NIPPC Proposed Competitive Bidding Guideline/Rules Revisions

Preamble: The definition of insanity is doing the same thing over and over again and expecting a different result. To date, the existing request-for-proposals ("RFP") Guidelines have resulted in about 95% utility-owned generation "winning" the utility-run RFPs in Oregon. As one might expect from these results, the competitive market has no confidence that the current guidelines are fair, will ever allow for diversity of ownership of generation resources, or will result in a resource portfolio that is the least cost and least risk to ratepayers. There are very real impacts to the utility's ratepayers resulting from the utilities' anticompetitive behavior, because the mere appearance of unfairness chills the market and limits the effort and resources the utilities' competitors are willing to commit to what will inevitably be a losing bid.

NIPPC urges the parties and the Commission to consider a truly competitive process where we abandon the attempt to compare cost-plus utility-owned bids to competitive bids with fixed prices and contract terms for performance. Head to head "competitive" procurement between utility-owned generation ("UOG") and independent power producer ("IPP") generation is an oxymoron because it is impossible to truly compare the unique advantages and disadvantages of the different ownership structures when the utility has an economic incentive to select its own generation resource. The consequence is ratepayers paying more costs and assuming more risks than would be the case if there were true diversity of ownership.

To address this inherent conflict, NIPPC recommends that either: 1) utilities be barred from owning new generation unless they can demonstrated that the market has failed, or there is a unique and valuable opportunity for ratepayers; or 2) utility ownership be capped at a specific percentage. Without firm requirements, it will be difficult for any competitive bidding process to clearly allow for diversity of ownership. Even with the Commission's longstanding intent to mitigate the self-build/own bias, NIPPC maintains that the best of intentions and the reduced ratepayer costs achieved to date will fall far short of true ratepayer protection as long as utility and IPP resource offerings are evaluated side by side.

Nevertheless, as long as the Commission endeavors to extract the most value from the current guidelines, NIPPC submits the following new recommendations and redlines to the existing guidelines for consideration.

<u>The IE should report to Staff</u>

The IE should be paid by the Commission, report to Staff, and the independent evaluator ("IE") shall provide notes from all conversations with the utility and the full text of any written communications.

Utility Ownership Options

The costs included in rates for utility ownership options, including equipment procurement, construction supervision, internal and external legal, finance and accounting expense, construction bids and all similar items, shall be capped at the cost included in the bid used for comparative analysis in the RFP.

The utility shall provide more information regarding the details of the ownership options in the IRP and RFP process, such as details on land use approvals, transmissions rights and arrangements, site control and resource quality (e.g. the quality of the wind resource or the solar irradiance).

The IE shall conduct a more rigorous review based on the possibility of ownership options not the existence of “Benchmark” resources. The term “Benchmark” shall be replaced with “Utility Owned Generation” or “UOG”.

The IE will review whether the pre-construction costs, pre-existing investments, transmission, and financing provisions are entirely included in the bid cost used for comparative analysis for purposes of developing the initial short list of bids, and the utility may then elect to propose UOG bids from the initial short list to be included on the final short list. For each such UOG bid the utility chooses to put forth for approval onto the final short list, Commission will oversee a financing due diligence by a highly qualified consultant, as required in a proposed section 10(g) of the RFP guidelines. The intent of this requirement is to subject the UOG bids that will be placed into rate base to the same type of deep due diligence for accuracy of cost and performance characteristics that must occur in order for fixed-price PPA bids to receive financing from major financial institutions. If there is a UOG, then the Commission is essentially acting as the banker approving the use of the utility’s monopoly service rights and rate recovery rights. Accordingly, the UOG project will be subjected to the same type of due diligence that any major IPP project must survive prior to acknowledging the UOG’s bid submittal as reasonable in the RFP.

Bid Scoring and Evaluation

Consideration of diversity, utility ownership risks, power purchase agreement risk mitigation, inflation risk mitigation, resource variability risk mitigation, and shorter contract terms.

The bidding process shall include two steps. First, all ownership options will be evaluated. The best ownership score will be announced to the bidders. Second, power purchase agreements will be provided an opportunity to beat the ownership score. NIPPC derived this proposal from bidding processes that occur in other situations where one of the bidders has an inherent conflict of interest. The utility has a conflict of interest because any successful UOG bids will provide an opportunity for the utility to increase its returns to utility shareholders while a successful non-UOG bid will provide no opportunity for returns to the utility's shareholders. In other areas of the law, such as bankruptcy and corporate acquisitions, a "conflict-of-interest proposal" like that of a UOG bid here requires special treatment, where the conflict-of-interest proposal is submitted first and then put out to be bid against by competitive bids.

Diversity shall be defined. Diversity of ownership means a range of different generation owners, including but not limited to utility ownership, power purchase agreements, and power purchase agreements with the option for utility ownership. There cannot be ownership diversity unless a substantial share of the generation is from long-term power purchase agreements in which the utility does not have the option to purchase the generation asset over the life of the power purchase agreement.

For RFPs that result in the acquisition of multiple generation facilities or more than 100 MW of renewable energy or multiple storage facilities in excess of 50 MW, the utility cannot obtain acknowledgement if the RFP does not result in ownership diversity.

The Commission shall not acknowledge an RFP that does not result in ownership diversity if the utility's RFPs over the last ten years have not resulted in ownership diversity.

Evaluate diversity based on the totality of the last RFPs. If the utility's long-term resource acquisitions over the last ten years have not resulted in diversity, then diversity gets greater weight in the resource evaluation as a non-price factor.

Proper accounting for shorter contract terms of PPA versus a rate-based facility. There is concern that the IE/utility are not correctly evaluating the actual costs for comparison purposes between a longer-term obligation placed in rate base (30-plus years) and the shorter-term PPA (15-25 years). Generally speaking, the PPA option will typically be far less expensive to the ratepayer in the early years and the UOG resource declines in costs in its later years (if the UOG costs and performs as advertised in those future years). Additionally, the UOG resource is placed in rates for a period that is typically far in excess of the term of the PPA bids, and thus the RFP that compares these two different resource types must conduct present value and/or levelization analysis. This analysis is inherently flawed since one type of bid (PPA) provides a known price while the other requires extensive assumptions to develop an assumed price. Consequently, this is an area where major errors can be made, yet there has been little to no analysis of it in past RFPs. NIPPC believes that there should be a workshop held to address this specific issue and determine how the utilities are currently conducting an analysis to develop the unknown and un-fixed present value and/or levelized price for UOG resources that could be compared to known and fixed PPA bid prices. NIPPC made a preliminary proposal for increased transparency on the impact of the present value assumptions in the RFP Guidelines, but reserves the right to further modify that proposal after workshops on the topic.

Utilities are to use qualified and independent third-party experts to review the expected solar as well as wind capacity factor for all projects on the shortlist.

Access to Bidder Information

Bidders should have access to their own bid evaluations and scores, and the score for all UOG bids on the short list.

Size

The size should be reduced to 50 MW nameplate capacity and kept at 5 years. Energy storage should be included as a resource.

UM 1182
Competitive Bidding Rules ~~Guidelines~~

1. RFP Requirement: A utility must issue an RFP for all Major Resource acquisitions ~~identified in its last acknowledged IRP~~. Major Resources are electric generation or energy storage resources with durations greater than 5 years and quantities greater than 50 ~~100~~ MW. In the case of generation resources, if multiple small generating resources total more than 50~~100~~ MW and meet the following criteria, then there is a rebuttable presumption that the multiple small resources are a single Major Resource and the competitive bidding rules ~~guidelines~~ apply:

a. The small resources are located on one parcel of land or on two or more adjacent parcels of land, or the generation equipment of any small resource is within five miles of the generation equipment of any other small resource; and

b. Construction of the resources is performed by the same contractor, or under the same contract, or under multiple contracts entered into within two years of each other.

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

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

If a utility issues an RFP that does not cap resource acquisitions at 49 MW and could result in the utility owning the generation resource at some point during the resource's operation, then these rules apply to the acquisition. A utility owning the generation resource at some point during the resource's operation will be known as a utility-owned generation or "UOG."

Under these RFP rules, no party should have an informational advantage in any part of the solicitation process. The RFP and all relevant information about it should be released to all potential bidders at the same time. Therefore, as part of the RFP requirement, the utility must provide specific information in its IRP regarding all Major Resources it will acquire prior to the acknowledgement of the next IRP. The level of detail provided must be specific enough to allow potentially interested bidders to begin planning and obtaining site control, regulatory approvals, and resource components that would meet the bidding requirements of the RFP. If a subsequently issued RFP excludes bids on a basis that could not be reasonably determined from the description of need identified in the IRP, the lack of specificity in the IRP is a basis for the Commission to decline to acknowledge the RFP.

2. Exceptions to RFP Requirement: A utility is not required to issue an RFP under the following circumstances:

a. Acquisition of a Major Resource in an emergency ~~or where there is a time-limited resource opportunity of unique value to customers~~.

b. Acknowledged IRP provides for an alternative acquisition method for a Major Resource, and the acknowledgement order specifically approves the alternative acquisition method.

c. Commission waiver on a case-by-case basis due to a time- limited resource opportunity of unique value to customers.

d. Acquisitions under the Public Utility Regulatory Policies Act.

e. Solar generation acquired pursuant to Section 22 of SB 1547.

Within 30 days of a Major Resource acquisition under Subsection (a) above, the utility must file a report with the Commission explaining how the requisite conditions have been met for acting outside of the RFP requirement. The report must be served on all the parties and interested persons in the utility's most recent rate case, RFP and IRP dockets.

When requesting a waiver under Subsection (c) above, the utility must file its request with the Commission and serve the request on all parties and interested persons in the utility's most recent general rate case, RFP and IRP dockets. The Commission will issue an order addressing the waiver request within 120 days, taking such oral and written comments as it finds appropriate under the circumstances.

3. Affiliate Bidding: A utility may allow its affiliates to submit RFP bids. If affiliates are allowed to bid, the utility must blind all RFP bids and treat affiliate bids the same as all other bids.

4. Utility Ownership Options: A utility may ~~use a self-build option~~ allow for bids in an RFP that would result in the utility owning the generation resource at some point during the resource's operation to provide a potential cost-based alternative for customers. ~~A site-specific, self-build option proposed in this way is known as a Benchmark Resource. A utility may also consider ownership transfers within an RFP solicitation.~~ If such a UOG bid prevails in an RFP, the revenue requirement allowed ~~costs~~ ~~included~~ in rates for the UOG plant~~options~~, including equipment procurement and construction bids, and all soft costs in development of the project and legal support from its inception to its removal from rates, shall be capped at the cost included in the bid as long as rates are sufficient to ensure confidence in the financial integrity of the utility.

5. Independent Evaluator (IE): An IE must be used in each RFP that permits bids with any form of UOG structure or affiliate bids to help ensure that all offers are treated fairly. Commission Staff, with input from the utility and interested, non-bidding parties, will recommend an IE to the Commission, which will then select or approve an IE for the RFP. The IE must be independent of the utility and likely, potential bidders and also be experienced and competent to perform all IE functions identified in these rules ~~Guidelines~~. The IE will contract with and be paid by the Commission ~~utility~~. The IE should confer with Commission Staff as needed on the IE's duties under these rules ~~Guidelines~~. The ~~utility may request recovery of its~~ payments to the IE may be recovered in customer rates. The IE shall provide notes from all conversations with the utility and the full text of any written communications to Commission Staff and non-bidding parties, and to the extent permitted by section 12 will promptly make such materials publicly available to the bidders.

6. RFP Design: The utility will prepare a draft RFP and provide it to all parties and interested persons in the utility's most recent general rate case, RFP and IRP dockets. The product or products sought through the RFP should be defined in a manner that is clear, nondiscriminatory, and consistent with the identified resource need announced in the acknowledged IRP. The RFP should state all relevant aspects of the product or products sought. At a minimum, these aspects include capacity and term, but other characteristics are usually necessary, among them fuel type, plant technology (*e.g.*, simple cycle gas turbine), and acceptable transmission requirements. An RFP should be written to accept bids from any products that can appropriately fill the issuing utility's objectives.

The RFP must also include clear details regarding the manner in which bids will be scored. RFPs should clearly specify the price and non-price criteria under which the bids are evaluated. Price criteria should specify the relative importance of each item as well as the discount rate to be used in the evaluation. Non-price criteria should also specify the relative importance of any items to be considered in non-price evaluation. A non-exhaustive list of such items may include items such as firm transmission reservation requirements, including acceptable delivery points and any scoring deduction for deliveries to any such points; credit evaluation criteria for UOG and non-UOG bids, such as the bond rating requirements; the plant technology if more than one technology is listed in the RFP; plant performance requirements, such as availability; and the required in-service date if the plant needs to be constructed.

The RFP shall minimize the use of non-price scoring factors. In its submittal to the Commission for approval of the draft RFP, the utility shall: identify each discrete non-price scoring factor, demonstrate that the non-price scoring factor cannot be eliminated as a scoring factor by converting the characteristics in question into a minimum bidding requirement, demonstrate that the draft RFP contains the objective criteria that a bidder could include in its bid in order to receive all scoring points available for the non-price scoring factor and that these criteria are objectively reasonable, and demonstrate that the non-price scoring factor's weight towards the overall score is appropriate.

The utility must conduct bidder and stakeholder workshops on the draft RFP. The utility will then submit a final draft RFP to the Commission for approval, as described in paragraph 7 below. The draft RFPs must set forth any minimum bidder requirements for credit and capability, along with bid evaluation and scoring criteria. The utility may set a minimum resource size, but Qualifying Facilities larger than 10 MW must be allowed to participate. The final draft submitted to the Commission must also include standard form contracts. However, the utility must allow bidders to negotiate mutually agreeable final contract terms that are different from ones in the standard form contracts. The utility will consult with the IE in preparing the RFPs, and the IE will submit its assessment of the final draft RFP to the Commission when the utility files for RFP approval.

7. **RFP Approval:** The Commission will solicit public comment on the utility's final draft RFP, including the proposed minimum bidder requirements and bid scoring and evaluation criteria. Public comment and Commission review should focus on whether the RFP meets the design criteria set forth in paragraph 6 above and: (1) the alignment of the utility's RFP with its acknowledged IRP and whether any party had any informational advantage prior to or during the RFP process; (2) whether the RFP satisfies the Commission's competitive bidding rules ~~guidelines~~; and (3) the overall fairness of the utility's proposed bidding process. After reviewing the RFP and the public comments, the Commission may approve the RFP with any conditions and modifications deemed necessary. The Commission may consider the impact of multi-state regulation, including requirements imposed by other states for the RFP process. The Commission will target a decision within 60 days after the filing of the final draft RFP, but the Commission may extend the 60 day target decision date for good cause ~~unless~~ demonstrated by the utility or interested stakeholders ~~requests a longer review period when it submits the final draft RFP for approval~~.

~~**8.** **Benchmark Resource Score:** The utility must submit a detailed score for any Benchmark Resource, with supporting cost information, to the Commission and IE prior to the opening of bidding. The score should be assigned to the Benchmark Resource using the same bid scoring and evaluation criteria that will be used to score market bids. Information provided to the Commission and IE must include any transmission arrangements and all other information necessary to score the Benchmark Resource. If, during the course of the RFP process, the utility, with input from the IE, determines that bidder updates are appropriate, the utility may also update the costs and score for the Benchmark Resource. The IE will review the reasonableness of the score(s) for the Benchmark Resource. The information provided to the Commission and IE will be sealed and held until the bidding in the RFP has concluded.~~

8~~9~~. **Bid Scoring and Evaluation Criteria:**

a. The utility and the IE will first accept only UOG bids that would result in utility ownership of the resource. After the determination of the lowest cost UOG bid, the utility will publish to all bidders, the Commission and interested stakeholders, the lowest cost price, including both a price score represented as a levelized price per year for different PPA or tolling agreement terms and any applicable non-price scores, which will be the price to beat by non-UOG bidders. The utility will provide the non-UOG bidders 14 days to submit their bids. The initial short-list will be selected among all of the bids by the IE, and the utility will determine which, if any, UOG bids it wishes to place on the final short list and to subject to the financing due diligence by the highly qualified consultant, as required in section 10(g) of these rules.

b.~~a.~~ Selection of an initial shortlist of bids should be based on price and non-price factors and provide resource diversity (e.g., with respect to fuel type and resource duration, and ownership). The utility should use the initial prices submitted by the bidders to determine each bid's price score. The price score should be calculated as the ratio of the bid's projected total cost per megawatt-hour to forward market prices using real-levelized or annuity methods. For each UOG bid, the price score will be presented in a way that transparently demonstrates the impact of the present value analysis that is used to compare the present value or levelized costs of the UOG bid for fixed price non-UOG bids. Such analysis will include, at a minimum, calculation of the annual levelized price of the UOG bid assuming different resource lifetimes for the bid for each five year interval extending from the shortest PPA term allowed to bid into the RFP to the proposed maximum period of evaluation of the UOG bid. For example, with a 15-year minimum PPA bid and an assumption the UOG bid will impose costs and benefits for 35 years, the analysis must present UOG bid price scores with the assumption of resource lives of 15 years, 20 years, 25 years, 30 years, 35 years. The non-price score should be based on resource characteristics identified in the utility's acknowledged IRP Action Plan (e.g., dispatch flexibility, resource term, portfolio diversity, etc.), ~~and~~ conformance to the standard form contracts attached to the RFP, the unique risks and advantages associated with the UOG and non-ownership options, and diversity of ownership. The non-price points for non-ownership options shall be larger if the utility's long-term resource acquisitions over the past ten years have not resulted in diversity of ownership. Diversity of ownership means a range of different generation owners, including but not limited to utility ownership, power purchase agreements, tolling agreements, and power purchase agreements or tolling agreements with the option for utility ownership. There cannot be ownership diversity unless a substantial share of the generation is long-term power purchase agreements in which the utility does not have the option to purchase the generation asset over the life of the power purchase agreement.

c.~~b.~~ Selection of the final shortlist of bids should be based in part on the results of modeling the effect of candidate resources on overall system costs and risks.

The portfolio modeling and decision criteria used to select the final shortlist of bids must be consistent with the modeling and decision criteria used to develop the utility's acknowledged IRP Action Plan. The IE will have full access to the utility's production cost and risk models.

d.~~e.~~ Consideration of ratings agency debt imputation should be reserved for the selection of the final bids from the initial shortlist of bids. The utility should obtain an advisory opinion from a ratings agency to substantiate its analysis and final decision, if requested by the Commission.

9~~10~~. Utility and IE Roles in RFP Process:

a. The ~~utility~~ IE will conduct the RFP process, score the bids, and select the initial and final shortlists~~, and undertake negotiations with bidders~~.

b. The IE will oversee the RFP process to ensure that it is conducted fairly and properly.

c. If the RFP does not allow affiliate bidding and does not allow bids for ~~include ownership~~ UOG options ~~(i.e., the utility is not including a Benchmark Resource or considering ownership transfers)~~, the use of an IE is not required, but the utility may retain an IE to assist it in its evaluation, in which case, the IE will check whether the utility's scoring of the bids and selection of the shortlists are reasonable.

d. If the RFP allows affiliate bidding or ~~includes ownership options~~ allows UOG bids, the IE will independently score ~~the utility's Benchmark Resource (if any) and~~ all ~~or a sample of the~~ bids ~~to determine whether the~~ and select~~ion for~~ the initial and final shortlists ~~are reasonable~~. In addition, the IE will evaluate the unique risks and advantages associated with ~~the Benchmark Resource~~ UOG options (if used), including but not limited to an evaluation of the following issues: construction cost over-runs (considering contractual guarantees, cost and prudence of guarantees, remaining exposure to ratepayers for cost over-runs, and potential benefits of cost under-runs); reasonableness of forced outage rates; end effect values; environmental emissions costs; reasonableness of operation and maintenance costs; adequacy of capital additions costs; reasonableness of performance assumptions for output, heat rate, and power curve; ~~and~~ specificity of construction schedules or risk of construction delays, the inclusion of pre-construction costs in ownership options, transmission options, and financing (whether the financing restrictions on non-ownership options are reasonable). The IE may also consider these issues as applicable to third party bids.

e. Once the competing bids and UOGs~~Benchmark Resource~~ (if used) have been scored and evaluated by the utility and the IE, the two should compare results.

The utility and IE should attempt to reconcile and resolve any scoring differences. If the two are unable to agree, the IE should explain the differences in its Closing Report. Any differences in scoring will also be documented and preserved by the utility, and made available to interested parties at the time of approval of the final short-list as well as preserved for use by the Commission and interveners in future cost-recovery proceedings.

f. Wind and solar RFPs: Utilities are to allow independent power producers to submit bids with and without an option to renew. Utilities are to use qualified and independent third-party experts to review the expected wind and solar capacity factor for all projects on the shortlist.

g. UOG Bids. For each UOG bid that the IE selects for the short list and that the utility chooses to include on the shortlist, the Commission must retain a highly qualified consulting firm of the type utilized by financing institutions for purposes of obtaining a due diligence evaluation consistent with those required to secure financing from reputable financing entities prior to investment in major generation facilities. The Commission Staff will maintain a list of pre-qualified entities that meet the criteria of a highly qualified consulting firm, and at the time that the draft RFP is made available for comment, the Commission Staff will choose and contact an entity from the list to have the entity available for the analysis at the time of short-list evaluation. The highly qualified consulting firm will produce a comprehensive report on the cost and performance assumptions of the UOG project and propose any necessary adjustments to the bid scoring. The highly qualified consulting firm will contract with and report to the Commission, but the costs of the highly qualified consultant will be the responsibility of the utility shareholders. The highly qualified consultant will provide the final report of its analysis to the Commission, and will provide a copy to the utility and interested stakeholders in RFP process.

10~~11~~. IE Closing Report: The IE will prepare a Closing Report for the Commission after ~~the utility has selected~~ the final shortlist has been selected, and the highly qualified consultant has completed the financing due diligence, as required in section 10(g) of these rules, for any UOG bids placed on the final short list. The utility shall include the IE's Closing Report and the financing due diligence by the highly qualified consultant, as required in section 10(g) of these rules, for any UOG bids, in the shortlist acknowledgement application that is filed with the Commission and served on the parties.

11~~12~~. Confidential Treatment of Bid and Score Information: Bidding information, including the utility's cost support for any UOG bids~~Benchmark Resource~~, as well as detailed bid scoring and evaluation results for all bids will be made available to the utility, Commission Staff and non-bidding parties under protective orders that limit use of the information to RFP approval and acknowledgment and to cost recovery proceedings. Bidders will have access to their own detailed bid scoring and evaluation results.

12~~13~~. RFP Acknowledgement: Except upon a showing of good cause, the utility must request that the Commission acknowledge the utility's selection of the final shortlist of RFP resources. If the final short list submitted to the Commission includes any UOG bids, the utility must explain in detail how the financing due diligence by the highly qualified consultant, as required in section 10(g) of these rules, supports the utility's position that the project should remain on the final short list, particularly if the financing due diligence by the highly qualified consultant, as required in section 10(g) of these rules, identified any flaws in the initial analysis of the UOG bid that resulted in placement on the initial short list. The IE will participate in the RFP acknowledgment proceeding. Acknowledgment has the same meaning as assigned to that term in Commission Order No. 89-507. RFP acknowledgment will have the same legal force and effect as IRP acknowledgment in any future cost recovery proceeding.

The utility's request should discuss the consistency of the final shortlist with the company's acknowledged IRP Action Plan. For RFPs that result in the acquisition of multiple generation facilities or more than 100 MW of renewable energy, the utility cannot obtain acknowledgement if the RFP does not result in ownership diversity. The Commission shall not acknowledge an RFP that does not result in ownership diversity if the utility's RFPs over the last ten years have not resulted in ownership diversity. The Commission will consider the request to acknowledge at a public meeting within 60 days of receiving the utility's application. Parties shall have expedited discovery rights under the Commission's contested case rules.

Commission Staff will make a recommendation about whether the Commission should require IE involvement through final resource selection at the time of acknowledgement of the utility's final shortlist of resources. Other parties, including bidders, may request expanded IE involvement at that time.