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September 21, 2018

Via E-filing

Mr. Mark Johnson
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Attn: Filing Center

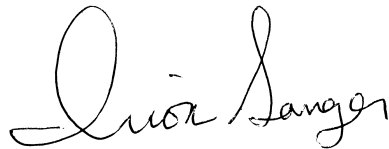
RE: In the Matter of Public Utilities Regulatory Policies Act, Obligations of the Utility
to Qualifying Facilities, WAC 480-107-105
Docket No. U-161024

Dear Mr. Johnson:

Please find the RFP Comments and the Redline of Draft WAC 480-107 of the
Northwest and Intermountain Power Producers Coalition in the above-referenced docket.

Thank you for your assistance. Please do not hesitate to contact me with any
questions.

Sincerely,



Irion A. Sanger

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UTIL. AND TRANSP.
COMMISSION

**BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

U-161024

In the Matter of)
)
Rulemaking for Integrated Resource)
Planning, WAC 480-100-238, WAC 480-90-)
238, and WAC 480-107)
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I. INTRODUCTION

1. The Northwest and Intermountain Power Producers Coalition (“NIPPC”) submits these comments regarding the Washington Utilities and Transportation Commission’s (the “Commission” or “WUTC”) draft rules related to competitive procurement for electric utilities (WAC 480-107). NIPPC appreciates this chance for comment on the draft rules, and also that the rules show some progress toward protecting customers from bias in the selection of generation resources toward utility-owned generation. As set out in more detail below, NIPPC continues to have significant concern about portions of the draft rules, and the Commission should adopt certain modifications to more completely level the playing field between utility-owned resources and third-party resources for the benefit of customers. Unfortunately, NIPPC does not believe the rules, if adopted as written, will result in meaningful, practical improvements. The rules require further work if they are to mitigate and manage the utilities’ bias against entering into contracts for lower cost and lower risk independent power producer (“IPP”) owned generation.

2. In these comments NIPPC provides: 1) responses to the questions posed by the WUTC in its August 24, 2018 Notice of Opportunity to File Written Comments; 2) general comments on

the proposed rules; and 3) a redlined version of the rules, showing the changes that should be adopted to more fully benefit customers and make the rules clearer. NIPPC's proposed changes are consistent with the Commission's mission, are necessary and appropriate based on past experience, and represent an implementation of competitive procurement for Washington utilities that would be fair for all parties, especially end-use consumers harmed by the current system.

3. NIPPC's November 2, 2016 comments in this docket set forth in detail the history surrounding competitive procurement rules at the WUTC. They also cover in detail the aspects of the current regulatory model that create a well-established bias for utilities to choose utility-owned generation to serve their loads rather than rely on third-party developers and power purchase agreements ("PPAs"). Those comments plead for the Commission to adopt strong rules regarding competitive procurement that ensure customers are benefitted by the protections offered by using IPPs to construct and operate required generation, and for the Commission to take meaningful steps to level the playing field for non-utility owners so that the Commission can be assured of a healthy diversity of generation resource options for the customers it protects.
4. NIPPC does not repeat those comments here, except to reiterate that absent strong rules regarding competitive procurement, Washington customers will be at risk as utilities continue to seek a return for their shareholders through maintaining an unnecessary and inappropriate monopoly over generation of electricity. The Commission should adopt rules that overcome utility bias in generation resource selection, and provide a greater likelihood that shareholders of IPPs, rather than captive utility ratepayers shoulder the risks associated with development, operation and management of generation facilities.

5. The draft rules reflect NIPPC's recommendations to improve the competitive bidding process by: 1) requiring a utility to hold a Commission-supervised request for proposal ("RFP") prior to acquiring 50 megawatts ("MWs") or more of new generation resources; 2) requiring a utility to retain an independent evaluator that should be more free from the editorial control of the utilities and thus better able to protect against utility bias; 3) providing stakeholders an opportunity to comment on both the draft and final RFPs, which must be approved by the Commission; and 4) adopting more specific RFP scoring and evaluation criteria to make the RFP more transparent to all bidders.
6. NIPPC recommends that the rules be further revised to include meaningful provisions that will address utility bias. These include:
- Requiring a two-stage process for RFPs where a utility-owned resource is bid, with the price scores of the utility-ownership options made available prior to the bidding for the power purchase agreement options;
 - Include a due diligence review of utility-ownership bids as one of the independent evaluator's ("IE") duties, to help ensure utility-ownership bids are fairly priced and evaluated equivalently with third-party bids;
 - If a utility-ownership bid is proposed for inclusion on the shortlist of the RFP for final negotiations, subjecting the utility's resource short list to an acknowledgement proceeding that has the same effect as integrated resource plan ("IRP") acknowledgment;
 - If the utility owned asset is the winning bid, imposing a cap on the costs included in rates;
 - Requiring that utilities' return on utility-owned generation be built into the price and collected on a per-MWh basis, in order to put these projects on equal footing with PPAs;
 - Removing language that could be interpreted as making the RFP process just one of many options utilities can use to acquire new resources;
 - Including a cost-based threshold for when storage projects require an RFP;
 - Relieving the utility and ratepayers of the costs of an IE when there is no utility ownership bid in response to an RFP;
 - Expanding the IE's duties to include managing, rather than just evaluating the RFP;
 - Having the IE be paid by the Commission, and reimbursed, and having the IE be managed by the Commission Staff;

- Requiring the utility to release the winning bid score to customers, the public, and bidders;
- Making clear that utilities cannot make RFPs overly prescriptive by mandating generation technologies, or locations without a statutory mandate or other regulatory requirement;
- Requiring that utility-owned transmission assets be made available for use by third-party bidders;
- Revising the rules to prevent project disaggregation by utilities in order to avoid the thresholds;
- Modifying the definition of subsidiary to be based on ownership alone, rather than ability to control the related company;
- Encouraging utilities to consult with all interested parties during the development of the RFP;
- Using an RFP process to select the IE;
- Requiring a Commission-approved PPA and other transaction documents, so that bids can be submitted and evaluated on a level playing field;
- Keeping the current rule language that the RFP rules do not override any utility’s Public Utility Regulatory Policies Act (“PURPA”) responsibilities;
- Requiring the RFP to specify interconnection requirements; and
- Not setting the threshold for distribution system projects at \$10 million, but conducting a further process to refine the methods that should be used to determine when an RFP is needed.

II. COMMENTS ON UTC’S SPECIFIC QUESTIONS

A. **Is the language in the draft rule at WAC 480-107-015 sufficient to require an all-source RFP for most resource needs, while allowing sufficient flexibility in the process to allow limited scope RFPs when they are most useful?**

7. Draft WAC 480-107-015 requires that a utility “must solicit bids for its resource needs identified during the IRP process.” It also requires that it “must accept bids for a variety of energy resources” that can meet the needs identified in the IRP, and that this includes conservation and efficiency, demand response, energy storage, qualifying facilities, power from independent power producers, and potentially utility- or utility affiliate-owned resources. The

rule then goes on to explain the circumstances under which an RFP is required, and provides certain exceptions for when that process can be avoided by a utility.

8. This portion of the rule is clear that utilities must solicit bids to meet their resource needs, and also that an RFP is required, except for certain enumerated circumstances. It also makes clear that the utility must look at all resources that can meet its identified needs. In instances where the identified resource need is specifically for renewable resources, the rule is drafted in a way that allows for an RFP to be limited in scope to reflect that requirement.
9. NIPPC supports this level of clarity in the rules, but has concerns with some of the language used to describe certain of the exceptions to the RFP, which are described below in paragraph 20.
10. NIPPC also notes that there is highly problematic language in the proposed version of WAC 480-107-001 that seems to undermine, or cause confusion about the required nature of the obligation to solicit bids and use RFPs. The proposed version of that rule states: “The rules in this chapter do not establish the sole procedures utilities may use to acquire new resources.” Taken at face value, this sentence as drafted could be interpreted to mean that nothing in the rules is mandatory and, instead, that the rules are just one option for the procedures utilities may use to acquire resources. The proposed edit to this sentence (turning “must” into “may”) contributes to this unfortunate potential interpretation. The prior version of the rules indicated that utilities *must* abide by the procedures, and that there could in fact be other requirements placed upon a resource acquisition. To ensure that the RFP requirement is mandatory, unless an exemption applies or a waiver is granted, this sentence should be left as it was in the prior rules, or removed altogether.

11. Additionally, WAC 480-107-035(7) states that the “utility may reject all project proposals if it finds that no proposal adequately serves ratepayers’ interest.” Although the rule specifies that a utility that makes this decision will have its finding reviewed in the utility’s relevant cost recovery proceeding, this provision still substantially undercuts the idea that the RFP process should be the primary method through which utilities select and then acquire resources. Instead of simply allowing utilities to make that decision, and proceed without an RFP, the rules should make clear that utilities must use the RFP process to acquire resources, unless they obtain a waiver from the rules.

B. In WAC 480-107-035(3) the draft contains the term net benefits. Language around this concept has been evolving recently. Would using a different phrase, such as costs and benefits, or impacts, be clearer?

12. The proposed version of WAC 480-107-035(3) uses the term “net benefits” in describing one of the criteria that the utility must evaluate with respect to project bids received, along with other factors like risk, state energy policy, resiliency, reliability, etc. The term “net benefits” is used in RCW 80.12.010(1) in establishing the standard to be met when there is a change in utility ownership. It is therefore likely that the Commission will most often interpret this phrase in the context of proposed mergers or acquisitions of a utility. Because the considerations and issues that arise in the context of a change of utility ownership are potentially quite different than the considerations at play during an RFP for a new resource, NIPPC believes it is not advisable to use the same wording in this rule.

13. As used in the draft rules, NIPPC assumes that the purpose of the phrase is to require utilities to consider both costs and benefits that may be associated with resources that are bid in response to an RFP. Simply using that language would likely be clearer, and accomplish the

same purposes without forcing the Commission to consider impacts to these rules from how it interprets the net benefits standard in other contexts.

C. RFP timing: “Is there a way to ensure long-lead time technologies have an equal opportunity to meet resource needs anticipated ten years out without requiring RFPs at such an early stage?”

14. NIPPC does not believe that the rules should require accommodation for extremely long lead time resources by requiring an RFP when a resource need is 10 years out because such acquisitions will be rare, and may result in unnecessary RFPs and vendor fatigue. In today’s market, most generation technologies will have lead times of three years or less, with notable exceptions where transmission availability, permitting or other issues may exist (e.g., hydropower licensing or pump storage licensing, certain conservation resources, etc.). Because longer lead time resources are likely to be the exception, NIPPC does not believe that they should cause the rules to require accommodation for 10-year lead times. Most project sponsors would not wish to wait 10 years between the commitment to sell and the final acquisition of the resource and therefore would be unlikely to bid into an RFP with a 10-year lead time to full acquisition.

15. NIPPC, however, agrees that the current process may not provide long lead time resources with a fair opportunity to compete in RFPs. The Commission should attempt to address the issue by using market purchases to fill the utility’s need prior to the acquisition of the long lead time resource. If a long lead time resource is shown to be the least cost and least risk resource, then the utility should analyze whether it can meet its need in the shorter term with market purchases. Market resources should be used to fill in the time between the stated date for a resource need and the date the long lead time resource can be made available.

It is important to keep in mind that integrated resource plans that identify specific capacity, energy and renewable needs by a specific date are as much an art as a science. A retrospective review of even the best utility planning shows that the only certain aspect of resource planning is that the specific needs and timing will be wrong. There should be some flexibility in the planning and RFP process to account for the fact that the specific forecasted need and timing will differ from what is actually needed, which supports allowing for the delay of an ultimate resource acquisition in some circumstances to provide long lead time resources an opportunity to compete.

D. Thresholds for exemption. In the proposed draft language for WAC 480-107-015(3) there are thresholds and circumstances that would exempt utilities from issuing an RFP without requesting an exemption.

1. Are the thresholds proposed appropriate?

16. WAC 480-107-015(4)¹ sets 50 megawatts (“MW”) as a capacity threshold for when an RFP is required. NIPPC supports this threshold with respect to electric generation, and strongly opposes raising it any higher than this amount. NIPPC understands this rule as requiring an RFP when the utility needs to acquire a resource to meet a capacity, energy or renewable resource need with a nameplate capacity resource greater than 50 MW. This represents a significant resource, and one which implicates all the concerns about utility bias towards owning generating assets. Additionally, raising the threshold higher than this would add to NIPPC’s concerns about utilities seeking to disaggregate projects into smaller “projects” to avoid the requirements of the rule.

¹ Although the WUTC’s question about exemptions refers to WAC 480-107-015(3), NIPPC assumes the reference was meant to refer to -015(4), which addresses the exemptions.

17. The threshold for storage resources, however, should be lower than 50 MW. Storage resources, on a per-MW basis, are much costlier than generating resources, and therefore a storage project well below the 50 MW of capacity threshold would likely implicate the same concerns about utility bias in the selection process that apply to electric generators 50 MW and above. Additionally, storage technologies are rapidly developing and dynamic, and thus an RFP process serves an important purpose with respect to storage by allowing customers to benefit from exposure to new technologies and proposals that can be provided in response to future RFPs.

18. NIPPC recommends that an RFP be performed based on the cost of the storage resource. Setting a specific number in the rules would be difficult given the declining costs of storage and the difficulty in revising rules. While it will be impossible to perfectly estimate the cost of new storage prior to the issuance of an RFP, utilities frequently provide estimates in their IRPs and when setting avoided costs for conservation and qualifying facilities selling power under the Public Utility Regulatory Policies Act. Thus, NIPPC recommends that an RFP for storage be conducted when the estimated cost for storage in an IRP is the same as the estimated lowest cost 50 MW capacity resource in the IRP.

2. Are there other circumstances appropriate to qualify for exemption from the rule?

19. The Commission should identify specific and narrow circumstances under which utilities should be able to be exempted from an RFP for a resource that otherwise fits the size and characteristics threshold. The Draft Rules would allow an exemption based on the Commission's generic rule allowing exemption from any rule, which uses the nebulous and

potentially broad “public interest” and “undue hardship” standard.² NIPPC maintains that exceptions be narrower and only when: 1) there is an emergency; and 2) a time limited opportunity to acquire a resource of unique value to the utility’s customers. In addition, if the Commission expands its current acknowledgement process to be more rigorous like Oregon’s, then an additional exemption may be warranted where an alternative acquisition methodology was proposed in the IRP and explicitly acknowledged in the IRP.³ These are the requirements in Oregon, which allowed exceptions in limited circumstances, including PacifiCorp’s fire sale acquisition of the Chehalis gas plant and Portland General Electric Company’s recent decision to enter into capacity contracts with Bonneville Power Administration rather than build a new gas generation unit at its ill-fated Carty location.

20. Additionally, as referenced above in paragraph 9, NIPPC is concerned that some of the language used in WAC 480-107-015(4) is unclear. Specifically, the rules state that an RFP is not required if the utility’s “identified resource need will be acquired under an existing tariff.” Neither the Commission’s notice, nor the rules provide further clarity on what is intended by this provision. If the intent is for utilities to be exempted from the RFP requirements in instances where they already have an expectation of having a resource need met through an existing tariff, then it is unclear why the utility would have projected a resource need in its IRP process. Further, NIPPC is unsure of what types of resources the utilities receive through existing tariffs that would be large enough to rise above the thresholds that otherwise require the submission of an RFP. NIPPC recommends that this language be dropped as it appears unnecessary, and could create an unintended incentive for utilities to acquire resources via tariff revisions rather than go

² Existing WAC 480-07-110(2)(c).

³ OAR 860-089-0100(3).

through the RFP process that is intended to protect customers. In the event that the Commission elects to keep the language, NIPPC requests that (at least informally) the Commission explain what type of resource acquisitions this is intended to allow.

3. What other types of resources would benefit from a threshold?

21. For the reasons described above, the Commission should adopt a cost-based threshold for purposes of determining when an RFP is required in order to acquire a storage facility.

E. Whether RFPs should be required for Delivery System /Distribution planning.

22. NIPPC generally supports competitive bidding where investment in the utility system is required, but recognizes that unique circumstances may exist in the case of the delivery system, as compared to generation. The \$10 million threshold referenced is ill-suited to support robust competition for distributed resources. NIPPC recommends that the Commission use a different methodology to determine when the need for a distribution RFP should be conducted. This could include: 1) a cost-to-capacity metric (\$/MW); and 2) an approach based on the capacity needs of the grid and the ability for distributed resources to meet that need. The Commission should better investigate these options, via a workshop or additional comments, to determine the appropriate measure for delivery system planning RFPs.

F. Reliance upon the market, and whether the rules should use the Northwest Power and Conservation Council's resource adequacy assessment as a third-party assessment of resource adequacy.

- 1. Are there other third-party sources that would be more appropriate to reference?**
- 2. Are there other methods that are easier, more transparent, or more accurate than relying on third-party analysis?**

23. NIPPC supports the use of the Northwest Power and Conservation Council's resource adequacy assessment or another independent third-party analysis. In NIPPC's experience, utility forecasts and assessments can, even if unconsciously, be biased in favor of the utility's preferred

outcome. In a rate case, Staff and intervenors have an opportunity to vet, challenge and obtain Commission resolution over disputed forecasts and assessments. The IRP and RFP process is different and there is limited opportunity for review and resolution of disputed issues, and warrants reliance upon independent analysis as much as possible to avoid even the appearance of bias.

G. Independent Evaluator. The draft rule WAC 480-107-AAA requires the use of an independent evaluator under certain circumstances.

1. Does this section identify the proper circumstances or are there other circumstances under which an independent evaluator should be required?

24. NIPPC believes this section properly identifies where an independent evaluator should be required because it ties to the 50 MW; however, a separate threshold of 20 MW for storage projects should be included in this section as well, for the reasons described above.

2. Is there value in requiring an independent evaluator for large projects when a utility will not be bidding? If so, is a 50 megawatt resource need an appropriate threshold?

25. There is not sufficient value to require an IE for large projects when there is no utility ownership option in the RFP. The regulatory model incentivizes utilities to own their own generation assets and IEs provide the kind of transparency that makes it more difficult for utilities to tip the scale during resource procurement. If a utility will not be bidding and will not accept build own transfer bids that result in utility ownership, then the costs associated with an IE are not warranted.

26. While IEs arguably provide some nominal value in all RFPs, their primary purpose is to ensure utilities fairly compete in their own RFPs. In certain instances, therefore, the costs should be avoided. It is entirely appropriate for the rule to provide two different RFP paths based upon

whether a utility is bidding for a resource. NIPPC has suggested language in the redline to provide for these two different paths.

27. The Commission's primary tool for protecting competitive markets and limiting utility bias has been its prudency review, which has failed to stop expensive and unnecessary utility owned projects from the nuclear power debacles of the 1980s to PacifiCorp's Wyoming 99 MW Rolling Hills project and Puget Sound Energy's Lower Snake River wind farm. The competitive bidding rules are not designed to be pre-approval or replace the rate case, but to provide an initial check or tool to address the utilities' bias to own resources. Thus, the fundamental justification for going through the regulatory burden, overseeing utility actions, and the expense of an RFP is because of a concern that the utilities will make the economically rational choice of choosing the interests of their shareholders over ratepayers.⁴

28. When there are no incentives for the utility to choose its own generation assets, then there is less need to burden ratepayers with additional costs of policing the utilities' actions to ensure that they do not favor certain bids. Simply put, when the utilities do not have a bias to select any particular outcome, then we should entrust them to make the right decision without the cost and burden of an RFP, and review that choice in a rate case.

29. Allowing exemptions for market purchases and PPAs is consistent with both the utilities' and the Commission's common practice. PSE, PacifiCorp, and Avista routinely enter into short-

⁴ The Commission should be concerned by any claims that this bias does not exist or is irrelevant. NIPPC does not doubt that the majority of utility managers take seriously their responsibility to meet their statutory duty to make decisions with the ratepayers' best interests at heart. However, even the most conscientious of utility managers will need to act scrupulously to avoid both this real explicit and implicit bias.

term firm contracts in the market, amounting to hundreds of megawatts.⁵ In the aggregate these transactions are similar to new major resource acquisitions, but raise no utility-ownership issues, and are not subjected to additional scrutiny of a formal RFP.

30. PacifiCorp's 2016 and 2017 RFPs provide a clear example as to why this kind of exemption is appropriate. PacifiCorp's most recent solar RFPs did not allow utility-ownership.⁶ This meant that the RFP can proceed on a more level playing field and does need the formal monitoring by an IE. PacifiCorp has now entered into significant long-term solar PPAs. This option allowed PacifiCorp to move more quickly and test the market, without going through traditional RFP steps. Common sense tells us that an RFP that does not include utility ownership need not go through additional scrutiny designed to mitigate that same bias.

31. NIPPC also recognizes that IEs provide value beyond the primary role of mitigating utility bias, but that value must be weighed against the rising costs attributed to IE involvement. The IE's oversight, review and documentation of the process may help inform later prudence reviews. Simply put, the prudence review should be significantly easier with the IE's help. In addition to better policing the utilities' actions, the assistance of a third-party evaluator can also serve to inform and improve the utilities' decision-making process.

32. These benefits, however, come at a cost, burden and complexity for both ratepayers and the Commission, which cannot be justified where there is no risk that the utility will own the new generation assets. The costs associated with using a worthwhile IE, however, should not be

⁵ See e.g., PacifiCorp 2017 IRP, OPUC Docket No. LC 67, PacifiCorp's IRP at 2 (Apr. 4, 2017) (forecasting PacifiCorp's front office transactions from 273 – 1,575 MW over the planning horizon).

⁶ PacifiCorp's 2017 Solar RFP at 1-2 (Nov. 15, 2017), available at <http://www.pacificorp.com/sup/rfps.html> (not accepting bids for either build and transfers and not submitting a benchmark bid).

unnecessarily imposed upon ratepayers. Staff and ratepayers have reviewed the prudence of utility decisions, and can continue to do so on non-ownership acquisitions without the benefit of an IE.

33. Finally, it should be noted that a primary beneficiary of using an IE when there is no utility ownership option is not ratepayers, but the utility. The use of IE provides greater certainty to the utility that the utilities' ultimate selection will be reviewed as reasonable and prudent. If a utility wants the greater cost recovery associated with including an IE when they are not needed to mitigate utility bias, then utility shareholders, and not ratepayers should pay for their costs.

3. Does this subsection provide enough specificity concerning the independent evaluator's role, or is additional rule language needed?

34. NIPPC supports the requirements in the rules for the use of an IE, but this role should be expanded, including: 1) managing rather than evaluating the RFP; 2) being paid by the Commission and not the utilities; and 3) being managed by Staff and not the utilities.

35. The IE should take on a larger role in the RFP process, and should be put in charge of managing the entire RFP process. This would protect customers by eliminating opportunities for the utility to influence the RFP process in ways that could be inconsistent with the neutrality that the IE is intended to provide, and take advantage of the neutral party to perform those duties where bias can be imposed. Because the IE has the expertise to solicit and review bids for resources, the IE should be allowed to take all of these steps in order to eliminate the potential for utility bias in how the RFP process is run.

36. Other states and commissions have adopted this approach of having the IE take on a more comprehensive role with respect to RFPs, administering the process to help ensure fairness and a lack of bias throughout. For example, in implementing a state program for competitive procurement of renewable energy, the North Carolina Utilities Commission recently developed

rules related to an Independent Administrator that was to assist in the selection of resources. Under those rules, the IE is called an Independent Administrator (“IA”) and their duties are expansive, and include developing a methodology to ensure equitable review of utility-owned and IPP bids, receiving and transmitting proposals, evaluating proposals, monitoring post-proposal negotiations, and providing a certification to the Commission of program compliance.⁷ A role like this makes sense for the IA, and that the rules should make clear that the IA role is to manage the RFP process.

37. NIPPC appreciates the provisions in the draft rule that make it clear that the IPP does not need to pay for the costs of the IE. NIPPC recommends, however, that the Commission directly hire and pay for these costs. The rules also contain problematic and unnecessary provisions that substantially undermine the benefits associated with the use of an IE. The rules state that the “independent evaluator will *contract with* and be *paid by* the utility.”⁸ These provisions contrast with the purposes of an IE to be “independent” and watch out for utility bias. It is implausible to assume that an IE is wholly independent when that individual or firm has a contract with, and is paid by the utility. This approach is unnecessary, and NIPPC requests that the Commission adopt changes that provide that the Commission can contract with and pay the IE. The Commission could then require the utility to reimburse it for such payments, and allow the utility to then collect those costs in rates (as long as the RFP includes the possibility of utility ownership—utility shareholders should pay for the IE if utility ownership is not possible).

⁷ See North Carolina Administrative Code, R8-71(d)(5), available at <https://www.ncuc.net/ncrules/Chapter08.pdf>, and adopted in that Commission’s Nov. 6, 2017 Order in Docket No. E-100, SUB 150, *In the Matter of Rulemaking Proceeding to Implement G.S. 62-110.8*.

⁸ Proposed WAC 480-107-AAA (3).

38. The rules also state that the utility “will also manage the contract terms with the independent evaluator.” Again, this could be done by Commission Staff, and aid the independence of the IE.

4. Should the Commission require that the independent evaluator be certified or accredited? If yes, provide specific qualifications the independent evaluator should possess.

39. The independent evaluator should be qualified to perform the work, have relevant experience, and be reviewed to ensure independence and competence. If the individual or firm meets these criteria, then NIPPC does not believe it is necessary for them to have any specific required certification or accreditation. However, the IE should have the demonstrated ability to police utility bias, and any process by which the IE is selected should specifically inquire into their views about the purpose of the RFP, how they would or have addressed the problem of utility bias, and how they intend to prevent it in any Washington RFP. NIPPC has reviewed the IE solicitations by utilities, and some of them appear designed to ensure that a weak IE, or even one biased against PPA bids was selected.

H. IE Report. “[W]e recognize that a two-step reporting process will increase the cost and length of the independent evaluator's review. Could the Commission require the reconciliation process to occur prior to the issuance of a single final report and still ensure that the evaluator's work is free from outside influence?”

40. NIPPC strongly supports the two-step reporting process. The extra time that would be required from the two-step process should be modest, and is well worth the additional transparency that is added to the IE’s review and the reconciliation process with the utility. Issuing a single report, after the reconciliation process is completed, would provide no insight into the extent of the differences between the IE’s initial independent view, and the outcome of the reconciliation process with the utility. Conversely, the two-step approach would create a

record and justification for how and why the IE's views changed, if they did, during the reconciliation process. And, under circumstances where a party was disappointed with the final report's conclusions, having a clear articulation of the changes in view that may have occurred, and a description of why, would give valuable insight.

I. Conservation RFP provisions.

41. NIPPC does not have comments on this question.

J. Procurement Outside of an RFP: Utilities often have opportunities to procure low-cost resources that are owned by entities that typically will not bid their resources into an investor-owned utility RFP, but will enter into contracts with the IOUs. These types of opportunities can also require the construction of complex components that do not lend themselves to a bid in an RFP. Contracts such as these require proactive behavior from the investor-owned utility outside of the RFP. How can the Commission ensure that utilities are pursuing these low cost opportunities available outside of an RFP? How can this idea be incorporated in rule?

42. NIPPC is somewhat confused by this question, as it is not clear exactly what types of physical resources are being referenced. If there is not opportunity or risk of utility ownership, then the utility should be free to procure resources outside of an RFP. If a utility is procuring a utility owned resource greater than 50 MW for generation or 20 MW for storage, then NIPPC maintains that the RFP process should apply, as it is calculated to solicit the resources that are available to serve that need. If, in some circumstance, the utility is aware of a unique opportunity, then it should seek a waiver from the rules for a time limited opportunity. It would seem more likely that in crafting a rule to capture this circumstance, the Commission could inadvertently open the door to a very subjective and difficult to monitor exception that utilities may attempt to use for a variety of resources and conditions. Even if flawed, the RFP process has the potential to better ensure a competitive market for generation and achieve the least cost and least risk resource for consumers.

K. Evaluation Transparency: Proposed draft rule 480-107-025(4) requires RFPs to “include a sample evaluation rubric that quantifies the weight each criterion will be given during the project ranking procedure.” What are the implications of this language?

43. NIPPC recommends that the draft rule require more transparency as to the scoring criteria for bidders. The more detailed the scoring criteria, the better, because it will allow IPPs to prepare bids that match the utilities actual needs and requirements, rather than some secret end result that only the utility owned asset can satisfy.
44. Transparency as to the scoring criteria is a fundamental element of a fair solicitation process, and it is even more important in an RFP where the utility is likely to have a self-interested utility-ownership option against which the independent power producer bids will be evaluated. For example, in discussing its competitive bidding rules, the Federal Energy Regulatory Commission (“FERC”) has explained: “No party, particularly the affiliate, should have an informational advantage in any part of the solicitation process. The RFP and all relevant information about it should be released to all potential bidders at the same time.”⁹ “[A]ll criteria should be specific and detailed so that all bidders can effectively respond to the RFP. Clear evaluation criteria will ensure that the RFP does not give an advantage to the affiliate.”¹⁰
45. This logical requirement would prevent one party from engaging in advanced permitting or development of its project with information not available to other bidders, such that the party could satisfy timing or other requirements of an RFP. It would likewise prevent one party with an informational advantage from compiling numerous different project characteristics in a manner that will achieve the greatest score.

⁹ Allegheny Energy Supply, LLC, 108 FERC ¶ 61,082, P.23 (2004).

¹⁰ Id. at P.30.

46. To illustrate the problem as applied to likely Washington RFPs, the utility will necessarily have a detailed understanding of the objective and subjective criteria that will receive a high score because the utility designs the RFP and solicits the resource. However, if the scoring criteria are not objective and subject to self-scoring by the independent bidders, the process cannot be fair because those bidders cannot structure their projects and their bid submittal in a way to meet the utility's needs, as reflected in its scoring criteria. Yet the proposed rule would appear to allow the utility to only furnish bidders with a "sample evaluation rubric" that is likely to amount to nothing more than scoring percentages for broad categories featuring several project attributes. The rule should require very specific and detailed scoring criteria for price and non-price criteria and eliminate the use of any subjective criteria.

47. The RFPs in Oregon have experienced a long-running problem with utilities providing only vague and subjective scoring criteria, especially with regard to so-called non-price criteria, such as the quality of transmission rights, the level of experience of the development team, and the credit supporting the bid. These vague criteria and the lack of transparency were undermining the integrity of the entire process. In response, the OPUC recently adopted rules that substantially remove the ability of the utility to game the process with vague scoring criteria.¹¹ In effect, these rules require the RFP to either convert the project characteristic at issue to a minimum bidding requirement or to characterize the non-price scoring criteria with a level of objective specificity that allows the bidder to self-score the bid.

48. Utilities sometimes argue that providing detailed scoring criteria to the bidders will allow the bidders to "game" the process in some way. This is an ironic claim because the utility often

¹¹ Re Rulemaking Regarding Allowances for Diverse Ownership of Renewable Energy Resources, OPUC Docket No. AR 600, Order No. 18-324 at 12-13 (Aug. 30, 2018) (adopting OAR 860-089-0400).

possesses this detailed bid scoring criteria when it assembles its own bid, and would thus be the only bidder able to game the process. In any event, in proceedings where NIPPC has participated, no utility has ever demonstrated how a bidder would game the process without misrepresenting the characteristics of its bid and being potentially in breach of the contract it may enter into with the utility. NIPPC believes that the benefits of transparency would outweigh the risk that a bidder may devise a way to game the process.

49. On a related topic, NIPPC supports the proposal in the rule to provide the bidders with their confidential bid score after the solicitation closes, but also believes that added transparency of providing the winning bid price to all bidders provides necessary transparency and another backstop to keep the utility honest. Specifically, the Commission should also require the utility to release the winning bid score to customers, the public and bidders.

L. Two-stage bidding process. Please discuss advantages and disadvantages of NIPPC's proposed approach of a two-stage bidding process, including whether the bidding structure proposed creates asymmetrical bidding opportunities between IPPs that offer power purchase agreements and those offering to sell their generation. How should the sequence of bid offers be designed if the IPP is offering two differently structured offers for the same project, one that is PPA and one that is a contract with transfer of ownership?

50. The two-stage bidding structure proposed by NIPPC contains significant advantages for ratepayers by more fully mitigating against the well-established utility bias toward utility-owned generation resources, and the acceptance of development risk by captive ratepayers. The two-stage process would ensure that a utility only builds and owns a resource in instances where that represents the best option available in the market. Although NIPPC's proposal definitely differs from the historical practice of the Commission, NIPPC asks that the Commission consider the following questions about the proposal:

- How would this process impact customers?

- Would such a provision be effective at ensuring least-cost resources are built to serve customers?
- Would the process prevent utilities from building resources when doing so is in the best interests of customers?
- Would the process further the Commission's goals and aid in the implementation of its duties?
- Would the process be unfair to utilities?

51. NIPPC asserts that a reasoned consideration of each of these questions would show that the two-step process is superior in terms of customer protection, ensuring low-cost resources are built, and more fully mitigating utility bias, while presenting no unfairness to utilities or hinderance to their building of resources when doing so is in the best interests of customers.

52. Contrary to the concerns of the utilities, the process would not mean that an IPP would automatically win the process. If a utility can truly build a project that is superior than what is available in the market, then its bid will win. Additionally, the process will not negatively affect pricing of the bids or result in IPPs submitting bids just below the utility's estimate because they will all know that they are competing against each other, and will thus continue to have every incentive to offer as low of a cost as is reasonable. The process could narrow the number of projects that an IE and the utility must evaluate because projects will only be bid if they are believed to be superior to the project offered by the utility.

53. As described more fully in NIPPC's November 2016 comments in this docket, NIPPC also emphasizes that this two-step process is not novel. In fact, in other industries and circumstances where a party has a conflict of interest, such as in bankruptcy proceedings or

corporate acquisitions, this process is commonly used to ensure against bias.¹² This process makes eminent sense in circumstances where utilities are proposing to build resources for customers, because there is an established conflict of interests between the utilities' understandable desire to produce returns for shareholders from the resource, and their charge to benefit customers through providing reliable service at the lowest reasonable costs.

54. The second part of the Commission's question above asks how the two-stage process would work in the case where an IPP offers two differently structured offers for the same project—one that is a PPA, and one that is a contract with transfer of ownership to the utility. This situation would seem to be handled appropriately through simply applying the rules as proposed by NIPPC. Because the structure involving transfer of ownership to the utility would result in utility ownership, it should be bid as part of the first-stage. And, if it were selected as the winner of the first stage, the second stage would determine if another project bid would be superior. In that second stage, the project could be also bid under a PPA structure, to determine if this structure provided any benefits that made it superior to the first-offered model, and to also compare the PPA structure to other bids that were provided during round two.

M. Resource Need Definition: “Should the proposed definition of Resource Need above include specific resource needs that should be subject to competitive bidding? If so, what should be included in that list?”

55. The proposed definition of “Resource Need” should be specific to the type of resource needs of the utility but should not be so prescriptive that it identifies a single generation technology or geographic location. In other words, NIPPC agrees that it is appropriate to issue an RFP for energy (e.g., up to a 200 aMW block of year-round baseload energy), an RFP for capacity (e.g., up to a 200 MW of dispatchable capacity during peak load periods or other

¹² See NIPPC Comments at ¶ 39.

specified times), or an RFP for renewable energy (e.g., up to a 200 aMW block of energy plus bundled Washington-qualified renewable energy certificates). However, NIPPC opposes overly prescriptive RFPs that would bar submission of bids from new or alternative generation technologies to meet the identified resource need or for a specified geographic location absent a statutory or regulatory mandate.

56. For example, PacifiCorp recently proposed a Wyoming wind-only RFP, which barred bids from solar facilities, facilities using battery or other storage, and even wind bids located outside of a narrow geographic area in Wyoming. Coincidentally, PacifiCorp's self-build option was a wind facility located in Wyoming plus an expensive self-build transmission line in Wyoming will amount to a massive addition to rate base. The resource need was low-cost renewable energy—not just Wyoming wind in a specific location. If a non-wind renewable facility outside of Wyoming could supply that resource need at lower cost and lower risk than the wind facility and transmission located in Wyoming, the RFP was eventually required to accept such bids. Not surprisingly, the Oregon Commission declined to acknowledge the short-list that emerged from PacifiCorp's Wyoming Wind RFP, explaining: "We simply cannot conclude at this time that the narrow shortlist from PacifiCorp's RFP—a packaged bundle of mostly company-owned Wyoming wind resources connected to a single transmission line—clearly represents the renewable resource portfolio offering the best combination of cost and risk for PacifiCorp customers."¹³ In the end, all evidence to date shows that PacifiCorp's Wyoming Wind RFP is resulting in very low cost resource acquisitions and an excellent deal for ratepayers, but we will be unable to determine if it was the best result.

¹³ Re PacifiCorp, dba Pacific Power, 2017R Request for Proposals, OPUC Docket No. UM 1845, Order No. 18-178 at 10 (May 23, 2018).

57. In sum, overly prescriptive RFPs that mandate generation technologies or locations could deprive ratepayers of potentially lower cost and lower risk resources. This point should be added to the definition of “Resource Need” in the rules.

N. Certain PURPA Rules Should Be Kept in the RFP Rules

58. The draft rules propose to remove the PURPA rules from the RFP rules and NIPPC is not opposed in principle to having two sets of PURPA and RFP rules. NIPPC understands that the RFP rules will keep WAC 480-107-101, which states that if there is any conflict between the Commission’s rules and PURPA, that PURPA governs. NIPPC supports keeping this provision in the RFP rules.

III. OTHER COMMENTS ON RFP RULES AND PROCESS

59. In addition to the above responses to the Commission’s questions, NIPPC offers the following comments on the use of RFPs and the proposed rules more generally.

A. Cost Caps and Approach to Rate of Return Ratemaking for Generation Resources

60. NIPPC continues to be very concerned about the established utility bias to select utility-owned resources as the method to meet resource needs. That bias has played out again and again in the state, and harms customers by forcing them to accept development risks that they do not have to bear. It also undermines the vitality of the energy markets that are critical to ensuring the health of the industry, and the availability of low-cost resources for customers. The Commission should do more than is described in the proposed rules to more fundamentally address the problem.

61. NIPPC proposes that the Commission institute caps on the costs of utility owned resources that can be included in rates. The Idaho Commission recently found that such limits can be warranted, recently ordering that PacifiCorp will not be able to recover any costs over and

above the utility's projected costs of a major resource addition for which it sought a Certificate of Public Convenience and Necessity.¹⁴ The Idaho Commission reasoned that this was warranted because the utility specifically argued that the project was needed in order to produce an economic benefit for customers (and not needed in the near-term to meet loads). Although most projects built by utilities are likely needed to meet resource needs in the nearer term, once a utility goes through an RFP project, and chooses *its* project above other projects, it is doing so because it is estimating an economic benefit to customers from that project. It is therefore appropriate to have the utility bear the risk that its project turns out to not provide that benefit, and remove that risk from customers. After all, if the utility does not want to bear that risk, it does not have to, and could always choose to fulfill a resource need through a PPA, and have a third-party bear that risk.

62. If the Commission is not interested in a simple and clear cost cap because of concerns regarding regulatory pre-approval (or disapproval), then there are less significant (and effective) alternatives. Instead of capping a utility's cost recovery to the price of the bid it provides for an RFP, the Commission could make clear that it will cap cost recovery at the cost of the next highest bid. This would still allow recovery of some cost overruns, if deemed prudent, but would prevent customers from being harmed by a utility's decision to forego the price certainties that would have been available if they had chosen the next highest bid. Another option would be to impose an assumption that any costs above utility's self-build estimate are presumptively

¹⁴ See Re Application of Rocky Mountain Power for a Certificate of Public Convenience and Necessity and Binding Ratemaking Treatment for New Wind and Transmission Facilities, Idaho Public Utilities Commission Case No. PAC-E-17-07, Order No. 34139 (Sept. 6, 2018).

imprudent. The Commission could allow the utility to rebut this presumption, but the utility should be required to provide clear and convincing evidence of a lack of imprudence.

63. NIPPC also proposes that when a utility bids a utility-owned project, and that project wins an RFP, the Commission should require the utility to collect its regulated return on that investment through building it into the fixed price of the resource, which could be collected on a per-MWh basis. This approach would be in contrast to the current practice of allowing utilities to add net plant costs into rate base, and then including them in the total utility rate base upon which the utility is allowed to earn its authorized return when setting rates. This current approach has led to too easy of a path for utilities to recover a return on costs that are really cost overruns, or slippage on projects that they may have chosen in order to benefit shareholders. Making the regulated return part of the fixed price of a resource would instead place cost control incentives on the utilities that they currently may not have, and would also ensure that utility-owned resource pricing is put on a comparable basis to a PPA bid from an IPP, which builds its (often lower) return into the fixed bid.

B. Use of Utility Assets to Provide Power Generation

64. Any decision by a utility not to allow bidders access to its utility-owned facilities or assets is harmful to customers and should be considered *per se* imprudence. Utilities have historically used their informational advantage in advance of solicitations to position themselves to prevail. Additionally, NIPPC's understanding is that utilities generally recover as operating expenses in rates the costs of their site, transmission rights, and other development costs, even if the utility-owned bid is not successful in the solicitation and is never placed in service for recovery as used and useful plant. NIPPC maintains that it is wholly unsupportable for ratepayers to be required to bear the costs of utility resources, but not be entitled to receive bids

from IPPs that can provide the utility with power for those customers that may rely on those assets customers are already paying for. The rules should thus clarify utilities' obligation to make utility-owned resources and rights available to third party bidders into an RFP process. Utility-owned facilities or assets do not include those facilities or assets to which the utility has the right of access or control under an agreement that is contingent upon regulatory approval of the utility's application to own that facility or asset.

65. Allowing bidders access to the same utility-owned transmission resources as the benchmark bid will result in lower cost proposals. NIPPC and customer advocates have pointed out numerous examples where utilities have used their utility-owned facilities and access to transmission to favor their benchmark bids or otherwise ensure that a utility-owned bid wins.¹⁵ Customers should not pay for any utility asset that is not used to their own benefit.

66. This issue will become of greater significance as the region's limited transmission assets and rights may serve to significantly limit the number and diversity of bidders of low cost and less risky generation that cannot access transmission to reach utility loads. A utility's transmission holdings that are recovered in rates or are being reserved for future use to transmit power to sell to its ratepayers (who will pay for them at that time) should be made available to bidders into the RFP. Utilities have a much wider portfolio of transmission resources and

¹⁵ Re PGE Request for Proposals for Capacity and Baseload Resources, OPUC Docket No. UM 1535, NIPPC's Comments at 18-19 (Feb. 22, 2012) (asking the Commission to require PGE to provide granularity regarding the scoring criteria because PGE's proposed scoring criteria had scoring percentages for broad categories containing several project attributes); Re PGE Petition for Partial Waiver of Competitive Bidding Guidelines and Approval of Request for Proposals (RFP) Schedule, OPUC Docket No. UM 1773, Order No. 16-280 at Appendix A at 5 (July 29, 2016); Re Investigation Regarding Competitive Bidding, OPUC Docket No. UM 1182, Order No. 06-446 at 5-6 (Aug. 10, 2006); Re PGE Request for Proposals for Capacity Resources, OPUC Docket No. UM 1535, Order No. 11-371 at 5-6 (Sept. 27, 2011).

reservations to benefit its ratepayers by ensuring that ratepayers have access to the least cost and least risk generation resources bid into the RFP. Any existing transmission reservations or transmission reservations in deferral status, in queue or optioned by a utility should be assumed to be available to the resource selected in any RFP.

67. If the Commission were not inclined to make this a hard and fast rule, it would be reasonable for the rules to provide that if the utility proposes a cost-plus utility-owned bid to compete against fixed-price competitive bids, and it determines that it will not make utility-owned resources available to other bidders, then the utility must explain why it would not be in the best interest of its customers to do so. This would at least encourage the utility to make ratepayer funded transmission available for use by competitors who may be able to supply the utility's customers with a lower, fixed-price product than the utility-owned cost-plus product.

68. This is the approach recently taken by the Oregon Commission, which was consistent with its historic approach of encouraging rather than requiring a utility to offer its assets to be used by third party bidders.¹⁶ The Oregon Commission explained that: "We believe that the use of utility owned resources by third parties to develop additional or better, more efficient bids will help facilitate the objective of more and better proposal options."¹⁷ The Oregon rules did impose a requirement that the utility explain what utility owned assets will be used and why it did or did not offer the benchmark or utility owned resources to third party bidders. Specifically, the rules require "that a filed analysis of the decision be provided to the Commission at the time of RFP

¹⁶ Re PGE Request for Proposals for Capacity Resources, OPUC Docket No. UM 1535, Order No. 11-371 at 6 (Sept. 27, 2011) (The Oregon Commission stated the decision to open up its site to third party bidders was a prudence decision, but directed PGE to consider other recent utility decisions that opened up their sites. This caused PGE to decide to offer up its site to bidders).

¹⁷ Re Rulemaking Regarding Allowances for Diverse Ownership of Renewable Energy Resources, OPUC AR 600, Order No. 18-324 at 10 (Aug. 30, 2018)

development, as well in a subsequent prudence determination.”¹⁸ PSE’s recent RFP in which that utility agreed to allow its transmission assets be used by third party bidders is an excellent example of what should be done in RFPs. PSE’s decision should be commended, but the rules should require this from all utilities in the future.

69. As described above, though, the Commission should just take the next step and clarify that any other action is per se imprudent. Therefore, the Commission’s rules should require utilities to offer up ratepayer-funded assets to bidders in order to obtain cost recovery for utility-owned assets.

C. Further Definition to Prevent Disaggregation of Projects

70. The proposed rules provide that the bidding requirements would not apply where “the utility’s identified resource need of capacity less than 50 MW.” Proposed WAC 480-107-015(4)(a). NIPPC recommends that the rule should more definitively proscribe a utility from evading the bidding requirements by rate-basing multiple facilities that fall just below the 50-MW capacity limit.

71. For example, in Oregon, the RFP Guidelines previously applied to resources of 100 MW or greater capacity, until PacifiCorp intentionally evaded the Guideline through its rate-based acquisition of multiple wind farms in Wyoming just below the capacity limit. Specifically, PacifiCorp avoided the previous Oregon RFP Guidelines for its Rolling Hills and Glenrock projects, which were sized at 99 MW each and separated by one mile, and also avoided the Guidelines by breaking apart one project into “two” 99 MW projects (Rolling Hills and Glenrock).¹⁹ The Oregon Commission determined that its rule needed “to be modified to

¹⁸ Id. at 11.

¹⁹ Re PacifiCorp 2009 Renewable Adjustment Clause, OPUC Docket No. UE 200, Order No. 08-548, pp. 3, 6, 19-22 (Nov. 14, 2008).

address the problem of a utility sizing projects to avoid competitive bidding requirements” and to “clarify when multiple small projects should be considered a major resource.”²⁰ The Oregon

Commission’s competitive bidding guidelines used the following criteria:

A utility must issue an RFP for all Major Resource acquisitions identified in its last acknowledged IRP. Major Resources are resources with durations greater than 5 years and quantities greater than 100 MW. If multiple small generating resources total more than 100 MW and meet the following criteria, then there is a rebuttable presumption that the multiple small resources are a single Major Resource and the competitive bidding guidelines apply:

- a. The small resources are located on one parcel of land or on two or more adjacent parcels of land, or the generation equipment of any small resource is within five miles of the generation equipment of any other small resource; and
- b. Construction of the resources is performed by the same contractor, or under the same contract, or under multiple contracts entered into within two years of each other.

A single area of land is considered one parcel even if there is an intervening public or railroad right of way.

The utility bears the burden of rebutting this presumption. If multiple small resources meet these criteria, but the utility believes that other factors show that each resource is separate and distinct, then the utility may request that the Commission find that the resources do not qualify as a single Major Resource. If the utility proceeds without making this request and without following the competitive bidding guidelines, then the utility may attempt to rebut the presumption that it should have followed the guidelines when the utility seeks recovery of the costs of the resource in rates.²¹

72. In the case of utility-owned resources where the utility has the incentive to avoid the rules, NIPPC recommends that the Washington rules should adopt similar criteria to specify when multiple small facilities that exceed 50 MW are subject to the bidding requirements in the

²⁰ Re Public Utility Commission of Oregon, Investigation Regarding Competitive Bidding, OPUC Docket No. UM 1182(1), Order No. 11-340, at 5 (Sept. 1, 2011).

²¹ Re Public Utility Commission of Oregon, Investigation Regarding Competitive Bidding, OPUC Docket No. UM 1182(1), Order No. 12-007, at Appendix A (Jan. 10, 2012).

rules to avoid the same issues that arose in Oregon before the loophole was removed there.

NIPPC has provided proposed revisions to the Washington rules submitted with these comments.

D. Addition of Due Diligence to IE's Duties

73. Because an IE's duties are to ensure an appropriate comparison is made between utility-owned projects and those bid by other third parties, it is critical that all projects be subjected to the same type of due diligence review. This ensures that all project costs and assumptions are equally supportable, and have been subjected to similar scrutiny. It is often assumed by regulators that the IE conducts a full analysis of the assumptions regarding the utility owned "bid". But typically, the IE does not perform this task and instead monitors the process to merely ensure that it is run consistent with its stated requirements (which are determined by the utility).

74. NIPPC proposes to introduce a due diligence review of the utility-owned bids on the shortlist that is commensurate with the type of "project-finance due diligence" that is regularly conducted to obtain third-party financing for an independent power producer's facility. Because utility-owned projects are usually not project financed, they escape the type of due diligence review that IPP projects must go through in order to get financing. Thus, NIPPC proposes that the IE's job duties in the rule be expanded to clearly include due diligence review of utility-owned projects bid in response to an RFP. Without this, utility-owned resources that have less certainty with respect to costs, risks, and feasibility will be compared to IPP projects that undergo a strict test of each of these items. The Commission should ensure that the IE has a broad enough scope to allow them to do a true "apples to apples" comparison of all of the projects bid in response to an RFP. NIPPC specifically proposes the following language:

For each bid with utility ownership on the final short list of potentially winning bids, the IE must conduct a project-finance due diligence

evaluation of the type utilized by financing institutions for purposes of securing financing from reputable financing entities prior to extending project financing for major generation facilities.

75. NIPPC's proposal is based on the assumption that bankers and other financiers typically retain independent firms to evaluate the viability of projects seeking financing commitments from commercial lenders. This is a commonly accepted idea in all types of business that obtain project financing. For example, when lending money to purchase a home, a bank will hire a third party to conduct market analysis to make sure they are not lending money that is clearly in excess of market value. A home inspector may also be retained to review the house and whether there are underground oil tanks. When hiring a builder to construct a new home or make improvements, a lawyer may be retained to review the construction agreement. These are the types of actions that someone who is investing their own money may take.

76. Investors require a far more thorough and rigorous analysis when lending money to construct electric generation resources for independent power producers securing project financing. A PPA bidder will develop and tender a bid that includes a confidential pro-forma accounting of project costs, revenues and returns. The bank will want every input to this income statement reviewed to determine whether the numbers are supported, whether they match the terms of the various contracts, the risk around the inputs, and steps taken to hedge that risk. The risk around each will be assessed and valued. A review will also ensure that all permits have been obtained, that the counter parties have the requisite experience to construct the facility, wind and solar profiles and cost assumptions are reasonable, etc. The draft power purchase agreement will be reviewed to ensure that the lenders understand how much the generator will be paid, how much power they will be paid for, and all the other risks, benefits and potential liabilities. Based upon the financial and engineering due-diligence review, the bank will decide

whether to lend money to the project, how much of the total project cost they are willing to lend, and what interest rate they will demand.

77. Some large developers that balance sheet finance their projects may not separately retain an independent consultant to conduct this due diligence. However, they often have internal staff that conduct a similar rigorous internal review of the proposed project pro-forma, often throughout the development process, because they also are putting their own private capital at risk, not ratepayer money.
78. Utility ownership bids are not vetted with the same project due diligence because their financing has the ultimate back stop of ratepayers. While the Commission conducts prudence reviews, too large of disallowance will harm the utility's cost of capital, which ultimately increase rates. Because they provide essential service (electricity), utilities are generally considered "too big to fail."
79. Any active participant or IE in the energy industry should know exactly what is contemplated by this proposed language. The level of due diligence that occurs during project financing is well known and there are firms that offer this type of due diligence review for third-party lenders. The language plainly requires that the review conducted be "of the type utilized by financing institutions for the purpose of securing financing." If a proposed IE is not aware of the type of due diligence that IPPs must go through to obtain project financing from a third-party lender, then that IE has no business advising this Commission on whether the utility's ownership bids have the same level of assurances of cost and performance as the IPP bids. The Commission should adopt NIPPC's proposed language into the final rule to ensure that utility-owned bids are not placed in rate base without first passing the same type of scrutiny as IPP bids for PPA options.

80. Finally, there is no reason to require bids that do not have an ownership option to go through this due diligence. As mentioned above, independent power producers typically perform this type of due diligence because they, unlike utilities, need to stand behind their bid price. Additionally, their bids are offered on a fixed price basis, not cost plus. To counter the inherent bias present in the regulatory model, it is entirely appropriate to treat utility-owned bids differently than PPAs, and only require the IE to separately perform this due diligence on projects on the short-list that the utility could own.

E. Requiring Acknowledgment of Shortlist when Utility Bid is Included.

81. The Commission's rules should be modified to provide more oversight over the selection of resources under an RFP by requiring utilities to submit the short list to the Commission for acknowledgment when the short list contains a utility-owned project. This process is necessary to address the fact that there is otherwise no meaningful Commission involvement in the utility's resource procurement decisions between the RFP process and the prudence review process, which normally occurs in a rate case. By that time, the Commission's review is too late to actually influence the decision that the utility makes about resource procurement. The Commission's acknowledgment process would also ensure that the utility followed the RFP process and the relevant criteria.

82. Such a requirement, however, would not constitute pre-approval or guarantee favorable ratemaking treatment. Oregon's process is illustrative, and the Oregon Commission has similarly concluded that it does not have the ability to pre-approve or pre-disapprove any utility decisions on prudence or other matters. In fact, the Oregon Commission does not even believe that it can bind a future Commission. In Oregon, the utility always has the burden of proving that it acted prudently, and (as part of that) bears the initial burden of producing evidence to

support prudence. When a utility follows the competitive bidding policies, then it has met its initial burden of producing evidence that it acted prudently and a party must then produce evidence of imprudence. From a legal perspective, the utility retains the overall burden of proof, but complying with the competitive bidding requirements merely provides the benefit of making it easier for the utility to provide evidence of prudence.²² Thus, in Washington, a determination that the utility followed or did not follow the competitive bidding rules would impact the evidentiary process, but not make a prudency determination.

F. Access to Confidential Information in RFPs by Lawyers Not Representing Specific Developers.

83. Representatives of non-bidding parties should be provided access to confidential material in utility RFPs, even if they represent bidders on other matters. In Oregon RFPs, the utilities have recently attempted (and failed) to restrict access to confidential information to only Staff and ratepayer advocates. The primary purpose of these restrictions is not to protect confidential material, but to ensure that those that can best police the utilities and understand the tricks they employ to ensure that utility owned assets win (NIPPC's representatives) are unable to meaningfully participate in an RFP. NIPPC urges the Commission to adopt Oregon's rule and policy of allowing non-bidding parties access to confidential material.²³

84. To be clear, NIPPC's position is only that legal counsel for organizations with a legitimate non-commercial interest in the RFP like customer groups, renewable energy advocates

²² Re PacifiCorp 2009 Renewable Adjustment Clause, OPUC Docket No. UE 200, Order No. 08-548 at 19 (Nov. 14, 2008).

²³ See Re Rulemaking Regarding Allowances for Diverse Ownership of Renewable Resources, OPUC Docket No. AR 600, Order No. 18-324, Appendix A at 9 (Aug. 30, 2018) (setting forth rule OAR 860-089-0550 regarding protected information).

and NIPPC be allowed to access this confidential material. This would not include individual companies, for profit organizations, and non-lawyer representatives.

85. The Oregon Commission has a longstanding policy of allowing broad access to confidential RFP information to non-bidders, including organizations that may include bidders and attorneys who represent bidders on other unrelated matters. In a 2006 competitive bidding investigation, PacifiCorp raised concerns about the disclosure of detailed bid scoring and evaluation to non-bidding parties, and explained that “parties may include entities that could use this information to the commercial disadvantage of bidders or the utility.”²⁴ Staff and Renewable Northwest Project (“RNP”), a renewable energy advocacy group that would likely have members who are bidders, opposed PacifiCorp’s proposal. The Commission agreed “with RNP and Staff that non-bidding parties should have access to this information and have written the guideline accordingly.”²⁵ There have been no problems with disclosures or inappropriate use of confidential material from utility RFPs.

86. This year the Oregon utilities suddenly re-raised the issue of access to confidential material by non-bidders. In a recent PacifiCorp RFP and in the Oregon Commission’s competitive bidding rulemaking, efforts were made to eliminate access to non-bidding parties, even under protective order to limit the ability of stakeholders to review and the OPUC to evaluate the reasonableness of RFPs. The utilities’ proposals would have prevented all of NIPPC’s current attorneys to review confidential material, and any new counsel would not likely be familiar with NIPPC’s interests and needs nor have the requisite knowledge of the rules, policies and/or competitive solicitations to provide competent legal advice.

²⁴ Re Commission Investigation Regarding Competitive Bidding, OPUC Docket No. UM 1182, Order No. 06-446 at 14-15 (Aug. 10, 2006).

²⁵ Id. at 14.

87. The Oregon Commission agreed with NIPPC and revised PacifiCorp’s protective order “to more specifically address NIPPC’s concerns. The language is revised to limit only persons (including attorneys) that are involved in PacifiCorp’s 2017R or 2017S RFPs. This will limit attorneys that represent current bidders in the 2017R or 2017S RFP process, but does not extend to attorneys that represent bidders on unrelated matters.”²⁶ The Oregon Commission also agreed with NIPPC in the generic competitive bidding rulemaking that it would:

not automatically eliminate access to protected information to a class of parties. We trust in the professional standards of the energy bar in Oregon, and expect all parties, individuals, and organizations trusted with protected information to strictly adhere to the letter and spirit of our protective orders. It is our conclusion that in practice, this has occurred and will continue to occur. However, this trust can and will be revoked if professional standards break down and information is disclosed improperly.²⁷

88. The Washington Commission should reach the same conclusion and adopt Oregon’s rule allowing broad access to confidential RFP material, unless they represent bidders in the RFP.

G. Definition of “Subsidiary” is Too Loose

89. The proposed rules offer a change to the definition of “subsidiary.” This is an important definition to get right, because whether a company that bids in response to an RFP is a subsidiary or affiliate of a utility determines the level of scrutiny that is applied to the bid. Unfortunately, the proposed language excludes any company of which the utility owns more than five percent from being considered a subsidiary, so long as the utility “does not control” that company. “Control” could likely be interpreted as owning more than 50% of the voting power of a company. Thus, a utility could potentially have a major ownership interest in another company

²⁶ Re PacifiCorp, dba Pacific Power Application for Approval of Final Draft 2017R RFP, OPUC Docket No. UM 1845, Order No. 18-080 at 3 (March 8, 2018).

²⁷ Re Rulemaking Regarding Allowances for Diverse Ownership of Renewable Energy Resources, OPUC Docket No. AR 600, Order No. 18-324 at 14.

(such as 45%), but claim that it is not a “subsidiary” because it does not “control” the company. This would clearly be contrary to the intent of rules, which are to protect against utility bias in selecting resources from which the utility will earn a return for shareholders. Any significant ownership percentage in another developer raises the same issues of utility bias that warrant these rules in the first instance, and thus for the purposes of these rules, subsidiary should be considered based on ownership percentage alone.

H. Consultation During the RFP Process

90. The rules provide that “Utilities are encouraged to consult with commission staff during the development of the RFP.” NIPPC urges the Commission to modify the rules to make clear that utilities are encouraged to consult with other interested parties as well. Such consultation and discussion helps ensure a common understanding of a utility’s intent, approach, and goals, and would help avoid unnecessary miscommunications and disputes.

91. A significant problem in many RFPs has been that there were unmentioned requirements in the RFP that were not known by many of the bidders until after the RFP had been released,²⁸ or even after bids were received.²⁹

92. NIPPC also requests that the rules make clear that parties have discovery rights with respect to the RFP process. This is a necessary tool to ensure that parties have access to communications between an IE and other parties, and to ensure that the Commission’s rules are

²⁸ For example, PGE’s RFP that selected its Carty gas plant that was ultimately \$150 million over budget included a controversial gas storage requirement that was known to only PGE prior to the issuance of the RFP, which meant that only PGE could win the RFP in the end.

²⁹ Only a limited number of resources could potentially compete in PacifiCorp’s recent Wyoming wind RFP; however, a much greater number of resources submitted bids, apparently unaware that they did not have a chance to become the winning bid. PacifiCorp ultimately may have acquired the least cost and least risk resource, but bidders should have been aware the requirements well in advance of the RFP.

followed. NIPPC recognizes that discovery will, of course, be subjected to appropriate confidentiality provisions and certain limitations on disclosure of competitive information.

I. Choosing the Independent Evaluator

93. The draft rules state that the utility recommends the IE to the Commission, after consultation with the Staff and appropriate stakeholders. NIPPC requests that the Commission modify this language to provide that the Staff make the recommendation instead. This gives the Staff greater influence over the selection of the IE, aids the IE's independence from the utility, and would also be consistent with the approach taken by the Oregon PUC in its recent rulemaking.³⁰

94. NIPPC also recommends that the selection of the IE be done through an RFP, upon which interested stakeholders could comment. This would ensure that a broad pool of candidates is considered, and that the parties have a chance to comment on the types of qualifications that would be necessary to ensure independence, competence, and qualification of the IE. NIPPC has proposed rule language based on Oregon's process for engaging an IE which allows the process to be controlled by Staff and the IE selection made by the Commission and not the utility.

J. Removal of Provisions Regarding Utility Bias

95. The proposed deletions from WAC 480-107-135(2) and (3) seem to unnecessarily lessen the rules' focus on eliminating utility bias in resource selection. For example, the draft rules propose to remove the utility's requirement to articulate in the RFP how it will avoid unfair advantage in the RFP process. NIPPC recommends that these provisions be left in the rule, and is unsure why they were proposed to be deleted.

³⁰ See Re Rulemaking Regarding Allowances for Diverse Ownership of Renewable Energy Resources, OPUC Docket No. AR 600, Order No. 18-324, adopting OAR 860-089-0200.

K. Use of Commission-Approved PPA and Transaction Documents

96. NIPPC recommends that the Commission review and approve any PPA and associated transaction documents for use in response to RFPs. In NIPPC's experience, the PPA documents can include onerous provisions that in and of themselves preclude PPA bids or steer the results toward a utility ownership option. For example, in PGE's recent Oregon RFP, that utility included language in its RFP PPAs that was objected to by the IE, Staff and stakeholders. PGE removed much of the language during the RFP approval process, and the Oregon Commission directed PGE to remove additional language that biased the results against PPA options.³¹

L. The Rules Should Limit the Ability to Use Interconnection Issues to Bias RFPs

97. The rules should specifically address how interconnection plays a role in the RFP process. In other states, RFPs have significantly limited the number of available projects by either outright excluding them, or including draconian scoring criteria that effectively precluded otherwise low cost and low risk projects in favor of utility owned resources that were further along the interconnection process. NIPPC recommends that the rules specify that a bidder need not have an interconnection agreement prior to completion of the formal RFP process.

98. Overly burdensome interconnection timelines will prevent otherwise viable projects from being considered in an RFP. This is particularly true when it is unknown when the next RFP will be issued, and developers may need to expedite their preparations to bid into an otherwise unforeseen RFP. The interconnection process in the Northwest, even when moving perfectly, can be cumbersome and time consuming, and it is not uncommon for there to be significant delays completely outside of the control of the developer. This may be especially true for studies

³¹ Re PGE 2018 Request for Proposals for Renewable Resources, Oregon Docket No. UM 1934, Order No. 18-171 at 3-4 (May 21, 2018).

conducted by utilities that are not subject to FERC’s interconnection jurisdiction, like BPA. Projects that are further along in the interconnection process will be able to produce a more refined bid and can be reflected in the negotiated price, but the process itself will should not structurally discriminate against any particular project.

M. Redlines Provided to Commission:

99. Attached to these comments are NIPPC’s redlines to the proposed rules, reflecting the changes described in these comments and other modifications that NIPPC proposes.

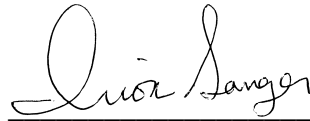
IV. CONCLUSION

100. NIPPC requests that the Commission consider these above comments, and make the changes to the proposed rules in order to more fully protect customers, and ensure a level playing field between utility-owned resources and independent power producers by issuing rules that are effective at mitigating utility bias towards utility-owned resources.

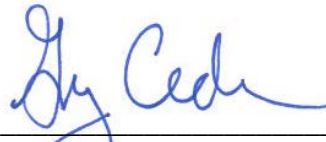
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Dated this 21st day of September 2018.

Respectfully submitted,



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Of Attorneys for the Northwest and Intermountain
Power Producers Coalition

Attachment to
Northwest and Intermountain Power Producers Coalition
Comments Regarding Proposed RFP Rules

Redline Changes to WAC 480-107

Chapter 480-107 WAC

WAC 480-107-001 Purpose and scope. (1) The rules in this chapter are intended to provide an opportunity to minimize long-term energy costs and risks, complement the integrated resource planning process, and establish a fair, objective, and transparent competitive bidding process. The rules in this chapter require utilities to solicit bids, rank project proposals, and identify any bidders that meet the minimum selection criteria, except in circumstances beyond the scope of these rules or explicitly exempted from these rules. ~~The rules in this chapter do not establish the sole procedures utilities may use to acquire new resources. Utilities may construct electric resources, operate conservation and efficiency resource programs, purchase power through negotiated contracts, or take other action to satisfy their public service obligations.~~

(2) The commission will consider the information obtained through these bidding procedures when it evaluates the performance of the utility in rate and other proceedings.

(3) To the extent of any conflict between these rules and the provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA),

Title II, sections 201 and 210, and related regulations promulgated by the Federal Energy Regulatory Commission (FERC) in 18 C.F.R. Part 292, PURPA and those related rules control.

WAC 480-107-002 Application of rules. (1) The rules in this chapter apply to any utility that is subject to the commission's jurisdiction under RCW 80.04.010 and chapter 80.28 RCW.

(2) Any affected person may ask the commission to review the interpretation or application of these rules by a utility or customer by making an informal complaint under WAC 480-07-910, Informal complaints, or by filing a formal complaint under WAC 480-07-370, Pleading—General.

(3) The commission may grant an exemption from the provisions of any rule in this chapter in the same manner and consistent with the standards and according to the procedures set forth in WAC 480-07-110 Exceptions from and modifications to the rules in this chapter; special rules. However, a utility must comply with the requirements regarding requests for proposals in these rules unless there is an emergency, such as a human-caused or natural catastrophe resulting from an unusual or unexpected event, that requires the utility to take immediate action; or there is a time-limited opportunity to acquire a resource of unique

value to the utility's customers.

WAC 480-107-004 Additional requirements. (1) These rules do not relieve any utility from any of its duties and obligations under the laws of the state of Washington.

(2) The commission retains its authority to impose additional or different requirements on any utility in appropriate circumstances, consistent with the requirements of law.

WAC 480-107-006 Severability. If any provision of this chapter or its application to any person or circumstance is held invalid, the remainder of the chapter or the application of the provision to other persons or circumstances is not affected.

WAC 480-107-007 Definitions. "Affiliate" means a person or corporation that meets the definition of an "affiliated interest" in RCW 80.16.010.

"Commission" means the Washington utilities and transportation commission.

"Conservation and efficiency resources" has the same meaning as defined by WAC 480-100-238(2).

"Conservation supplier" means a third-party supplier or utility affiliate that provides equipment or services that save capacity or energy.

"Generating facilities" means plant and other equipment used to produce electricity purchased through contracts entered into under these rules.

"Independent Administratorevaluator" means a third party, not affiliated with the utility, that manages and administers the request for proposal, and provides an evaluation of the utility's ~~request for proposal process,~~ evaluation, selection criteria, and related analyses of all project bids and project proposals discussed in this chapter received in response to a request for proposal.

"Independent power producer" means a non-utility entity that develops or owns generating facilities or portions thereof that are not qualifying facilities as defined in WAC 480-106-xxx.

"Integrated resource plan" or **"IRP"** means the filing made every two years by a utility in accordance with WAC 480-100-238 Integrated resource planning.

"Project developer" or **"bidder"** means an individual, association, corporation, or other legal entity that can enter into a contract with

the utility to supply a resource need.

"Project proposal" or **"bid"** means a project developer's document containing a description of a project and other information in response to the requirements set forth in a request for proposal.

"Qualifying facilities" means generating facilities that meet the criteria specified by the FERC in 18 C.F.R. Part 292 Subpart B as described in WAC 480-106.

"Request for proposals" or **"RFP"** means the documents describing a utility's solicitation of bids for delivering a resource need.

"Resource need" has the same meaning as defined by WAC 480-100-238(2).

"Resource supplier" means a third-party supplier or utility affiliate that provides equipment or services that serve a resource need.

"Subsidiary" means any company in which the utility owns directly or indirectly five percent or more of the voting securities, and that may enter a power or conservation contract with that electric utility.

~~A company is not a subsidiary if the utility can demonstrate that it does not control that company.~~

"Utility" means an electrical company as defined by RCW 80.04.010.

WAC 480-107-015 The solicitation process. (1) The utility must

solicit bids for its resource needs identified during the IRP process. It must accept bids for a variety of energy resources which may have the potential to fill the identified needs including: electrical savings associated with conservation and efficiency resources; demand response; energy storage; electricity from qualifying facilities; electricity from independent power producers; and, at the utility's election, electricity from utility subsidiaries, and other electric utilities, whether or not such electricity includes ownership of property.

(2) A utility may participate in the bidding process as a resource supplier, or may allow a subsidiary or affiliate to participate in the bidding process as a resource supplier, pursuant to conditions described in WAC 480-107-135 Conditions for purchase of resources from a utility's subsidiary or affiliate and WAC 480-107-AAA Independent ~~Evaluator~~ Administrator for Large Resource Need or Utility or Affiliate Bid.

(3) The solicitation process in this section is required whenever a utility's most recently acknowledged integrated resource plan demonstrates that the utility has a resource need within ~~{XX}~~3 years.

(4) Utilities are exempt from the RFP requirement under this section under the following circumstances:

(a) The utility's identified resource need of capacity is less than 50 megawatts; or provides no option of utility ownership of a resource; or, in the case of a resource need for energy storage, the resource in the utility's IRP is forecast to cost less than the estimated lowest cost of any 50 megawatt capacity resource in the IRP.

(b) The utility plans to satisfy the remainder of its identified resource need for capacity with short-term market purchases so long as sufficient regional adequacy to support these forecasted market purchases has been identified by the Northwest Power and Conservation Council in their latest published power supply adequacy assessment over the entire period of the utility's resource need or the next five years, whichever period is shorter;

(c) The utility's identified resource needs are for conservation and efficiency resources and the utility has previously issued an RFP in accordance with WAC 480-107-065;

~~(d) The utility's identified resource need is for a distribution system or local transmission resources project estimated to cost less than \$10 million; or~~

~~(d) The utility's identified resource need will be acquired under an existing tariff.~~

(5) A project less than 50 megawatts requires an RFP if it is part

of multiple projects that in aggregate provide the utility with more than 50 megawatts of capacity, the generation equipment of any one of these resources is within five miles of the generation equipment of any of these resources, and construction of these resources is performed under the same contract or within two years of each other. A utility may request that the Commission find that resources presumed to be aggregated as described in this section should not be considered in the aggregate, but bears the burden of rebutting the presumption that the acquisition is subject to these rules by showing each resource is separate and distinct. If the utility proceeds with a resource acquisition where the project meets the aggregation criteria without utilizing the RFP requirements of this rule, then the utility will be required to rebut the presumption that it should have followed the guidelines when the utility seeks cost recovery of the resource in rates.

+5)-(6) A utility must submit to the commission a proposed RFP and accompanying documentation no later than one hundred thirty-five days after the utility's integrated resource plan is due to be filed with the commission. Interested persons will have sixty days from the RFP's filing date to submit written comments to the commission on the RFP. The commission will approve, approve with conditions, or suspend the RFP

within thirty days after the close of the comment period.

~~(6)~~ (7) Utilities are encouraged to consult with commission staff and other interested parties during the development of the RFP. Utilities may submit draft RFPs for staff review prior to formally submitting a proposed RFP to the commission.

~~(7)~~ (8) A utility must solicit bids for resource needs within thirty days of a commission order approving the RFP, with or without conditions, as applicable. To solicit bids, a utility must post a copy of the RFP on the utility's public web site and place notices in relevant industry publications. The utility must maintain a list of potential vendors and communicate to those vendors when an RFP is issued.

~~(8)~~ (9) The utility must ensure that all bids remain sealed until the expiration of the solicitation period specified in the RFP.

~~(9)~~ (10) A utility may issue RFPs more frequently than required by this rule.

~~(10)~~ (11) Any person interested in receiving commission notice of utility proposed RFP filings may place their name on the IRP listserv on the commission's website.

WAC 480-107-025 Contents of the solicitation. (1) The RFP must identify the resource need, including any specific attributes or

characteristics the utility is soliciting, such as the amount and duration of power, the avoided cost identified in the integrated resource plan, the type of technology necessary to meet a compliance requirement, and any additional information necessary for potential bidders to make a complete bid.

(2) The RFP must document that the size and operational attributes of the resource need requested are consistent with the range of estimated new resource needs identified in the utility's integrated resource plan.

(3) The RFP must allow any resources that meet a portion of the amount or a subset of the characteristics or attributes of the resource need to bid, including unbundled renewable energy credits for a renewable resource need, or conservation and efficiency resources for a capacity need.

(4) The RFP must clearly explain the specific ranking procedures and assumptions that the utility will use in accordance with WAC 480-107-035 Project ranking procedure. The RFP must include a sample evaluation rubric that quantifies the weight each criterion will be given during the project ranking procedure. The RFP must also specify any minimum criteria and qualifications that bidders must satisfy to be eligible for consideration in the ranking procedure. The RFP must

specify how any scores for non-price criteria will be assigned, and this scoring must be objective and reasonably subject to self-scoring analysis by bidders. Non-price score criteria that seek to identify minimum thresholds for a successful bid and that may be converted into minimum bidder requirements must be converted into minimum bidder requirements.

(5) The utility's RFP submittal must declare if the utility or an affiliate is allowed to bid into the RFP.

(6) The RFP must specify the timing of process including the solicitation period, the ranking period, and the expected selection period.

(7) The RFP must identify all financial security requirements and the rationale for such requirements.

(8) The RFP must identify utility-owned transmission assets that could be used by bidders to assist in meeting the resource need, and allow the use of such assets to be included in bids.

~~(8)~~ (9) The RFP must contain a Commission-approved power purchase agreement and associated transaction documents that contain terms and conditions that bidders may utilize in issuing a response to the RFP.

(10) The RFP may not limit bids to specific generation technologies

or specific locations, or require an interconnection agreement prior to completion of the RFP process.

WAC 480-107-AAA Independent ~~Administrator~~Evaluator for Large Resource Need or Utility or Affiliate Bid. (1) If required to solicit bids under WAC 480- 107-015(3), a utility must engage the services of an independent evaluator to oversee the solicitation process if:

(a) The resource need is greater than 50 megawatts, or in the case of energy storage, the need is greater than the threshold in WAC 480-107-015(4) (a); ~~or~~and

(b) (i) The utility, its subsidiary, or an affiliate is allowed to submit a bid; or (ii) ~~The solicitation may result in acquisition of a resource that the utility will own at some point during the resource's operation.~~

(2) The ~~utility~~commission staff, after consulting with ~~commission staff~~the utility and the appropriate stakeholders, must recommend an independent ~~evaluator~~administrator for approval by the commission. In seeking qualified candidates for independent administrators, a request for candidates' proposals must be utilized, and staff will evaluate candidates' independence, proposed costs, experience and competence.

(3) The independent ~~evaluator~~administrator will manage the RFP process, and contract with and be paid by the ~~utility~~commission. The utility shall reimburse the commission for the costs incurred, and will be allowed to recover such costs through rates in the case where a utility bid was provided in response to the RFP. The ~~utility~~commission staff will also manage the contract terms with the independent ~~evaluator~~administrator.

(4) The independent ~~evaluator~~administrator will, at a minimum:

(a) Ensure that the RFP process is conducted fairly and properly;

(b) Verify that the utility's inputs and assumptions including

capacity factors are reasonable; ~~and~~

(c) Evaluate the unique risks of each bid;

~~(e)~~ (d) When the RFP allows bidding by the issuing electric company or an affiliate of the company, or includes resource ownership options for the electric company, the independent administrator must independently score the affiliate bids and bids with ownership characteristics or options, if any, and all or a sample of the remaining bids; ~~and~~

(e) For each bid with utility ownership that is included on the final short list of potentially winning bids, conduct a project-finance due diligence evaluation of the type utilized by

financing institutions for purposes of securing financing from reputable financing entities prior to extending project financing for major generation facilities and complete a comprehensive report on the cost and performance assumptions in the bid and propose any necessary adjustments to the bid scoring and whether the bid should remain on the short list for final negotiations as a result of the conclusions of the report.

(5) The independent ~~evaluator~~administrator will provide an initial report to the commission at the conclusion of the process, before reconciling project rankings with the utility, and a final report after reconciling rankings with the utility in accordance with WAC 480-107-035(4) Project ranking procedure.

(a) No stakeholder, including the utility or staff, shall have any editorial control over the independent ~~evaluator~~administrator's initial report.

(b) The final report should not differ significantly from the initial report and must explain any significant ranking differences and why the independent ~~evaluator~~administrator and the utility were, or were not, able to reconcile the differences.

(c) The utility, staff, and stakeholders may file responses to the

final report with the commission.

(6) The utility, staff, and stakeholders shall have discovery rights with respect to the RFP process, as limited by any applicable protective order, and in accordance with WAC 480-07-400 and 480-07-405. Protected information will be provided to the Commission, the independent administrator, and non-bidding parties as appropriate under the terms of the protective order. Information shared under the terms of a protective order may be used in RFP review and approval, final short list acknowledgement, and cost recovery proceedings.

(7) The utility must give the independent ~~evaluator~~administrator full access to examine and test the utility's production cost and risk models and any other model or data that is necessary for the independent ~~evaluator~~administrator to complete its work.

WAC 480-107-035 Project ranking procedure. (1) The commission must approve the procedures and criteria the utility will use in its RFP to evaluate and rank project proposals.

(2) At a minimum, the ranking criteria must recognize resource cost, market-volatility risks, demand-side resource uncertainties, resource dispatchability, resource effect on system operation, credit and

financial risks to the utility, the risks imposed on ratepayers, public policies regarding resource preference adopted by Washington state or the federal government, environmental effects including those associated with resources that emit carbon dioxide, resiliency attributes, and reliability costs and benefits. The ranking criteria must recognize differences in relative amounts of risk inherent among different technologies, fuel sources, financing arrangements, contract provisions, and be consistent with the avoided cost methodology developed in the utility's most recently acknowledged integrated resource plan.

(3) The utility must evaluate project bids that meet only a portion of the resource need in conjunction with other proposals in developing the lowest reasonable cost portfolio. The utility must consider the value of any additional ~~net~~ benefits, or costs that are not directly related to the specific need requested.

(4) The utility and, when applicable, the independent ~~evaluator~~ administrator will each score and produce a ranking of the qualifying bids following the RFP ranking criteria and methodology.

(5) If the utility or an affiliate bids into the RFP or the RFP may result in utility ownership of the winning resource, then all bids involving utility or affiliate ownership will be first submitted and

evaluated. The best score and price will then be announced to the bidders, and a second round of responses to the RFP will be conducted to determine if any independent power producer bids receive a better score than the utility- or affiliate-owned bid.

~~(5)~~ (6) Within five days after the sealed project proposals have been opened for ranking, the utility must make available for public inspection on the utility's website a summary of each project proposal.

~~(6)~~ (7) The utility may reject any project proposal that does not specify, as part of the bid, the costs of complying with environmental laws, rules, and regulations in effect at the time of the bid.

~~(7)~~ (8) The utility may reject all project proposals if it finds that no proposal adequately serves ratepayers' interests. The commission will review, as appropriate, such a finding together with evidence filed in support of any acquisition in the utility's relevant general rate case or other cost recovery proceeding. This provision does not relieve a utility of its requirements under these rules to receive bids for, and utilize the required RFP processes before obtaining resources that meet the thresholds specified in these rules.

~~(8)~~ (9) After the process is concluded, the utility will provide access to each bidder to its own confidential scoring information.

~~(9)~~(10) Within five days after executing an agreement for acquisition of a resource or determining that all proposals or bids will be rejected, the utility must make available for public inspection on the utility's website a final detailed ranking of results for all proposals, and the details of the winning bid pricing and scores.

WAC 480-107-045 Pricing and contracting procedures. (1) Once project proposals are ranked in accordance with WAC 480-107-035 Project ranking procedure, the utility must identify the bidders that best meet the selection criteria and that are expected to produce the relevant attributes as defined by that portion of the resource need to which the project proposal is directed.

(2) The project proposal's price, pricing structure, and terms are subject to negotiation.

WAC 480-107-065 Acquisition of conservation and efficiency resources. (1) A conservation and efficiency resource supplier may participate in the bidding process for any resource need. A utility or a utility subsidiary may participate as a conservation supplier, on conditions described in WAC 480-107-135 Conditions for purchase of resources from a utility's subsidiary or affiliate.

(2) All conservation and efficiency measures included in a project proposal must produce savings that can be reliably measured or estimated with accepted engineering, statistical, or meter-based methods.

(3) A utility must acquire conservation and efficiency resources through a competitive procurement process. A utility must use one of the following options:

(a) Option 1. A utility achieves at least thirty-three percent of the utility's conservation and efficiency resource program savings each biennium through competitively procured programs;

(b) Option 2. A utility solicits competitive proposals for each conservation and efficiency resource program in the portfolio at least every six years; or

(c) Option 3. A utility develops a competitive procurement framework in consultation with their conservation advisory group, as described in WAC 480-109-110 Conservation advisory group. If a utility develops a competitive procurement framework:

(i) The framework must define the minimum proportion of the utility's budgeted conservation and efficiency resource programs that must be submitted for competitive bidding over a specified time frame;

(ii) The utility must document that the framework was supported by

the advisory group;

(iii) The framework must be filed as an appendix to each biennial conservation plan, as described in WAC 480-109-120 Conservation planning and reporting; and

(iv) The first competitive procurement framework for conservation and efficiency may be filed with the 2020-2021 biennial conservation plan.

WAC 480-107-075 Contract finalization. (1) Unless otherwise prohibited by law, a utility may decide whether to enter into a final contract with any project bidder that meets the selection criteria of the RFP. Any bidder may petition the commission to review a utility's decision not to enter into a final contract.

(2) Except upon a showing of good cause, the utility must request that the Commission acknowledge the utility's short list of resources for final negotiations when any utility-owned generating facility is included in such list, and the utility must include the independent administrator's comprehensive report described in WAC 480-007-AAA(4)(e) with its application for approval of the authorization to engage in final negotiations with the short list of bids.

~~(2)~~ (3) Any project bidder and utility may negotiate changes to the selected project proposal for the purpose of finalizing a particular contract consistent with the provisions of this chapter.

~~(3)~~ (4) The utility may sign contracts for any appropriate time period specified in a selected project proposal for up to a twenty-year term. The utility may sign longer-term contracts if such provisions are specified in the utility's RFP.

~~(4)~~ (5) If material changes are made to the project proposal after project ranking, including material price changes, the utility must suspend contract finalization with that party and rerank, and have the independent evaluator ~~administrator~~ rerank when applicable, projects according to the revised project proposal. If the material changes cause the revised project proposal to rank lower than projects not originally selected, the utility must instead pursue contract finalization with the next ranked project.

WAC 480-107-135 Conditions for purchase of resources from a utility, a utility's subsidiary or affiliate. (1) The utility, its subsidiary, or affiliate may participate in the utility's bidding process, and the utility may solicit bids that will result in the utility owning the resource at some point during its operation. In these circumstances, the

solicitation and bidding process will be subject to additional scrutiny by an independent evaluator administrator, pursuant to WAC 480-107-AAA Independent evaluator administrator for large resource need or utility or affiliate bid, and the commission to ensure that no unfair advantage is given to the utility, its subsidiary, its affiliate, or any bid that might result in the utility owning the resource.

(2) A utility, its subsidiaries or affiliates may not submit a bid or accept bids that will result in the utility owning the resource at some point during its operation unless the utility provides notice this may occur in the RFP. The utility must indicate in its RFP how it will ensure that the utility-owned resource, or the resource of its subsidiary or affiliate, through association with the utility, will not gain an unfair advantage over bids for a resource that will be owned and operated by an independent power producer during its operation.

(3) A utility must not disclose the contents of an RFP or competing project proposals to its own personnel involved in developing the utility's bid, or to any subsidiary or affiliate prior to such information being made public. The utility must include in the RFP and notice the methods used to assure that inappropriate information is tightly controlled and not communicated internally or with affiliates or

subsidiaries.

(4) If a utility provides a bid in response to an RFP, it must include its requested regulated return in the total project costs, and that such return will be collected on a per-megawatt hour basis similar to cost recovery provided for with respect to power purchase agreements with independent power producers.

(5) If a project owned by the utility, affiliate, or subsidiary is the winning bid, the Commission will allow to be included in rates only the costs that were included in the bid used for comparative analysis in the RFP.

WAC 480-107-145 Filings—Investigations. (1) The commission retains the right to examine project proposals as originally submitted by potential developers. The utility must keep all documents supplied by project bidders or on their behalf, and all documents created by the utility relating to each bid, for at least seven years from the close of the bidding process, or the conclusion of the utility's general rate case, including any time period allowed for reconsideration or appeal, in which the fully-developed project was reviewed for prudence, whichever is later.

(2) The utility must file with the commission within 30 days of the conclusion of any resource RFP process a summary report of responses

including, at a minimum:

(a) Specific reasons for any project rejected under WAC 480-107-035(6) Project ranking procedure.

(b) Number of bids received, categorized by technology type;

(c) Size of bids received, categorized by technology type;

(d) Number of projects received, categorized by technology type;

(e) Size of projects received, categorized by technology type; and

(f) Median and average bid price categorized by technology ~~—~~type.

Categorization should be broad enough to limit the need for confidential designation whenever ~~possible~~practical.

WAC 480-107-999 Adoption by reference. In this chapter, the commission adopts by reference all or portions of regulations and standards identified in subsection (1) of this section. The publication, effective date, reference within this chapter, and availability of the resources are as follows:

(1) Pacific Northwest Power Supply Adequacy Assessment as published by the Northwest Power and Conservation Council.

(a) The commission adopts the Pacific Northwest Power Supply Adequacy Assessment for 2023 published in 2018.

(b) This publication is referenced in WAC 480-107-015.

(c) Copies of Pacific Northwest Power Supply Adequacy Assessment for 2023 are available from the Northwest Power and Conservation Council at <https://www.nwcouncil.org/energy/energy-topics/resource-adequacy/pacific-northwest-power-supplyadequacy-assessment-for-2023>.