

**BEFORE THE WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION**

In the matter of the

PUGET SOUND ENERGY

2024 Voluntary All-Source Request for  
Proposals for Clean Energy Transformation  
Act

DOCKET NO. UE-240532

NORTHWEST & INTERMOUNTAIN  
POWER PRODUCERS COALITION  
COMMENTS

**I. INTRODUCTION**

The Northwest & Intermountain Power Producers Coalition (“NIPPC”) hereby respectfully submits these comments on Puget Sound Energy’s (“PSE’s”) 2024 Voluntary All-Source Request for Proposals (“RFP”). NIPPC understands PSE’s position is that a voluntary RFP is not subject to Washington Utilities and Transportation Commission (“Commission” or “WUTC”) approval or stakeholder input.<sup>1</sup> However, NIPPC submits these comments and hopes PSE voluntarily decides to make changes. However, if PSE does not revise the RFP, then the Commission and interested stakeholders can better understand how many of the provisions of PSE’s 2024 RFP are likely to lead to a relatively uncompetitive procurement, with potential economic harm to ratepayers who are unlikely to benefit from least-cost, least-risk resources that meet state requirements. Specifically, the design of this RFP is likely to reduce the number and quality of bids, diminish the transparency and fairness of the RFP, bias the results in favor of

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<sup>1</sup> WAC 480-107-011(3); WAC 480-107-017.

utility-owned resources, and may preclude PSE from acquiring the lowest reasonable cost and least risky resources.

In addition, the Commission may wish to take other actions to change the status quo that Washington's competitive procurement rules are in danger of becoming a dead letter which no longer provide any effective supervision over the utilities' procurement process. Since the rules were adopted, PSE has embarked on an unprecedented plan of resource procurement to meet clean energy requirements and the integrated resource planning process has been changed so that they are less frequent and secondary in importance to Clean Energy Implementation Plans ("CEIP") and Integrated System Plans ("ISP").

NIPPC's recommended changes are particularly important given the large amount of resources PSE is planning to acquire in this RFP. PSE is planning to acquire 2.3 million annual megawatt-hours by 2030 from non-emitting resources that comply with Washington's Clean Energy Transformation Act ("CETA") and up to 1,755 megawatts ("MW") of summer peak and 1,573 MW of winter peak capacity resources in 2029.<sup>2</sup> These resources will provide significant energy, capacity, and environmental benefits; however, absent significant changes in the RFP design and oversight, the suite of procured resources may needlessly increase costs to ratepayers.

It is important to ensure any RFP from a utility will acquire resources that are the lowest reasonable cost. If an RFP is biased in favor of utility-owned resources, then it is likely the resources will not be the lowest reasonable cost and will be riskier. Stakeholder review and input as well as Commission oversight over the RFP is vital to ensuring the resources are the

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<sup>2</sup> PSE 2024 Voluntary RFP at 1 (July 1, 2024).

lowest reasonable cost. However, utilities will continue to avoid Commission oversight and approval of the RFP through voluntary RFPs. This is an outcome that NIPPC warned the Commission was likely to occur during the rulemaking for the RFP rules.<sup>3</sup> Specifically, NIPPC warned the “abbreviated process is inadequate and will likely to lead to uncompetitive procurements” and that:

Without a robust process, voluntary RFPs could become an exception that swallows the rule by inappropriately enabling utilities to avoid scrutiny of inadequately designed and issued voluntary RFPs. The risk of voluntary RFPs without Commission approval being the norm is exacerbated by Washington’s unique approach to RFPs. In other states NIPPC is familiar with, there is a robust RFP process when the utility decides that it wants to move forward with an RFP. By contrast, the process laid out in Washington’s draft rules requires a utility to issue an RFP after the Commission acknowledges the utility’s Integrated Resource Plan with a particular resource need. This increases the possibility that the post-IRP RFP process may not be the main RFP in which the utility actually wishes to acquire resources, and the voluntary RFP becomes the manner in which the utility actually selects its resources.<sup>4</sup>

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<sup>3</sup> *In re Rulemaking for Integrated Resource Planning, WAC 480-100-238, WAC 480-90-238, and WAC 480-107*, Docket No. U-161024, NIPPC Comments at 21-23 (Nov. 2, 2016) (“The Commission’s bidding rules need a requirement that makes them compulsory when utilities acquire resources rather than merely providing another checkbox at the end of the IRP process. NIPPC therefore proposes the Commission require utilities to follow a Commission-supervised RFP whenever it seeks to acquire generation resources in excess of 50 MW of nameplate capacity and certain energy storage with a term of five years or more.) (internal cites omitted); *see also In re Amending, Adopting, and Repealing WAC 480-107, Relating to Purchases of Electricity*, Docket No. UE-190837, NIPPC Comments (Dec. 3, 2020).

<sup>4</sup> Docket No. UE-190837, NIPPC Comments at 2-3 (Dec. 3, 2020).

The Commission noted NIPPC’s concerns but declined to make any changes to the rules.<sup>5</sup> Specifically, the Commission stated:

NIPPC expressed further concern with the different public participation protocols resulting from required and voluntary RFPs, suggesting that utilities will sidestep using the required RFP following an IRP and instead use the voluntary RFP to acquire a large portion of its resources. We do not believe utilities can or will sidestep acquisitions that must be pursued through a required RFP. The information from bidders in a required RFP will demonstrate the cost of available resources the utility did not select and will be available to consider in a prudence review of resources acquired by the utility in its voluntary RFP. In the event that this process results in unintended consequences, the Commission will revisit this portion of the rules.<sup>6</sup>

NIPPC understands a required RFP with stakeholder involvement and Commission oversight and approval is only required when a utility’s integrated resource plan (“IRP”) demonstrates the utility has a resource need within four years.<sup>7</sup> A utility can avoid this requirement by demonstrating its need is outside four years. Since PSE’s required 2021 RFP, PSE has issued seven RFPs for various types of resources.<sup>8</sup>

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<sup>5</sup> Docket No. UE-190837, General Order R-602 at ¶ 25 (Dec. 28, 2020).

<sup>6</sup> Docket No. UE-190837, General Order R-602 at ¶ 25.

<sup>7</sup> WAC 480-107-009(2).

<sup>8</sup> PSE issued a 2023 Energy Efficiency RFP, 2023 Lower Snake River Wind Expansion RFP, 2023 Distributed Solar and Storage RFP, 2024 Distributed Solar and Storage RFP, 2024 Kitsap Non-wires Alternatives RFP, this 2024 Voluntary All-Source RFP, and a 2025-2026 Capacity and Firm Energy RFP. See <https://www.pse.com/en/pages/energy-supply/acquiring-energy>.

PSE is also currently avoiding this requirement because it will not file another IRP until 2027, which likely will not be approved by the Commission until January 2028.<sup>9</sup> On July 11, 2024, the Commission granted PSE's request to extend its filing requirements for the IRP from 2025 until 2027 for an ISP that would combine the IRPs and CEIP.<sup>10</sup> Thus, PSE will not file another IRP, or IRP type document, until 2027, and obtain approval by the Commission around January 2028. The 2021 RFP was approved by the Commission on June 14, 2021,<sup>11</sup> which means that PSE may be able to issue RFPs without stakeholder involvement or Commission oversight and approval for a period of about 6.5 years. The practical impact is that the Commission does not have any meaningful RFP rules.

NIPPC conducted a review of PSE RFP and there are several aspects of PSE's 2024 RFP that are inconsistent with basic principles for ensuring a fair, transparent, and competitive procurement process. NIPPC provides a number of recommendations to the RFP below. There may be other objectionable provisions in PSE's 2024 RFP and NIPPC reserves the right to comment on additional issues in future comments.

- Use a price/non-price score ratio closer to 80/20 instead of 50/50;
- Remove any potential imputed debt adder for power purchase agreements ("PPA");

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<sup>9</sup> Eng. Sub. H.B. 1589, 68th Leg., 2024 Reg. Sess. at Sec. 3 (11) (Wa. 2024), available at: <https://lawfilesexternal.wa.gov/biennium/2023-24/Pdf/Bills/Session%20Laws/House/1589-S.SL.pdf?q=20240603133625>.

<sup>10</sup> *In re Petition for an Order Extending Filing and Reporting Requirements under RCW 19.405.060 and 19.280.030, and Exemption from the Requirements of WAC 480-90-238(4), 480-100-640(1) and 480-100-655(2), and Requiring the Company to file an Integrated System Plan by January 1, 2027*, Docket No. UE-240433, Order No. 01 at 1-2, 6 (July 11, 2024).

<sup>11</sup> *See In re PSE For an Order Approving Proposed RFP*, Docket No. UE-210220, Order 01 (June 14, 2021).

- Allow bids using conditional firm, number of hours transmission service and conditional firm, system conditions transmission service;
- Contract term provisions that are unreasonable and out of market including, but not limited to: delay damages for missing commercial operation date; security required before commercial operation date; and waiver of jury trial.
- Allow long-lead time resources with a Commercial Operation Date beyond January 1, 2030; and
- Ensure members of PSE's participating resource bid team has not had access to any highly confidential bidder access from previous RFPs or IRPs.

## II. COMMENTS

### A. Use a Price/Non-Price Score Rate of 80/20

PSE is proposing to use a price/non-price score ratio of 50/50.<sup>12</sup> This is a remarkably high non-price percentage, which inserts a significant degree of discretion for PSE to choose its preferred (potentially higher cost and riskier) resources. NIPPC recommends a more fair and reasonable price/non-price ratio of 80/20.

Non-price factors are inherently subjective and allow for the opportunity to unfairly bias the evaluation of bids. Further, non-price factors limit the Commission, stakeholders, and an independent evaluator from applying a mostly quantitative analysis. NIPPC understands that there will always be certain factors or characteristics of a specific resource proposal that cannot be fully reflected in the bidder's proposed pricing, but non-price factors should be eliminated as much as possible because of the potential bias in results.

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<sup>12</sup> PSE 2024 Voluntary RFP, Exhibit A at A-1.

The key principles that should inform what are appropriate non-price scoring factors to include in an RFP are:

- The weighting of any specific non-price scoring factors should reflect the magnitude of costs or benefits of that factor relative to the price evaluation score, so that the weighting of evaluation factors reflects the utility's best estimate of the actual costs or benefits to ratepayers of any non-price factor relative to the total costs and benefits of the resource.
- Non-price scoring factors should not result in double-counting costs or savings that have already been captured in the price scoring evaluation (i.e., no double-counting of costs or benefits already embedded in the bidder's bid price and contracting requirements). To do otherwise will distort the true cost and value of the proposed resource to the detriment of utility ratepayers.
- The assignment of non-price "points" to any resource in the evaluation process should be explained and justified based on a clear nexus between the direction (i.e., cost or benefit) and magnitude of the non-price cost or benefit to ratepayers, and the assignment of non-price points added or subtracted from the price score assigned to each bid must be directionally correct (i.e., non-price evaluation factors that represent costs not embedded in the bid price should be subtracted from the price score and benefits that are not captured in the bid price score should result in points added to the bid price score).
- All non-price scoring factors should be applied uniformly and objectively to all ownership types in a non-discriminatory manner.

Oregon's competitive bidding rules require non-price factors to be converted to price factors and minimum bidder requirements where practicable.<sup>13</sup>

PSE's proposed 50/50 price/non-price score ratio provides a utility with far too much discretion to reject lower cost resources in favor of utility-owned bids that the utility believes offer greater shareholder value and/or have other desirable characteristics. The degree to which each non-price factor can affect and/or distort the overall score should be commensurate to the

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<sup>13</sup> OAR 860-089-0400(2), -0400(2)(c).

significance of each non-price factor. In other words, the non-price factors taken as a whole must be commensurate to the significance of the overall price and score. It can be difficult in the abstract to identify the perfect categories or weighting because each particular RFP may have different categories or weighting depending on the utility's needs at that time. However, it is important to recognize that the selection of the specific categories and weighting is the best opportunity for a utility to bias the results by identifying categories and providing weight that favors a utility owned or pre-selected option. Given the inherent subjectivity in analyzing non-price factors and the lack of clarity regarding the specific factors, resources selected could be a higher cost and less reliable resources could easily "win" the RFP simply because it is the utility's preferred choice.

If PSE's price/non-price score ratio was revised consistent with the principles above, then the actual weighting of price to non-price factors will be empirically based and supportable, and most likely result in a lower weighting of price factors relative to non-price. Specifically, NIPPC recommends a price/non-price score ratio of 80/20 instead of 50/50.

This is more aligned with ratios from other utilities, and PSE's price/non-price ratio radically departs from standard industry practices. For example, PacifiCorp used a price/non-price score ratio of 75/25,<sup>14</sup> and PGE was directed to use a price/non-price score ratio around

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<sup>14</sup> PacifiCorp 2022 All-Source RFP at 33 (Feb. 2, 2022), available at: [https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/suppliers/rfps/pacificorps-2022-all-source-request-for-proposals/PacifiCorp\\_2022AS\\_RFP\\_Main\\_Document.pdf](https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/suppliers/rfps/pacificorps-2022-all-source-request-for-proposals/PacifiCorp_2022AS_RFP_Main_Document.pdf) (hereinafter "PacifiCorp 2022 RFP").



80/20 in its 2021 RFP<sup>15</sup> and voluntarily agreed to a 100 percent price score in its 2021 RFP. Idaho Power Company used a 75/25 price/non-price score ratio in its last RFP<sup>16</sup> and is proposing that same ratio in its upcoming RFP.<sup>17</sup> In PSE’s 2021 RFP, PSE used a price/non-price score ratio of 70/30.<sup>18</sup> A price/non-price score ratio closer to 80/20 would result in a more fair, objective RFP and help ensure the lowest reasonable cost resources are selected.

Finally, PSE’s evaluation and scoring rubrics for non-price factors are vague, subjective, and prevent a bidder from being to self-score its bid to have an idea of what its score will be.<sup>19</sup> For example, for Phase 2 evaluation PSE lists “counterparty viability” as a factor for consideration listing potential experience, with no indication of how each of those factors will be counted. If “counterparty viability” will be part of the rubric, then PSE should identify the specific scores that will be provided to each subfactor so that the bidder can provide PSE with information to satisfy “counterparty viability” and not guess what information will be sufficient to obtain a full score. In that same respect, PSE does not list how many points will be provided

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<sup>15</sup> *In re PGE 2021 All-Source RFP*, Oregon Public Utility Commission (“OPUC”) Docket No. UM 2166, Order No. 21-460 at 6 (Dec. 10, 2021) (the price/non-price score ratio was 81.2/18.8).

<sup>16</sup> Idaho Power 2026-2027 All-Source RFP at 24 (Apr. 5, 2023), available at: [https://docs.idahopower.com/pdfs/AboutUs/businessToBusiness/2026\\_IPC\\_AllSource\\_RFP.pdf](https://docs.idahopower.com/pdfs/AboutUs/businessToBusiness/2026_IPC_AllSource_RFP.pdf).

<sup>17</sup> Idaho Power Company Draft 2028 All-Source RFP at 24 (July 25, 2024), available at: [https://docs.idahopower.com/pdfs/AboutUs/businessToBusiness/2028\\_IPC\\_AllSource\\_RFP.pdf](https://docs.idahopower.com/pdfs/AboutUs/businessToBusiness/2028_IPC_AllSource_RFP.pdf).

<sup>18</sup> PSE 2021 All-Source RFP, Exhibit A at A-1 (June 30, 2021), available at: <https://www.pse.com/en/pages/energy-supply/acquiring-energy/2021-All-Source-RFP>.

<sup>19</sup> The only exception is that PSE provides information regarding the scoring of its “Equity Plan”. NIPPC commends PSE for providing this level of detail, which will be invaluable for bidders to design bids that meet PSE’s goals of fostering equity and energy justice.

to each rubric, so that the bidder will not know if PSE favors projects with more experienced counter parties, greater site control, etc.

**B. Remove Any Imputed Debt Adder for PPAs**

It is unclear from the RFP, but it appears that PSE could be imposing an unreasonable imputed debt adder to PPA bids.<sup>20</sup> PSE states “[i]mputed debt will be considered for the purposes of consolidated company balance sheet and credit analysis prior to any contracting” that applies to both PPA and ownership bids.<sup>21</sup> It is not entirely clear how PSE is planning to evaluate imputed debt and how it would affect scoring. However, if PSE is planning to factor debt imputation in any way in this RFP (which generally is done by adding costs associated with so called debt imputation into PPA and non-utility bids), then NIPPC recommends deleting the imputed debt adder. While NIPPC does not support analyzing imputed debt in the RFP stage, if imputed debt will be analyzed for bids, then it needs to be analyzed exactly the same for PPA bids and utility-owned bids.

Imputed debt adders are a cost typically added to PPA bids to account for alleged risk in a utility’s credit rating assessment due to debt from PPAs. Imputed debt adders theoretically reflect the added costs to a utility’s cost of service caused by the PPA. Typically, this issue is addressed in ratemaking, not RFPs. NIPPC has attached two reports prepared by Mike Gorman

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<sup>20</sup> PSE 2024 Voluntary RFP, Exhibit A at A-2.

<sup>21</sup> PSE 2024 Voluntary RFP, Exhibit A at A-2.

on the imputed debt adder that explain what an imputed debt adder is and how it would have biased the results of the RFPs evaluated by Mr. Gorman for the Commission’s review.<sup>22</sup>

Imputed debt adders run counter to the central policies of good RFP design because it is lacking in transparency and justification. The Independent Evaluator (“IE”) in PGE’s RFP stated it is “concerned that [imputed debt] is a theoretical cost that could serve to bias the selection of bids.”<sup>23</sup> Additionally, the IE noted it has “seen no additional evidence from S&P or other parties that this risk has increased in the past few years.”<sup>24</sup> The IE stated it sees no reason to depart from past precedent unless there is evidence that “S&P is becoming more aggressive in assessing these costs and that PGE has actually incurred increased costs as a result of debt imputation.”<sup>25</sup>

This all goes to show that it is unlikely that a single PPA emerging from an RFP would ultimately lead to imputed debt and even more unlikely that the impact of such imputed debt would actually flow through as a perceptible cost to ratepayers when considering all of the other factors that affect a utility’s cost of capital and its impact on rates. PSE did not provide any reasonable basis to assume that any rating agency would impute debt to a prevailing PPA or tolling agreement in this RFP given PSE’s circumstances, much less explain how such imputed debt (if it were to be applied by a ratings agency) would ultimately result in a lower overall credit

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<sup>22</sup> See Attachments B and C (reports submitted with NIPPC comments in OPUC Docket Nos. UM 2255 and UM 2274).

<sup>23</sup> *In re PGE 2023 All-Source RFP*, OPUC Docket No. UM 2274, IE’s Assessment of PGE’s Draft All Source RFP at 19 (May 31, 2023).

<sup>24</sup> OPUC Docket No. UM 2274, IE’s Assessment of PGE’s Draft All Source RFP at 19.

<sup>25</sup> OPUC Docket No. UM 2274, IE’s Assessment of PGE’s Draft All Source RFP at 19.

rating for PSE or ultimately have a perceptible impact on rates PSE would request to charge its customers.

Further, imputed debt adders would harm and discriminate against independent power producers that submit PPA bids. An imputed debt adder will increase PPA bid costs while a similar cost is not added to utility-owned bids. This will cause the PPA bid to appear more expensive than it is and less competitive, which biases the RFP outcome in favor of the utility-owned bid over the PPA bid. It is anti-competitive to add an imputed debt adder to PPA bids especially when the imputed debt adder is non-transparent and unjustified.

Use of imputed debt bid adders is also barred by the Oregon Public Utility Commission's ("Oregon Commission" or "OPUC") historic policies, orders and rules, and the Oregon Commission rejected debt imputation adders in PGE's and Idaho Power Company's ("Idaho Power") most recent RFPs.<sup>26</sup> The Oregon Commission relied upon the above mentioned reports by Michael Gorman as well as two different Oregon IE recommendations to reject PGE and Idaho Power's debt imputation adders.

The Oregon Commission has disallowed the use of imputed debt for use in selection of the initial shortlist at least since the Oregon Commission's 2006 bidding guidelines, which allowed consideration of imputed debt only for development of a final shortlist and reserved the possibility of requiring a ratings agency opinion to substantiate the utility's decision to use

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<sup>26</sup> *In re Idaho Power Company Application for Approval of 2026 All-Source RFP to Meet 2026 Capacity Resource Need*, OPUC Docket No. UM 2255, Order No. 23-260 at 5-6 (July 17, 2023); OPUC Docket No. UM 2274, Order No. 24-011, Appendix A at 17-19 (Jan. 12, 2024).

imputed debt at all.<sup>27</sup> Subsequently, in 2011, the Oregon Commission disallowed the use of imputed debt whatsoever in RFPs and directed utilities to raise the issue solely in a rate case where the utility's overall cost of capital could be fully analyzed in context.<sup>28</sup> When a utility next proposed use of imputed debt to penalize PPA and tolling agreement bids, the Oregon Commission rejected the proposal, citing its 2011 decision.<sup>29</sup> Consistent with that authority, the Oregon Commission's current rules require that price scores "must be based on the prices submitted by bidders and calculated using units that are appropriate for the product sought and technologies anticipated to be employed in responsive bids using real-levelized or annuity methods."<sup>30</sup>

Thus, NIPPC recommends PSE not include an imputed debt adder.

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<sup>27</sup> *In re Investigation Regarding Competitive Bidding*, OPUC Docket No. UM 1182, Order No. 06-446 at 10-12 (Aug. 10, 2006) (discussing Guideline 10(c)).

<sup>28</sup> *In re Commission An Investigation Regarding Performance-Based Ratemaking Mechanisms to Address Potential Build-vs.-Buy Bias*, OPUC Docket No. UM 1276, Order No. 11-001 at 6 (Jan. 3, 2011) (stating: "we allow the utilities to raise the impact on this practice on credit ratings and earnings in individual rate proceedings. We believe that this issue is more appropriately addressed in the context of an overall examination of a utility's cost of capital").

<sup>29</sup> *See In re PGE's Request for Proposals for Capacity Resources*, OPUC Docket No. UM 1535, Order No. 11-371 at 7 (Sept. 27, 2011) (rejecting PGE's proposed use of imputed debt in an RFP and stating: "We agree with CUB that, although PGE's position is consistent with our Competitive Bidding Guidelines, it conflicts with Order No. 11- 001. We take this opportunity to clarify that this more recent order supersedes the guidelines and directs the parties to deal with debt imputation issues in rate cases.").

<sup>30</sup> OAR 860-089-0400(2)(a).

**C. Allow Bids Using Conditional Firm, Number of Hours and Conditional Firm, System Conditions Transmission Service**

PSE is only allowing bidders to use firm point-to-point or conditional firm point-to-point transmission service.<sup>31</sup> Due to the constrained nature of the transmission system, especially Bonneville Power Administration’s (“BPA”) system that PSE relies on, NIPPC recommends allowing bids to use conditional firm “number of hours” and conditional firm “system conditions” transmission service to increase the number and quality of bids. Bids using these transmission services could be assigned a lower score, but those bids should be allowed to bid into the RFP and compete with other resources to select the lowest reasonable cost resources. The Oregon Commission recently agreed with NIPPC and required PGE to accept bids using conditional firm, number of hours and conditional firm, system conditions transmission service.<sup>32</sup>

BPA offers its transmission customers two types of conditional curtailment options for two conditional firm service categories: “Number of Hours” and “System Condition”.<sup>33</sup> While either option is, in practice, often effectively firm for most of the year, BPA retains the option to curtail conditional firm service when specific conditions are met. For the “Number of Hours” conditional curtailment option, BPA specifies (at the time it offers the customer a transmission

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<sup>31</sup> PSE 2024 Voluntary RFP at 9-10.

<sup>32</sup> OPUC Docket No. UM 2274, Order No. 24-011 at 1-2 (Jan. 12, 2024).

<sup>33</sup> BPA Transmission Business Practice, “Conditional Firm Service” Version 26 at Sec. A.3 (Jan. 13, 2022), available at: <https://www.bpa.gov/--/media/Aep/transmission/business-practices/tbp/conditional-firm-service-bp.pdf>. These curtailment options apply to both the Bridge and Reassessment categories of conditional firm service.

service agreement) the number of hours per year that it may curtail the customer’s service.<sup>34</sup>

BPA can trigger curtailments of the customer’s service up to the number of hours specified in the service agreement for any reason. BPA’s most recent awards of “Number of Hours” conditional firm service specified anywhere from 33 curtailment hours up to 247 hours of curtailment per year.<sup>35</sup>

For the “System Conditions” conditional curtailment option, BPA must identify in the service agreement the specific transmission grid conditions under which it may curtail the customer’s service. An example of the type of system condition that would allow BPA to curtail conditional firm service would be when flows across specific paths approach the system operating limit.<sup>36</sup> Under “System Conditions”, BPA can curtail customers’ conditional firm service whenever “real-time analysis identifies curtailment [on specific paths] to mitigate transmission constraints”.<sup>37</sup> System Condition conditional firm service requests that impact more than one path may be subject to curtailment when there is congestion on any of the paths specified in the service offer.<sup>38</sup>

BPA retains the right to reassess the characteristics of customers’ conditional firm service every two years.<sup>39</sup> This allows BPA to either increase the number of hours of curtailment if the

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<sup>34</sup> BPA Transmission Business Practice, “Conditional Firm Service” Version 26 at Sec. A.3.a and Sec. H.2.

<sup>35</sup> BPA, 2022 Cluster Study Report at Sec. 5.2 (June 10, 2022) (Attachment A).

<sup>36</sup> BPA Transmission Business Practice, “Conditional Firm Service” Version 26 at Sec. A.3.a and Sec. H.3.

<sup>37</sup> Attachment A, BPA, 2022 Cluster Study Report at Sec. 5.2.

<sup>38</sup> Attachment A, BPA, 2022 Cluster Study Report at Sec. 5.2.

<sup>39</sup> BPA Transmission Business Practice, “Conditional Firm Service” Version 26 at Sec. D.3.

customers has selected the “Number of Hours” option; or when the customer has selected the “System Conditions” option, BPA can identify new system conditions that would allow it to trigger a curtailment of the customer’s service.<sup>40</sup> When BPA reassesses customers’ conditional firm service and increases the number of hours or increases the system conditions that apply to the conditional firm service, the customer has the option to terminate the service.<sup>41</sup>

BPA’s system is becoming increasingly more constrained, and BPA is increasingly offering conditional firm, number of hours and conditional firm, system conditions transmission service. This means that PSE’s prohibition on using conditional firm, number of hours and conditional firm, system conditions transmission service could have the practical effect of excluding a significant number of bids in this RFP, and the reductions in the bidder pool will get worse over time. Therefore, to ensure as many bids are eligible for the RFP as possible, NIPPC recommends PSE allow bids using conditional firm, number of hours and conditional firm, system conditions transmission service.

NIPPC understands conditional firm, number of hours and conditional firm, system conditions transmission services are not as valuable as traditional firm transmission, but these services still would have significant energy value and some capacity value. Additionally, when a resource would be curtailed is highly dependent on the resource’s generation characteristics and the system conditions BPA has placed on the transmission service. Thus, it would be unreasonable to not allow bidders using these transmission services to bid into the RFP

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<sup>40</sup> BPA Transmission Business Practice, “Conditional Firm Service” Version 26 at Sec. D.3.

<sup>41</sup> BPA Transmission Business Practice, “Conditional Firm Service” Version 26 at Sec. F.3.



especially with the high need PSE has expressed. Bids using conditional firm, number of hours and conditional firm, system conditions transmission service should be allowed to bid into the RFP and be assigned a lower score than bids using firm point-to-point and conditional firm point-to-point transmission service.

**D. Use More Reasonable and Market-Aligned Contract Term Provisions**

NIPPC completed a basic review of the PPA term sheet and PPA, and NIPPC recommends revisions to a few contract provisions that are out of market or unreasonable. There may be more contract provisions that are out of market and should be revised, but NIPPC is only recommending some of the most important. A non-market PPA may contribute to or be a major factor in utility-owned bids being favored over PPA bids. Further, non-market PPA provisions can drive PPA bids to increase their price, which artificially makes utility-owned assets look better for ratepayers. This does not ensure PSE is selecting the lowest reasonable cost resources. NIPPC recommends at the least the following changes to the contract provisions.

**1. COD Delay Damages**

PSE requires a seller of energy in a PPA to pay daily liquidated damages of \$500 per MW if the scheduled COD is missed.<sup>42</sup> This is excessive, unreasonable, and not consistent with other RFP PPAs. NIPPC recommends the damages amount be reduced.

PGE's delay damages if the scheduled COD is missed are equal to

\$150 per MW of Nameplate Capacity per day beginning on the first day through the 30th day after the Scheduled Commercial Operation Date, \$250 per MW of Nameplate Capacity of the Facility per day beginning on the 31st day through the 60th day after Scheduled

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<sup>42</sup> PSE 2024 Voluntary RFP, Exhibit J-1 at J1-3.

Commercial Operation Date, and \$350 per MW of Nameplate Capacity of the Facility per day beginning on the 61st day after Scheduled Commercial Operation Date until the Commercial Operation Date is actually achieved or the Guaranteed Commercial Operation Date, whichever occurs first.<sup>43</sup>

PSE's delay damages are much higher than PGE's. NIPPC recommends the delay damages should be revised to be determined based on actual damages at the time of a default. At the very least, PSE's delay damages should be revised to more closely match PGE's delay damages so that it is more aligned with market terms.

## **2. Pre-COD Security**

PSE's pre-COD security requirement is equal to \$100,000/MW plus the maximum delay liquidated damages of \$500 per day per MW up to 180 days. For a 100 MW project this would equal \$19 million in security. This is excessive and unreasonable compared to other utility RFP PPAs. For example, PGE requires pre-COD security of \$125/kilowatt. For a 100 MW project this would be \$12.5 million. PSE's requirement is excessive and should be reduced to be more aligned with PGE's requirement. NIPPC recommends PSE's pre-COD security be reduced to be more aligned with other RFP PPAs.

## **3. Jury Trial Waiver**

PSE's PPA includes a jury trial waiver.<sup>44</sup> NIPPC recommends this provision be deleted. There is a constitutional right to a jury trial in the United States, and bidders should not have to

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<sup>43</sup> PGE 2023 RFP, Appendix Q at 4, available at: [https://assets.ctfassets.net/416ywc1laqmd/7zTkFrQALxaZ5dlRjwa2tm/9f9cdd92404196de3a0f0f555db69d6b/Appendix\\_Q\\_-\\_Renewable\\_PPA\\_Form\\_Term\\_Sheet\\_02.01.24.pdf](https://assets.ctfassets.net/416ywc1laqmd/7zTkFrQALxaZ5dlRjwa2tm/9f9cdd92404196de3a0f0f555db69d6b/Appendix_Q_-_Renewable_PPA_Form_Term_Sheet_02.01.24.pdf).

<sup>44</sup> PSE 2024 Voluntary RFP, Exhibit K-1 at § 11.14.

waive that right to sell power to PSE. An Oregon Independent Evaluator concurred with NIPPC that a jury trial provision is “atypical for utility procurements.”<sup>45</sup> Previously, PSE has removed a waiver of the right to a jury trial after parties, including NIPPC, raised concerns regarding the waiver.<sup>46</sup> Now that PSE is conducting a voluntary rather than a Commission-approved RFP, PSE is reinserting the jury trial waiver. A right to a jury trial provides necessary protections for counter parties to PSE in an RFP for cutting-edge renewable and storage technologies.

The right to jury trial is not just a theoretical issue, but provides real, practical benefits to ensure utilities do not engage in abusive and illegal actions. For example, a Utah jury found that PacifiCorp committed theft of trade secrets in an RFP and award substantial damages against PacifiCorp.<sup>47</sup> This Utah PacifiCorp example makes clear that the right to a jury trial and all damages remedies available under the law are essential to protect the rights of the bidders and to hold a utility accountable for its potential actions. Thus, the jury trial waiver should be deleted.

**E. Allow Long-Lead Time Resources with Commercial Operation Dates Beyond January 1, 2030**

PSE is only allowing bids with commercial operation dates (“COD”) by January 1, 2030, and will not allow a longer COD for long-lead time resources.<sup>48</sup> Instead, PSE encourages long-

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<sup>45</sup> *In re PacifiCorp 2020 RFP*, OPUC Docket No. UM 2059, Independent Evaluator’s Assessment of PacifiCorp’s Final Draft 2020 AS RFP at 22 (June 10, 2020).

<sup>46</sup> *Compare in re Puget Sound Energy Request for Proposal*, Docket No. UE-210220, Proposed Updates to Draft 2021 All-Source RFP, Exhibit G at 12 (May 10, 2021) (including a waiver of a jury trial) to Final 2021 Request for Proposals for All Sources, Exhibit G at 12 (June 30, 2021) (removing the waiver of a jury trial).

<sup>47</sup> *See generally USA Power, LLC v. PacifiCorp*, 2016 UT 20, 372 P3d 629 (2016).

<sup>48</sup> PSE 2024 Voluntary RFP at 12

lead time resources to submit bilateral offers.<sup>49</sup> Long-lead time resources should be able to bid into this RFP and compete with other resources to ensure PSE acquires the lowest reasonable cost and least risky resources. Moreover, for PSE to achieve its clean energy goals under CETA, it will likely need to acquire new diverse resources many of which could be long-lead time resources. Long-lead time resources can provide many unique benefits compared to other resources such as larger generating capacities, higher capacity factors, resource diversity to complement other resources, increased resiliency and reliability, and more. Long-lead time resources will take longer to develop due to more intensive permitting with planning, engineering, and environmental review processes, investment in the supply chain, large upfront capital investments, and more. Where a typical renewable project could be developed in about five years, long-lead time resources may need development timelines of five to ten years or more. Thus, PSE's COD should be extended for long-lead time resources so that those resources can bid into the RFP and compete with other resources.

PSE's approach is contrary to what other utilities do for long-lead time resources in RFPs. For example, Portland General Electric Company ("PGE") and PacifiCorp both allow an extended COD for long-lead time resources.<sup>50</sup> Each of these RFPs had a COD for long-lead time resources two years past the COD for other resources. Therefore, NIPPC recommends a COD of

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<sup>49</sup> PSE 2024 Voluntary RFP at 12.

<sup>50</sup> See, e.g., PGE 2023 All-Source RFP at 11 (Feb. 2, 2024), available at: [https://assets.ctfassets.net/416ywc1laqmd/2MBWofNsLQmI7WnqLLwqXa/8f926fca56136a247a654ce0c1fa8e5a/UM\\_2274\\_2023\\_All-Source\\_RFP\\_Main\\_Document\\_02.02.2024.pdf](https://assets.ctfassets.net/416ywc1laqmd/2MBWofNsLQmI7WnqLLwqXa/8f926fca56136a247a654ce0c1fa8e5a/UM_2274_2023_All-Source_RFP_Main_Document_02.02.2024.pdf); see also PacifiCorp 2022 RFP at 3).

at least January 1, 2032 for long-lead time resources, but consider a longer-lead time if resources can demonstrate a longer COD is needed such as offshore wind.

**F. Limit Access to Highly Confidential Past Bidder Information by PSE’s Participating Resource Bid Team**

PSE limits its participating resource bid team from accessing highly confidential bidder information that is available to the PSE evaluation bid team in the current RFP.<sup>51</sup> However, PSE does not limit the PSE participating resource bid team from accessing highly confidential bidder information from past RFPs or IRPs. PSE’s participating resource bid team should not have had previous access to highly confidential bidder information from this or previous RFPs or IRPs.

Highly confidential bidder information from previous RFPs or IRPs is competitively sensitive information that PSE’s participating resource bid team should not have access to. PSE’s participating resource bid team could use that information to develop its own bid to know what prices would be competitive, the project’s operating statistics and how efficient competitors are, where resources planned to be developed, and more. The release of this information to PSE’s participating resource bid team or other bidders would undermine third parties’ trust in the integrity of the RFP process and damage those bidders whose information was released. NIPPC and the competitive power industry has consistently recommended that bidder information should remain protected for years after the completion of an RFP.<sup>52</sup>

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<sup>51</sup> PSE 2024 Voluntary RFP at 14.

<sup>52</sup> *In re PacifiCorp, dba Pacific Power 2021 IRP*, OPUC Docket No. LC 77, NIPPC’s Request for Certification, or in the Alternative, Request for Clarification at 6 (Feb. 7, 2022) (Highly Confidential bidder information should remain highly protected for the duration of the Modified Protective Order, which is five years); *see also* OPUC Docket

Highly confidential bidder information should remain protected from review by any PSE employee that will prepare a utility-owned bid for a period of seven years, which is consistent with the Mutual Confidentiality Agreement,<sup>53</sup> or at least for a period of five years. Bidders bid into the RFP with the assurance their information will remain protected, and PSE's participating resource bid team should not be able to review that information. Further, with PSE's increased energy and capacity needs due to CETA, PSE will be issuing RFPs more frequently, and bidders' information from one RFP to the next RFP will become less stale and must be adequately safeguarded.

### **III. CONCLUSION**

NIPPC appreciates this opportunity to comment and recommends PSE make the changes recommended above. At the very least, NIPPC hopes these comments are educational to the Commission on the importance of stakeholder involvement and Commission oversight and approval of RFPs to ensure the RFP process is fair, transparent, and competitive and the utility acquires the lowest reasonable cost and least risky resources.

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<sup>53</sup> No. LC 77, Invenergy LLC's Comments in Support of NIPPC's Request for Certification or, in the Alternative, Request for Clarification at 6 (Feb. 7, 2022).  
PSE 2024 Voluntary RFP, Exhibit D at D-3.

Dated this 31st day of July 2024.

Respectfully submitted,

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