

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of Amending, Adopting, and
Repealing WAC 480-107, Relating to
Purchases of Electricity

DOCKET UE-190837

SECOND COMMENTS OF PUBLIC COUNSEL

June 29, 2020

I. INTRODUCTION

1. Pursuant to the Washington Utilities and Transportation Commission’s (UTC or “Commission”) June 1, 2020, Notice of Opportunity to File Written Comments (“Notice”), Public Counsel submits the following comments in response to the questions posed in the Commission’s Notice.

II. COMMENTS AND ANSWERS

A. General Comments Regarding Draft Rules

1. Stakeholder Review Process

2. During Puget Sound Energy’s (PSE or “Company”) last all source Request for Proposal (RFP) (Docket UE-180271), Public Counsel recommended that in future RFPs PSE could consider including a stakeholder review process.¹ In our conception of these groups, stakeholders could be included in the ranking process for proposals, rather than just viewing a summary of the project proposal or the agreement after its execution as proposed in draft WAC 480-107-035. A stakeholder review group could provide parties an opportunity to view and discuss ranking of the proposals with the utilities, while maintaining strict confidentiality due to the sensitive nature of a competitive solicitation. We suggested that the group be limited to parties that routinely participate in cost recovery proceedings and sign confidentially agreements, including, but not limited to, the Company, Commission Staff (“Staff”), and Public Counsel. We echo that recommendation here as a way to provide stakeholders an opportunity to more fully understand the evaluation and ranking of bids, especially as utilities work to comply with the Clean Energy

¹ Comments of Public Counsel, ¶¶ 8-9, *Puget Sound Energy’s Proposed Request for Proposals for All Generation Resources* (May 29, 2018) (Docket UE-180271).

Transformation Act's (CETA) equity provision. Modifying draft WAC 480-107-015(2) to state that "Utilities must consult ..." with Commission staff and others during RFP development would be one way to include a stakeholder review group in the proposed rules.

2. Requirement for an Independent Evaluator

3. Public Counsel strongly supports the requirement for an independent evaluator. An independent evaluator can provide oversight and assistance with the design of the solicitation, increase transparency over the bidding and ranking process, and provide greater assurance that the process is competitive and fair. Public Counsel has previously stated that all RFPs should require an independent evaluator.² Public Counsel, however, supported an earlier iteration of the RFP rules that exempted utilities from the RFP process if the resource need was less than 50 MW,³ which functionally limited the requirement for an independent evaluator to that same 50 MW threshold. The most recent draft rules deleted the 50 MW trigger for the solicitation process⁴, but included an 80 MW threshold for the use of an independent evaluator, which is at odds with Public Counsel's support for the use of an independent evaluator in all instances.
4. Previous comments by Climate Solutions indicate that a threshold that is set too low may create an undue burden on small resource development.⁵ Public Counsel is therefore open to the idea of applying a MW threshold to trigger the need for an independent evaluator, but believes additional discussion is warranted regarding the specific MW threshold. The current 80 MW

² Initial Comments of Public Counsel, ¶ 30 (Mar. 12, 2020).

³ See Notice of Opportunity to File Written Comments, Draft WAC 480-107 Redline (Feb. 6, 2020); see also Request for Proposal Comments of Public Counsel, ¶ 30, *Rulemaking for Integrated Resource Planning, WAC 480-100-238, WAC 480-90-238, and WAC 480-017* (Sept. 21, 2018) (Docket U-161024).

⁴ See Notice of Opportunity to File Written Comments, Draft WAC 480-107 Redline (Jun. 1, 2020).

⁵ Climate Solutions Comments on Amending, Adopting, and Repealing WAC 480-107, Relating to Purchases Electricity, at 5 (Mar. 13, 2020).

threshold appears to be set at that level in response to PacifiCorp’s desire to maintain consistency with its requirements in Oregon,⁶ but may be inappropriate for other utilities. Additionally, as indicated by the Western Grid Group, the current threshold does not align with the Federal Energy Regulatory Commission’s (FERC) distinction between small and large generator interconnection agreements.⁷ Public Counsel appreciates the additional questions regarding this issue included in this notice as well as the opportunity for further discussion in the upcoming workshop.

B. Answers to Notice Questions

1. The draft rule at WAC 480-107-015(4), Solicitation Process, shortens the RFP filing period requirement from 135 days to 45 days after a utility files its IRP, reduces the 60-day comment period to 30 days, and requires a Commission decision 60 days after the RFP is filed. The intended outcome is to reduce the time between identifying the resource need and pursuing resources through an RFP. Does the draft rule contain adequate time for public involvement to assure that, in most circumstances, stakeholder concerns are resolved? If not, please recommend an alternative timeline for these filing requirements.

5. Generally, Public Counsel opposes shortening the time period for public comments for all filings before the UTC. We believe that it is important to allow sufficient time for all parties to review and participate in the RFP process. Cutting the length of the comment period in half may hamper some stakeholders’ ability to participate, which seems out of step with the stated policy goals of CETA to ensure the equitable distribution energy and non-energy benefits and burdens.

6. In the previous docket U-161024, Public Counsel suggested that utilities should hire an independent evaluator prior to or soon after an IRP is completed or filed. We stated that this hiring would “allow the utility sufficient time to obtain and employ the IE in drafting,

⁶ PacifiCorp’s Comments in the Rulemaking Relating to Purchases of Electricity, at 5 (Mar. 13, 2020).

⁷ Western Grid Group Comments Relating to Electricity Purchases and Compliance with the Clean Energy Transformation Act, at 6 (Mar. 13, 2020).

developing, and reviewing the RFP.”⁸ We also noted our support for lengthening the 135 day timeline between the submission of the IRP and the issuance of an RFP to allow for the retention of an independent evaluator and allowing the evaluator enough time to assist with the formulation of the RFP.⁹ We look forward to the comments of other stakeholders as this issue is discussed.

2. The draft rule at WAC 480-107-015(4), Solicitation Process, includes the requirement that the utility “must accept bids for a variety of energy resources that may have the potential to fill the identified resource needs including, but not limited to...” What burden does this requirement impose? What are the benefits or drawbacks of the rule providing that the utility “may accept bids”?

7. Public Counsel supports the proposed language in draft WAC 480-107-015(7) that the “utility must accept bids for a variety of energy resources ...”¹⁰ Public Counsel believes that utilities should be required to consider a variety of bids, rather than just be allowed to consider a variety of bids. We look forward to the comments of other stakeholders, particularly utilities, for a discussion about the burdens and benefits of each approach.

3. The “Contents of a solicitation” section of draft rule WAC 480-107-025(5) requires a sample evaluation rubric or, in the alternative, an explanation of the evaluation criterion. This requirement is intended to better enable bidders to design projects and bids that satisfy the resource needs as identified in the RFP. Does the draft language improve the transparency of the evaluation process? If not, please recommend an alternative approach or alternative components of the evaluation criterion that will provide the necessary transparency.

8. Public Counsel believes the draft language improves the transparency of the evaluation process because it allows for either a sample evaluation rubric with quantified weights associated

⁸ Reply Comments on Requests For Proposals on Behalf of Public Counsel, ¶ 8, *Rulemaking for Integrated Resource Planning, WAC 480-100-238, WAC 480-90-238, and WAC 480-017* (Oct. 26, 2018) (Docket U-161024).

⁹ *Id.*

¹⁰ The question prompt misidentified the relevant section as draft WAC 480-107-015(4).

with each criterion or a detailed narrative. But as we suggested in our earlier comments, the draft rule should not include the phrase “specifically identified.”¹¹ Our proposed language is as follows:

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 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. The RFP must also specify any minimum criteria and qualifications that bidders must satisfy to be eligible for consideration in the ranking procedure.¹²

Public Counsel interprets the phrase “specifically identified” to limit utilities to only the criteria identified in the rubric. As we noted earlier, with rapidly changing technologies, Public Counsel believes there could be instances where a possible ratepayer benefit is not expressed in the RFP rubric. It would be appropriate to consider non-listed criteria in the evaluation of the bid, as long as there was “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.”¹³ Thus, Public Counsel believes the Commission should include our suggested language instead.

//

///

////

¹¹ Reply Comments on Requests For Proposals on Behalf of Public Counsel, ¶¶ 20-22, *Rulemaking for Integrated Resource Planning, WAC 480-100-238, WAC 480-90-238, and WAC 480-017* (Oct. 26, 2018) (Docket U-161024).

¹² Request for Proposal Comments of Public Counsel, ¶ 13, *Rulemaking for Integrated Resource Planning, WAC 480-100-238, WAC 480-90-238, and WAC 480-017* (Sept. 21, 2018) (Docket U-161024).

¹³ Reply Comments on Requests For Proposals on Behalf of Public Counsel, ¶ 22, *Rulemaking for Integrated Resource Planning, WAC 480-100-238, WAC 480-90-238, and WAC 480-017* (Oct. 26, 2018) (Docket U-161024).

4. Comments received from stakeholders in this docket on March 13, 2020, presented a variety of options for determining when a utility should be required to use an independent evaluator. Several commenters recommend including a capacity threshold ranging from 20 MW to 100 MW.

a. Are there unintended consequences of using a capacity threshold in WAC 480-107-AAA to decide whether an independent evaluator will add value to the Commission’s review?

9. The comments of other stakeholders indicate that using a MW threshold that is too low could potentially hinder small resource development,¹⁴ but a threshold set too high out of sync with FERC mandates may place additional burdens on distributed and community-scale projects.¹⁵ Public Counsel is also concerned that setting the MW threshold too low may make it unduly burdensome to hold solicitations for smaller, more equity-focused resources.

10. On the other hand, choosing a threshold using a MW threshold that is too high would reduce the oversight and transparency of the RFP process, which are critical for larger projects and for solicitations in which the utility participates as a bidder. Additionally, setting the threshold too high could result in solicitations where small, distributed and community-scale projects or equity-focused projects cannot benefit from the oversight of an independent evaluator. The risks from this lack of oversight may become more pronounced if the utilities shift towards more of these types of projects in order to meet their clean energy requirements.

//

///

////

/////

¹⁴ Climate Solutions Comments on Amending, Adopting, and Repealing WAC 480-107, Relating to Purchases Electricity, at 5 (Mar. 13, 2020).

¹⁵ Western Grid Group Comments Relating to Electricity Purchases and Compliance with the Clean Energy Transformation Act, at 6 (Mar. 13, 2020).

- b. If a capacity metric (i.e., MW) is used in WAC 480-107-AAA(1)(a), what is the justification for requiring a capacity metric as a threshold for retaining an independent evaluator?**

11. The capacity threshold is a simplified approach to balancing the need for independent oversight of the RFP process against the costs for a utility and potential burdens on bidders. If the utility does not have a large resource need, it can fulfill its requirements with smaller solicitations that may not require as much oversight. Larger projects increase the level of complexity as well as the potential impact on ratepayers and profit for utility shareholders and bidders, which, in turn, increases the need for independent oversight. It is possible that a different metric could achieve these goals similarly, but Public Counsel does not have a suggestion at this time.

- c. Should a metric(s) other than capacity be used in WAC 480-107-AAA(1)(a), in addition to financial interest, to decide whether or not the utility must use an independent evaluator? If so, what considerations should be used to determine the value of that metric?**

12. As stated above, Public Counsel does not have a suggestion for a different metric at this time. However, regarding the inclusion of the financial interest metric to this question, it is unclear if Staff is considering modifications to the requirement for an independent evaluator if the utility, its subsidiary, or affiliate participates in the bidding process. The current and previous iterations of the draft rules have been clear regarding this requirement, and Public Counsel strongly opposes any modification of that rule. The rule should not be modified for different levels of financial interest of the utility in the project.

//

///

////

5. **The draft rule at WAC 480-107-135(1)(a) provides for the use of an independent evaluator when a utility has a financial interest in the resource choice, including when a utility is considering repowering one of its owned resources at the end of the resource's life to fulfill the resource need identified in the RFP. The draft rule requires that the repowering of the utility-owned resource be evaluated with the other responsive bids to the RFP. What are the benefits and drawbacks of this requirement?**

13. Public Counsel supports the requirement to use a solicitation process with an independent evaluator when the utility has a financial interest in the resource choice, including when the utility is considering repower a utility-owned resource. Although repowering can be a cost-effective method of increasing the efficiency of a resource and extending its useful life, it is not necessarily always the lowest reasonable cost option. A solicitation process for these instances would require a utility to consider other, potentially better, options and would ensure ratepayers are not inappropriately overpaying to meet a resource need. An independent evaluator is necessary because the potential for the appearance of impropriety or bias that exists in all solicitations in which the utility participates as a bidder does not disappear simply because the resource need may be met by repowering existing utility resources.

14. Public Counsel acknowledges, however, that a potential drawback of requiring a full solicitation process with an independent evaluator in these instances is that the length of the RFP process may impact the ability of the utility to obtain production tax credits or similar benefits. The assurance that ratepayers are paying for the lowest reasonable cost resource, the benefits of independent oversight, and removal of any bias or appearance of bias generally outweigh the potential for tax credits, but Public Counsel looks forward to discussing this issue further at the workshop.

6. Under certain circumstances, the draft rules at WAC 480-107-AAA require utilities to use independent evaluators, approved by the Commission, to assist in the evaluation and ranking of bids. What qualifications demonstrate that independent evaluators have the training or experience to appropriately weigh and consider CETA's equity provisions in their ranking of project bids?

15. At a minimum, an independent evaluator should have experience with evaluating disparate impacts of solicitations on communities. They should have an understanding of how and why the location of resources can have detrimental impacts on and significant benefits for communities. The evaluator should also demonstrate knowledge of vulnerable communities in Washington or an understanding of the communication and outreach required to gain that knowledge. The independent evaluator must also be familiar with the cumulative health disparities analysis described in RCW 19.405.140. Public Counsel acknowledges that these qualifications may be difficult to find in an evaluator who also has the requisite knowledge of utility resource needs and bidding procedures. Public Counsel, therefore recommends that utilities be allowed to hire a separate consultant who is more experienced with the equity considerations of utility resource planning decisions to work in tandem with the independent evaluator.

16. Public Counsel also recommends that Staff request input from stakeholders participating in UE-191023 who may not be parties to this proceeding. Discussion regarding the equity component of the clean energy standards has been raised more explicitly in the CEIP rulemaking, and interested stakeholders may not be aware that equity concerns have been raised in the RFP rulemaking as well.

//

///

7. **In previous comments, stakeholders have requested various provisions for the consideration of minority-, women-, disabled- and veteran-owned businesses as bidders or subcontractors in utility RFPs. Please provide citations to existing federal, state, or local laws applicable to the requirements of utility RFPs related to minority-, women-, disabled- or veteran-owned businesses and how these affect the language in the draft rule.**

17. Washington state and local laws contemplate contracting with women- and minority-owned businesses generally, but do not explicitly address utility specific RFPs. RCW 39.19 directs the Washington State Office of Minority & Women's Business Enterprises to encourage contracting among women- and minority-owned businesses to bid for public works and public education contracts.¹⁶ This covers public contracts with private entities, but not contracts between two private entities. WAC 326 implements RCW 39.19 and establishes the role of the Office of Minority & Women's Business Enterprises. The Director of the Office of Minority & Women's Business Enterprises is responsible for setting overall state goals for contracting with women- and minority-owned businesses, which applies to public works and educational institutions.¹⁷ This helps to ensure that agencies work toward the state's goal of encouraging business with marginalized communities. The Office of Minority & Women's Business Enterprises is also responsible for certifying qualifying minority- and women-owned businesses.¹⁸ Again, the goals set do not apply to investor-owned or publicly-owned utilities.

18. The City of Seattle encourages departments to contract with women- and minority-owned businesses. Individual departments are required to set voluntary goals for percentage of contracts awarded to women- and minority-owned businesses, but this is not an enforceable target. Seattle

¹⁶ RCW 39.19.010.

¹⁷ WAC 326-30-030.

¹⁸ WAC 326-20-010.

City Light is included in the requirement to set a voluntary target for their contracts.¹⁹ In 2019, Seattle City Light intended for 13 percent of all contracts to be awarded to women- and minority-owned businesses.²⁰

19. Outside of Washington, California places reporting and goal-setting requirements on all utilities, including energy, water, and telecommunications. Beginning in 2012, the California Public Utilities Commission was directed to set contracting goals for utilities operating in California. Regulated utility industries were required to report on contract procurement goals and efforts to increase contracts from “women, minority, disabled veteran, and LGBT business enterprises in all categories, including, but not limited to, renewable energy, energy storage system, wireless telecommunications, broadband, smart grid, vegetation management, and rail projects.”²¹ These reporting requirements apply to utilities with \$25 million or more in gross California-based revenues.²² Utilities grossing between \$15 million and \$25 million in California revenues are required to submit more simplified data on procurement from these enumerated businesses.²³

20. The Commission should consider contracts with minority-, women-, disabled-, and veteran-owned businesses when determining compliance with CETA's equity requirements. As a

¹⁹ Dept. of Fin. And Admin. Serv., *Purchasing and Contracting, Women- and Minority-Owned Businesses*, CITY OF SEATTLE, <http://www.seattle.gov/purchasing-and-contracting/social-equity/wmbe> (last visited June 26, 2020)

²⁰ City Purchasing & Contracting Serv., *2019 WMBE Plans* at 88, CITY OF SEATTLE (Aug. 27. 2019) http://www.seattle.gov/Documents/Departments/FAS/PurchasingAndContracting/WMBE/WMBE_plans_2019.pdf.

²¹ Cal. Pub. Utils. Code 8283(a), available at https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PUC§ionNum=8283.

²² Cal. Pub. Utils. Comm'n, *Utility Supplier Diversity Program*, <https://www.cpuc.ca.gov/supplierdiversity/> (last visited June 26, 2020).

²³ *Id.*

result, this can be considered as criteria for evaluating RFPs. Public Counsel recommends the following:

- Utilities should set a goal for contracts with minority-, women-, disabled-, and veteran-owned businesses.
- Targets for contracts should be based on percentage of total contracts issued, percentage of total contract spending, percentage of contracts issued to comply with CETA, and percentage of contract spending in compliance with CETA.
- Utilities should report granular data, in terms of number of contracts issued and spending on contracts, on the contracts issued to each of the enumerated groups.
- Utilities should be required to report why minority-, women-, disabled-, and veteran-owned contracts were not selected.

21. Public Counsel recommends the following amendments to the draft rules. WAC 480-107-015(3) should include the following:

(3) A utility must conduct outreach to potential bidders, including nonprofits and under-represented bidders such as minority-, women-, disabled and veteran-owned businesses, to encourage equitable participation in the bidding process. Potential bidders must have equitable access to information relevant to responding to a utility's RFP, including but not limited to accommodation required by the Americans with Disabilities Act communications guidance. Utilities must set annual goals for contracts awarded to minority-, women-, disabled-, and veteran-owned businesses.

22. Public Counsel also recommends the following addition to WAC 480-107-145(2):

(h) Number of bids received by bidder type, including women-, minority-, disabled, or veteran-owned businesses;

(i) Detailed explanations why the utility did not select a women-, minority-, disabled-, or veteran-owned business contracts;

~~(j)~~(j) Number of projects received, categorized by ownership structures; and

(k) Number of projects using labor standards identified in RCW 82.08.962 and RCW 82.12.962.

III. CONCLUSION

23. Public Counsel appreciates the opportunity to provide comments on these Notice questions. We look forward to reviewing other parties' comments and participating in further discussions on these topics. If there are any questions regarding these comments, please contact Nina Suetake at nina.suetake@atg.wa.gov, Corey Dahl at corey.dahl@atg.wa.gov, or Stephanie Chase at stephanie.chase@atg.wa.gov.

Dated this 29th day of June, 2020.

ROBERT W. FERGUSON
Attorney General

/s/ 

NINA SUETAKE, WSBA No. 53574
Assistant Attorney General
Public Counsel Unit
Email: Nina.Suetake@ATG.WA.GOV
Phone: (206) 389-2055