopt that draft as its ultimate Code of Conduct, and we will not make such a representation in the future. Because that draft is so sketchy, all parties will have an incentive to make it more comprehensive, i.e., it will be a true placeholder. The Coalition and all other parties will then be able to re-engage and reach agreements on

what a final, substantive Code of Conduct should include. Even if no consensus Code of Conduct emerges from those discussions, at least the parties will be able to highlight the key issues for the Commission and propose good alternatives from which the Commission can choose.

THE COMMISSION SHOULD NOT ADOPT

THE PROPOSED CODE OF CONDUCT

6. There are two major reasons why the Commission should not adopt the proposed rules. First, because they are a substantive set of rules supported by some parties and recommended by the Administrative Law Judge, they do not serve as a true placeholder. Parties have an incentive to resist changing them. Their adoption therefore has the potential to inhibit the open discussions that a more “blank slate” would require.

7. The second major reason is that the proposed rules have some fundamental, major problems. No one is at fault for this defect. The legislative deadline has driven the parties and the Commission to propose something that is simply not ready for adoption. PGE has commented at every stage of this proceeding and has participated in every workshop and other meeting. In addition, we have engaged parties in more informal talks. The schedule simply has not allowed a detailed discussion of each and every word of each and every rule, which is absolutely vital if the resulting proposal is to represent a Code of Conduct the Commission would want to promulgate and publish in the Administrative Code. The face-to-face workshops and other meetings were especially truncated. The parties either spent most of their time on one of the first rules and never got to the later ones, or they talked about policy and never got to a discussion of exactly how the rules should be worded. Thus the proposal before the Commission is simply not ready to be adopted.

8. Following are example of problems that the schedule has caused. This list is not exhaustive, but it will indicate to the Commission why it would be unwise to adopt the proposed rules.

(A) Rules must be sufficiently clear to give notice to the parties of what the rules cover. This principle is embodied in the Due Process Clause of the Constitution and is often called a “vagueness” issue. Consider the definition of competitive operation, proposed rule 860-038-0005(8). The question that rule raises is what are “activities related to the provision of electricity services?” We know what electricity services are because they are defined in that same rule. But we do not know what “related activities” are, and the parties are likely to disagree seriously about what that phrase covers. Either the phrase should be deleted, leaving the rule to cover just electricity services, which is the result we believe is correct, or the Commission will need to open a proceeding to decide what else is covered. Otherwise we cannot follow the rules, and we do not believe you can enforce it.

(B) ORS 757.646, which requires the Commission to adopt this Code of Conduct, begins by requiring the Commission to “develop policies to eliminate barriers to the development of a competitive retail market structure.” We have recommended consolidating proposed rules 860-038-0540 and 860-038-0580(1), which would make previously confidential information available to a utility ESS and other ESSs on an equal basis. We then went further to try to provide for access to information on non-regulated services, not only to ESSs but to other competitive businesses such as computer stores and electrical contractors. Our proposal would open the competitive field by eliminating barriers to communications that currently exist. In contrast, the proposed rule simply clamps down on what a utility can do, an approach does that not seem to carry out the legislative intent. Further discussions in this area certainly appear to offer the

likelihood of reaching a better, broader rule, but the schedule we all worked under simply prevented it. A revised schedule would again open up that possibility.

(C) The rules must be flexible enough to cover the changing regulatory environment. Consider again proposed rule 860-038-0540(1), the other rule we wanted to open to allow a freer exchange of information. The proposed rule, though, precludes disclosure of **any information** (it is not limited to proprietary or electricity-related, or otherwise) to a competitive operation “or other entity.” Besides the vagueness problem, look at how restrictive this rule is. Rules are like statutes in that they need to allow the affected parties to operate within their requirements. By being so prescriptive, this rule completely confines utilities in every communication we might have with anyone.

(D) The next example of the problems with the Code of Conduct before the Commission is proposed rule 860-038-0580. Subsection (3) purports to give the Commission jurisdiction over “intangible property,” and “rights, entitlements, and business opportunities.” We believe (1) customers have never paid for those and (2) that while you clearly have jurisdiction over certain tangible property, you do not have authority over a utility’s ideas or thoughts.

(E) Regardless of that issue, however, this rule has major technical problems (and again, this is not the only one, but it is a very clear example). Focus on the last sentence of Subsection (2) that reads: “For purposes of this rule, ‘utility’ or ‘regulated’ and ‘nonutility’ or ‘nonregulated’ have the meaning given in the Uniform System of Accounts prescribed for Public Utilities and Licensees by the Federal Energy Regulatory Commission.” The problem is that the Uniform System of Accounts does not define “regulated,” “nonutility,” or “nonregulated.” So the provision is absolutely meaningless. This provision is a prime example of how the schedule has

damaged this whole process. Because of the lack of time, the proposal simply has not undergone the thoughtful and thorough study that it needs before the Commission adopts it as a rule binding on the parties. More time to deal with this type of technical issue will result in a better proposed rule for the Commission to consider.

(F) In the same proposed rule, look at subsection (3). The words “good” and “service” are defined as a transfer, which clearly makes no sense. When applying that definition to subdivisions (4)(d) and (e), they explain what to do when a transfer is sold. PGE does not sell transfers.

CONCLUSION

9. The AR 380 process was the open, collaborative process that works best in Oregon. Unfortunately, that rulemaking took so long that the schedule for AR 390 became unduly compressed. The resulting set of rules on a Code of Conduct is simply not ready for adoption. PGE would like to re-engage in the 380-type discussions so that the parties can bring the Commission a proposed Code of Conduct that can serve as an example to other states of how such rules should be worded. The set of rules before the Commission definitely does not meet anything close to that standard. Adopting the proposed rules, even with an understanding that the parties will try to “fix” them later, would be extremely unwise. The incentive to make sure they do indeed get “fixed” simply is not present.

10. To ensure that that incentive is in place, the Commission should adopt a true placeholder and charge the parties with coming back with a good Code of Conduct that will carry out the legislative intent of SB 1149. PGE offers its first filing in this case as that placeholder.

THEREFORE, PGE requests that the Commission not adopt the proposed Code of Conduct rules but instead either (1) adopt a placeholder set of rules or (2) adopt our November 3 proposal as the Commission's Code of Conduct rules.

Respectfully submitted this the 15th day of December, 2000.

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CERTIFICATE OF SERVICE

I certify that I have served the foregoing **Motion** on the persons shown on the Commission's Service List as detailed on its Internet Web Page in the manner prescribed there.

This the 15th day of December, 2000.

A. W. Turner