

QUESTION AND ANSWER ADDENDUM TO PROPOSAL

1. What are the reasons why the organization has independence from the PUC?

Nonprofit organizations offer a unique opportunity to merge public value orientation and private sector effectiveness. The approach taken in creating this nonprofit organization is an effort to balance the strengths and potential of the nonprofit group, while ensuring accountability for the public funding it receives.

The key strength of a nonprofit is its ability to draw in caring and committed community leaders who volunteer their time to support the mission of the organization. These people often bring experience and knowledge otherwise unavailable to the group. Strong community leaders are more willing to give their time and energy if they have real authority behind their decisions and legal responsibility. They also tend to make better decisions.

The organization's independence as a nonprofit also provides it with flexibility not afforded to public agencies. This flexibility provides the group with the ability to respond without cumbersome, drawn-out processes. The experience of similar efforts in other states, especially California, suggests that having independence from public agencies removes some of the burdens and restrictions that can hinder the organization's success. These procurement and personnel restrictions may make sense for larger public agencies but not for smaller, single-purpose nonprofit organizations.

There is precedence in Oregon for creating a nonprofit organization to relieve a burden of government on energy issues. The Oregon Climate Trust was established in 1998 by the Energy Facility Siting Council (EFSC) to help improve the environment by investing in greenhouse gas mitigation. The group was borne from state law and functions as a separate nonprofit organization incorporated in Oregon with ongoing accountability to EFSC. Similarly, the proposed SB 1149 nonprofit will function as an independent, public benefit organization with very strong accountability to the PUC for the actions it takes and the manner in which it spends its funds.

2. How will the PUC be able to hold the new nonprofit accountable for the funds the nonprofit spends for conservation and renewables?

The most significant control the PUC will have is its authority to suspend funding to the organization. These funds will be provided through PUC authority by the utilities that collect the public purpose charges. A grant agreement between the PUC and the organization will spell out in detail the expectations and requirements that the nonprofit group must fulfill in order to receive the funding. (See related question #14.) The agreement will also establish other guidelines on how the organization is structured, who it serves, how it will account for the effectiveness of its activities, how it will make its decisions in open forums, etc. The PUC will be able to cancel the agreement and suspend funding with 60 days notice.

In addition, a PUC representative will participate as a non-voting ex-officio member of the board to support communication between the organization and the PUC and to ensure accountability to issues and concerns raised by the PUC.

3. What other requirements will ensure the nonprofit is held accountable for the funds it collects and distributes?

The board of directors of the nonprofit organization will be held accountable through their fiduciary responsibilities to the organization. The Attorney General is responsible for overseeing the public trust obligations of all nonprofit organizations in the state. In addition, the IRS has key requirements that it imposes on all groups recognized as public charities. The board will report to both of these agencies as part of its accountability requirements.

In addition, the organization will have two advisory committees that will provide input and advice on the decisions it makes. These committees – one focusing on conservation and the other focusing on renewables – will provide input to both the strategic and operational plans of the organization. Their input should help ensure that the activities of the organization are consistent with the needs and mandates that drive the organization.

4. What ongoing reporting will take place between the new nonprofit and the PUC?

There are several ways the new organization will communicate with the PUC. First, the organization will provide an annual report to the PUC that summarizes the program accomplishments and accounts for the finances managed by the organization for the year. The report will also describe any modifications or revisions to the strategic plan that the board has made during the course of the year. Financial information will come from a thorough, independent audit that will comply with generally accepted accounting principles (GAAP). Second, the organization will submit prospective annual budget reports and periodic interim budget updates to the PUC for review. Third, the PUC will have a non-voting representative on the board who will receive all information and correspondence directed to board members of the organization. Finally, the organization will respond immediately to any PUC request for information concerning the organization's activities related to SB 1149/ORS 757.612(3).

5. What advantages are provided by having the nonprofit board select its own board members, rather than having the PUC make the decision forever?

As described above, there are key advantages to giving the new nonprofit organization the responsibility and authority to govern its own affairs. Those advantages extend into the board development process as well. Effective board development is much broader than simple nomination and election. The recruiting process for building an effective board incorporates governing committees and advisory committees as tools that bring people into the organization one step at a time. Effective boards advance their board prospects through roles as advisors and committee members to ensure they are ready and committed to take on the role of board member. The final step onto the board is done as part of a well-organized process of identifying specific organizational profile needs and recruiting to fill those needs. The first place to look is among the advisors and committee members, and then among the larger pool of supporters.

This process of building leadership can only be accomplished if the organization has control over the board development process. Organizations need to be able to act quickly and thoughtfully when adding and removing board members from the group. This can almost

never be accomplished when the process of nominating board members is done by an outside organization or agency, especially one subject to political influences. In addition, if there were to be direct control of board appointees by the PUC, the organization would likely be subject to Oregon's statutory scheme governing public entities (*See also points under question #1.*)

6. How will the organization ensure that there is no conflict of interest among the board members of the nonprofit?

Conflicts of interest will be strictly addressed by ORS 65.361 and by a corporate requirement that board members regularly disclose any potential or possible conflict. This law is part of Oregon's Nonprofit Corporation Act and is designed to create very strict conflict of interest rules governing Oregon nonprofit corporations. It covers both direct and indirect conflicts.

7. How will the board ensure it has diversity and balance?

The board will establish its own guidelines on board composition in both the details of its bylaws and in more specific board development policies. The board will establish these guidelines to ensure it has the diversity needed to be most effective in supporting its mission. In addition, the PUC will probably insert key provisions within the grant agreement to ensure that the organization that receives the public purpose funds is governed by a board that has the skills, connections and demographics to be effective. If the organization fails to meet those guidelines, the PUC has the authority to cancel the grant agreement with 60 days notice.

8. Is there a reason the purpose statement is so broad?

The purpose statement is part of the articles of incorporation required for the formation of any nonprofit corporation in Oregon. The statement establishes the breadth of activity that is appropriate for the organization to undertake, and is the basis for judging the public benefit of the organization by the Attorney General and IRS.

The broad purpose statement recommended for the corporation responds to a legal concept entitled "ultra vires." Essentially, it means "without authority." A corporation operates in an "ultra vires" manner when it undertakes unauthorized activities. When that happens, the board of directors becomes personally liable for anything that goes wrong with those activities, because they are operating outside their corporate authority. For this reason, the purpose statement is left broad, permitting the organization to establish and modify its mission statement to more specifically address the needs and opportunities facing the organization over time. A 70% vote of the board of directors will be required to alter the purpose clause.

For example, the organization will have responsibility for implementing programs and projects to fulfill the mandate provided by SB 1149/ORS 757.612(3). It may also seek additional grant funding from private foundations to implement an education program that supports conservation efforts more broadly than those activities eligible under SB 1149/ORS 757.612(3). For this reason, the purpose must accommodate the potential for the broader activities, while restricting the use of funds from SB 1149/ORS 757.612(3) within a grant

agreement with the PUC. The grant agreement between the organization and the PUC will strictly limit the activities that the organization can undertake with the public purpose funds to those that fit the constraints of the law.

9. Will the nonprofit organization be able to do more than administer the funds provided through SB 1149?

While the genesis of the new organization is SB 1149, the activities of this group will not be limited to the work mandated by the public purpose provisions of the law. The group may engage in any activities that are within the framework of its purpose statement, which must be *consistent* with the activities of SB 1149/ORS 757.612(3). The organization may seek outside funding from public and private sources for activities that range from organizational development to public education. However, the organization will have very strict requirements to keep any other funds separate from those restricted for the purposes of SB 1149/ORS 757.612(3).

10. Will public open meeting laws be part of the new organization's policies?

Yes, the organization will commit to hold all board meetings in compliance with ORS 192.610 (public meeting rules) except when in executive session.

11. How do the questions being answered today fit into the overall process of implementing SB 1149/ORS 757.612(3)?

The activities now underway represent the first step in the process of setting up the organization. This initial step is simply to develop the framework that will create a new nonprofit organization to implement the conservation and renewables activities spelled out in the law. Once that initial framework is in place – including incorporation, the development of a board of directors, and the organization of the corporation – additional details will be worked out. The biggest and broadest of those details will fall to the board. Advisory committees will provide input to the board as it develops its strategic direction and governing policies. More specific details will be developed by those responsible for implementing them, including staff, consultants and organizational partners.

The timeline for these decisions begins with Commission approval of the organizational framework. A board will then be recruited, and the corporation will be created as quickly as possible, hopefully through this fall and early winter. Once in place, the board will immediately begin making planning and governing decisions for the organization. An executive director may be hired by the board as early as January or February, 2001, in order to be involved in the organization's strategic planning process, which will be conducted during the winter and spring of 2001. More specific implementation decisions will probably follow the Commission's formal decision to direct the funds to the new organization in an order and in its agreement with the organization, which is currently scheduled for May 2001.

12. How will the organization recruit a board of directors?

The board development process will begin immediately upon approval of the organizational development framework by the PUC. The PUC staff person responsible for creating the nonprofit organization will convene a committee to create a board profile grid that defines

the skills, connections and backgrounds that are most appropriate for board members to bring to the organization. The grid will emphasize criteria that can become part of a grant agreement between the organization and the PUC. Once the criteria have been established, the committee will help identify and recruit prospects to serve on the board. The initial board proposed by the committee will be presented to the PUC for approval prior to their appointment.

The ongoing process of recruiting and building the board will fall to a board development committee of the organization. It will lead the ongoing process of recruiting, orienting, training, evaluating and recognizing board members. The profile grid will be updated regularly to assist in that process.

13. What happens if the organization folds or is dissolved?

Public purpose funds advanced to the corporation which have not been spent or otherwise committed will be deemed to be held “in trust” by the corporation for the PUC. In such event, the funds will not be deemed to belong to the corporation until committed or expended in a process that will include PUC review. In the event of a termination of the agreement or dissolution of the corporation, the PUC will control the ultimate distribution of any “uncommitted” funds. For any other assets accumulated by the organization, the board will distribute the assets to another 501(c)(3) entity that is doing work similar to the organization, as required by state law.

14. What will be defined for the formation of this nonprofit through a PUC order, through contract with the PUC and within the articles of incorporation and bylaws?

Four different legal documents will affect how the nonprofit organization does its work. The PUC will issue an *order* that directs the utilities affected by SB 1149/ORS 757.612(3) to distribute the conservation and renewable funds collected to the nonprofit organization. A *grant agreement* between the nonprofit organization and the PUC will define very specific guidelines that the organization must meet in order to receive the funds through PUC authority. (Some of these guidelines have been spelled out in the proposal.) The agreement can be altered with the mutual consent of both parties, and can be terminated by either party with 60 days notice. *Articles of incorporation and bylaws* will be created as part of the development of the new nonprofit organization. The bylaws and articles are required in starting any nonprofit organization. They will establish the framework by which the new nonprofit organization will operate, and must include certain provisions required of an Oregon nonprofit, public benefit, charitable, tax exempt organization, as mandated by Oregon state law and the Internal Revenue Code. The articles of incorporation and bylaws can be changed only by a 70% vote of the new nonprofit’s board of directors.

15. What relationship will the new nonprofit have to existing conservation and renewables programs?

The convening committee is recommending that the board of the new nonprofit organization adopt a policy that the group will complement, not compete with, existing programs. The PUC may also want to put a provision about collaboration into the grant agreement. Partnerships with other groups will be a critical strategy for the organization to be effective.

16. What level of input and advice has been sought in developing these recommendations and approaches?

Input to these early steps of the process has been extensive and will continue to provide interested stakeholders opportunities to shape implementation of the conservation and renewables funding decisions provided by SB 1149/ORS 757.612(3). The PUC organized a convening committee as a starting point for identifying and resolving issues necessary to develop this preliminary proposal. The committee was made up of people who have a strong working knowledge of the purpose for which the organization is being created and the kinds of nonprofit structures that will enable the organization to be an effective administrator of the conservation and renewable funds. The committee was made up of Carol Brown, Portland General Electric; Jason Eisdorfer, Citizens' Utility Board; Margie Gardner, Northwest Energy Efficiency Alliance; Jeff Harris, Northwest Power Planning Council; Brian Hedman, PacifiCorp; Stan Price, Northwest Energy Efficiency Council; John Savage, Oregon Office of Energy; and Peter West, Renewable Northwest Project. Marc Smiley, an organizational development consultant, was hired to support the process, paid with funds advanced by PGE and Pacific from future collections of public purpose charges.

Additional counsel was sought for the legal and accounting issues that would face the start-up of the new organization. Gary McGee, CPA, Managing Director of Gary McGee & Associates, and William S. Manne, partner with the law firm of Miller/Nash, are considered among the most knowledgeable and experienced experts in the field of nonprofit organizations. Both provided considerable input to the details incorporated into this proposal. A memo highlighting several key issues in the organizational development of the new nonprofit is attached to this document.

17. Will there be limitations in the amount of spending allowed for administration?

The organization will limit the expenditures on administration to the lowest possible amount, seeking to balance administrative efficiency with overall organizational effectiveness. The convening committee, consistent with the advice of legal and accounting experts, chose not to recommend a maximum administrative expense percentage. Establishing a specific figure fails to recognize the unique start-up costs the organization will face. Administrative costs during the initial two years could be significantly more than those facing the organization in subsequent years. Administrative costs also vary considerably from organization to organization depending on the nature of the organization's activities. General guidelines on administrative costs may be developed and included in the grant agreement between the PUC and the organization and regular reporting to the PUC will provide an overview of the amounts and nature of such expenditures.

An independent auditor will audit the organization each year based on generally accepted accounting principles (GAAP). The PUC will review budgeted and actual administrative costs of the organization annually, relying on information from the audit to support its review.

18. What will be the roles and relationships of the organization's board and staff?

The board of the new nonprofit organization will be responsible for fulfilling the *governing* responsibilities of the organization. In this role, they will carry fiduciary responsibility, and will be accountable to the Oregon Attorney General and public at large. The board will also be accountable to the PUC for the funds it administers on behalf of SB 1149/ORS 757.612(3). Governing responsibility includes defining the strategic direction of the organization, maintaining financial accountability, ensuring adequate financial resources and ensuring necessary leadership development. In fulfilling these functions, the board will rely on staff and other professional advisors to support its efforts.

The board will likely hire an executive director to serve as the chief executive officer of the organization. The executive director will be responsible for the *management and operations* of the organization, including program planning, implementation and administration. To support the director, additional staff will likely be hired according to the specific strategies defined within the strategic plan. The executive director would be accountable directly to the board of directors for all actions of staff and contractors.

At least two advisory committees will be established to support both the board and the staff. The bylaws of the new organization will call for a conservation advisory committee and a renewable resources advisory committee. Other advisory committees may also be established. These groups will provide advice and resources to aid the board in fulfilling its governing responsibilities, particularly in its strategic planning efforts. These advisory committees will also be involved in supporting the executive director in program planning and implementation efforts.

19. What happens after the 10-year period of funding for the SB 1149?

At this point, it is impossible to determine what will happen to the organization at the end of the 10-year period. Formal recommendations will be made to the 2011 Legislature regarding whether public purpose funds should be renewed. This decision will be based in large part on the success of the organization during its 10 years of operations, especially toward the goal of developing the competitive markets for energy efficiency services and renewables. The new organization probably will not be able to ensure that competitive markets will be developed in 10 years, but should be able to make significant progress toward promoting a competitive environment for delivery of conservation and renewable resources through the programs it funds. The organization also will have the ability to draw funding from other private and public sources consistent with its purpose. This could extend the activities of the organization past the duration of funding provided by SB 1149/ORS 757.612(3).

20. How will terms, such as "new cost-effective conservation" and "reasonable operations costs" be defined?

Some terms that will be applicable to the organization, such as "new renewable energy resource," are defined in SB 1149. Other terms, such as "new energy conservation," "market transformation," and "above-market costs of new renewable energy resources" are defined in the Commission's rules (OAR 860-038-0005). "Cost-effective conservation" was not defined in SB 1149, although it is defined in other legislation and in PUC rules. The

definition was most recently addressed in Docket UM 551 and Order No. 94-590. The organization should start with the existing approach to determining conservation cost effectiveness as prescribed in the UM 551. However, the definition may need to be reviewed in a public forum at some point by the organization. If changes to the current UM 551 approach are recommended, the board should seek Commission agreement on the change. The board will define many of its own terms within its policies, some of which will be subject to PUC review, e.g., “reasonable operations costs.”

21. Why was the decision made to create a separate nonprofit organization rather than fulfill the mandate of SB 1149 through some existing organization or agency?

SB 1149 does not allow the conservation and renewables funds to be administered by a governmental agency. The legislation allows the Commission to direct how the utilities spend the funds or to direct the funds to a “nongovernmental entity for investment in public purposes.”

PUC staff and others believe that the funds should not continue to be administered by the utilities. Staff recommended that the conservation and renewable funds should be administered by an entity charged specifically with the purpose of achieving the goals of the legislation. In order to help foster a competitive environment for delivery of conservation and renewable resources, the administrator would invest the funds through competitive bidding for delivery of conservation programs and renewable resources rather than deliver its own programs. The Commission agreed with staff that a nonprofit organization operating similarly to the Northwest Energy Efficiency Alliance (Alliance) would be a good model to use for administrator of the funds. The Alliance board was not interested in expanding its regional conservation market transformation focus to also administer the portions of the Oregon public purpose funds allocated to local conservation and renewable resources. No other existing nonprofit organization in Oregon or the region was found to be suitable for administering the estimated \$30 million that will be collected each year by PGE and PacifiCorp for investment in conservation and renewable resources. Most existing organizations that focus on conservation and renewables, both nonprofit and for profit, are interested in bidding for program implementation rather than just administering the programs. As a result, staff recommended and the Commission agreed that a new nonprofit should be set up to administer the conservation and renewables funds that are not self-directed by large customers.

22. Is it necessary to open a docket to ensure public input to the process of forming the new nonprofit organization?

We do not believe it is necessary to open a formal docket at this time in order to allow for public comment on the nonprofit proposal. The draft white paper proposal was posted on the PUC website with notice to interested SB 1149 parties on July 11, 2000. Staff conducted a workshop on July 20, 2000 to provide an overview of the proposal and to take informal comments. Formal written comments were requested on the draft white paper through July 31, 2000. All formal comments are currently posted on the PUC website. Staff is responding to comments received during the public review period in this Q & A Addendum and by making revisions to the organization proposal. Before staff takes the proposal to the

Commission, the revised proposal and supporting documents will again be posted on the PUC website with notice to interested parties that includes the date of the public meeting that staff will make its recommendation. Formal comment to the Commission on the proposal may be made by anyone prior to or during the public meeting.

We recommend using this informal approach to providing public input to the Commission on recommendations on the establishment of the new nonprofit organization, rather than slowing the process through the requirements of a formal docket. A docket would seriously impair the likelihood that the new organization would be functioning by October 1, 2001. Parties interested in ensuring an effective organization is set up to administer the future conservation and renewables funds will be able to participate in the conservation and renewables advisory committees and other committees. Through those committees, stakeholders will be able to provide input on the organization's strategic planning, guidelines to be included in the PUC grant agreement, and other implementation activities.

23. Are there some interim decisions that may be necessary before the nonprofit board is fully functional and prepared to take action?

Advisory groups will be formed by this fall to provide forums for interested parties to discuss potential transition activities related to conservation and renewables prior to October 1, 2001. Some recommendations from the groups may be brought to the Commission for decision prior to the formation of the board of directors. Other recommendations, such as modifications to existing conservation programs during a transition period, may be brought to the Commission by the utilities through tariff filings.