

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

Rulemaking for Integrated Resource Planning,
WAC 480-100-238, WAC 480-90-238, and
WAC 480-017

DOCKET U-161024

**REPLY COMMENTS ON REQUESTS FOR PROPOSALS (RFPS) ON BEHALF OF
PUBLIC COUNSEL**

October 16, 2018

I. INTRODUCTION

1. Pursuant to the Commission's request for Reply Comments issued at the October 2, 2018 Workshop and the October 11, 2018 Notice of Opportunity to File Written Reply Comments on the Request for Proposals (RFPs) Draft Rules, the Public Counsel Unit of the Washington State Attorney General's Office (Public Counsel) respectfully submits these comments. While the Workshop encompassed robust discussion, we would like to clarify one issue regarding the exemptions from the solicitation process in the proposed Draft Rules WAC 480-107-015(4), in addition to responding to the Notice questions.

II. CLARIFICATION ON EXEMPTIONS

2. Currently WAC 480-107-002(3) Application of Rules states,
- No exception from the provisions of any rule in this chapter is permitted without prior written authorization by the commission. Such exceptions may be granted only if consistent with the public interest, the purposes underlying regulation, and applicable statutes. Any deviation from the provisions of any rule in this chapter without prior commission authorization will be subject to penalties as provided by law.

3. Under the proposed Draft Rules, the Commission has two provisions for exemptions.

First, WAC draft rules 480-107-002(2) and (3) state,

(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.

Second, draft rule WAC 480-107-015(4) states:

(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;

(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

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

4. Public Counsel supports the two provisions of exemptions in the Draft Rules.

Nonetheless, given the additional provision for specific instances in which the utility can qualify for an exemption from the RFP requirement, Public Counsel recommends that the Commission add clear language under WAC 480-107-015(4) stating that these exemptions are subject to the requirements of WAC 480-07-110 and that the Commission can deny an exemption or waiver of the RFP rules. Presently, it is not clear in the Draft Rules whether or not the utility must prove

that an exemption requested under WAC 480-107-015(4) is appropriate, in the public interest, and/or in the interest of a utility's customers, as required by section 110. Public Counsel, therefore, recommends that WAC 480-107-015(4) be modified as follows:

(4) Utilities may file for an exemption from the RFP requirement following the procedures set forth in WAC 480-07-110, and the Commission will determine if it is in the public interest to grant such an exception. Utilities are exempt from the RFP requirement under this section under the following circumstances:

5. Additionally, Public Counsel believes that all interested stakeholders should have the opportunity to comment on the utility's proposed exemption. While stakeholders should have this opportunity through existing procedures under WAC 480-107-110, Public Counsel recommends that the exemption procedures mirror the proposed process for filing an RFP to ensure stakeholder involvement and sufficient opportunity to comment. Specifically, Public Counsel proposes the following additions to WAC 480-107-115(5).

(5) A utility must submit to the commission a proposed RFP or petition for exemption and accompanying documentation no later than one hundred and 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 of the RFP or petition for exemption to submit written comments to the commission on the RFP or petition. The commission will approve the RFP, approve the RFP with conditions, suspend the RFP, or grant the requested exemption from the RFP within thirty days after the close of the comment period.

III. NOTICE QUESTION

1. Independent Evaluator Requirement

Draft rule WAC 480-107-AAA requires the use of an independent evaluator (IE) when the resource need is greater than 50 megawatts or the utility, its subsidiary, or an affiliate plans to submit a bid. During the workshop stakeholders discussed requiring the use of an IE when bids contain a utility ownership option and how that requirement may in practice result in requiring an IE in all RFPs.

The Commission requests feedback on a new proposal to encourage the use of an IE in circumstances that differ from what is required in the draft rule. WAC 480-107-015(5) prescribes a ninety day process between when a utility files a proposed RFP

with the Commission and Commission approval of the RFP. The new proposal would allow a utility to shorten this to a 30 day comment period with Commission approval at the next regularly scheduled open meeting after the comment period closes when the utility has obtained the services of an IE for the RFP and early enough to allow the IE to participate in the formulation of the RFP.

a. Does the incentive of a shortened regulatory approval process for the RFP encourage the use of an IE?

b. Does the use of an IE adequately assure sufficient review of the RFP considering the tradeoff in the length of the stakeholder comment period?

6. Public Counsel believes the new proposal is ambiguous, given the lack of details on (1) when utilities should retain the IE, (2) the role of the IE, and (3) the overall timeline of the regulatory approval process for the RFP. Public Counsel would like to ensure that the IE has sufficient time to assist in the development and the review of the draft RFP.¹ Without these clear guidelines, Public Counsel cannot definitively support a shortened stakeholder comment period.

7. Public Counsel generally opposes shortening public comment. In this instance, Public Counsel believes the shortening of the public comment period may prevent stakeholders and other interested parties from participating. We would like to ensure that all parties have sufficient time to review and participate in the RFP process. Furthermore, Public Counsel believes that the public participation process benefits all filings before the UTC and should not be hindered.

8. Public Counsel would like to offer an alternative proposal. As we discuss below, we believe that the IE should be retained prior to or soon after the completion and/or filing of the IRP. This will allow the utility sufficient time to obtain and employ the IE in drafting, developing, and reviewing the RFP. Public Counsel supports lengthening the 135 day deadline

¹ We further explain our views on the role and responsibilities of the IE in response to question two below, and will not list them in response to this question.

between submission of the IRP and issuance of an RFP, if necessary, in order to allow the utility time to retain an IE and allow IE adequate time to assist in the formulation of the RFP, while maintaining the existing 90 day review process for the public and the Commission.

2. Role of the Independent Evaluator

During the workshop there was significant discussion on the proper role of an IE. General ideas were that an IE will oversee a bidding process to make sure there is no bias or perception of bias in the bidding process, or that an IE will monitor each step of the RFP evaluation process to determine that the utility has acted in a fair and impartial manner in conducting the evaluation.

Keeping in mind the proposed role of the IE in rule will be the minimum role and that a utility may contract for more in depth involvement at their discretion, specifically describe what you envision to be the proper role of an IE in the draft rule. In doing so please address the following specific questions.

- a. How deeply should the IE be involved in the development of the RFP? Should an IE independently score all bids, a sampling of bids, or only bids resulting in utility ownership?**
- b. How should the IE be involved in communication between the utility and bidders?**
- c. Should there be a requirement that the IE document and file all communications with the Commission?**
- d. In situations where there is a direct conflict between the IE and the utility should additional process be proscribed?**

9. Public Counsel believes the IE's responsibility should be to increase transparency and fairness of the RFP process. At a minimum, the IE's role should be as follows:

- Development and Review of the Draft RFP: The IE will assist in the development of the draft RFP. The IE will also review the RFP in order to identify whether there is any bias in the draft RFP or any other issues. If there are any identified issues with the draft RFP and the utility chooses not to follow the advice of the IE, the IE should be able to present at the Open Meeting and bring these issues to the attention of the Commission and other interested parties.

- Monitoring of Evaluation Bids: The IE will review the bids after the utility has scored them. The IE will not independently score the bids, but the IE may question and/or disagree with the weighted or detailed explanation of a bid's evaluation. The disagreements and the discrepancies should appear in the final report.
- Final Report: The IE will write a report on their findings. This report should include all discrepancies and identified bias and/or issues within the entire RFP process.

10. Public Counsel recommends that the role of the IE be clearly defined in rules in order to ensure the uniform application and role of the IE in the drafting of the RFP. Additionally, Public Counsel believes that rules should be drafted requiring the utility to retain the IE by a specific time, so they may assist in the development of the RFP. Specifically, Public Counsel recommends that the utility be required to retain an IE prior to or soon after the filing of the IRP in order to assist in the development of the draft RFP.

11. Given the role and responsibilities mentioned above, Public Counsel believes that the role of the IE is generally one of an active auditor, not an active *participant*. We do not believe that the IE should be independently scoring bids, nor do we believe that the IE will be making any decisions for the utility. However, the IE should be identifying any bias or possible discrepancies in the RFP process; thus, the utility will continue to be the decision maker in any resource acquisition decisions.

12. At this time, Public Counsel does not have a position on how involved the IE should be in communications between the utility and the bidders. We believe more details on the time and the cost of this involvement are necessary before making any recommendations. Nevertheless, we do believe that any communications with the IE should be logged and retained, but not filed

at the UTC, unless directed to do so.² The communications should be retrievable and held for a period of time, in the instance that the Commission or any other party requests the communication in an adjudicative proceeding.

13. Finally, Public Counsel believes that if there are any instances of direct conflict with the utility and the IE, these instances should be reported and filed within the RFP docket. If the direct conflict is not resolved in a reasonable and timely manner, then it will be scheduled for resolution at a regularly scheduled Open Meeting. We believe that all interested parties should have the ability to review the conflict in question, file comments, and participate at the Open Meeting.

3. Conservation RFP

In the draft rules, three options for conservation RFPs were presented at WAC 480-107-065(3). Option 3, under which the utility develops a competitive procurement framework in consultation with their conservation advisory group, appears to be the only option that commenter would utilize.

a. What additional guidance on the development of such a framework would be useful, either in rule or in an adoption order?

b. What particular rule language would allow sufficient flexibility to the utility while ensuring conservation RFPs are performed on a cadence to ensure the utility pursues all cost-effective conservation at the lowest reasonable cost?

14. In Public Counsel's comments filed on September 21, 2018, we exclusively supported the use of Option Three under WAC 480-107-065(3). While we support the conservation advisory groups' consultation on the competitive procurement framework, we do believe two rules should be considered within this context.

² Public Counsel believes that the 'communications' that should be retained and/or logged consist of, but are not limited to: emails, mailings, faxes, and telephone calls, including the identity of the caller, date, and time the call occurred.

15. First, Public Counsel believes that low-income programs should be exempted from the competitive procurement process. Considering that low-income conservation receives separate treatment under WAC 480-109-100(10), we believe that it is appropriate to continue this separate treatment and allow the community action agencies in partnership with the utilities to administer the low-income programs without the use of competitive bidding. Additionally, low-income conservation programs are discussed not only in the conservation advisory groups, but also in each utility's low-income advisory group. During these meetings, stakeholders and community action agency representatives are able to ask and answer questions about the administration of programs intended to benefit low- or moderate-income customers. Thus, the agencies that are directly working in the community are able to address any issues on program implementation and ensuring the agencies are pursuing all cost-effective conservation at the lowest reasonable cost.
16. Second, as was discussed at the Workshop on October 2, 2018, Public Counsel would accept proposed language in which the utilities should *consider*, but not be required to competitively bid 100 percent of their non-low income programs. We believe it would be overly burdensome and expensive to bid 100 percent of programs every biennium. However, we do believe the conservation advisory group should discuss and consider all non-low income programs for every biennium and consult on which programs should be competitively procured. We believe this language is flexible and ensures that the utility is actively pursuing all cost-effective conservation at the lowest reasonable cost.
17. Public Counsel looks forward to reviewing other stakeholder comments and recommendations regarding the competitive procurement framework of conservation RFPs.

4. Market Purchases Resource Adequacy Exemption

The draft rules at WAC 480-107-015(3)(b) rely on the Northwest Power and Conservation Council’s resource adequacy assessment to reduce the number of requests for exemptions from rule and allow resource needs to be covered by short-term market purchases. This is not intended to eliminate the need for a utility to perform its own resource adequacy assessment within an IRP and the exemption has no bearing on the determination of market risk. During the workshop, stakeholders suggested adding additional language to limit the degree of reliance on the market a utility may have in order to qualify for this type of automatic exemption.

- a. If this idea were to be incorporated into rule, what level of reliance on the market would be reasonable?**
- b. Should the degree of reliance be tied to a separate metric? If so, what metric should be used?**
- c. Should an RFP be required for firm resources whenever there is significant market risk?**
- d. This section also uses the undefined term “short-term market purchases.” Please provide comments on the following proposed definition: “Purchases of energy or capacity on the spot or forward market contracted for a term less than four years.”**

18. Public Counsel does have considerable concern regarding a utility’s over-reliance on market purchases for meeting its need, given the new exemption in WAC 480-107-015(4). However, we are uncertain as to what threshold and metric represents a reasonable level of reliance for a utility, while also maintaining compliance with the current lowest reasonable cost definition under WAC 480-100238(2)(b). However, as we described in our earlier comments, Public Counsel believes that the exemptions under WAC 480-107-015(4) should be reviewed similarly to a draft RFP and must be shown to be in the public interest. We look forward to further discussion on this topic.

19. Public Counsel believes that the term “short-term market purchases” should be defined within the context of these rules. Public Counsel believes this definition is necessary in order for the Commission, all interested stakeholders, and utilities to have clear parameters on what is and

is not considered an exemption for short-term market purchases under this section. We generally agree with the definition provided in (d), but are not convinced whether the timeframe identified, “for a term less than four years”, is appropriate and have some concerns that this timeframe may be too long. We look forward to reading other parties’ comments and further discussion on this topic.

5. RFP Transparency

In their September 21, 2018, comments Public Counsel provided redline edits to the draft rules that state “The RFP must include a sample evaluation rubric that either quantifies the weight each criterion will be given during the project ranking procedure or provides a detailed explanation of the aspects of each criterion that would result in the bid receiving higher priority.”

Here Staff will provide one additional edit for comment. “The RFP must include a sample evaluation rubric that either quantifies the weight each criterion will be given during the project ranking procedure or provides a detailed explanation of the aspects of each criterion specifically identified that would result in the bid receiving higher priority.”

- a. Is this language sufficient to elicit the transparency stakeholder’s desire in an RFP? Is this language reasonably flexible?**
- b. Will this requirement result in the utility being tied to and limited to criterion established prior to review of the bids that does not fit or account for the complexity of the evaluation of actual bids?**
- c. Should instead the utility be required to establish contemporaneous documentation of its criterion prior to receipt of bids and provide its contemporaneous reasoning for any changes to its criterion?**

20. Public Counsel disagrees with the suggested amendment. We continue to support our original language as follows, “The RFP must include a sample evaluation rubric that either quantifies the weight each criterion will be given during the project ranking procedure or provides a detailed explanation of the aspects of each criterion that would result in the bid receiving higher priority.”

21. As we stated in our comments filed on September 21, 2018 and at the Workshop on October 2, 2018, we recommended this language in order to provide utilities with flexibility in evaluating bids that may not be adequately evaluated with a numeral value. Hence, this detailed explanation can be used to address this issue. Moreover, we believe that the rubric is a standard, or a floor, by which all bids will be evaluated, but may not represent all known or accountable benefits or criterion.

22. Public Counsel interprets Commission Staff's language to limit utilities to only the criteria identified in the rubric. We disagree with this restriction. We understand that in almost all instances the criteria by which all bids are assessed, either with a numerical or qualitative weight, will be represented in the rubric. However, with the rapid change in and availability of new technologies, we believe there may be instances where a ratepayer benefit is not expressed in the RFP rubric. Public Counsel believes that it would be appropriate to consider this non-represented criterion in the bid's evaluation, with accurate documentation and detailed explanation as to why this criterion should be considered and how it was weighed and evaluated against the criteria identified in the existing rubric. Therefore, we believe that the Commission's amended language precludes this unforeseen benefit or criterion, and does not provide the flexibility that our original language is intended to encompass.

IV. CONCLUSION

23. Public Counsel appreciates the opportunity to submit reply comments on the proposed Draft RFP Rules. We look forward to reading other reply comments and further conversations on the Draft RFP Rules. If there are any questions regarding these comments please contact Carla Colamonici at CarlaC@ATG.WA.GOV or at (206) 389-3040.