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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 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 appreciate the significant efforts made by the Administrative Hearings Division (AHD) to craft a set of ADR rules that will accomplish the laudable goals of (1) achieving reasonable and durable resolutions to disputes between utilities and QFs; (2) reducing unnecessary litigation; while (3) protecting the rights of all parties. While the resulting Proposed Rules are not entirely consistent with the Joint Utilities preferences, they do reflect a workable compromise of the concerns voiced by the Joint Utilities and the QF developers that participated in the informal phase of the rulemaking. That said, the Joint Utilities strongly advocate for one key addition to the Proposed Rules—a “meet and confer” requirement—and also comment on two issues raised by the developers at the August 25, 2020 Public Meeting.

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

Throughout the informal process, Joint Utilities supported a mandatory ADR rule, which would require that parties participate in ADR prior to filing a complaint. The Joint Utilities believe that such a process would serve as the most effective approach to identifying and addressing disputes that are susceptible to resolution without the need for a Commission resolution on the

merits. In fact, the vast majority of the QF formal complaints filed in the last several years have been resolved without the need for a Commission resolution on the merits. The Joint Utilities believe that a mandatory ADR process before filing a complaint will lead to more efficient resolution of these disputes before they are filed as formal complaints and impose high litigation costs on the utilities, developers, and the Commission. Unfortunately, the QF developers opposed a mandatory approach and during the course of the informal process, AHD consistently proposed voluntary ADR only.

As an alternative to a mandatory ADR process, the Joint Utilities proposed a simple meet and confer rule, whereby a party is required to make its own good faith effort to resolve a dispute prior to filing a complaint with the Commission. A copy of the proposed meet and confer rule is included as Attachment 1. While AHD chose not to include this meet and confer process in its Proposed Rules, the Joint Utilities request that the Commission consider adopting it.

The meet and confer rule proposed by the Joint Utilities is based upon the approach adopted by the Commission in Section 27.1 of its Large Generator Interconnection Procedures (LGIP), as approved in Order No. 10-132¹—and includes the following requirements:

- At least seven days before filing a complaint, a disputing party must send the other party a notice of dispute, including a brief summary of the matters disputed.
- The dispute will be referred to designated senior representatives from both parties, who will meet and confer telephonically or in person at the earliest date practicable.
- Any complaint filed with the Commission must be accompanied by a certificate of compliance showing that the parties met and conferred or showing good cause for a failure to confer.
- Finally, to fully protect the rights of a complainant that believes it will be prejudiced by a delay in filing a complaint, the complainant may request a waiver of the rule contemporaneously with the filing of its complaint—and in the event the waiver is not granted, there will be a stay of all deadlines for the complaint while the parties meet and confer.

As compared with a mandatory ADR process, under the meet and confer approach the disputing parties would not have the benefit of a neutral third-party mediator. However, the proposed meet and confer rule would require senior members of both complainant and respondent organizations to comprehensively evaluate the facts and law relevant to the dispute, and to fully consider the economic impact of the dispute on their respective organizations. In the Joint Utilities' experience, this more intense focus on a dispute by more senior representatives can

¹ Section 27.1 of the LGIP is in turn based on the FERC LGIA.

frequently bring a fresh perspective that allows for the identification of mutually agreeable resolutions.

Moreover, the proposed meet and confer rule is specifically designed to ensure that a complainant is not prejudiced by the requirement. In expressing their opposition to the proposal, the developers specifically noted that they were concerned that any mandatory process might delay the filing of a complaint to the developer's disadvantage. They also argued in general that there might be times when a meet and confer process would be a waste of time. For this reason, the Joint Utilities specifically included a process whereby a party can, contemporaneously with the filing of a complaint, ask that the Commission waive the meet and confer requirement for "good cause shown." Importantly, also in response to concerns voiced by the developers, the waiver provision specifically prevents prejudice in the event the request for waiver is denied by staying all deadlines for the complaint while the parties meet and confer.

The Joint Utilities were disappointed by AHD's decision not to pursue a mandatory ADR process—but understand that ADR can only be successful with two willing partners. However, at a minimum, this Commission should adopt a meet and confer process that at least provides for a speed bump that will slow down the rush to litigation.

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

The Proposed Rules maintain the strict 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 can be successful without it.

III. The Commission Should Not Include NewSun's Staff Consultation Proposal.

Very late in the informal phase of this docket, NewSun Energy (NewSun) proposed an entirely new ADR process, whereby, instead of initiating a mediation process with a neutral third party, either party could request a consultation with Commission Staff.² Under NewSun's proposed rule, once a request is made the other party would be required to participate. The goal was to provide both parties with Staff's view of the proper resolution of the dispute.

While the Joint Utilities appreciate NewSun's efforts, they believe that the Staff consultation concept is fundamentally flawed and should be rejected for three reasons. *First*, as NewSun has acknowledged, parties currently have the ability to reach out to Staff to discuss Staff's views on issues in dispute, and many QF developers already avail themselves of such a process.

² The Joint Utilities are responding to NewSun's proposal as revised after discussions with the ALJ and Joint Utilities.

If the QFs wish to involve a utility in such a conversation, they need only ask. *Second*, and more importantly, as much as the Joint Utilities respect Staff's knowledge and expertise on issues of PURPA law and policy, Staff cannot serve as a neutral third party. On the contrary, Staff participates as a party to every Commission investigation regarding PURPA implementation. In most if not all these dockets, Staff takes an opposing position to either the utilities, the developers, or both, on a whole host of issues. Moreover, Staff has also at times intervened in QF complaint dockets. So Staff's view on any one issue relating to PURPA is unlikely to be viewed as unbiased. In a similar vein, involving Staff as a consultant to party disputes could potentially raise concerns under the Commission's Internal Operating Guidelines. And finally, the Joint Utilities are concerned with the impact of NewSun's proposal on Commission resources. Under NewSun's proposal, Staff would need time to investigate and formulate input into the variety of legal and policy issues that might be brought to them. Further, should Staff decide to intervene in a complaint, the Staff involved in the consultation should be recused from participating in the complaint proceeding; thus, drawing on other Commission resources.

The Joint Utilities appreciate this opportunity to comment on Staff's Proposed Rules and look forward to continuing to work with the parties in the formal phase of this docket.

Respectfully submitted,



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ATTACHMENT 1

to

Joint Utilities' Comments on Staff's Proposed Rules

Proposed Meet and Confer Rule

OAR 860-___ - ___

Requirement to Confer Prior to Filing Complaint or Petition for Declaratory Ruling

(1) Except as provided in subsection 4 or 5 below, prior to filing a complaint pursuant to ORS 756.500 or a petition for declaratory ruling pursuant to ORS 756.450, regarding any dispute between an electric company, as defined in OAR 860-089-0020, and a qualifying facility, as defined in OAR 860-029-0010, the complainant or petitioner for declaratory ruling must first make a good faith attempt to resolve the issues in dispute using the procedures in this Section.

(2) At least seven (7) days before filing a complaint or petition for declaratory ruling, the disputing party shall send the other party a written notice of dispute or claim (“Notice of Dispute”). Such Notice of Dispute must include a brief summary of the matters disputed, including any relevant facts or law and the relief requested. In order to ensure that the appropriate representatives are involved in dispute resolution, the Notice of Dispute should identify whether the matters in dispute concern the terms and conditions of a power purchase agreement, interconnection service, and/or transmission service.

Such dispute or claim shall be referred to a designated senior representative of each party for resolution on an informal basis, and such senior representatives will meet and confer telephonically or in person on the earliest date practicable after the receipt of the Notice of Dispute.

(3) The complainant or petitioner must file a certificate of compliance with this rule at the same time as the complaint or petition is filed. This certificate will be sufficient if it states either that the parties met and conferred telephonically or in person or contains facts showing good cause for a failure to confer.

(4) The Commission may waive the requirement to confer upon request of the Complainant for good cause shown. A complainant or petitioner requesting such waiver may file such request with its Complaint. If such waiver is not granted, the Commission will stay all deadlines associated with the complaint or petition until the parties have conferred.

(5) The parties are relieved of the requirement to confer if they elect to participate in mediation under this Division.