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

I. INTRODUCTION

The Northwest & Intermountain Power Producers Coalition ("NIPPC")[1] respectfully submits these Comments for consideration by the Oregon Public Utility Commission ("Commission") on Portland General Electric Company's ("PGE") 2021 Draft All-Source Request for Proposals ("Draft RFP"). NIPPC supports PGE moving forward with its RFP and proposes improvements to increase the number and quality of bids, and to ensure greater transparency and fairness.

There are several recommendations the Commission should require PGE to adopt before the RFP is approved. In general, the non-price scoring is strongly biased against third-party bidders offering power purchase agreement ("PPA") or storage capacity agreement ("SCA") bids in favor of utility owned bids, which can include the

[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/.

benchmarks, asset purchase agreement ("APA") bids, build transfer agreement ("BTA") bids, engineering procurement and construction ("EPC") bids, and likely the affiliate bids (which remain inadequately described). PGE's non-price scores are not subject to self-scoring as required by Commission rules, and most of the non-price elements for adherence to PGE's commercial terms (totaling 21 percent of the total score) would *only* penalize PPA and SCA bids – creating a serious structural bias in favor of utility ownership in the solicitation.

Relatedly, the Draft RFP's term sheets and form contracts contain numerous unreasonable provisions for PPA and SCA bids, including a commercially unreasonable availability guarantee, a very high delay liquidated damages penalty imposed only on PPA and SCA bidders, no damages cap for PPA and SCA bids comparable to that provided for EPC/APA bids, expansive uncompensated curtailment, revocation of fixed-prices during any negative market pricing event, a jury trial waiver, and more. Additionally, the non-price score for element of level capacity ratio is not subject to self-scoring as the Commission previously directed.

NIPPC has two recommendations regarding the scoring for PPA bids and the draft term sheets and contracts. First, the Commission should revisit the high percentage of the scoring attributable to adherence to the term and contract forms, and reduce the non-pricing element related to adherence to the forms to ten percent. Second, the Commission should adopt all of NIPPC's recommended changes to the term sheets and form contracts, which only address the most unreasonable provisions.

Next, NIPPC also has concerns with certain minimum bid requirements, such as the permitting requirements and the liability cap, two-year term length in the nondisclosure agreement, and the Project Labor Agreement requirement.

Additionally, the Draft RFP should be improved with respect to transparency and fair treatment of PGE's proposed affiliate bid. NIPPC recommends the affiliate in this RFP be treated the as a benchmark bid –, if the affiliate bid is allowed at all, subject to all the same requirements and rules as benchmark bids – because the proposed affiliate here is not sufficiently independent from PGE to warrant any other treatment.

Finally, NIPPC makes miscellaneous recommendations related to the Draft RFP's interconnection study requirements and the timeline to provide updated pricing.

NIPPC recommends that the Commission address each of these concerns and require PGE to update its RFP in accordance with NIPPC's recommendations.

II. Comments on PGE's Draft RFP

A. Non-Price Scoring: PGE's Draft RFP Is Strongly Biased Against PPA and SCA Bids and Should Therefore Be Revised

The non-price scoring proposal in PGE's RFP, and the related requirements of the RFP's term sheets describing the form contracts, are strongly biased in favor of utility ownership bids. Although the Commission approved the scoring methodology for PGE's RFP, such approval was conditioned on PGE correcting several elements of PGE's initially proposed scoring methodology.[2] Additionally, with respect to PGE's proposed

[2] *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, 1 & Appendix A at 1 (Oct. 6, 2021) (approving PGE's scoring methodology "with the modifications outlined in [Staff's] memo").

"scoring associated with adherence to PGE's Power Purchase Agreement," the Commission itself stated in its Order No. 21-320 that the scoring method "may be reasonable if the overall terms of the contract are reasonable," but since PGE had not provided such terms and conditions previously, "Staff and stakeholders will review the proposed contract during the subsequent RFP docket."[3] Thus, the non-price scoring method – which PGE proposes to be heavily weighted towards a bidder's adherence with PGE's proposed commercial terms – is an open issue for evaluation now that PGE has supplied the full picture of its proposal with the draft RFP. As explained below, NIPPC strongly objects to the current proposal in the draft RFP because it results in significant structural bias against PPA and SCA bids in the proposed RFP. NIPPC therefore recommends that PGE, and if necessary, the Commission, make appropriate revisions to the biases and flaws identified herein.

1. The Commission's Rules Require the Non-Price Scoring Criteria to be Objective and Subject to Self-Scoring by Bidders.

At the outset, the Commission's administrative rules impose very clear restrictions on non-price score criteria that must be applied here.

Most significantly, all non-price scoring criteria must be subject to self-scoring by the bidders. The rules state: "Non-price scoring criteria must be objective and reasonably subject to self-scoring analysis by bidders."[4] The rules also provide that the scoring may "be based on conformance to standard form contracts."[5] However, the overall requirement of objective criteria that can be self-scored also applies to any criteria that

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[3] UM 2166, Order No. 21-320 at 1.
[4] OAR 860-089-0400(2)(b).
[5] OAR 860-089-0400(2)(b).

are based on conformance to standard form contracts.[6] Notably, in the rulemaking where this rule was adopted, PGE and the other utilities advocated for removal of the requirement in Staff's proposed rules that non-price scoring criteria be subject to self-scoring by bidders, but the Commission rejected the utilities' argument and adopted the requirement for objective self-scoring.[7] The Commission explained: "Staff's language allows utilities two options when reviewing non-price attributes: convert the attribute into a characteristic that can be objectively scored, or make the attribute a minimum threshold."[8]

PGE misreads these requirements, and its misreading has resulted in a biased RFP proposal. PGE asserts: "As is permitted under OAR 860-089-0400(2)(b), PGE's non-price scoring is largely based on conformance to proposed standard form contracts and term sheets. *Additional non-price scoring criteria must be objective and reasonably subject to self-scoring by bidders*."[9] Thus, PGE appears to believe that the rules allow for subjective non-price criteria in the case of conformance to standard contract form and term sheets and that the requirement for objective criteria applies only to non-price criteria other than adherence to the contract forms and term sheets.

But that is wrong. The rules plainly state "[n]on-price scoring criteria must be objective and reasonably subject to self-scoring analysis by bidders."[10] There is no

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6 OAR 860-089-0400(2)(b).

7 *In the Matter of Rulemaking Regarding Allowances for Diverse Ownership of Renewable Energy Resources*, Docket No. AR 600, Order No. 18-324 at 12-13 (Aug. 30, 2018).

8 Docket No. AR 600, Order No. 18-324 at 12-13.

9 PGE's Draft RFP at Appendix N, p. 9 (emphasis added).

10 OAR 860-089-0400(2)(b).

exception to that requirement in the rules. And the rules require objective criteria that are subject to self-scoring for good reason because subjective evaluation criteria are an area where a utility can easily bias the results of an RFP towards its preferred result. If the evaluation of adherence to the contract forms and term sheets were an exception to the requirement for objective scoring subject to self-scoring, that exception could easily swallow the rule – which, as explained below, is exactly what would happen with PGE's Draft RFP where PGE's subjective evaluation of a bidder's conformance to the contract term sheets is allocated most of the non-price scoring criteria and 21.2 percent of the total RFP score.

2. The Current Draft RFP's Non-Price Score Criteria for Conformance to PGE's Proposed Commercial Terms Are Not Objective or Subject to Self-Scoring by Bidders.

An overarching concern NIPPC raised in the last round of comments on the scoring methodology was the lack of transparency in PGE's non-price scoring method due to the generalized and non-descriptive non-price scorecard PGE previously provided. NIPPC pointed to the detailed scorecard PacifiCorp developed in response to similar objections in its most recently approved RFP in UM 2059. Staff agreed with NIPPC and stated in its memo: "Staff encourages PGE to consider the example NIPPC provided of PAC's nonprice scoring matrix from the RFP in Docket No. UM 2059 to further support presentation of the non-price scoring moving forward."[11]

[11] *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, Appendix A at 26.

While the non-price scoring matrix PGE has now supplied in the Draft RFP helps better understand PGE's proposal, it demonstrates several flaws and significant bias against PPA and SCA bids in PGE's RFP design.[12] The non-price scoring matrix demonstrates that PGE's evaluation criteria for non-price scoring are, in many cases, highly subjective and not subject to self-scoring by the bidders as the Commission's administrative rules require. The "Commercial Performance Risk Non-Price Scoring Matrix" – which is allocated 212 non-price points or 21.2 percent of the overall RFP score – is particularly problematic and demonstrates that, under PGE's proposal, PPA and SCA bids would be penalized for criteria for which no EPC, APA, and benchmark bids could possibly be penalized. In addition to detailed comments below on this subject, NIPPC has also attached hereto a table displaying PGE's "Commercial Performance Risk Non-Price Scoring Matrix" with an additional column containing a summary of NIPPC's concerns and recommendation with each element of that matrix.

As NIPPC previously commented, PGE describes this non-price scoring category as "Commercial Performance Risk," but it is in fact nothing more than the bidder's willingness to agree to PGE's form contract provisions as summarized in the term sheets of the RFP for each bid type. To receive full or most available points in this area, the RFP basically requires the bidder to agree that it would sign a contract containing the commercial terms summarized in the applicable term sheet and contained in more detail in the applicable form contract (e.g., Renewable PPA, Renewable PPA plus Storage, SCA, EPA, or APA) and gives PGE subjective discretion to penalize a bidder for any

[12] PGE's Draft RFP at Appendix N, Exs. B & C.

alternative proposals. Thus, while PGE does not require and score a redline to the entire form contract, it will penalize any bidder that does not commit to the major key provisions listed in the applicable term sheet.[13]

As NIPPC stated in its prior comments, this proposal is structurally biased against PPA bids because PPA bids necessarily include ongoing performance assurances not included in the utility-ownership bids. PPA bids will have two bad choices. First, they can mark up the forms, and risk being disqualified because of the non-price score penalty. Or, second, they can agree to PGE's unreasonable contract forms, which will drive up the bid price. In other words, by imposing contract forms that increase a developer's cost and risk in unreasonable ways, PGE requires those bidders to offer higher prices. This has the practical impact to artificially making utility owned options look more economic, and, if a PPA option is able to overcome these obstacles and win the RFP, then it will unnecessarily increase costs for ratepayers.

PGE's scorecard demonstrates that PGE will need to engage in a subjective evaluation of the edits to the term sheets that bidders supply to evaluate the bidder's "adherence" with the contract provisions as well as the degree of non-adherence and appropriate penalty for such non-adherence. That is an inherently subjective exercise. Even assuming PGE's proposed contract provisions described in the term sheets are reasonable (which as discussed below is not the case), this structure for the RFP violates the requirement of objective evaluation criteria.

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[13] Draft RFP at 19 (stating, "Should proposed revisions to highlighted terms and conditions increase PGE's exposure to risks related to project schedule, performance or cost then PGE will adjust the bid's non-price score consistent with Appendix N.").

To illustrate, each of the categories on the non-price scorecard evaluating adherence to PGE's commercial terms include highly subjective evaluation. The categories of commercial terms, each allocated 35 points, include Forecasting and Scheduling, Credit and Security, PPA/SCA or Utility Owned Output Asset Guarantee, Commercial Online Date Provisions, Payment and Settlement Provisions, Product Definition and Other Limitations. For each category, the scorecard states that a bidder will receive 35 points if the bidder's mark-up of the applicable term sheet for its bid demonstrates the "Term sheet redlines and related commercial circumstances better protect PGE customers from schedule, performance or cost risk than form term sheet provisions."[][14] That is a highly subjective evaluation that cannot be easily self-scored by bidders. Indeed, each of the remaining descriptions for lower scores are identical for each category and entail highly subjective evaluation. The identical descriptions of the points allocation for each of the scorecard's non-price categories for commercial risk associated with deviations from PGE's term sheets are as follows:

> 35 = Term sheet redlines and related commercial circumstances better protect PGE customers from schedule, performance or cost risk than form term sheet provisions
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> 28 = Term sheet redlines and related commercial documents generally conform to form term sheet and present modest risk to schedule, performance or cost.
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> 21 = Term sheet redlines and related commercial documents present isolated significant risks to schedule, performance or cost. Risk is reasonably bound by commercial term or circumstance.

[14] Draft RFP, Appendix N at p. 21 (Forecasting and Scheduling terms); *id.* at 21 (Credit and Security terms); *id.* at 22 (PPA and SCA Output Guarantee terms); *id.* at 23 (Utility Owned Asset Output Guarantee terms); *id* at 24 (Commercial Online Date Provisions); *id.* at 24 (Payment and Settlement Provisions); *id.* at 25 (Product Definition and Other Limitations).

14 = Term sheet redlines and related commercial documents present isolated significant risks to schedule, performance or cost. Risk is not reasonably bound by commercial term or circumstance.

7 = Term sheet redlines and related commercial documents present compounded and significant risks to schedule performance or cost. Risk is not reasonably bound by commercial term or circumstance.

0 = Term sheet redlines and related commercial documents present unacceptable and unmitigated risks to schedule performance or cost.

0 = Bidder does not provide any redlines, declines to negotiate definitive agreement consistent with redlined or unedited term sheet, and/or defers all commercial considerations to negotiation phase.[15]

Under these criteria on the scorecard, there is no way to self-score anything other than a bid that makes no revisions to the term sheet and simply accepts all of PGE's proposals. For example, if a wind PPA bidder makes any edits to PGE's 97-percent availability guarantee (which, as discussed below, all bidders should be expected to do so given its extreme unreasonableness), there is no way to know how PGE will score a proposal to use a turbine-by-turbine guarantee instead of full-nameplate-capacity guarantee or a proposal to reduce the guarantee to 90 percent. The same is true for the other categories as well.

Additionally, allocating so many points to adherence with the form contract provisions set forth in PGE's term sheet inherently biases the RFP against the PPA and SCA bidders because the PPA and SCA form contracts and term sheets contain ongoing contractual requirements that are not included in the EPC and APA agreements. In addition to bidding a structure where payment is only made for delivered energy and capacity, the PPA and SCA term sheets includes contractual commitments and liquidated

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[15] Draft RFP, Appendix N at pp. 21-26.

damages penalties for non-performance applicable after operation of the facility and throughout the 15-year to 30-year term of the PPA or SCA, such as an output and availability guarantees, reduced payment for excess energy, uncompensated curtailment, and others (discussed further below). Such guarantees provide liquidated damages payments to PGE in the case where the resource does not perform as agreed and are thus over and above the typical guarantees that the project will achieve commercial operation by a scheduled commercial operate date.

Similarly, the commercial performance score card allocates 35 points each to "Forecasting & Scheduling" provisions and "Payment and Scheduling Provisions" that will largely only apply to PPA and SCA bids.[16] It also includes "Credit Requirements" that will only apply before commercial operation to BTA, EPC, and APA bids, and commercial online date provisions that are less stringent for the EPC, BTA, and APA bids.[17] NIPPC has supplied a mark-up of the non-price scorecard for the commercial risk factors with these comments to illustrate where the scorecard is obviously evaluating compliance with contractual provisions that apply only to the PPA and SCA bids.

In contrast, the EPC contract and term sheet requires almost *no* ongoing contractual commitments after initial operation. The EPC form contract and term sheet includes a commercial operation guarantee,[18] but after that point, the operational performance and risk of underperformance would be up to PGE. While PGE suggests in the scorecard that EPC bids will provide some contractual assurances after operation

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[16] Draft RFP at Appendix N, pp. 21-26.
[17] Draft RFP at Appendix N, pp. 21-26.
[18] Draft RFP at Appendix D, p. 6.

through a Long-Term Service Agreement ("LTSA"),[19] the RFP only requires EPC bids to be supported by an LTSA of five years in length and provides no LTSA form contract with pre-identified provisions against which a bid could be scored and against which stakeholders can comment at this time to fully evaluate the LTSA's comparability to the PPA and SCA contract forms and terms.[20] Similarly, while the RFP states PGE will accept BTA bids,[21] the Draft RFP contains no term sheet or form contract for such bids. Thus, the Draft RFP is not even complete on this point, even if this structure were acceptable.

In the APA, the situation is even worse because the APA is merely a transfer of development assets without any real performance guarantees or even a commercial operation guarantee.[22] Instead, PGE (and its ratepayers) would be the party taking on the risk of project failure both before and after commercial operation with an APA, and there is no ongoing performance guarantee for the 30-year life of the resource.

Thus, as discussed in more detail below, the PPA and SCA term sheets contain provisions on material points that are not applicable to the EPC, APA, or benchmark bids and thus subject the PPA and SCA bidders to points deductions that could not apply to the utility-ownership bids. Given that the PPA and SCA bidders will provide additional protections through such contractual commitments, the PPA and SCA bidders should be *credited* in the non-price scoring or through contingency pricing adders to the forecasted revenue requirement for the utility-ownership structures in the price score. Alternatively,

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19 Draft RFP at Appendix N, p. 23.
20 Draft RFP at Appendix N, pp. 8, 18.
21 Draft RFP at 19.
22 Draft RFP at Appendix H (APA Form Contract).

the non-price scorecard could be reconfigured such that the PPA and SCA bids are the only bids that can receive any points for categories with contractual commitments not included in the utility-ownership bids, and the utility-ownership bids would receive a maximum score of zero for such categories. Instead, PGE appears to have proposed an RFP that will *penalize* PPA and SCA bids for making edits to performance guarantees and contractual commitments that do not apply whatsoever to utility ownership bids or bids PGE would own.

As NIPPC previously commented, the contrast between PGE's proposal in this RFP and the final approved RFP issued by PacifiCorp in 2020 in Docket No. UM 2059 is striking. There, the Commission and the Independent Evaluator ("IE") specifically agreed with NIPPC's concerns regarding the potential for bias due to the extra performance guarantees supplied with a PPA as opposed to the utility-ownership bids.[23] The Commission's concern in PacifiCorp's UM 2059 RFP is particularly significant because in that RFP the adherence with the pro forma PPA or EPC provisions was only allocated five percent of the overall scoring weight.[24] And, partly in response to comments from NIPPC, the final non-price score card's line item for "Contract Progression and Viability" made clear that PacifiCorp's points allocation would not allow subjective analysis of the bidder's proposed redline to the commercial terms proposed by

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23 *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 6 (July 16, 2020).

24 *PacifiCorp Application for Approval of 2020 All-Source Request for Proposal*, Docket No. UM 2059, PacifiCorp Reply Comments at 29 (June 1, 2020) (attached to PacifiCorp's Reply Comments).

PacifiCorp, but rather was limited to an objective analysis of whether the bidder provided any mark-up of the documents at all.[25]

Even with those limitations, the Commission remained concerned about the bias of PacifiCorp's RFP against PPA bids and committed to continue evaluating the issue with respect to how the bids were scored at the shortlist selection stage, stating: "Two of the issues, terminal value and performance guarantees, may cause utility bias in bid evaluations due to differences between bids proposing a build-transfer agreement (BTA) and a power purchase agreement (PPA). . . . If we find the BTA and PPA differences persist throughout this RFP, we will further consider potential ratepayer risk mitigation solutions when reviewing the shortlist."[26]

In sum, PGE's proposal to allocate 21.2 percent of the score adherence to PGE's term sheets based on subjective scoring criteria should be rejected as unreasonable and likely to result in bias against PPA and SCA bids unless it is made clear in the RFP that utility-owned bids will receive necessary contingency price adders for each of these categories or will receive a non-price score of zero for such categories. The Commission should reduce the scoring for adherence to PGE's term sheets to ten percent. PGE has not demonstrated its subjective scoring criteria comply with the Commission's administrative rules and has not demonstrated its RFP is compliant with the directive in the Commission's prior order in this docket.

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25 Docket No. UM 2059, PacifiCorp's Reply Comments at 11 & Appendix L.
26 Docket No. UM 2059, Order No. 20-228, at 5-6 (July 16, 2020).

3. 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.

Aside from NIPPC's position that the non-price scoring matrix should be revised to eliminate penalties for PGE's subjective evaluation of compliance with commercial terms, the Draft RFP should also be revised to remove commercially unreasonable terms from the term sheets and form contracts for the PPA and SCA bids. Although the compressed schedule of review has precluded a more thorough critique of the provisions, NIPPC offers the following recommendations for the commercial provisions in the term sheet and form contracts.

PPA Availability Guarantee – The PPA term sheets and form contracts contain a commercially unreasonable availability guarantee.[27]

First, the availability guarantee requires 97 percent mechanical availability, which is defined as hours where "the Facility is potentially capable of producing power at Nameplate Capacity regardless of actual weather conditions or season, without any mechanical operating constraint or restriction . . . ."[28] The problem with this provision is maintenance on a wind facility is typically performed on only part of the facility at a time, e.g. turbine-by-turbine, and thus a commercially reasonable availability guarantee measures available hours on a turbine-by-turbine basis. This is the same problem PGE's Schedule 201 PPA initially had before the OPUC ordered PGE to correct it in Docket No. 1610 after the issue was fully litigated.[29]

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27 Draft RFP at Appendix A, p. 12 (Renewable PPA Form Term Sheet); Draft RFP at Appendix C, p. 10 (Renewable Storage PPA Form Term Sheet).

28 Draft RFP at Appendix A, pp. 12-13.

29 Docket No. UM 1610, Order No. 14-058 at 30.

Second, a 97-percent availability requirement is unreasonably high. By comparison, PacifiCorp revised its availability guarantee after objection in the UM 1845 RFP to a 93-percent requirement, which was measured turbine-by-turbine.[30]

Notably, nothing in the RFP requires the utility-ownership bids to contain anything close to this availability guarantee with liquidated damages payments for the full operation term even if revised as NIPPC recommends.

Delay Liquidated Damages – The PPA and SCA term sheets and form contracts have very high delay damages penalties that are not contained in the EPC terms sheet, even though the EPC/BTA bidder must also ensure it brings the facility online timely. There is no apparent basis for the lenient provisions in the EPC contract.[31] Therefore, the excessive delay liquidated damages provisions on the PPA and SCA term sheet and contract forms should be deleted and the issue of damages left to be determined based on actual damages at the time of a default, as appears to be the proposal for the EPC/BTA bids. The IE also identified this issue, explaining: "One item that does look out of line is the liquidated damages for commercial operating delay for the storage resource PPA. PGE proposes damages that range from $150 to $350 a MW. For all other agreements these damages range from $100 to $300 per MW. PGE provides no reason these numbers should differ. We would suggest making them match the other agreements."[32] In fact, however, the EPC term sheet contains no delay liquidated damages at all.[33]

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[30] Docket No. UM 1845, Order No. 17-345 at 3.

[31] Draft RFP at Appendix A, p. 4; Draft RFP at Appendix B, pp. 3-4; Draft RFP at Appendix D.

[32] Draft Independent Evaluator Report at 8-9 (Oct. 20, 2021).

[33] Draft RFP at Appendix D.

Damages Cap – As the IE Report notes, "the APA and EPC form has some limits on liability, generally about 100% of the purchase price with some exceptions[,]" yet the PPA and SCA forms contain no such damages caps.[34] NIPPC agrees with the IE that the damages cap included for utility-ownership bids "is likely something that bidders offering a PPA would also be interested in as this is usually a component of the transaction."[35] Yet again, this is an area where the Draft RFP imposes more onerous requirements on the PPA and SCA bidders.

Transmission/Scheduling – The Draft RFP's term sheet and form contract for the PPA bids includes a proscription against pseudo ties and appears to even bar any intrahour scheduling in the contract form.[36] Those restrictions could significantly increase costs for the PPA bids and will not be imposed on utility-owned bids, providing utility-owned bids another advantage. The term sheet and contract forms should allow comparable use of available scheduling options without penalty and should not unreasonably constraining only the PPA and SCA bids.

Output Guarantee and "Excess Energy" – The PPA term sheets and form contracts contain an onerous output guarantee. The output guarantee first requires a guarantee that the facility will not deliver less than 90 percent of its "Annual Expected Output", which is defined in the form contract as "generation profile associated with a

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34 Independent Evaluator Report at 8-9; *see also* Draft RFP at Appendix D, p. 7.

35 Independent Evaluator Report at 8-9.

36 Draft RFP at Appendix A, p. 11 (Renewable PPA Form Term Sheet); Draft RFP at Appendix C, p. 12 (Storage PPA Form Term Sheet); *see also id.* at Appendix E, pp. 35-36 (§ 3.8.4).

50% probability exceedance" (referred to as P50 forecast).[37] Although not entirely clear from the documents, it appears there would be liquidated damages for failure to deliver within 90-percent of the P50 forecast in any given year with more significant shortfalls (less than 50 P50 for solar and 75 percent for wind) in consecutive years triggering a potential termination.[38]

However, a second element of the output guarantee unreasonably penalizes the seller for *exceeding* the P50 threshold with reduced payments at the lesser of 93 percent of the market price or 75 percent of the contract price for any energy delivered monthly in excess of the an amount roughly equivalent to the P50 threshold in any given month (referred to as "Excess Energy").[39] This provision regarding reduced payment for any energy exceeding the monthly P50 threshold is entirely unreasonable and convoluted. It means that in half of the months of contract the seller is likely not going to be paid the full contract price for all of its output. This punitive and unreasonable provision does not apply to any utility-ownership bid and should be deleted to prevent bias and confusion in the RFP.

Negative Pricing – The PPA term sheet and contract form also has a confusing provision that appears to state PGE will not pay the preestablished contract price bid into the RFP whenever the market prices happen to be negative, and it will instead pay (or

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[37] Draft RFP at Appendix A, p. 12; Draft RFP at Appendix E, p. 12 (definition of "Expected Output"); *id.* at p. 13 (definition of "Guaranteed Output Threshold"); *id.* at 40 (§ 5.1.8).

[38] Draft RFP at Appendix A, p. 12.

[39] Draft RFP at Appendix A, p. 14 ("Excess Energy" term); *see also* Draft RFP at Appendix E, p. 12 (definitions of "Excess Energy" and "Expected Output"); *id.* at p. 13 (definition of "Guaranteed Output Threshold"); *id.* at 24 (§ 2.3.2).

rather make the seller pay) 107 percent of the negative market price.[40] NIPPC objects to this aspect of the term sheet and contract form because it biases the solicitation against PPA bidders. A utility-owned project is still paid for by ratepayers even when the market price is negative, including depreciation, return on rate base, and operation and maintenance costs. Additionally, this unpredictable negative pricing risk will make financing of PPA facilities challenging because it is not currently known how often the market will have negative prices over the next 30 years. The intent and purpose of this provision is unexplained in the RFP documents. It should be removed.

Storage Round-Trip Efficiency – The storage term sheets and contract forms include a requirement for "Round Trip Efficiency" that is unreasonably high.[41] Round Trip Efficiency is essentially a measure of the percentage of energy lost in the storage process, which represents the percentage of energy discharged as compared to the energy injected to the storage facility.[42] The SCA and Renewable PPA term sheets require a Guaranteed Round-Trip Efficiency of 90 percent in the first contract year, which is presumably expected to escalate after the first contract year.[43] However, the industry norm for Round-Trip Efficiency is only 85 percent, and therefore the baseline expectation should be lowered to 85 percent on the term sheet.

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40 Draft RFP at Appendix A, p. 15; Draft RFP at Appendix E, p. 24 (§ 2.3.3(c)).
41 Draft RFP at Appendix C, p. 12; Draft RFP at Appendix B, pp. 5-6.
42 Draft RFP at Appendix F, p. 10 ("'Round-Trip Efficiency' means the ratio, expressed as a percentage, of Discharging Energy output from the Storage Facility to Charging Energy input into the Storage Facility").
43 Draft RFP at Appendix C, p. 12; Draft RFP at Appendix B, pp. 5-6..

Additionally, it bears noting again that the utility-owned bids are not required to include any protections like the round-trip efficiency guarantee for the full term of an SCA, even with NIPPC's recommended edit.

Uncompensated Curtailment – The PPA term sheet and contract form contains a requirement that the bidder agree to 400 hours (or 4.5 percent) of the hours per year of *uncompensated* curtailment by PGE in the PPA.[44] Because the PPA seller would only be paid for delivered power and not provided a flat capacity payment, the ratepayers would pay nothing for the curtailment right, and the PPA bidders would need to increase their bid price for a volumetric contract price based on the assumption they will be subject to this extensive uncompensated curtailment. In contrast, ratepayers will pay PGE for each hour of curtailment for whatever reason with at utility-owned EPC/APA or benchmark bid because the resource remains in rate base and its operating and maintenance expense remains in base rates without any adjustment to account for such curtailments. The uncompensated curtailment provision should be removed because it is unreasonable and biases the RFP against PPA bids.

Regulatory Approvals – The PPA term sheet requires OPUC "approval" satisfactory in PGE's sole discretion as a condition precedent to the PPA's effectiveness.[45] This provision should not be included in the PPA because the OPUC does not approve PPAs entered into after an RFP. Including such a provision in the PPA will frustrate financing and delay the winning bidder's ability to bring the facility online.

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[44] Draft RFP at Appendix A, pp. 14-15.
[45] Draft RFP at Appendix A, p. 1.6

Of course, the transaction is contingent upon satisfactory results in the RFP, but if PGE is not satisfied with the result of the RFP it has no obligation to enter into a PPA.

Credit Requirements – The Draft RFP's Credit Requirements require further revision to prevent bias. This element accounts for 35 points in the scoring.[46]

First, the Draft RFP has very high performance assurance amounts. The credit requirements for the standard form contracts are $200/kw-pre COD and $100/kW thereafter for PPAs.[47] These amounts are excessive, and NIPPC recommends at least reducing them by at least half.

Second, the performance assurance levels are not comparably applied across resource types. The EPC/APA term sheet requires only $100/kW for pre-operational performance assurance for EPC bids.[48] The Draft RFP's Appendix K describes the Credit Requirements and additionally states: "The pre-COD performance assurance for EPC (or similar) will also include a payment and performance bond in a penal sum up to 100% of the contract price."[49] But that additional requirement for a performance bond is not included on the EPC/APA term sheet and thus apparently not subject to scoring penalty if the EPC bidder declines to offer it.

In any event, there is no reason provided for why the harm would be greater in the case of a delay default with a PPA as opposed to utility ownership. Indeed, given that the utility may own the underlying site and could not just terminate the contract and walk away from a project with an EPC structure, it would appear the utility's damages

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[46] Draft RFP at Appendix N, pp. 21-22.
[47] Draft RFP at Appendix A, p. 16.
[48] Draft RFP at Appendix D, p. 2.
[49] Draft RFP at Appendix K.

exposure could be even higher with an EPC. Additionally, PGE does not explain why it will not accept a bond as a form of security for PPA bids, which should be allowed if it is allowed for utility-ownership bids. In sum, NIPPC recommends that the security levels should be revised to be reasonably comparable for the pre-operational period.

Third, the contract forms and Appendix K appear to require the seller to post the liquid performance assurance even if the seller meets PGE's creditworthiness criteria or provides a parental guarantee.[50] The IE also noted this duplicative security requirement as a problem, explaining that the RFP appears to require bidders to use a parental guarantee *and* a letter of credit when bidders should have the option to provide just one or the other form of security.[51] NIPPC agrees that the Draft RFP does appear require *both* a liquid form of security (letter of credit or bond) *and* a parental guarantee, which is duplicative and makes no sense.[52] It should be an either/or requirement, not both.

Waiver of Jury Trials – Although not included in the term sheets, the RFP's contract forms contain jury trial waivers that bidders should be allowed to strike without penalty should they proceed to negotiations with PGE.[53] If a bidder wishes a jury trial waiver, then they can request such a contract provision, but a bidder should not be penalized for refusing to agree to such a provision.

50 *E.g.* Draft RFP at Appendix E, pp. 47-48 (Article 9).
51 Independent Evaluator Report at pp. 7-8.
52 Draft RFP at p. 14 and Appendix K.
53 Draft RFP at Appendix E (Renewable PPA Form Agreement), p. 59; Draft RFP at Appendix F (Storage Capacity Form Agreement), p. 44; Draft RFP at Appendix H (APA Form Agreement), p. 45; Draft RFP at Appendix I (EPC Form Agreement), p. 69; Draft RFP at Appendix J (Form Parent Guarantee), p. 8.

There is a constitutional right to a jury trial in the United States, and bidders should not have to waive that right to sell power to PGE. An Oregon IE concurred with NIPPC that a jury trial provision is "atypical for utility procurements."[54] Additionally, in Washington, Puget Sound Energy removed a waiver of the right to a jury trial after parties, including NIPPC, raised concerns regarding the waiver.[55] A right to a jury trial provides necessary protections for counter parties to PGE in an RFP for cutting-edge renewable and storage technologies.

As the Commission is aware (and is discussed in more detail below), a Utah jury found that PacifiCorp committed theft of trade secrets in an RFP and award substantial damages against PacifiCorp. This Utah PacifiCorp example makes clear that the right to a jury trial and all damages remedies available under the law are essential to protect the rights of the bidders and to hold a utility accountable for its potential actions. Thus, the Commission should require PGE to remove all the jury trial waivers in its Final Draft RFP's form contracts.

<u>Summary of Non-Price Scoring of Term Sheet Revisions</u>: In summary, the Commission should require revisions to the term sheets and form contracts and also adjust the subjective non-price scoring on this element of the RFP. One more example, pointed out by the IE, further supports NIPPC's position on this issue. The IE

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[54] Docket No. UM 2059, Independent Evaluator's Assessment of PacifiCorp's Final Draft 2020 AS RFP at 22 (June 10, 2020).

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

recommends that that EPC/APA bids' points for this category for "Forecasting and Scheduling" should be split between "Credit and Security" and "Utility Owned Asset Output Guarantee" categories because utility-owned bids will not be required to comply with contractual forecasting and scheduling terms.[56] However, the output guarantee in a utility-owned bid is limited to the term of the Long Term Service Agreement supporting the bid, which would not normally be as long as the full term of a PPA (e.g., 30 years), and is not required to be in PGE's EPC and APA term sheets. As noted above, only a five-year minimum LTSA is required. Additionally, the credit and security for a utility-owned bid is non-existent after commercial operation. Anything that goes wrong and is not covered by the LTSA is a utility/ratepayer cost under all of the utility-ownership structures. Most of the provisions in the Commercial Performance Scorecard regard elements of the term sheets that only the PPA and SCA bidders must edit. Thus, the IE's comment on this point highlights the problem we previously identified with subjectively penalizing PPA bidders for a mark-up to the substance of a term sheet which contains provisions that do not exist for a utility-owned bid. This element of the non-price scoring requires significant revision to prevent bias.

4. The Non-Price "Level Capacity Ratio" Is Not Subject to Self-Scoring

The Commission should require PGE to include a detailed description for bidders on how to self-score the effective load carrying capacity ("ELCC") values as required by Commission Order No. 21-320 adopting Staff's Report. NIPPC previously expressed concerns regarding PGE's proposed ELCC value method because PGE intended to build

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[56] Independent Evaluator Report at p. 14.

off of the ELCC methods it used in PGE's 2019 IRP Update, which undervalued the capacity contribution of Oregon solar and solar-plus-storage facilities.[57] Staff shared NIPPC's concerns that bidders could not ascertain the ELCC value that PGE's Sequoia model would assign their bids.[58] Therefore, Staff recommended "PGE should provide bidders a detailed description of how to calculate the ELCC using the information from the 2019 IRP and 2019 IRP Update and a sample calculation as part of the RFP materials."[59] Thus, Commission Order No. 21-320 requires PGE to provide information to bidders so that the bidder can self-score its ELCC value for purposes of evaluating the Level Capacity Ratio, which is worth 59 non-price score points for Renewable Resource Bids (but not Dispatchable Capacity bids).[60]

However, PGE's proposed Final Draft RFP does not appear to contain any further details that would allow a bidder to self-score its ELCC values.[61] Thus, to ensure this non-price criteria is subject to self-scoring, the Commission should require PGE to update its ELCC value calculation so that there is enough information for bidders to self-score their scores as required by Order No. 21-320.

B. In addition, PGE should include in the final shortlist and report the ELCC value ultimately assigned to the bids. Minimum Bid Requirements

The Draft RFP's minimum bid requirements should be further revised to improve clarity and unreasonable requirements.

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57 *See* NIPPC's Comments at 19-21 (Aug. 23, 2021).
58 Order No. 21-320, Appendix A at 26.
59 Order No. 21-320, Appendix A at 26.
60 Draft RFP at Appendix N, p. 20.
61 Draft RFP at Appendix N, pp. 10-12.

1. The Permitting Requirement Should Be Revised.

The Commission should adopt the IE's recommendation that there be exceptions to the minimum bid requirements for permitting. The IE and Staff both recommended PGE provide more clarity on its permitting matrix.[62] Specifically, Staff recommended the Commission require PGE to "[p]rovide additional clarity on its permitting matrix including further defining the more open-ended categories included in the matrix."[63] The IE also had concerns with the permitting matrix stating that "many offers that would otherwise have a reasonable chance of being constructed would be eliminated over missing a single permit."[64] The IE recommended there be exceptions to the minimum bid requirements for permitting to allow for "situations where a permit will [be] required, but not be acquired at the timeline suggested in the RFP."[65]

PGE's Final Draft RFP made some minor changes to the permitting minimum bid requirements, but it still requires that all permits be secured as a precondition to submitting a bid.[66] PGE also notes that where a specific permit is not required at all or during the RFP process, the bidder may provide a "narrative explanation on the bid form regarding why it is not applicable."[67] However, PGE should not have unilateral discretion to reject a bid or lower its score based on that narrative description. Further, in

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62 Order No. 21-320, Appendix A at 16 (Oct. 6, 2021).
63 Order No. 21-320, Appendix A at 16.
64 Independent Evaluator Report at 13 (Oct. 10, 2021).
65 Independent Evaluator Report at 14 (Oct. 10, 2021).
66 Draft, RFP at Appendix N, p. 19.
67 Draft RFP at 15.

many cases permits are required to advance to the final shortlist with a few limited exceptions of permits not required until construction.[68]

NIPPC shares the concerns expressed by the IE that cost-effective projects likely to be constructed could be eliminated over missing a single permit deadline. There should be more flexibility in the bidding process especially considering bidders do not know if their project will be selected when they initially submit a bid. Thus, the Commission should adopt the IE's recommendation that there be exceptions to the minimum bid permitting requirements to allow for situations where a permit will be required but not acquired by the tight timeline suggested in PGE's Final Draft RFP.

2. The Nondisclosure Agreement Should Be Revised

To participate in the RFP, bidders will need to execute PGE's proposed non-disclosure agreement ("NDA"). However, the NDA contains several unreasonable provisions that the Commission should correct. As explained below, the Commission should require PGE to remove the cap on liability damages and remove the term effectiveness of the NDA to be effective indefinitely.

First, the Commission should remove the cap on the amount of liability damages. Currently, the NDA sets a party's maximum liability for a breach of the NDA, tort, or other claim at $500,000.[69] The cap on the maximum amount of liability should be removed because $500,000 is not sufficient to cover all potential damages due to breach of confidentiality, potential torts, or other claims. PacifiCorp has been subject to a multi-million-dollar jury verdict for breaching confidentiality in an RFP process. In *USA*

[68] Draft RFP at Appendix N, p. 19.
[69] Draft RFP at Appendix L, p. 6.

Power, LLC v. PacifiCorp, USA Power engaged in work to develop a power plant and signed an NDA with PacifiCorp when PacifiCorp expressed interest in buying the asset.[70] PacifiCorp terminated the negotiations and issued an RFP for its needs instead.[71] USA Power submitted its power plant to PacifiCorp's RFP, but PacifiCorp also submitted its own power plant proposal that "was very similar to the Spring Canyon project proposed by USA Power[,]" which PacifiCorp ended up selecting over USA Power's project.[72] USA Power brought suit against PacifiCorp alleging it misappropriated trade secrets and violated the NDA.[73] After a trial, the jury returned a verdict against PacifiCorp in the amount of $133 million in damages (around $21 million in actual losses and $112.5 million in unjust enrichment damages), but the trial court reduced the unjust enrichment award against PacifiCorp to $91 million, which the Utah Supreme Court upheld.[74]

Additionally, PGE was awarded a multi-million-dollar settlement regarding construction disputes of Carty, a natural gas generation facility, after it was selected for construction in 2013 following a competitive planning process in 2009.[75] There were delays in the construction of the Carty facility, which lead to the settlement.[76] Eventually, the parties agreed to pay PGE $130 million and released all claims against

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70 *USA Power, LLC v. PacifiCorp*, 2016 UT 20, ¶¶ 1-3 372 P3d 629, 638 (2016).
71 *USA Power, LLC*, 2016 UT at ¶ 4.
72 *USA Power, LLC*, 2016 UT at ¶ 4.
73 *USA Power, LLC*, 2016 UT at ¶ 5.
74 *USA Power, LLC*, 2016 UT at ¶¶ 6, 7, 26.
75 Rich Nemec, *PGE Settles Contractor Disputed New Gas-Fired Power Plant*, NATURAL GAS INTELLIGENCE (July 31, 2018), https://www.naturalgasintel.com/pge-settles-contractor-disputed-new-gas-fired-power-plant/.
76 *Id.*

each other.[77] This is an example of where liability was on the third-party instead of the utility. PGE would not want to limit liability in these circumstances to $500,000.

These examples demonstrate the need to remove the cap on the maximum amount of liability. If PacifiCorp could be held liable for breach of an NDA by misappropriating trade secrets and required to pay over $110 million in damages, then $500,000 is not an appropriate maximum amount of liability damages. Further, if a third-party could be required to pay PGE $130 million in settlement, then $500,000 is not appropriate. Thus, the Commission should require PGE remove the maximum amount of liability listed in the NDA to more appropriately account for potential harm that could result from a breach of the NDA, tort, or other claim.

Second, the NDA currently is unreasonably limited to a term of just two years[78] after its execution.[79] The two-year limitation on the effectiveness of the protections of the NDA should be removed. Bidders must sign the NDA prior to bid submission, which PGE anticipates will be due by January 17, 2022 but projects could submit bids earlier.[80] However, projects do not have to come online until the end of 2024, which could be more than 2 year since the effective date of the NDA.[81] Thus, the effective term should at least be until commercial operation date when trade secrets regarding a project need to be protected, but it should be extended indefinitely. Thus, the Commission should require PGE to remove two-year limitation on the protections of the NDA.

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[77] *Id.*
[78] Draft RFP at Appendix L, p. 5.
[79] Draft RFP at 9.
[80] Draft RFP at 8.
[81] Draft RFP at 13.

3. The Project Labor Agreement Requirement Should Be Removed

The Commission should require PGE remove the requirement that bidders must include a Project Labor Agreement ("PLA") in any executed Engineering, Procurement, and Construction ("EPC") Agreements. In PGE's Final Draft RFP, PGE requires bidders to secure a PLA for any executed EPC agreement.[82] This is unnecessary considering the labor requirements in Oregon House Bill ("HB") 2021[83] and the current constrained labor market.

HB 2021 includes requirements that renewable energy projects over 10 megawatts must comply with prevailing wage rates and benefits, participate in apprenticeship programs, and establish and execute a plan for outreach, recruitment, and retention of workers of women, minorities, veterans, and people with disabilities.[84] HB 2021 also makes a PLA a compliance option, but not a requirement, for developers of renewable energy projects. HB 2021 already includes sufficiently strict labor requirements projects must adhere to, so there is no need to require a PLA.

Thus, the Commission should require PGE to remove any requirement that a bidder must have a PLA in place for EPC agreements because HB 2021 provides sufficient protections and requirements.

4. The Minimum Bid Requirements for Online Date Should Be Clarified

Among the minimum bidding requirements, the Draft RFP states that the resource must be online no later than the end of 2024, but the Draft RFP creates the possibility of

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[82] Draft RFP at 17-18.

[83] HB 2021, 81st Or. Leg. Assembly, 2021 Reg. Sess. (codified at 2021 Or. Laws ch. 508).

[84] HB 2021, Sec. 26(2), (3).

exceptions, which require further clarification to prevent unfair treatment.[85] It is clear that PGE will accept bids for pumped storage hydro resources online by the end of 2027, which NIPPC supports, but a further exception requires additional clarification.

Specifically, the Draft RFP contains a footnote located in two different locations stating as follows: "PGE will also consider other long-lead time technologies that satisfy the remainder of PGE's eligibility requirements, have been commercially proven, and can be shown to require additional construction time beyond what is possible by 2024."[86] However, no further criteria are provided by PGE for bidders to forecast whether their circumstance would warrant an online date later than 2024, or what information should be submitted to qualify for an online date after 2024 due to the need for additional construction time. NIPPC recommends that the final RFP should provide objective criteria to evaluate whether an online date beyond 2024 will be allowed for bids so that the IE and other stakeholders can evaluate PGE's application of these criteria in the solicitation.

Similarly, the IE recommends that, in addition to pumped storage hydro projects, otherwise qualified projects delayed solely due to actions of a transmission provider should be eligible for a later online date.[87] The IE explains that "the fact is that transmission providers can experience delays in conducting the appropriate studies and implementing needed upgrades" and this "leads to bid rejection if the bidder does not

85 Draft RFP at 13-14 & n. 6.
86 Draft RFP at 11 n. 1 & 14 n. 6.
87 IE Report at 17.

have the appropriate study in time or if the study shows upgrades being completed beyond the allowed COD."[88]

NIPPC supports the IE's recommended allowance to bids that are otherwise qualified but are delayed beyond 2024 solely due to a transmission provider's actions, and NIPPC further recommends that PGE also clarify specifically which information it requires from bidders to qualify for an online date beyond 2024 on account of the need for additional construction time, as specified the footnotes quoted above.

C. Benchmark and Affiliate Treatment

The Commission should require PGE to treat its affiliate bid as a benchmark bid and provide clarity on the scoring process for the affiliate bid. PGE proposes five benchmark bids and one affiliate bid.[89] NIPPC is unaware of any prior Oregon RFP with a utility affiliate bid. NIPPC supports in principle the idea that a utility should be allowed to bid into the RFP as an affiliate and is not opposed to PGE's proposed affiliate bidding into the RFP. In this case, however, the affiliate is not sufficiently independent, and should not be treated differently than a benchmark bid. PGE should also provide more clarity regarding the contracting process for that affiliate bid and how the various bids will be scored against each other before the Commission approves PGE's proposal to bid in with an affiliate.

PGE's affiliate bid should be treated as a benchmark bid subject to the provisions of the Commission rules because PGE's affiliate has not yet been approved by the Commission and, the affiliate that PGE has proposed, is not sufficiently independent

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88 *Id.*

89 *See* Draft RFP at Appendix P, p. 2.

from PGE. In the rulemaking docket that adopted the benchmark and affiliate rules, the Commission discussed "affiliates" and the more relaxed treatment of them than benchmark bids and explained:

> we clarify that separate utility affiliates need not offer any resource elements to their other bidders nor explain their decision not to offer such elements. A separate affiliate, like a private third party bidding on an RFP, operates in a higher-risk highly competitive environment and it should not be obligated to provide access to its proprietary assets to other competitive entities.[90]

This demonstrates the Commission envisioned an affiliate for the RFP process to be a separate entity from the utility which has similar risks and costs to those of other independent third-party bidders.

Here, PGE's affiliate is not the type of affiliate contemplated in the RFP rules as it is not completely separate like the Commission envisioned. From the information PGE has shared in Docket No. UI 461, PGE's affiliate will share employees with PGE, PGE will provide office support to the affiliate, and PGE will provide various services to the facilitate such as "business analysis, finance and treasury support, human resources, investor relations, legal services, construction and engineering, purchasing, consulting/training services, and other services[.]"[91] It does not appear the "affiliate" here even has its own employees separate from PGE. Additionally, PGE is the likely source of credit support for this affiliate. It is difficult to imagine PGE strictly enforcing PPA provisions, much less bringing legal action to do so, against its affiliate. This is not a

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[90] Docket No. AR 600, Order No. 18-324 at 11 (Aug. 30, 2018).

[91] *In re PGE Affiliated Interest Transaction with Portland Renewable Resource Company*, Docket No. UI 461, Application for Approval of an Affiliated Interest Transaction with Portland Renewable Resource Company at 9 (Sept. 10, 2021).

separate entity like the Commission envisioned in AR 600 adopting these rules. Further, the Commission has yet to approve the bare minimum affiliated interest transactions for office support for the affiliate by PGE.[92] Thus, the Commission should require PGE to treat this RFP affiliate bid as a benchmark bid subject to the RFP benchmark bid requirements in the Commission rules.

PGE's affiliate bid should be subject to all benchmark bid requirements outlined in Commission rules. One requirement for benchmark bids is that if elements of a benchmark bid secured by the utility are not made available to all bidders, the utility must provide an explanation when seeking RFP acknowledgement and recovery of costs in rates.[93] Some examples of these elements include land and transmission rights. Regarding land, the IE Report states PGE has complied with this requirement by making land it plans to use for battery storage resources available but only for non-PPA bids due to security concerns and land in northeast Oregon used for the affiliate solar bid available to any bidder.[94]

Regarding transmission, the IE states that PGE asserts "utility controlled transmission rights will not be used for the benchmark offers."[95] PGE states that "[b]enchmark resources or affiliate bids will not rely on utility-controlled transmission rights to meet the 2021 All-Source RFP bid requirements."[96] PGE states that if Colstrip associated transmission rights are used for a benchmark or other bid, then "those rights

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92 *See generally*, Docket No. UI 461.
93 OAR 860-089-0300(3).
94 Independent Evaluator Report at 16 (citing Draft RFP at Appendix P, p. 2).
95 Independent Evaluator Report at 16.
96 Draft RFP at Appendix P, p. 3.

would also be made available for all bidders subject to the same constraints and limitations."[97] These are broad statements not supported by a detailed "analysis explaining that decision[.]"[98] PGE should be required to provide further assurances or detailed descriptions regarding how the transmission rights are not held by PGE and not funded by ratepayers as required by Commission rules. Further, PGE's affiliate bid should be subject to these same requirements because it should be treated as a benchmark bid.

A second requirement for benchmark bids is that benchmark bids must be scored first and filed with the Commission before the third-party bidding process begins.[99] The IE Report explains that PGE properly states in its Final Draft RFP that it will score the benchmark bids before the rest of the bids.[100] However, in this RFP, PGE's affiliate bid should also be submitted beforehand with the benchmark bids because the affiliate bid should be treated as a benchmark bid. Thus, the Commission should require PGE to submit its affiliate bid early for scoring with the other benchmark bids.

A third requirement for benchmark and affiliate bids is that "[a]ny individual who participates in the development of the RFP or the evaluation or scoring of bids on behalf of the electric company may not participate in the preparation of an electric company or affiliate bid and must be screened from that process."[101] PGE states it separated the RFP development team from the benchmark and affiliate teams.[102] The IE acknowledges PGE

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[97] Draft RFP at Appendix P, p. 3.
[98] OAR 860-089-0300(3).
[99] OAR 860-089-350(1).
[100] Independent Evaluator Report at 17.
[101] OAR 860-089-0300(1)(b).
[102] Draft RFP at 7.

stated it has complied with this requirement but states it "presume[s] that PGE will provide a list of names to us specifying who is on which side of this divide."[103]

The Commission should adopt the IE's recommendation that PGE provide a list of names who worked on preparing the RFP, who will evaluate and score the RFP bids, and who will be involved with the benchmark and affiliate bids. Additionally, the Commission should require PGE confirm that everyone on the benchmark and affiliate teams were not involved in the Integrated Resource Planning ("IRP") process because the IRP leads to the RFP as the RFP relies on IRP modeling. and that everyone on the benchmark and affiliate teams have never and will not have access to any data, analysis, or other resources used by the team working on the RFP to the same extent as non-affiliate bidders Both recommendations will ensure there is transparency in the RFP process and no unfair advantage for benchmark or affiliate bids.

Finally, PGE should clarify the bidding structure for the affiliate bid. From NIPPC's review of the Final Draft RFP and IE Report, it is not clear what type of bid the affiliate will be such as a PPA, an APA, or a BTA. NIPPC seeks clarification regarding what contractual relationship would exist between PGE and the affiliate, before and after operation, how that contractual relationship will be scored compared to other bids. Even if the affiliate will sell to PGE under a PPA, it should be scored similar to a benchmark or other utility-owned resources with reasonable contingency price adders because it is not realistic to expect PGE to strictly enforce the PPA provisions against the affiliate.

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[103] Draft Independent Evaluator Report at 16 (Oct. 10, 2021).

In summary, NIPPC has several recommendations regarding the benchmark and affiliate bids. First, the Commission should require PGE to treat its RFP affiliate bid as a benchmark bid. Second, PGE's affiliate bid should be subject to the same rules and requirements as a benchmark bid such as the requirement to make utility-owned assets available to all bidders or provide an explanation explaining why PGE did not, requiring benchmark bids to be scored before third-party bids, and ensuring personnel associated with the benchmark and affiliate teams are separate from the RFP development team. Additionally, the Commission should require PGE confirm personnel who worked on the IRP were separate from those working on the affiliate bid and the affiliate bid team has not had (and will not have) access to data or resources that non-affiliate bidders do not have access to. Third, the Commission should require PGE clarify the bidding structure for the affiliate bid and ensure the scoring of its bids are reasonable and fair to other bidders.

D. Interconnection Study Requirements

The Commission should require PGE to update its Final Draft RFP to only require that bids to supply a system impact study ("SIS") to qualify for the final short list. Currently, PGE's Final Draft RFP requires a bid to a completed SIS to qualify for the initial short list and a completed facilities study to qualify for the final short list.[104] Requiring a completed SIS before a bid can be added to the initial short list would significantly limit competition and make it more difficult for third-party bids to compete

[104] Draft RFP at 16.

against utility bids. Thus, bidders should only need a completed SIS to qualify for the final shortlist instead of a SIS and facilities study as PGE proposes.

E. Timeline for Best and Final Price Update

The Commission should require PGE to update the RFP schedule so that bidders on the initial short list have more than a week to update their best and final prices. Currently, PGE proposes that bidders on the initial short list must update their best and final price a week after the initial short list is identified.[105] A week is not long enough for many bidders to run models, call suppliers, and confer with its financial team to update best and final prices. There is often significant analysis that needs to be done to update prices. Thus, the Commission should require PGE to increase the amount of time between the identification of the initial short list and when bidders must update their best and final prices. to a much less compressed time frame. Giving bidders adequate time to have these tough discussions, closer to a month or five weeks, would better serve ratepayers as it would result in better, more accurate, and ideally lower final prices. Otherwise, bidders may just build in a higher cost buffer to cover the uncertainty that comes with a rushed, last-minute decision without adequate information and analysis.

F. PGE Should Allow an Opportunity to Cure Bid Discrepancies

PGE allows bidders to submit one base proposal and two alternatives with each bid fee.[106] The alternatives may consist of a different technology, volume, contract-term, in-service date, and/or pricing structure for the same resource at the same location, but a proposal for a different bid at a different site will be considered a separate proposal and

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[105] Draft RFP at 8.
[106] Draft RFP at 9.

subject to a separate bid fee.[107] Should a bid be submitted with one or more alternative, and PGE determines the alternative should have instead been listed as a separate bid, the bidder should be given an opportunity to cure that discrepancy.

III. CONCLUSION

NIPPC appreciates the effort that PGE has put into the preparation of its RFP and urges PGE to make revisions and provide the clarifications requested in these comments. If necessary, the Commission should direct PGE to make all changes and clarifications identified in these comments.

Dated this 1st day of November 2021.

Respectfully submitted,

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[107] Draft RFP at 9.

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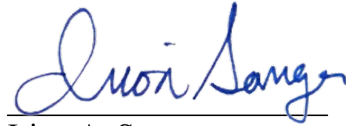

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RESOURCE PERFORMANCE GUARANTEE SECTION

Forecasting and Scheduling

Max Score	Point Allocation	Key Terms, Conditions, and Circumstances to Consider	NIPPC's Comments on Proposed Scoring
35	35 = Term sheet redlines and related commercial circumstances better protect PGE customers from schedule, performance or cost risk than form term sheet provisions 28 = Term sheet redlines and related commercial documents generally conform to form term sheet and present modest risk to schedule, performance or cost. 21 = Term sheet redlines and related commercial documents present isolated significant risks to schedule, performance or cost. Risk is reasonably bound by commercial term or circumstance. 14 = Term sheet redlines and related commercial documents present isolated significant risks to schedule, performance or cost. Risk is not reasonably bound by commercial term or circumstance. 7 = Term sheet redlines and related commercial documents present compounded and significant risks to schedule performance or cost. Risk is not reasonably bound by commercial term or circumstance. 0 = Term sheet redlines and related commercial documents present unacceptable and unmitigated risks to schedule performance or cost. 0 = Bidder does not provide any redlines, declines to negotiate definitive agreement consistent with redlined or unedited term sheet, and/or defers all commercial considerations to negotiation phase.	• Forecasting • Scheduling • Forecast Agent • Discharge Schedule Provisions • eTag Modification • Entity • Failure to Deliver FacilityOutput	• As proposed by PGE's scorecard, only PPA and SCA Bids Can Receive less than 35 points because only PPA term sheets have any terms corresponding to these requirements and guarantees intended to protect ratepayers • EPC/APA and benchmark bids should get zero points for complete lack of guarantees on this category but the scorecard does not so provide • Thus, scoring proposal for this category is biased and should be deleted and reallocated to price score for all bids

Credit and Security

Max Score	Point Allocation	Key Terms, Conditions, and Circumstances to Consider	NIPPC's Comments on Proposed Scoring
35	35 = Term sheet redlines and related commercial circumstances better protect PGE customers from schedule, performance or cost risk than form term sheet provisions 28 = Term sheet redlines and related commercial documents generally conform to form term sheet and present modest risk to schedule, performance or cost. 21 = Term sheet redlines and related commercial documents present isolated significant risks to schedule, performance or cost. Risk is reasonably bound by commercial term or circumstance. 14 = Term sheet redlines and related commercial documents present isolated significant risks to schedule, performance or cost. Risk is not reasonably bound by commercial term or circumstance. 7 = Term sheet redlines and related commercial documents present compounded and significant risks to schedule performance or cost. Risk is not reasonably bound by commercial term or circumstance. 0 = Term sheet redlines and related commercial documents present unacceptable and unmitigated risks to schedule performance or cost. 0 = Bidder does not provide any redlines, declines to negotiate definitive agreement consistent with redlined or unedited term sheet, and/or defers all commercial considerations to negotiation phase.	• Security • Parent Guarantee • Credit Support • Aggregate Limitation of Liability	• PPA/SCA bids can be penalized for post-COD credit and security revisions to term sheets, but EPC/APA bids cannot as EPC/APA term sheets do not have credit or security provisions post COD • Additionally, pre-COD credit and performance assurance requirements are higher for PPA/SCA bids • EPC/APA and benchmark bids should get zero points for post-COD credit and security under these provisions but scorecard does not so provide • Thus, scoring proposal for this category is biased and should be deleted and reallocated to price score for all bids

PPA and SCA Output Guarantee
(Note: Bidder to receive score for either PPA and SCA Output Guarantee or Utility Owned Asset Output Guarantee)

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35	35 = Term sheet redlines and related commercial circumstances better protect PGE customers from schedule, performance or cost risk than form term sheet provisions 28 = Term sheet redlines and related commercial documents generally conform to form term sheet and present modest risk to schedule, performance or cost. 21 = Term sheet redlines and related commercial documents present isolated significant risks to schedule, performance or cost. Risk is reasonably bound by commercial term or circumstance. 14 = Term sheet redlines and related commercial documents present isolated significant risks to schedule, performance or cost. Risk is not reasonably bound by commercial term or circumstance. 7 = Term sheet redlines and related commercial documents present compounded and significant risks to schedule performance or cost. Risk is not reasonably bound by commercial term or circumstance. 0 = Term sheet redlines and related commercial documents present unacceptable and unmitigated risks to schedule performance or cost. 0 = Bidder does not provide any redlines, declines to negotiate definitive agreement consistent with redlined or unedited term sheet, and/or defers all commercial considerations to negotiation phase.	• Output Guarantee • Minimum Availability Guarantee • Capacity Guarantee • Duration Guarantee • Round Trip Efficiency Guarantee • Related Default Provisions • Related Damages and Remedies • Operations and Maintenance	• These output guarantees in the PPA are not commercially reasonable, and do not exist for the EPC/APA or benchmark bids (see below) • Thus, scoring proposal for this category is biased and should be deleted and reallocated to price score for all bids

Utility Owned Asset Output Guarantee
(Note: Bidder to receive score for either PPA and SCA Output Guarantee or Utility Owned Asset Output Guarantee)

Max Score	Point Allocation	Key Terms, Conditions, and Circumstances to Consider	NIPPC's Comments on Proposed Scoring
35	35 = Term sheet redlines and related commercial circumstances better protect PGE customers from schedule, performance or cost risk than form term sheet provisions ***and specifically include robust warranties and LTSA for asset life.*** 28 = Term sheet redlines and related commercial documents generally conform to form term sheet and present modest risk to schedule, performance or cost ***and specifically include robust warranties and LTSA.*** 21 = Term sheet redlines and related commercial documents present isolated significant risks to schedule, performance or cost. Risk is reasonably bound by commercial term or circumstance. 14 = Term sheet redlines and related commercial documents present isolated significant risks to schedule, performance or cost. Risk is not reasonably bound by commercial term or circumstance. 7 = Term sheet redlines and related commercial documents present compounded and significant risks to schedule performance or cost. Risk is not reasonably bound by commercial term or circumstance. 0 = Term sheet redlines and related commercial documents present unacceptable and unmitigated risks to schedule performance or cost. 0 = Bidder does not provide any redlines, declines to negotiate definitive agreement consistent with redlined or unedited term sheet, and/or defers all commercial considerations to negotiation phase.	• Warranties • Long-Term Service Agreements • Energy or Capacity Guarantees • Consideration of Utility Customer Fixed Price and Fixed Volume Guarantees Through Regulatory Model	• Because there is no "Term Sheet" for an LTSA applicable to all EPC/APA bids and the "Warranties" in the EPC and APA do not related to "Output" of a constructed facility, this category of the score card makes no sense. • The Draft RFP only requires an LTSA with a EPC bid (not an APA bid) and even with the EPC bid, the LTSA need only be 5 years in length. • Scorecard states it will evaluate and allocate points for "Consideration of Utility Customer Fixed Price andFixed Volume Guarantees Through Regulatory Model", but presumably this is the same risk/value for all EPC/APA and benchmark bids and thus should be identified as receiving a certain amount of points on the scorecard. • EPC/APA and benchmark bids should get zero points for lack of comparable output and operational guarantees on this category, but scorecard does not so provide. • Thus, scoring proposal for this category is biased and should be deleted and reallocated to price score for all bids.

LIMITATION OF LIABILITY AND REMEDIES

Commercial Online Date Provisions

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Payment and Settlement Provisions

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Product Definition and Other Limitations

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