BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2166

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY Application for Approval of an Independent Evaluator for 2021 All-source Request for Proposals	NORTHWEST & INTERMOUNTAIN POWER PRODUCERS COALITION'S COMMENTS ON STAFF'S REPORT

I. INTRODUCTION AND SUMMARY

The Northwest & Intermountain Power Producers Coalition ("NIPPC")[1] respectfully submits these Comments on Staff's Report filed November 19, 2021, for consideration by the Oregon Public Utility Commission (the "Commission"). NIPPC continues to support Portland General Electric Company ("PGE") moving forward with its 2021 Draft All-Source Request for Proposals ("Draft RFP"), but stresses that Staff's recommendations do not include all changes to the Draft RFP needed to remove unreasonable bias and ensure a fair bidding process.

NIPPC stands by all prior recommendations that were made in its Comments filed on November 1, 2021 ("NIPPC's Nov. 1st Comments"), and NIPPC will be available to answer any questions the Commissioners may have at the public meeting on December 2, 2021, with respect to any issues previously addressed.

Instead of restating all prior comments, these Comments on Staff's Report focus on a

[1] NIPPC is a membership-based advocacy group representing electricity market participants in the Pacific Northwest. NIPPC members include independent power producers ("IPPs"), electricity service suppliers, and transmission companies. NIPPC's current member list can be found at http://nippc.org/about/members/.

limited subset of important issues that Staff's recommendations do not adequately resolve. The Commission should require correction of these problems to ensure the bidding process is not biased in favor of utility ownership or PGE-affiliated bids, and to ensure that the best resources for ratepayers prevail in this RFP. The proposed RFP, even with Staff's recommended revisions, is significantly biased in favor of utility-owned or PGE-affiliated bids.

First, Staff's Report overlooks that most of the non-price elements for Commercial Performance Risk – which is really just adherence to PGE's commercial term sheets and constitutes 21.2 percent of the total score – would *only* penalize power purchase agreement ("PPA") and storage capacity agreement ("SCA") bids. This element of the RFP creates a serious structural bias in favor of utility ownership. Neither Staff nor PGE has offered any meaningful correction to this structural bias in the RFP. NIPPC recommends that the Commission reduce the points allocation for Commercial Performance Risk to 10 percent and reallocate the remaining points to the price scores.

Second, and relatedly, the Draft RFP's term sheets and form contracts contain numerous unreasonable provisions for PPA and SCA bids, which NIPPC specifically identified in prior comments. While Staff recommends adoption of a small handful of changes on this subject recommended by the Independent Evaluator ("IE"), NIPPC identified a significant number of additional commercial terms that must be revised to ensure that the starting point for scoring the bids and is not unreasonable. As the Commission previously ruled, the scoring penalties for non-adherence to commercial terms can only be reasonable if PGE's proposed commercial terms are reasonable. Because many of PGE's proposed commercial terms are unreasonable, this element of the RFP's non-price scoring remains heavily biased against PPA and SCA bids.

Third, the Draft RFP should be improved with respect to transparency and fair treatment

of PGE's proposed affiliate bid. Staff's Report largely defers to Docket No. UI 461 to develop conditions on PGE's affiliate. But that puts the cart before the horse. The Commission must be assured, *before it approves the RFP*, that the proposed participation of the affiliate will not bias the RFP. But it is not possible to do so when PGE has provided no details on the structure of the affiliate bid, much less proposed any meaningful restrictions that ensure the RFP will be competitive and fair with the proposed affiliate's participation. Based on statements made by PGE in Docket No. UI 461, the affiliate will not have any meaningful separation from PGE's regulated operations. But separation of employees and operations of an affiliate is a bedrock protection that should be required to prevent harm to the ratepayers and competitive bidders. Because PGE has provided insufficient assurances and transparency as to its proposed affiliate bid before the time for approval of the Draft RFP, the Commission should reject the proposed use of an affiliate in this RFP or at least require it be treated as a benchmark resource.

Fourth, NIPPC recommends that the Commission require PGE to remove the Draft RFP's proposal that bids be supported by a project labor agreement ("PLA"). Although NIPPC supports the use of PLAs on many projects and its members regularly enter into them, PGE's proposed PLA requirement is far more stringent than the requirements of House Bill 2021 ("HB 2021"). Despite Staff's conclusions, PGE's proposed PLA will limit the competitiveness of the RFP and should be removed. In the alternative, the Commission should, at a minimum, require revisions to the requirement to ensure that bidders have an "off-ramp" in the event that they are unable to meet the requirement in a given locality after demonstrated good faith efforts to do so.

Fifth, PGE's proposed nondisclosure agreement ("NDA") contains two unreasonable limitations – a $500,000 damages cap and a two-year limitation on the term of the protections – which are not adequate to fully protect commercially sensitive information bidders will submit to

PGE in this RFP for cutting edge renewable energy technologies. These limitations are not reasonable and should be eliminated.

II. COMMENTS ON STAFF'S REPORT ON PGE'S DRAFT RFP

A. The Commission Should Reduce Non-Price Scoring Allocation to Remove Structural Bias in the RFP

As NIPPC's Nov. 1st Comments demonstrated, PGE's non-price scores included a number of subjective evaluation criteria related to bidder's substantive edits to PGE's proposed "term sheets" for PPAs, SCA, build transfer agreements ("BTAs"), engineering procurement and construction ("EPC") agreements, and asset purchase agreements ("APA").[2] Many of these scoring elements could only result in point deductions for PPA and SCA bids due to the fact that only PPAs and SCAs will provide such contractual protections after commercial operation and through the term of the power or capacity sale. This scoring framework would provide significant competitive advantage to utility-owned bids, including the benchmarks, BTA, EPC, APA, and likely any affiliate PPA. To ensure this issue was not overlooked or misunderstood, NIPPC even attached to its prior comments a marked-up copy of PGE's RFP Appendix N, Exhibit C: Commercial Performance Risk Non-Price Scoring Matrix.[3] Thus, NIPPC recommended that the Commission should significantly reduce the overall scoring allocated to the Commercial Performance Risk category from 21.2 performance of the overall bid score to 10 percent, or require assurances that utility-owned bids will receive necessary contingency price adders to their price score for each of these categories or will receive a non-price score of zero for such categories, as they provide no such contractual protections.[4]

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[2] NIPPC's Nov. 1st Comments at pp. 3-14.
[3] NIPPC's Nov. 1st Comments at Attachment.
[4] NIPPC's Nov. 1st Comments at p. 14.

PGE's Reply Comments opposed NIPPC on this point and argued, in essence, that its cost-of-service utility-owned resources also face risk.[5] However, PGE acknowledges that in the utility-ownership model, the risk of "long-term project underperformance" is "shared with customers through ratemaking" whereas with a PPA such risk is borne by the independent power producer "through reduced payment and cover damages" provisions in a PPA.[6] Additionally, PGE appears to acknowledge that the utility and its ratepayers bear the risk of wholesale market price volatility in the case of underdelivery of a utility-owned resource.[7] Thus, PGE's own response demonstrates the point NIPPC made. Although PGE has not explained how the utility-owned resources will be scored for the non-price elements for commercial risk, it is reasonable to assume from PGE's Reply Comments that PGE believes utility-owned bids should receive most or all points available for these categories.

PGE also argues that NIPPC's proposal to eliminate the use of subjective scoring of compliance with PGE's term sheets and form contracts is "not a credible argument."[8] However, as NIPPC pointed out, NIPPC's proposal is consistent with the treatment in PacifiCorp's last RFP, which contained no scoring penalties for the substance of revisions to the RFP's form contracts and limited points on the subject to only five percent of the overall score.[9] PGE fails to explain why it is "not a credible argument" to recommend use of the same Commission-approved method that PacifiCorp used in its last RFP applying the same administrative rules.

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5 PGE's Reply Comments, Docket No. UM 2166, at pp. 11-14 (Nov. 10, 2021) (hereafter "PGE's Nov. 10th Reply Comments").

6 PGE's Nov. 10th Reply Comments at p. 13.

7 PGE's Nov. 10th Reply Comments at p. 13.

8 PGE's Nov. 10th Reply Comments at p. 15.

9 NIPPC's Nov. 1st Comments at p. 13; *see also In the Matter of PacifiCorp, dba Pacific Power, Application for Approval of 2020 All-Source Request for Proposal*, Docket No. UM 2059, Order No. 20-228, at 5-6 (July 16, 2020); PacifiCorp's Reply Comments, Docket No. UM 2059, at pp. 10-11 (June 1, 2020).

Staff's Report does not adequately resolve this issue.[10] First, Staff inexplicably concludes that the non-price scoring of bidders' edits to the term sheet is "objective and reasonably subject to self-scoring."[11] Relying on that conclusion, Staff recommends no reduction to the scoring allocation of 21.2 percent for Commercial Performance Risk, instead limiting its recommendation to a reallocation of the 35 points for the "Forecasting and Scheduling" category to the "Credit and Security" and "Utility Owned Asset Output Guarantee" categories in the case of all APA, EPC, and BTA bids.[12]

NIPPC respectfully submits that Staff's recommendation does not go far enough to prevent a structural bias in this RFP. As previously explained and noted above, Staff is wrong that the non-price scoring elements for the commercial performance terms are "objective" and subject to self-scoring, as the Commission's administrative rules affirmatively require for non-price scoring elements.[13] There is no basis for Staff's conclusion. PGE's proposed non-price scorecard plainly requires PGE to subjectively evaluate the degree of risk imposed by various edits bidders will make to the commercial terms PGE proposes on its term sheets. The evaluation of the degree of risk created by potential edits to PGE's commercial terms is a highly subjective and non-transparent endeavor.

For example, the Draft RFP provides no insights into whether a change to the PPA's commercial terms from a 97-percent availability guarantee to a 90-percent guarantee warrants a non-price soring penalty of five points or 30 points. Similarly, if a PPA bidder refuses to agree to receive negative pricing – instead of the fixed prices in the PPA – whenever the market price is

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10 Staff's Report at pp. 21-23.
11 Staff's Report at p. 22.
12 Staff's Report at pp. 21-23
13 OAR 860-089-0400(2)(b).

negative, as PGE's PPA term sheet proposes, there is no way to know in advance from the scorecard how such a revision will be penalized. There is even less transparency as to how those same to issues would be scored for a utility-ownership bid, especially given that those two commercial terms have no apparent relevance to any of the utility-ownership term sheets. The same is true for most, if not all, of the other categories on the scorecard, including the unreasonable PPA and SCA terms that NIPPC discussed in its November 1st comments. Nobody could self-score such non-price criteria based on the information supplied by PGE.

If this issue is not corrected by the Commission, it will result in a scoring penalty only for the PPA/SCA bids for most of the scoring elements within 21.2 percent of the RFP's overall score. This framework is likely to significantly deter participation and likely to reduce the competitiveness of this RFP by artificially restricting both the number of bidders and the individual alternative bids submitted. The one-sided nature of this element of the RFP is particularly concerning because PGE is submitting multiple benchmark and affiliate bids, as well as other utility ownership options, that will not be held to the same contractual performance terms as PGE proposes to require of independent bidders.

Additionally, as NIPPC's prior comments pointed out, this issue is still a live issue because PGE did not supply its proposed commercial terms with its submittal of the scoring method the Commission approved, and thus the Commission reserved the right to revisit the issue after seeing such commercial terms and how edits would be scored.[14]

Indeed, at the time the Commission approved the scoring methodology, PGE had not even supplied the detailed Commercial Performance Risk scorecard, which now demonstrates

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[14] *In the Matter of Portland Gen. Elec. Co., Application for Approval of an Independent Evaluator for 2021 All-source Request for Proposals*, Docket No. UM 2166, Order No. 21-320, p. 1 (Oct. 6, 2021).

that these scoring elements are subjective, not subject to self-scoring, and will largely result in penalties only to PPA and SCA bids.[15] The entirety of the description on the non-price scorecard supplied by PGE prior to the Commission's approval of the scoring method was as follows:

Score Type	Component	Description	Total Dispatchable Points Possible	Total Renewable Resource Points Possible
Non-Price Score	Commercial Performance Risk	Points are allocated based on adherence to commercial terms and conditions that focus on performance guarantees and limitations of liability and remedies	270	270

Now that PGE has disclosed its intent to include subcategories for Commercial Performance Risk that will only result in scoring deductions for PPA and SCA bids and has thus demonstrated the RFP's bias in favor of utility ownership, the Commission should correct the problem before the RFP is issued.

As noted above, the distinction between PGE's RFP and PacifiCorp's last RFP is striking. In Docket No. UM 2059, PacifiCorp agreed to not subjectively evaluate the adherence to contract terms, and its points allocation of only five percent of the overall score was much lower for this category.[16] PacifiCorp's proposal in ongoing Docket No. UM 2193 appears to be similar to its approach in Docket No. UM 2059. PacifiCorp's approach on this subject is a much more faithful implementation of the Commission's administrative rules on this point and has not precluded PacifiCorp from effectively soliciting resources under the rules.

15 PGE's Application for Approval of Scoring and Modeling Methodology, Docket No. UM 2166, p. 31 (June 15, 2021) (containing proposed scoring matrix as "Exhibit B").

16 PacifiCorp's Reply Comments, Docket No. UM 2059, at pp. 10-11 (June 1, 2020).

In sum, the Commission should reduce the non-price scoring allocation for adherence to commercial and performance terms from 21.2 percent to 10 percent to limit the bias in PGE's RFP on this subject.

B. The Draft RFP's Term Sheets and Form Contracts for PPA and SCA Bids Contain Commercially Unreasonable Terms that Should be Revised to Prevent Bias.

As noted above, the Commission specifically stated it wished to revisit the issue of the reasonableness of PGE's proposed commercial performance terms because adherence to such terms could only be a reasonable non-price scoring element if such terms are reasonable. The Commission's reasoning holds true whether the Commission adopts PGE's 21.2-percent points allocation or NIPPC's proposal to reduce such allocation to 10 percent for this non-price category. Thus, NIPPC's Nov. 1st Comments argued revisions should be made for several of PGE's proposed commercial terms. Those included the following problems:

- PPA Availability Guarantee, which is the same form of provision previously rejected by the Commission as unreasonable in Docket No. UM 1610;
- Asymmetrical Delay Liquidated Damages for PPA and SCA bids that are excessive and higher than the amounts included in the utility-ownership term sheets;
- Asymmetrical Damages Caps that cap contractual damages only for utility-ownership bids and not PPA or SCA bids;
- Restrictive Transmission/Scheduling Requirements that will apply only to PPA bids;
- Output Guarantee and "Excess Energy" provisions that apply only to PPA bids and penalize deliveries outside of the project's P50 on a *monthly* basis;
- Negative Pricing provisions that will apply only to PPA bids to reduce payment from the contracted price bid into the RFP to a negative price whenever the market price is negative during the PPA term;
- Storage Round-Trip Efficiency provisions that are more stringent than normally used in storage contracts and will only apply to PPA and SCA bids, and not utility ownership proposals;

- Uncompensated Curtailment for 400 hours, which will only apply to PPA bids and not utility-ownership bids under which the utility is fully compensated by ratepayers during all curtailments;

- Regulatory Approval provisions that are inconsistent with Commission practice and will frustrate financing of PPA bids; and

- Credit Requirements that are duplicative, asymmetrically applied to PPA and SCA bids in higher amounts, and unreasonably high.[17]

PGE's Reply Comments generally asserted, without evidence, that its proposed commercial terms "reflect market."[18] NIPPC strongly disagrees. Additionally, PGE did not discuss in any detail why the onerous provisions discussed above are necessary for the term sheets with respect to the PPA Availability, Output Guarantee and "Excess Energy", Negative Pricing, Storage Round-Trip Efficiency, Uncompensated Curtailment, or Regulatory Approvals.[19] Further, the risk of significant scoring deductions associated with proposing revisions to the unreasonable commercial constraints will likely limit the options the market might bring to table in the RFP.

Largely deferring to PGE, Staff only adopted the two limited changes proposed by the IE and one relatively minor proposal NIPPC made. Those modifications were to make the delay liquidated damages and damages caps symmetrical for all contract types, and to adopt NIPPC's proposal to eliminate or clarify the confusing requirement for regulatory approvals by the Commission as a condition precedent to the PPA's effectiveness.[20]

With respect to the remaining unreasonable provisions NIPPC identified, Staff summarily rejected NIPPC's detailed comments, and it asserted the bidders can negotiate those issues, albeit

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[17] NIPPC's Comments at pp. 15-22.
[18] PGE's Nov. 10th Reply Comments at pp. 14-17.
[19] PGE's Nov. 10th Reply Comments at pp. 14-17.
[20] Staff's Report at pp. 17-21.

after suffering a scoring penalty for to doing so.[21] NIPPC strongly disagrees. The remaining commercial terms discussed in NIPPC's Nov. 1st Comments are not "reasonable."

Nothing in PGE's Reply Comments, Staff's Report, or the IE's submittals in any way demonstrates such provisions are reasonable. NIPPC recognizes that Staff had a lot of ground to cover in its Report and appreciates Staff's review, including its recommendation for three important revisions to the term sheets. But Staff's summary consideration and recommendation for the remaining contested points on the term sheets lacks justification. The Commission specifically stated that it would only agree the non-price scoring for Commercial Performance Risk could be reasonable if the forthcoming term sheets and contract forms were reasonable. The term sheets are not reasonable, as NIPPC demonstrated, and instead will result in significant scoring penalties only for PPA and SCA bids, which are the only bids to which most of these unreasonable commercial terms apply.

Therefore, the Commission should direct PGE to remove or revise the unreasonable commercial terms identified in NIPPC's Nov. 1st Comments from the term sheets to ensure bidders are not penalized for proposing substantive edits to such provisions.

C. Staff's Report Does Not Provide Adequate Protections With Respect to PGE's Proposed Affiliate Bids.

NIPPC's Nov. 1st Comments raised a number of concerns with the Draft RFP's proposed treatment of benchmark and affiliate bids. Some of these concerns were addressed by PGE and Staff's Report, but at least one major concern was not adequately resolved. Specifically, with respect to the proposal to accept bids from a PGE affiliate, NIPPC argued that because PGE's proposed affiliate was not sufficiently independent of PGE's regulated operations, the affiliate

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21 Staff's Report at pp. 20-21.

bid should be treated the same as a benchmark under the bidding rules. That would include: (1) the affiliate bids' project assets be shared; (2) the affiliate bid be scored before competitive bids; (3) that the team that works on the affiliate be identified and be restricted from the RFP team, and also not be allowed to have been on the IRP development team, and (4) contingency price adders be included in the affiliate's price score because it is not likely to be a truly arms-length PPA that PGE would strictly enforce.[22] Additionally, further transparency as to the commercial structure of the affiliate bid (e.g. PPA, or something else) is necessary to make meaningful evaluation and recommendations for the affiliate's treatment.

PGE's Reply Comments provided no further clarity on the structure of its affiliate or its independence of the regulated operations of the utility.[23] In the ongoing affiliate docket, Docket No. UI 461, PGE has stated the affiliate is really being used primarily to obtain the financial value of investment tax credits that are not fully available to regulated utilities.[24] However, PGE has not put forward any serious proposal to ensure the affiliate's employees and operation are sufficiently separate from PGE's regulated monopoly operations to prevent cross subsidization and harm to the competitive wholesale market in the Commission's RFPs. Indeed, PGE has suggested in workshops in UI 461 that the affiliate will not even have its own employees, much less its own office space or computer systems. PGE's Reply Comments in this docket even confirm that PGE intends to staff the affiliate with individuals who directly worked on PGE's IRP and presumably had access to proprietary planning and modeling information in that

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[22] NIPPC's Nov. 1st Comments at pp. 32-37.

[23] PGE's Nov. 10th Reply Comments at p. 36.

[24] PGE's Application for Affiliated Interest Transaction, Docket No. UI 461, p. 2 (Sept. 10, 2021) (stating that "PGE's overall proposal is intended to address certain structural tax disadvantages encountered by utilities").

docket.[25]

Staff's Report does not adequately address this issue such that the Commission could be assured that use of the proposed affiliate in this RFP is reasonable or fair.[26] Even though Staff acknowledges that the restrictions on the affiliate have not been created yet in UI 461, "Staff is confident that an affiliate bid will be scored fairly."[27] It further contends that NIPPC's concerns and proposals are "not supported by the competitive bidding rules."[28] Staff also states that an affiliate that bids into RFPs need not have any separation from the utility's regulated operations or resource planning to protect the integrity of the bidding process under the Commission's bidding rules.[29] However, Staff notes such issues may be addressed in UI 461, even though Staff recommends the Draft RFP be approved before such issues are addressed.[30]

NIPPC disagrees with Staff's recommendation to approve the Draft RFP and its treatment of PGE's affiliate bids before Staff or the Commission even know the relevant details regarding the proposed affiliate. PGE bears the burden of demonstrating this RFP will be fair with the affiliate, and PGE has failed to meet that burden in this docket. While Staff is correct that the competitive bidding rules do not addresses this issue in great detail, that hardly resolves the question. The rules still require a "fair, objective, and transparent bidding process" for the benefit of ratepayers.[31] Additionally, the Commission "may approve the RFP with *any conditions it deems necessary*, upon a finding that the electric company has complied with the provisions of

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[25] PGE's Nov. 10th Reply Comments at p. 36.
[26] Staff's Report at pp. 28-30.
[27] Staff's Report at p. 29.
[28] Staff's Report at p. 29.
[29] Staff's Report at p. 30.
[30] Staff's Report at p. 29.
[31] OAR 860-089-0010(1).

these rules *and that the RFP will result in a fair and competitive bidding process*."[32] Thus, the lack of a specific proscription of all affiliates in the rules does not preclude the Commission from rejecting PGE's novel and vague proposal to use an affiliate here.

In any event, the bidding rules do in fact support the need for basic separation between the affiliate and the utility's regulated monopoly operations. The rules describe affiliate bids as distinct from benchmarks and refer to them as "*[s]eparate* electric company affiliate bids[,]" confirming the Commission expected such an affiliate to be a truly "separate" entity from the utility and subject to the same competitive pressures as IPPs.[33] Nothing in the rules suggests that the Commission expected the utility's affiliate would consist of the same utility employees that developed the IRP, including its proprietary modeling, and who are working in the same office and sharing the same computer systems and databases of the utility that solicits the RFP.

Indeed, separation between the regulated utility operations and the affiliate engaged in the competitive market is a fundamental element of regulation of utility-affiliate transactions. No Oregon utility has bid an affiliate into an Oregon RFP in the modern era, and therefore it is not surprising that parties did not propose more details in the Commission's administrative rules in Division 89. However, ample precedent establishes that protection of competitive markets and a utility's captive customers necessitates that a regulated utility must be sufficiently separated from any affiliate engaged in the regulated market.

For example, operational separation is a fundamental principle in the Federal Energy Regulatory Commission's ("FERC") market-based rate rules for wholesale power sales in FERC-regulated competitive markets. FERC has explained: "Under the separation of functions

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32 OAR 860-089-0250(5) (emphasis added).

33 OAR 860-089-0300(3)(b) (emphasis added); *see also* Docket No. AR 600, Order No. 18-324 at 11 (Aug. 30, 2018) (discussing "*separate* utility affiliates" (emphasis added)).

requirement in the market-based rate affiliate restrictions, employees of market-regulated power sales affiliates must operate separately, to the maximum extent practical, from employees of affiliated franchised utilities with captive customers."[34] FERC's rules "are intended to guard against the potential for a franchised public utility with captive customers to interact with a market-regulated power sales affiliate in ways that transfer benefits to the affiliate and its stockholders to the detriment of the captive customers."[35] Although some exceptions exist to allow limited sharing of employees, "franchised public utilities with captive customers are prohibited from sharing employees that engage in resource planning or fuel procurement with their market-regulated power sales affiliates."[36] Such restriction is necessary because "[i]f the franchised public utility and its market-regulated power sales affiliate are permitted to share employees that make strategic decisions about future generation supply, such as deciding when and/or where to build or acquire generating capacity, such strategic decision-making by a shared employee could result in generation being built or acquired for the benefit of the market-regulated power sales affiliate, and at the expense of the captive customers of the franchised public utility."[37] The reason for such restriction is obvious: "the corporate entity has an inherent incentive to decrease its market-regulated power sales affiliate's costs in order to maximize profits for shareholders."[38]

Similarly, the California Public Utilities Commission ("CPUC") has long required that utility affiliates engaged in the energy market not share offices, computer systems, or employees

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34 *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity, Ancillary Serv. By Public Utilities*, 131 FERC ¶ 61,021, 61,151 (April 15, 2010) (citing 18 CFR § 35.39).
35 *Id.* at 61,157.
36 *Id.* at 61,159.
37 *Id.*
38 *Id.*

with the regulated utility. The CPUC's affiliate rules adopted in the late 1990s have special provisions for certain transactions where the affiliate is providing gas or electric services, including marketing power or providing power plant or construction services.[39] The CPUC "recognized that the development of competitive markets would be undermined if the utility were able to leverage its market power into the related markets in which their affiliates compete[,]" and "[r]ules focusing primarily on corporate separation and cost accounting may not be adequate to overcome the incumbent's advantage."[40] Importantly, "rules that rely more on separation, and less on cost accounting solely, can minimize the likelihood of abuses" and are "easier to monitor than rules that primarily rely on reporting requirements."[41] The CPUC also noted that the "consumer interests we seek to protect go hand in hand with promoting competition."[42] With limited exceptions, the rules generally required affiliates to use different facilities, office equipment, and employees.[43]

Thus, the Commission should not allow PGE to submit bids from an affiliate into this RFP without first assuring the affiliate is sufficiently separate from PGE's regulated operations. If the PGE can just label a bid an "affiliate" bid without regard to the level of independence of it from the regulated operations, a new and unexpected loophole will exist in the bidding rules. PGE's Draft RFP suggests the affiliate would be bid as an "PPA" bid.[44] However, without

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39 *Order Instituting Rulemaking to Establish Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates*, CPUC Rulemaking 97-04-011, Decision 97-12-088, at p. 7 (Dec. 16, 1997).

40 *Id.* at 10-11.

41 *Id.* at 11.

42 *Id.* at 12.

43 *Id.* at 58-68.

44 PGE's Draft RFP at 18 ("PGE will consider affiliate ownership opportunities delivered to PGE customers through a power purchase agreement."); *id.* at Appendix P, p. 1 ("PGE intends to submit one solar resource in Northeast Oregon as an Affiliate bid").

adequate separation, PGE's affiliate would have numerous advantages and present serious risk of cross-subsidization to the detriment of the ratepayers and competitive bidders. Without sufficient restrictions, PGE's affiliate could use the regulated utility's credit to back the affiliate bid and then paradoxically treat the affiliate bid the same as any other "PPA" bid with the regulated utility when there is little assurance the PPA will ever be enforced in the same way as a PPA with a truly *independent* power producer. PGE would be able to, at its sole discretion, choose when and how to enforce the PPA with itself. It is entirely unreasonable to treat such an affiliate PPA bid the same as a PPA bid submitted by independent bidders in this RFP.

Additionally, PGE's apparent proposal to use the same employees who were involved in resource procurement plans in the IRP, including its proprietary modeling PGE may also use in the RFP, runs directly counter to the principles of separation of the affiliate and gives PGE's affiliate an unfair informational advantage in the RFP.

In sum, PGE's proposal to use an affiliate in the RFP raises many unanswered questions. Because PGE has provided insufficient assurances and transparency as to its proposed affiliate bid at the time of approval of the Draft RFP, the Commission should reject the proposed use of the affiliate bid in this RFP. At a bare minimum, the affiliate should be scored with similar cost contingency adders as a utility-owned benchmark, and be scored before other bids, because it is not analogous to another IPP bid and instead presents similar risks to ratepayers due to its apparent lack of separation from the regulated utility function.

D. The RFP's Labor Requirement Should Be Removed or Modified.

NIPPC disagrees with Staff's recommendation that the Commission authorize PGE's imposition of labor requirements, including use of union labor and a project labor agreement

("PLA"), as a minimum bidding requirement in the Draft RFP.[45]

NIPPC members support the use of PLAs on many projects and regularly enter into them. But PGE's proposed requirement that any project in any state bidding into the RFP must use union labor and a PLA is a far more stringent standard than required by Oregon law, as amended by Section 26 of HB 2021.[46] Staff's Report appears to incorrectly assumes there are no inconsistencies between the requirements of HB 2021 and PGE's labor requirements in its RFP.[47]

HB 2021's requirements will generally require either payment of prevailing wage and use of a specified percentage of apprentices on a project, among other requirements, or the use of a PLA for facilities with capacity of at least 10 megawatts ("MW") and located in Oregon, and it includes some critical exceptions.[48]

In contrast, the PLA requirement in PGE's RFP is more expansive than HB 2021 in at least four ways. First, PGE's RFP requires a PLA even for small projects under 10 MW that the legislature exempted. Second, PGE's RFP requires a PLA for out-of-state projects exempted from HB 2021 and subjected to different labor markets and standards than Oregon. Third, PGE's RFP fails to include the flexibility that Oregon's legislature adopted in allowing project developers to meet prevailing wage and apprenticeship standards in lieu of signing a PLA. Fourth, unlike HB 2021, PGE's RFP specifies no "good faith" exception in the event of a local labor shortage affecting a given project. Taken together, these four incrementally more stringent requirements than HB 2021 will not mitigate the risk to ratepayers of price escalations and

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45 Staff's Report at pp. 26-28.
46 2021 Or Laws ch 508, § 26.
47 Staff's Report at p. 27 ("Staff has reviewed the terms proposed by PGE and none appear to conflict with HB 2021's terms . . . ."); *id.* at 28 ("it does not contradict HB 2021").
48 2021 Or Laws ch 508, § 26.

project execution challenges. Contrary to Staff's conclusion, they will result in greater risk to ratepayers.

NIPPC reiterates its recommendation that the Commission should not authorize PGE's RFP to impose more stringent requirements than HB 2021.[49]

In the alternative, if the Commission accepts Staff's recommendation to accept PGE's proposed PLA requirement, then the Commission should at least ensure that bidders have an "off-ramp" in the event that they are unable to meet the requirement in a given locality despite their best efforts. Such an off-ramp should be contingent on a bidder making a demonstration of good-faith attempts to comply with the RFP requirement. For example, HB 2021 specified such a good-faith demonstration as the provision of "documented and verifiable information" including "Internet addresses of employment advertisements or job announcements," "dates, times, Internet addresses and attendance lists of a pre-job conference," and "contacts requesting workers […] and whether a response was provided within 48 hours of the request."[50] Similarly, the Clean Energy Transformation Act in Washington specifies good faith efforts, "designed to maximize the likelihood that the project is completed with said standards," include "proactive outreach," "advertising in local community publications," and "participating in community job fairs, conferences, and trade shows."[51] A good-faith off-ramp in this RFP could draw from these examples.

Finally, NIPPC disagrees with Staff's acceptance of PGE's suggestion that a PLA "stopgap" is needed.[52] By the time successful bidders in this RFP enter into a contract with PGE,

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[49] NIPPC's Nov. 1st Comments at p. 30.
[50] 2021 Or Laws ch 508, § 26(2)(d).
[51] RCW § 18.12.962(2)(a).
[52] Staff's Report at p. 28.

the Oregon Department of Energy will have had sufficient time to finalize its specifications about how to make an attestation under HB 2021. There will be no need for a "stopgap" of any kind because this aspect of the law will be fully implemented.

E. The Nondisclosure Agreement Should Be Revised.

NIPPC's Nov. 1st Comments recommended that the Commission should require PGE to remove the $500,000 cap on liability damages and remove the two-year term limitation of the NDA.[53] The NDA provides critical protections against intentional or inadvertent misappropriation of bidder's technological or commercial information. Failure to include adequate protections in an RFP for a major generation resources during this time of rapid technological changes could easily deter certain bidders from participating in the RFP. Yet Staff summarily rejected NIPPC's recommendation without any substantive explanation of why, deferring to PGE's comment that NIPPC's proposal is "'out of market and not reasonable.'"[54]

Contrary to PGE's assertions, NIPPC objected to similar monetary cap on liability in the NDA in one of PGE's recent RFPs, in Docket No. UM 1613, and PGE itself agreed to remove the cap after Staff agreed with NIPPC.[55] In that case, PGE proposed a liability limitation of $100,000.[56] Staff's Report, approved by the Commission, explained: "Staff has not seen a limitation of liability in previous PGE or PacifiCorp resource RFP NDAs[,]" and "Staff is concerned a limitation on liability in a non-negotiable NDA may limit participation in an RFP, and is not the norm in other RFPs."[57]

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53 NIPPC's Nov. 1st Comments at pp. 27-29.
54 Staff's Report at p. 35 (quoting PGE's Nov. 10th Reply Comments at p. 31).
55 *In Re Portland Gen. Elec. Com.; Request for Proposals for Renewable Resources*, Docket No. UM 1613, Order No. 12-376, at p. 1 and App. A at pp. 6-7 (Oct. 8, 2012).
56 *Id.* at App. A at p. 6.
57 *Id.* at App. A. at p. 7.

Additionally, the most recent PacifiCorp RFP, Docket No. 2059, used a Confidentiality Agreement that contained no limitation on monetary damages of any dollar amount.[58]

Thus, PGE's liability limitation in its proposed NDA is not consistent with the "market" and is not reasonable. A limitation on damages to just $500,000 is far lower than the potential damages at issue. As NIPPC noted, the $91 million verdict against PacifiCorp, stemming from an RFP and affirmed by the Utah Supreme Court, confirms the large magnitude of potential harm in this context.[59]

Additionally, the NDA should be in effect for more than two years to provide meaningful protections. Even the Commission's general protective order remains effective for five years.[60]

In sum, the Commission should require PGE to remove the damages cap and two-year limitation from the RFP's NDA.

III. CONCLUSION

NIPPC recommends that the Commission require the revisions proposed in NIPPC's comments for PGE's Draft RFP.

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[58] PacifiCorp's 2020 All-Source RFP, Docket No. UM 2059, Appendix G-1, Confidentiality Agreement (July 7, 2020), available at https://www.pacificorp.com/suppliers/rfps/all-source-rfp/2020-all-source-rfp-docs.html.

[59] *See* NIPPC's Nov. 1st Comments at pp. 27-28 (discussing *USA Power, LLC v. PacifiCorp*, 2016 UT 20, ¶¶ 1-3 372 P3d 629, 638 (2016)).

[60] General Protective Order No. 21-161, Docket No. UM 2166, App. A at p. 4, ¶ 20 (May 21, 2021).

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Respectfully submitted,

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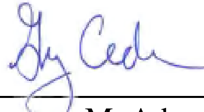

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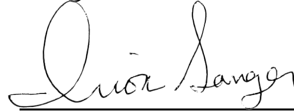

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