McDOWELL RACKNER GIBSON PC
419 SW 11th Ave, Suite 400 | Portland, OR 97205

LISA RACKNER
Direct (503) 595-3925
lisa@mrg-law.com

October 20, 2020

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
Filing Center
P.O. Box 1088
201 High Street S.E., Suite 100
Salem, OR 97308-1088

Re: Docket AR 629 – Joint Utilities' Comments on Staff's Proposed Rules

Attention Filing Center:

Portland General Electric Company (PGE), PacifiCorp, dba Pacific Power (PacifiCorp), and Idaho Power Company (Idaho Power) (together the Joint Utilities) respectfully submit these final comments to the Public Utility Commission of Oregon (Commission) regarding the proposed alternative dispute resolution (ADR) rules for disputes arising between utilities and qualifying facilities (QFs) pursuant to Oregon's implementation of the Public Utility Regulatory Policies Act (PURPA), published on August 28, 2020 (Proposed Rules). The Joint Utilities filed initial comments on October 2, 2020 and submitted oral comments at the public rulemaking hearing held on October 6, 2020 (the Hearing). These final comments are intended to supplement the comments already provided to respond to a few of the issues raised at the Hearing.

As noted in our initial comments, the Joint Utilities generally support the Proposed Rules. However, the Joint Utilities urge the Commission to add one key component. Specifically, the Commission should adopt the Joint Utilities' proposed "meet and confer" requirement. In addition, the Joint Utilities continue to support the Proposed Rules' confidentiality provisions and oppose NewSun Energy's (NewSun) proposed Staff consultation rule.

I. The Commission Should Add a Mandatory Meet and Confer Process.

The Joint Utilities support the proposed meet and confer requirement as a potentially effective tool to resolve disputes before the parties become embroiled in litigation. In the Joint Utilities' experience, involving senior representatives in the dispute resolution process makes it more likely the parties will identify a mutually agreeable resolution.

At the Hearing, the developers opposed the meet and confer requirement, arguing that it would unreasonably delay their ability to file complaints, and create a potential trap for the

unsophisticated developer, who may omit the step to their detriment. The developers also expressed their view that it is only the utilities and not the developers that need to get a senior representative involved in disputes, suggesting that utility personnel take unreasonable and inflexible positions in disputes whereas developer personnel do not. None of these arguments have merit.

First, the meet and confer rule as originally drafted by the Joint Utilities required a complainant to confer fourteen days before filing—to provide ample time to resolve the dispute before the initiation of litigation. However, the developers objected to the delay, and in response the Joint Utilities proposed a shorter timeframe. The resulting seven-day conferral period is highly unlikely to prejudice or even inconvenience any litigant. In contrast, litigation of QF complaints at the Commission has generally stretched for anywhere from several months to two years. Thus, the short delay imposed by the Joint Utilities' meet and confer rule seems a small price to pay to allow for the possibility that litigation could be entirely avoided.

Similarly, in response to concerns voiced by the developers about potential prejudice to QFs who feel the need to file a complaint without delay, the Joint Utilities revised their proposal to allow for waiver of the rule "for good cause shown". The Joint Utilities drafted the waiver rules to ensure there could be no prejudice to the interests of the developers, by providing that the waiver request could be filed contemporaneously with the complaint. That provision further protects the complainant's interests by providing that if the request for waiver is denied, the only consequence will be that the deadlines in the complaint litigation will be stayed for one week to allow the parties to meet and confer under the rule.

Second, the concern that the meet and confer rule could serve as a "gotcha" opportunity to dismiss the complaints of unsophisticated developers is misplaced. QF complaints are filed by lawyers who presumably will be aware of the meet and confer requirement. Moreover, the Joint Utilities have never argued that non-compliance with the rule should result in dismissal of the complaint. Instead, the Joint Utilities propose that if a complainant omits the meet and confer step, the ALJ simply stay prosecution of the complaint until the seven-day meet and confer process is completed.

Third, attorneys for the developers argued at the Hearing that the meet and confer rule is unnecessary because the utilities could, at their option, involve senior representatives in disputes without a rule requiring them to do so. This argument appears to be founded in the baseless premise that when a dispute arises between a QF employee and a utility employee, it is only the utility employee that could benefit from the more intense focus and broader perspective that a senior representative could bring. This position is entirely at odds with the utilities' experience—which is that in many cases QF employees take unreasonable positions, and that when they do involve more senior employees, the dispute can be resolved. Moreover, a meet and confer rule provides a formal escalation step in the dispute resolution process that gives notice to both sides when a dispute is on the cusp of litigation. This allows both the developers and utilities to allocate their time and resources appropriately to head off costly litigation whenever possible. It is simply unrealistic to expect that senior representatives for both the developer and utility will be involved in each of the myriad of issues that may arise during the 3-4 year development phase or the

remaining (up to 20 year) delivery period. For this reason, the Joint Utilities strongly urge the Commission to adopt such a provision.[1]

At the Hearing, Commissioner Thompson asked whether the goals of the meet and confer process could be met by requiring senior representatives to confer *after* a complaint is filed. While the Joint Utilities appreciate consideration of and improvements to their proposal, we do not support this approach. A "post-complaint" meet and confer requirement fails to achieve the chief goal of the rule—which is to prevent litigation before it begins. Once a complaint is filed, there is considerable momentum towards litigation and with only seven days to meet and confer, much of the potential litigation cost savings will be lost. Finally, a post-complaint meet and confer option adds no new tool to the parties' toolbox. All parties recognize the possibility of settlement and can initiate settlement discussions at any time after litigation is filed. Accordingly, the proposal adds nothing to the current alternative dispute resolution options and deprives the meet and confer proposal of its primary benefits.

In short, in response to concerns voiced by the developers, the Joint Utilities made several changes to the meet and confer proposal, all designed to ensure that there is no possibility that they would be harmed by the rule. As a result, there truly is no downside to this relatively modest proposal—while the benefits could be substantial. For this reason, the Joint Utilities continue to urge the Commission to adopt this proposal.

II. The Commission Should Maintain the Proposed Rules' Confidentiality Provisions.

The Proposed Rules maintain the confidentiality that the Commission has always accorded settlement discussions. This approach should not be altered. Confidentiality is absolutely required to encourage frank and open discussions, the willingness of parties to admit weaknesses or errors, and to identify more creative solutions to the problems raised. The Joint Utilities have never participated in settlement negotiations that were not subject to confidentiality requirements, and doubt that any mediation—or conferral process—can be successful without it. Importantly, more often than not it is the QF and not the utility that demands that a settlement agreement be treated confidentially. So, while the trade associations that are parties to this case may object to confidentiality, individual QFs routinely have insisted on it.

The developers argue that there is a public interest reason to dispense with confidentiality in settlement discussions—specifically to ensure that utilities cannot use confidential settlement to discriminate among QFs. However, this position is flawed. Utilities are obligated to implement PURPA evenhandedly among QFs, and it is typically the utility that needs to explain to the QF that it cannot accord the QF the "special treatment" it desires, just to resolve a complaint. It is true that in the settlement of a dispute, extenuating circumstances can be considered in adjusting relief provided to parties. However, overall, the Joint Utilities insist on maintaining uniformity in

[1] To the extent additional language would be helpful to clarify the term, "senior representatives," the Joint Utilities would propose adding the following additional language to their draft provision addressing this issue: "Senior representatives are representatives with authority to agree to a settlement and to bind their respective companies to a settlement agreement."

treatment among similarly situated QFs, frequently over the objection from the QF's counsel that this is not necessary.

III. The Commission should Reject the Staff Consultation Rule.

The Proposed Rules did not include NewSun's Staff Consultation proposal, and the Joint Utilities continue to recommend against its adoption. At the Hearing, the developers argued that the Commission should have no qualms about adopting the proposal because the rule simply codifies a process that is already available. This position is patently incorrect. While it is true that either a developer *or* a utility may reach out to Staff to request input on an issue in dispute, there is no formal process and there is no presumption that would require Staff to serve as a neutral arbiter nor that either side could compel Staff's involvement for every dispute that may arise. Indeed, it is precisely because Staff participates as a party in all PURPA policy dockets, and therefore cannot (and should not) be presumed to be unbiased on any particular issue in dispute, that the Joint Utilities continue to oppose the Staff Consultation proposal. [2] Further, the NewSun proposal would draw extensively on Commission resources, excluding Staff experts from future related complaints. Furthermore, it could potentially place Staff at the center of negotiations between the parties.

The Joint Utilities appreciate this opportunity to provide these final comments on Staff's Proposed Rules.

Respectfully submitted,

Lisa Rackner

Adam Lowney
McDowell Rackner Gibson PC
419 SW 11th Avenue, Suite 400
Portland, OR 97205
dockets@mrg-law.com

David White
Portland General Electric Company

Carla Scarsella
PacifiCorp, dba Pacific Power

[2] If the Commission is inclined to adopt some form of Staff consultation, the Joint Utilities recommend approval of the revised Staff consultation rule prepared by Chief Administrative Law Judge Nolan Moser and set forth in his August 14, 2020, Public Meeting Memorandum with the clarification that participation by either QFs or the utility is voluntary (neither QFs nor utilities may compel the participation of the other side) and that Staff may elect not to serve in this role on a case-by-case basis.

Donovan Walker
Idaho Power Company

Attorneys for Portland General Electric Company, PacifiCorp, dba Pacific Power, and Idaho Power Company