BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 629

In the Matter of Rulemaking Regarding Alternative Dispute Resolution for Complaint Filings and Requests for Declaratory Ruling	JOINT COMMENTS OF RENEWABLE ENERGY COALITION, NORTHWEST & INTERMOUNTAIN POWER PRODUCERS COALITION, AND COMMUNITY RENEWABLE ENERGY ASSOCIATION ON THE PROPOSED ADR RULES

I. INTRODUCTION

The Renewable Energy Coalition ("the Coalition"), the Northwest and Intermountain Power Producers Coalition ("NIPPC"), and the Community Renewable Energy Association ("CREA") (collectively the "QF Trade Associations") respectfully submit these Comments in response to the Chief Administrative Law Judge ("ALJ") Nolan Moser's proposed alternative dispute resolution ("ADR") rules for Public Utility Regulatory Policy Act of 1978 ("PURPA") disputes between qualifying facilities ("QFs") and utilities, filed on August 28, 2020.

The QF Trade Associations appreciate ALJ Moser's efforts thus far, to ensure that the final proposed rules will resolve PURPA disputes in a fair, timely, and cost-effective manner while still enabling access to justice for QFs. Each of the three utilities (collectively the "Joint Utilities") and the individual renewable energy developers who participated in this process also engaged constructively and cooperatively. The efforts by all involved resulted in widespread agreement on most aspects of the proposed ADR

rules and only a discrete and limited number of outstanding issues for the Oregon Public Utility Commission (the "Commission" or "OPUC") to resolve.

In the regulatory context, which includes PURPA, the Commission should strive to make stable and enforceable decisions, consistent with state and federal law and regulations. Specifically, for disputes regarding QF power purchases and interconnection services, the Commission must exercise its general and specific powers to protect QFs, as utility customers, from unjust and unreasonable utility actions, which includes enabling QFs to obtain fair, just, and reasonable rates and contract provisions.[1] In addition, the Commission must enforce the utilities' purchase obligations under PURPA.

The QF Trade Associations ask that the Commission seriously consider its duties and obligations laid out in the statutory framework described below while determining the final version of the ADR rules for PURPA disputes in Oregon. Ultimately, the QF Trade Associations support the Administrative Hearing Division's ("AHD") recommendation to create a voluntary mediation option[2] and oppose the Joint Utilities' request for a mandatory meet and confer period with a seven day advance notice period before filing a complaint.[3] Additionally, the QF Trade Associations urge the Commission to maintain the confidentiality provision already present in OAR 860-001-0350. Lastly, the QF Trade Associations support the proposal to add a workable Staff consultation process into the final proposed rules, where Staff could provide informal guidance to parties in a dispute when necessary.

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1 ORS 756.040(1).
2 AHD Report at 3.
3 *Id.* at 4.

To aid the Commission's decision making, the QF Trade Associations have attached their comments made in the informal rulemaking as Appendix B to these comments.

II. STATUTORY FRAMEWORK

The Commission should adopt an ADR process in this proceeding that implements the specific goal of PURPA: allowing independent power producers and renewable energy generators to sell their net output to the utilities in a non-discriminatory manner and at avoided cost rates. The Commission's adjudicatory process is an important part of Oregon's uniform and settled institutional climate for and increasing the marketability of QFs. Therefore, the ADR process adopted from this proceeding should not undermine that climate or QF marketability, nor undermine the state's goals of promoting the development of a diverse array of permanently sustainable energy resources, which includes QFs.

The parties to PURPA disputes are not ordinary business litigants attempting to enforce a generic contract or business law, as the Commission must always consider its statutory duty to encourage QF development and enforce a utility's must-purchase obligation while working to resolve PURPA disputes. As regulated monopolies seeking a high return on investment, utilities have an incentive to invest in building their own new power plants instead of purchasing power from independently-owned generators.[4]

[4] Congress passed PURPA because Congress found that "traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities," and this reluctance was a barrier to the development of cogeneration and small power production facilities. *FERC v. Mississippi*, 456 U.S. 742, 750 (1982).

However, federal and Oregon-specific PURPA laws require that each "electric utility shall offer to purchase energy or energy and capacity … from a qualifying facility."[5] This statutory requirement exists to combat the natural business opposition of utilities to QFs, which manifests during the PPA and interconnection processes. Accordingly, then, the Commission should make its final decision on what ADR rules to adopt in light of this natural tension. The Commission must establish ADR procedures that are consistent with and further federal and state energy policy by creating an orderly and consistent set of economic practices and regulatory procedures that explicitly encourages QF development.

Additionally, under Oregon law, QFs are protected customers, both as interconnection customers and power purchasers. The Commission is required to represent all utility customers in "all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction."[6] The Commission has broad and expansive authority to "make use of its jurisdiction and powers of its office to protect such customers from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates."[7] Thus, in addition to its duty to encourage QF development, the Commission is obligated to protect QFs as end-use consumers of power and interconnection service.

Federal and state PURPA laws recognize that QFs, as interconnection consumers and purchasers of power, are entitled to additional statutory protections than other

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5 ORS 758.525(2).
6 ORS 756.040(1).
7 *Id.*

consumers.[8] Under the federal PURPA statute, QFs have the right to interconnect with a utility by paying a nondiscriminatory interconnection fee approved by the state regulatory authority or a nonregulated electric utility.[9] Federal law also provides specific statutory protections for QFs purchasing power from utilities in that they have the right to purchase supplementary power, back-up power, maintenance power, and interruptible power at rates which are just and reasonable, based on accurate data and consistent system-wide costing principles, and that are non-discriminatory.[10]

III. COMMENTS

A. The QF Trade Associations Support an Optional Mediation Period and Oppose a Requirement to Meet and Confer

An optional mediation period for parties within a PURPA dispute is currently the best practice available that simultaneously supports QF development. The QF Trade Associations appreciate the AHD's understanding that in order "to ensure that [these ADR rules] … are most effectively utilized" all parties must believe the rules are fair, and therefore, any mediation participation must be voluntary.[11] The QF Trade Associations understand and support the idea of reducing additional costs associated with litigation, but do not support the Joint Utilities' proposed mandatory meet and confer requirement before filing a complaint, nor the 7-day notice period for the reasons below.

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8 In addition to these affirmative rights, QFs are further protected because they are exempt from state laws and regulations respecting their rates, and financial and organizational aspects. 18 CFR § 292.602.

9 *Id.* § 292.306.

10 *Id.* § 292.305.

11 AHD Report at 6.

1. The Joint Utilities' Proposed Requirement Is Unnecessary and Inappropriate

The QF Trade Associations assert that the Joint Utilities' proposed meet and confer rule as well as its seven-day notice before filing a complaint rule are unnecessary, inappropriate, harmful, and unworkable with Oregon's PURPA policies. The Commission should not make conferring before filing mandatory because the counsel for QFs generally follow this protocol voluntarily, therefore, these complaints are rarely a surprise to the utility. As a result, the QF Trade Associations are concerned that there may be other motives to proposing this rule that could harm QFs in the long run. Moreover, meeting and conferring *after* filing a complaint could provide the same benefits to all parties with less risk to QFs. For these reasons, explained in further detail below, the Commission should not adopt the Joint Utilities' proposed mandatory meet and confer and notice rules. If the Commission nevertheless decides to adopt the Joint Utilities' proposals, then additional changes to the rules should be implemented.

As a practical matter, a mandatory meet and confer and notice period of seven days is unnecessary because QFs or their counsel routinely provide adequate notice to utilities before filing complaints at the Commission by sending demand letters requesting that the utilities take action or else a complaint will be filed, or by reaching an agreement with the utility about how to resolve the dispute (e.g., mutual agreement to file a complaint). There are a small minority of cases where QFs do not send formal demand letters threatening litigation, or where there is no mutual agreement for filing a complaint. These generally fall into two categories: 1) cases where there were significant negotiations and disputes (often including the involvement of counsel), in which the

utility had ample time to elevate and resolve the dispute; and 2) cases where there was insufficient time to meet and confer, typically because of disputes (often arising at the last-minute) and an upcoming avoided cost price reduction (sometimes a surprise filing by utility or where the utility requested an earlier effective date, on which the utility itself did not "confer" or warn the QF with whom it was negotiating that rates would drop sooner than the QF expected). Mandating a meet and confer period does not add value in either of these categories of cases, especially when the utility is hiding information about its plans to lower prices from QFs.

At the Rulemaking Hearing on October 6, 2020, counsel for the Joint Utilities asserted that the Joint Utilities are often only provided with a phone call the day of or day before filing a complaint. The Joint Utilities have not provided any data to support this allegation.

The QF Trade Associations have conducted a careful review of the complaints filed against Portland General Electric Company ("PGE") and PacifiCorp,[12] which demonstrates that formal demand letters threating litigation are sent prior to filing most complaints, and nearly all of the remaining complaints were filed after the utility had more than sufficient time to resolve the dispute or there was no time to resolve the dispute. This is evidenced by the chart prepared by the QF Trade Associations and attached to these comments as Appendix A.[13] This chart clearly shows that of the 83

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12 The QF Trade Associations attempted to identify all the publicly available complaints against PGE and PacifiCorp; however, given the large number of complaints against PGE, some may have been inadvertently missed.

13 This chart is based on publicly available information, as well inquires to some QFs that were willing to provide additional information. There are some

complaints filed by QFs in the last four years (for which public information was available), QFs sent formal demand letters in 45 of those cases letting the utilities know that they would pursue litigation if the dispute was not resolved. Of the remaining cases, the parties had met and conferred in at least 18 of the cases. In another 10 cases, ongoing disputes were clearly apparent, and the complaints were filed only after parties were not able to effectively negotiate a resolution through other forms of documented communications.

Of the remaining cases, 10 QFs had to file speedy complaints to lock in avoided cost prices, as is explained in more detail below. Notably, in these cases, PGE engaged in actions which demonstrated that negotiation would have been futile and any meet and confer requirement would have been harmful to the QF.

Therefore, of the 83 complaints filed by QFs in the last four years, there were only 10 cases where utilities can say that they did not have formal or implied notice, but those complaints were filed expeditiously for reasons caused by a utility. By contrast, for the three complaints filed by PGE, it does not appear that PGE provided any notice or sent any demand letters before filing its complaint. Regardless of the specifics for each dispute, what is clear is that QF complaints are rarely surprising to the utility.

Finally, this chart does not take into consideration the majority of the communication made between the client and utility prior to retaining counsel. QF developers often seek to engage with the utilities to resolve disputes in most cases before they resort to retaining counsel, which can be a significant business expense, especially

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complaints in which the QF Trade Associations do not know or cannot reveal what communications or attempts to resolve the dispute occurred.

for many smaller developers. Thus, the Commission should presume that there have been other efforts to resolve disputes that have not been catalogued in the attached chart.

The Joint Utilities have indicated that they want a formal "meet and confer" requirement to properly elevate disputes to senior management. As evidenced by the attached chart, the utilities already have ample time to prepare for most complaints and elevate the issue within the utility organization. In contrast, QFs are already making considerable efforts and expending significant resources to alert utilities to disputes and resolve them without litigation. With that in mind, perhaps the best solution to help resolve disputes more efficiently would be to ask that the utilities (or at least PGE) to take QF disputes seriously by changing their interactions with QFs to reduce disputes and by involving more senior representatives in negotiations earlier. Under no circumstances, however, is it appropriate to mandate another compliance hurdle for QFs, when any "problem" of inefficiency when they have not created this "problem". Such an unfairly applied rule would cut against Oregon's PURPA policy of supporting QF development.

Lastly, a mandated meet and confer period *before* filing a complaint is inappropriate because nothing prevents the parties from meeting and conferring *after* a filing a complaint. The QF Trade Associations agree that voluntarily meeting and conferring before filing a complaint may help resolve PURPA disputes earlier and reduce litigation expenses for both sides. However, such an ADR process should be voluntary and not required before or after filing a complaint.

2. A Mandatory Meet and Confer and 7-Day Notice Period Could Prejudice QFs

The Commission should also reject the Joint Utilities' proposed mandatory meet-and-confer and seven-day notice requirements, because there are several ways they could potentially prejudice QFs, and prejudice against QFs would violate Oregon's policy of encouraging QF development.

a. Increased Expenses

One purpose of promulgating these ADR rules is to decrease the litigation expenses each party incurs.[14] However, creating a mandatory meet and confer requirement could actually increase expenses for QFs. The cost savings imagined by the proposed meet and confer process assumes that the process will resolve more disputes, eliminating the need to file a complaint. As previously mentioned, though, many QFs already provide notice and/or meet and confer with the utilities before filing complaints. Therefore, making this process mandatory is unlikely to result in reduced disputes. On the contrary, creating a mandatory notice and meet and confer requirement will add new and formalistic steps that only serves to lengthen the dispute process, which in all likelihood will result in higher legal costs.

b. Utilities Will Use Additional Contracting Delays to Prevent QFs from Locking in Avoided Cost Prices and Increase Associated Litigation

As previously mentioned, occasionally, it would prejudice a QF to participate in a meet and confer before pursuing litigation. For example, when a QF avoided cost rate

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[14] Email from Chief ALJ Moser to participants (Oct. 24, 2019, 18:06 PST) (asking if the new ADR rules should "be driven by a statutory goal or purpose along with common goals of cost-efficient, timely, and fair dispute resolution?").

change is imminent, the QF needs to establish its legally enforceable obligation ("LEO") to lock in prices before that change occurs. Thus, QFs must act quickly, generally because of the utility's actions, and any further delays only harm the QF.

The Commission's LEO policies are not clear and have been subject to extensive litigation. The Commission has concluded that:

> A LEO will be considered established once a QF signs the final draft of an executable contract provided by a utility to commit itself to sell power to the utility. A LEO may be established earlier if a QF demonstrates delay or obstruction of progress towards a final draft of an executable contract ….[15]

In UM 1610, CREA and the Coalition advocated for clearer policies to allow the QF to lock in prices without a need to resort to litigation and continue negotiations with the utilities.[16] However, the Commission elected to retain its discretion, which only increased the possibility of litigation.[17] What constitutes a delay or obstruction of progress is not clear.

One problem with this LEO standard, is that it is not clear how a QF can demonstrate utility delay other than by filing a complaint. Some utilities argue, and state commissions have adopted policies where a QF must file a complaint and/or execute a contract before forming a LEO. Therefore, QFs have attempted to establish a LEO by unilaterally executing PPAs when the utility refused to provide an executable PPA, and/or by filing a complaint before the date of the price change if utilities refuse to provide executable PPAs. In the pre-rulemaking process in AR 629, the QF Trade

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15 *In re Comm'n Investigation into QF Contracting and Pricing*, Docket No. UM 1610, Order No. 16-174 at 3 (May 13, 2016).

16 *Id.* at 26.

17 *Id.* at 27-28.

Associations attempted to ensure more clarity regarding the ability to form a LEO, which would have allowed QFs to keep negotiating with the utilities without the need to file a complaint in an effort to lock in prices. Yet, their proposed approach was opposed and not included in the draft rules.

PGE has previously used out-of-cycle avoided cost filings while simultaneously delaying the negotiation process with the goal and purpose of ensuring that QFs negotiating contracts would be unable to form LEOs. For example, PGE has taken the position that its Schedule 201 for negotiating contracts has a specific process with a set number of days for PGE to respond (i.e., 15-business days), and PGE often will not provide a response earlier even if it is able to. Regardless of the unreasonableness of PGE's actions, as long a PGE strictly adheres to those contracting deadlines, then PGE's position is that a QF cannot form a LEO.[18] PGE has clearly taken an approach where it does not inform QFs of its intent to lower avoided cost rates early or provide QF with any notice that such a filing is coming (which would allow the QF to expedite its contracting).[19] With this approach, PGE can take all of the time outlined in its contracting process to ensure that it does not provide an executable PPA until after rates

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[18] *Bottlenose Solar et al. v. PGE*, Docket No. UM 1877-1882, UM 1884-UM 1866, UM 1888-UM 1890, PGE Motion for Summary Judgment at 4 (Jan. 24, 2018).

[19] A "confer" requirement that would require the utilities to inform and provide notice to QFs that a non-scheduled rate change would occur and a specific date for when rates would change would reduce litigation. Washington has a rule that avoided cost changes are filed on November 1 of each year and the utility can make a filing at any other time, but only "provided that the commission may not allow such tariff revision to become effective until at least sixty days after such filing." WAC 480-106-040(3). Such a rule in Oregon could have avoided a substantial portion of the complaints filed against PGE.

drop. This is not the only creative effort that PGE has taken to delay the QF contract negotiating process.[20]

PGE's delays and requests for expedited or retroactive price reductions are the reason for all or most of QF complaints where QFs did not send demand letters to PGE before filing a complaint. For example, in 2017, PGE filed a request to lower the size threshold for solar QF's eligibility for standard avoided cost prices from 10 MWs to 3 MWs,[21] which effectively was a surprise reduction in avoided cost prices. PGE also asked for the price reduction to be effective on the date of its filing.[22] In 2017, PGE also filed an avoided cost rate filing on May 1 hoping it would become effective on May 17,[23] which was earlier than the 60 days that the QF development community expected. In both circumstances, the Commission granted PGE partial relief allowing rates to be reduced earlier than usual, but not as early as PGE had requested.[24]

With this context in mind, PGE was negotiating contracts with four QFs, Kaiser Solar, Marquam Creek Solar, Ridgeway Solar, Walker Creek Solar, and Parrot Creek Solar in the spring of 2018. The QFs made a typographical mistake inserting "3039" as

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20 *E.g.*, *In re PGE Application to Lower the Standard Price and Standard Contract Eligibility Cap for Solar QFs*, Docket No. UM 1854, NIPPC, Coalition and CREA Joint Response to PGE Motion for Interim Relief at 36-39 (July 27, 2017) (Listing pages of examples of PGE's actions, including for example, PGE "mistakenly" inserting "Lane" instead of "Linn" county and incorrectly copying and pasting the project's nameplate, and then requiring the QF to wait 15 business days to obtain the next draft.).

21 Docket No. UM 1854, Application (June 30, 2017).

22 Docket No. UM 1854, PGE's Motion for Interim Relief.

23 *In re Application to Update Schedule 201 Qualifying Facility Info.*, Docket No. UM 1728, Supplemental Application (May 1, 2017).

24 Docket No. UM 1728, Order No. 17-177 (May 19, 2017); Docket No. UM 1854, Order No. 17-310 (Aug. 18, 2017).

the date of contract termination rather than "2039". A reasonable person would understand that the year 3039 was a typographical error and was supposed to be 2039. However, PGE was unwilling to simply correct this typographical error without delay and instead extended the contracting process by using an additional 15 business days to fix this minor typo, which would have resulted in the QF being unable to execute contract until late April 2018. PGE was expected to file for new avoided cost rates on May 1, but PGE did not inform the QFs whether there would be a rate reduction or whether PGE would request expedited or retroactive approval. Given PGE's actions, the QFs were not certain whether PGE would request retroactive or interim relief, and they anticipated that PGE would not provide an executable PPA until after avoided cost rates dropped. Accordingly, the QFs requested that PGE assure them in writing that it would not use the typographical error to delay providing an executable PPA. Additionally, the QFs made clear that they wanted to finalize a contract before avoided cost rates dropped.

When PGE did not respond to the QFs final communications on April 25, 2018, the QFs then executed draft contracts and filed complaints against PGE on April 30, 2018, immediately prior to PGE's May 1 filing (which sought an effective date of May 8, 2018).[25] This was intended to lock in avoided cost before the rate reduction or a potential PGE retroactive rate proposal. Had a meet and confer or notice period been mandatory when those disputes were live, it would mean that the QFs could not have filed their complaints until after PGE made its May 1 filing (or would have need to assert a "good

[25] Docket No. UM 1728, Supplemental Application (May 1, 2018).

cause" exception in order to file those complaints) giving PGE an additional argument for why it believes these QFs lost favorable avoided costs.

Further, had a mandatory meet and confer or notice period existed, it likely would not have resolved the dispute. This is because when PGE makes its surprise and/or retroactive avoided cost changes, it has at least sometimes wanted to know the results of the Commission's order regarding when the lower rates would go into effect before providing executable PPAs. More likely, it would have merely forced the QFs to hire counsel and escalate the disputes earlier on, so as to avoid the possibility of being irrevocably prejudiced.

The utility is the regulated entity with the mandatory purchase obligation, and at least PGE has made it clear that they will only do the minimum required by the Commission. Therefore, the solution here would be to simply require that the utility develop an internal procedure for elevating such disputes rather than requiring the QF to jump one more hurdle before filing a complaint (potentially risking its ability to form a legally enforceable obligation and in effect creating *more* disputes for the Commission to resolve). Such a rule would cut against the purpose of this rulemaking to *reduce* the number of disputes the Commission needs to resolve.

c. Venue Concerns Are a Legitimate Reason Not to Have a "Meet and Confer" Requirement

Venue disputes have also arisen when the utilities have prior notice and time to prepare to preemptively file a complaint against a QF that has notified a utility of its intent to file. Under the "first filed" doctrine, the complainant determines the controlling venue in a concurrent jurisdiction situation. PGE has purposely and strategically been the

first to file in the past when they have received such notice, and the QFs have suffered as a result. For example, in *PGE v. Pacific Northwest Solar LLC*, Pacific Northwest Solar LLC ("PNW Solar"), provided PGE with a demand letter and notified PGE that it would be filing a complaint in the Multnomah County Circuit Court to resolve the dispute if the dispute was not resolved.[26] Instead of constructively engaging, either on the merits or on the choice of venue, PGE rushed to file a preemptive complaint at the Commission because PGE believed it would obtain a more favorable decision by the Commission than a court. Instead of focusing only on the merits of the jurisdictional arguments raised in that case, PGE repeatedly argued that the fact that it had first filed was a relevant consideration. Requiring a 7-day notice period would only provide utilities an unfair advantage to file first.

d. Allowing the QF to Complete Negotiations is Another Legitimate Reason Not to Have a "Meet and Confer" Requirement

A practical impact of the Commission's LEO policies and the utilities' interpretation of them is that it creates tension between honestly raising and trying to resolve issues early and as they come up or simply rushing through the negotiation process to reach the point of getting an executable PPA before raising an issue. For example, in the Blue Marmots case, there were policy questions and disputes regarding QF transmission arrangements, when a LEO was formed, and whether the LEO included non-price terms and conditions. The Commission allowed four of the five projects to obtain their sought transmission arrangements, in part, because those four projects had

[26] Docket No. UM 1894, Complaint and Request for Dispute Resolution (Aug. 31, 2017).

obtained executable PPAs. However, one of the projects did not obtain its preferred transmission arrangements, in part, because PGE did not provide an executable PPA.[27] The Commission's intention in these cases was to issue a fair and balanced order that balanced the interests of the QFs, PGE, and ratepayers. Based on the Blue Marmots order, QFs and the utilities now have a greater understanding of the importance of providing an executable contract and when disputes should be raised.

However, as a result of the Commission's UM 1610 policy and the Blue Marmot order that a LEO does not form until an executable PPA is provided, the Commission has provided an incentive for QFs to seek to get as far along in the PPA process as possible prior to the utility refusing to continue negotiations. Some QFs may delay raising any disputes until after they obtain an executable PPA for fear that the utility will stop negotiating or processing the PPA, which may harm the QFs ability to form a LEO. As a result, the 7-day notice period also has the potential to harm QFs because it could result in the utility refusing to continue negotiations or provide an executable contract.[28]

e. The "Meet and Confer" Requirement Will Limit Access to Justice

The QF Trade Associations see the mandatory meet and confer period as an additional hurdle that could prevent QFs from being heard on the merits. They also see it as a potential procedural trap for smaller or unaware QFs who could unknowingly

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27 *In re Blue Marmot V LLC, et al. v. PGE*, Docket No. UM 1829, Order No. 19-322 at 20 (Sept. 30, 2019).

28 Again, if the Commission had adopted the Coalition and CREA's recommendations in UM 1610 or the QF Trade Associations proposals in the informal dispute resolution process, then both the QFs and utilities could focus on contract negotiations rather than attempting to fit into FERC's and the Commission's similar but sometimes contradictory LEO policies.

commit compliance violations, which would add unavoidable litigation expenses to the QF. The Joint Utilities' Comments suggest that a complainant could "request a waiver of the [meet and confer] rule contemporaneously with the filing of its complaint" if it "believes it will be prejudiced by a delay in filing a complaint.[29] A "good cause" waiver will simply create more litigation over whether the waiver request was appropriate.

Instead of creating an unnecessary process that has the potential to prejudice QFs, the QF Trade Associations point out again that nothing currently prevents parties from meeting and conferring after filing a complaint. If the QFs file a complaint and the parties meet and confer shortly afterward, the parties could reach a settlement. Then, they could move to dismiss the case with almost no action by the OPUC, which poses minimal, if any, burden on Commission resources. In fact, a rapid conferral could allow the utilities to avoid the burden of preparing answers; if so, the QF, and not the utility, would be the only entity entailing greater litigation costs by conferring after filing rather than before. Nevertheless, the QF Trade Associations strongly prefer this approach. In practice, some complaints are in fact dismissed shortly after filing, which could signify a speedy settlement or other resolution acceptable to the QF, and this includes the four complaints in the spring of 2018 discussed above for which no demand letter was sent (Kaiser Solar, Marquam Creek Solar, Ridgeway Solar, Walker Creek Solar, and Parrot Creek Solar). Thus, the utilities have little reason to oppose postponing their suggestions until after QFs file their complaints.

[29] Joint Utilities' Comments at 2 (Oct 2, 2020).

f. The Commission May Not Have the Legal Authority to Require a QF to "Meet and Confer" Prior to Filing a Complaint

The QF Trade Associations question whether it is lawful to place any condition on the ability to file a complaint under ORS 756.500, which does not provide for any specific conditions prior to filing a complaint. Mandating a meet and confer period before pursuing litigation at the Commission could violate a QF's right to file a complaint "against any person whose business or activities are regulated by one or more of the statutes, jurisdictions for the enforcement or regulation of which is conferred upon the commission."[30]

g. AHD Has Explained that Mandatory Processes Will Undermine Confidence by the Stakeholders that the Dispute Resolution Process Is Fair

The AHD has already considered and rejected the option of mandatory mediation, explaining that it "believe[s] it is important that all traditional complaint participants believe that the rules are fair, in order to ensure that they are most effectively utilized."[31] Accordingly, the AHD settled on a voluntary participation structure. Mandating a meet and confer period is, in essence, not very different than mandating a mediation process, which the AHD did not support. Following the same line of logic, the Commission should not adopt an unfair mandatory meet and confer period, in lieu of a previously rejected and unfair mandatory mediation period.

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30 ORS 756.500

31 AHD Report at 6.

3. Extra Protections Must Be Added If a Meet And Confer is Required

If the Commission disagrees with the AHD's recommendation to only adopt voluntary ADR measures and adopts the Joint Utilities' mandatory meet and confer and 7-day notice period, then the QF Trade Associations recommend the following three revisions:

1. Projects that are five megawatts or less, sole proprietorships or family-owned, or community-based should be exempt from a mandatory meet and confer.

2. It should be in effect after filing the complaint.

3. The costs of both the QFs and utilities' participation should fall upon the utilities' shareholders, not QFs or ratepayers. The Commission, upon the recommendation of the utilities, would be mandating additional process and cost on QFs and ratepayers, even in scenarios where the parties have already failed to reach a successful compromise and the QFs have already determined that they want to pursue a complaint.

If the utilities truly want to mandate this additional unnecessary process, then they should be required to use their resources in furtherance of this solution, to ensure that QFs and ratepayers are not burdened with additional costs and to ensure that the legal playing field is level for QFs with limited legal resources.

B. The QF Trade Associations Do Not Support Restricting the Commission's Existing Confidentiality Rules Further

The QF Trade Associations ask the Commission to revise the proposed confidentiality provisions. First, the Commission should set narrow limitations on confidential material in settlement discussions, consistent with its current standard

confidentiality provision, [32] which only says parties cannot use any communications from settlement discussions against another party in filings. Second, the Commission should allow for the publication of all QF-utility settlements, especially ones that have occurred as part of a government-funded and approved mediation process.

In their comments, the Joint Utilities assert that the proposed rule maintains the strict confidentiality rule "the Commission has always accorded settlement discussions."[33] In reality, however, the proposed confidentiality rule[34] is much broader than the Commission's current confidentiality rule. The confidentiality provisions make it far more difficult, if not impossible, for QFs to discuss certain disputes among themselves. This proposed rule provides yet another barrier for access to justice because the QF will have to agree to far more restrictive confidentiality provisions to utilize any Commission mediation services.

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32 OAR 860-001-0350(3) ("Without the written consent of all parties, any statement, admission, or offer of settlement made during settlement discussions is not admissible in any Commission proceedings, unless independently discoverable or offered for other purposes allowed under").

33 Joint Utilities' Comments on Staff's Proposed Rules at 3 (Oct. 10, 2020).

34 Order No. 20-273 at 4 ("Confidentiality and Use of Statements, Proposals, or Materials in Complaints ("(1) Unless otherwise agreed to by the parties in writing, all written or oral communications made by the parties in preparation for or during the mediation session(s) including but not limited to offers of settlement must be kept confidential by the parties and the mediator, may not be used by the non-disclosing party for any purpose other than participation in the mediation process, and may not be released to any third party or be offered into evidence in any legal proceeding unless agreed to in writing by both parties. Confidentiality obligations in this section apply to each party's employees and representatives (including each party's counsel). (2) For purposes of ORS 192.502(4), the Commission obligates itself to protect from disclosure any document submitted in confidence during settlement discussions.").

This particular proposed confidentiality rule would give utilities the upper hand in any mediation proceeding. Consider that a single utility like PGE would have the ability to enter into multiple simultaneous settlements with many different QFs. When this happens, PGE will know every communication and negotiation made with each QF and what it has agreed to with different QFs. However, the QFs will be in the dark in their negotiations, as they would not be allowed to discuss any aspect of the mediation with other QFs facing similar disputes. While utilities are obliged to treat QFs in a non-discriminatory manner, any utility could provide different and better deals to QFs with better negotiating tactics, a bigger legal budget or that are willing to reach an agreement on other unrelated issues, regardless of whether the QFs are similarly situated as to the facts and merits of the disputes. The Commission must fairly implement PURPA, not just resolve disputes. Therefore, it should not adopt ADR rules that increase the utilities bargaining position and power over QFs.

All settlements reached in Commission-funded mediation should be publicly available. Making PUC-funded mediation settlements available will allow the Commission, other developers, and the public to learn about any systemic or wrongful conduct. Furthermore, the secrecy of settlements protects and often encourages repeat harmful behavior, which is why many courts and legislative bodies have recently enforced and passed laws mandating the publication of certain settlements to protect the public interest.[35]

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[35] For example, the Eleventh Circuit has long held that settlements in Fair Labor Standards Act ("FLSA") litigation should not be confidential because as that would contravene congressional intent and undermine regulatory efforts. *Lynn's*

The Commission has published its PURPA rules and orders and has a strong interest in ensuring the uniform and non-discriminatory application of the law to all QFs. Making all settlements public will also allow the Commission to perform its duty to enforce the law, protect the public, and encourage QF development. If a utility violation of PURPA or any other law is hidden by settlement confidentiality, then the Commission cannot fulfil its duties under Oregon's PURPA statutes and may encourage the utilities to treat similarly situated QFs differently.

It is one thing to allow utilities and QFs to negotiate disputes outside of the Commission's view, but the rules promulgated in this proceeding will be official OPUC rules for an OPUC-approved mediation process. Thus, the Commission would be approving a mediation process that uses the OPUC's resources to promote a potentially discriminatory and non-uniform application of the law that was specifically designed, in part, to protect QFs.

Again, one of the purposes for promulgating these ADR rules was to make the dispute process more efficient and affordable.[36] Keeping in line with this goal, it is logical for the Commission to discourage any repeat harmful or unlawful conduct that utilities could keep hidden through a confidential mediated settlement process. For these

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Food Stores, Inc. v. United States, 679 F.2d 1350 (11th Cir. 1982). As a result, FLSA settlement agreements must be filed in the court's public docket (*Hanson v. Wells Fargo Bank*, No. 08-80182-CIV, 2009 WL 1490582 (S.D.Fla. May 26, 2009)). Other examples of laws that mandate publicized settlements include settlements that would have concealed public hazards (Fla. Stat. Ann. § 69.081) and settlements over motor vehicle problems in its Lemon Law settlements (Cal. Civ. Code § 1793.26). In recent years legislative bodies have also made efforts to publicize settlements related to fair housing claims and harassment claims.

[36] *See supra* 9 n. 13.

reasons, the QF Trade Associations support and request that the Commission not adopt the proposed confidentiality rule, keep its existing confidentiality rule, and make (at least some extent) the PUC-funded negotiated settlements available to the public.

C. The QF Trade Associations Support Having Commission Staff Involved in the ADR Process

NewSun Energy proposed to involve Commission Staff in the ADR process when needed to provide insights into questions of law and Commission policy that arise during PURPA disputes. The QF Trade Associations support creating such a mechanism to the extent that Staff is willing, available, and able to help.[37] Staff has already made themselves available for consultations in the past when available, but unfortunately, many QFs are unaware that Staff offers this valuable informal guidance. Therefore, there is no reason for the Commission not to publicize this consultation service, which is already available, in the proposed rules.

If the Commission does not adopt NewSun's proposal, at minimum the Commission should include in its rules that Staff may be available to provide insights. This would allow smaller or less sophisticated QFs to take advantage of the Staff's guidance while going through the ADR process without hiring legal counsel to know that this option is available.

To be sure, the QF Trade Associations do not expect Staff to offer mediation services during the ADR process. The expectation would be that Staff offer, when asked, to listen to the dispute discussion informally, offer their understanding of Commission

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[37] The QF Trade Associations understand and support Staff's need to make decisions regarding who participates in a particular ADR process, so they are not prevented from working on any future policy dockets related to the same topic.

law and policy, and explain how it may apply to the particular dispute at hand. Staff should have the discretion to decline to participate or opine. The QF Trade Associations understand that Staff has concerns regarding their availability to assist should there be an influx of ADR proceedings in a short window of time, which is why the QF Trade Associations ask that this service be publicized and available for future ADR proceedings specifically subject to any conditions that Staff believes are warranted.

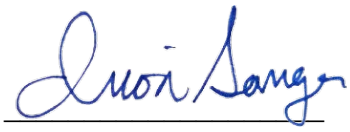
IV. CONCLUSION

The QF Trade Associations appreciate the opportunity to comment on the proposed ADR rules for PURPA disputes.

Dated this 20th day of October 2020.

Respectfully submitted,

Sanger Law, PC



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APPENDIX A

OPUC Docket #	Complainant	Date Filed	Brief Description	Did Utility Have Official Notice that Complaint Would be Filed if Issue Was Not Resolved? N/A = not available or not publicly known.	Was the Utility Provided an Opportunity to Resolve the Dispute?	Demand letter & Date letter was sent if known N/A = not available or not publicly known.	Other forms of notice or important notes?
UM 1566	Patu Wind Farm v. PGE	12/12/2011	PGE refused to pay full net output from off system QF regarding transmission arrangements dispute.	Yes, by way of demand letter.	Yes, the demand letter was served more than a month before the complaint was filed.	Yes (11/07/2011).	
UM 1742	Surprise Valley Electric. Corp v. PacifiCorp	6/22/2015	PacifiCorp has failed to comply with Schedule 37, OPUC rules, FERC rules and policies, and the Oregon and federal PURPA statutes. PacifiCorp unreasonably delayed the contract completion process and refused to finalize or execute a PPA with QF.	Yes, by way of demand letter.	Yes, the QF struggled through two years of communicating with PacifiCorp regarding interconnection issues before filing complaint, and QF sent a demand letter more than two months before filing.	Yes (4/16/2015).	
UM 1784	Harney Solar I v. PGE	6/21/2016	PGE failed to execute a PPA because of pending rate reduction.	No.	Yes, to the extent that there was time available with the urgent filing deadline. PGE had an QF-executed PPA for almost a month that they would not execute despite ongoing communications to resolve the dispute.	N/A.	QF executed its contract on 5/24/2016 and on 6/8/2016 OPUC approved the updated AC rates that would go into effect on 6/22/2016.
UM 1785	Riley Solar I v. PGE	6/21/2016	See above.	No.	Yes, to the extent that there was time available with the urgent filing deadline. PGE had an QF-executed PPA for almost a month that they would not execute despite ongoing communications to resolve the dispute.	N/A.	QF executed its contract on 5/27/2016 and on 6/8/2016 OPUC approved the updated AC rates that would go into effect on 6/22/2016.
UM 1829	Blue Marmot V v. PGE	4/28/2017	PGE refused to execute PPA because PGE did not accept QF transmission arrangements.	Yes, by way of demand letter.	Yes.	Yes (4/24/2017).	

UM 1830	Blue Marmot VI v. PGE	4/28/2017	See above.	Yes, by way of demand letter.	Yes.	Yes (4/24/2017).	
UM 1831	Blue Marmot VII v. PGE	4/28/2017	See above.	Yes, by way of demand letter.	Yes.	Yes (4/24/2017).	
UM 1832	Blue Marmot VIII v. PGE	4/28/2017	See above.	Yes, by way of demand letter.	Yes.	Yes (4/24/2017).	
UM 1833	Blue Marmot IX v. PGE	4/28/2017	See above.	Yes, by way of demand letter.	Yes.	Yes (4/24/2017).	
UM 1844	Evergreen Biopower v. PGE	5/31/2017	PGE challenged a QF's eligibility for standard prices.	Yes, in the form of emails and several calls to the utility's attorney in an attempt to avoid litigation.	Yes, to the extent that there was time available with the urgent filing deadline.	Yes (date unknown).	There was a deadline to file before the rate change. PGE changed terms at the last minute.
UM 1859	Falls Creek Hydro v. PGE	8/7/2017	PGE refused to execute PPA of a pending rate reduction.	Yes, by way of demand letter.	Yes, the demand letter was served more than a month before the complaint was filed.	Yes (7/03/2017).	
UM 1860	Red Prairie Solar v. PGE	8/7/2017	PGE refused to accept estimated generation output using the same formula it has previously accepted for over a dozen projects and refused to execute PPA because of pending rate reduction.	Yes, by way of demand letter.	Yes, QF provided all info requested to receive a PPA on 6/2/2017 and PGE did not respond until 6/28/2017 requesting additional info, which QF provided immediately. PGE said it would provide a PPA but did not reach out again until 7/22/2017 saying it needed more information.	Yes (7/31/2017).	
UM 1861	Volcano Solar v. PGE	8/7/2017	See above.	Yes, by way of demand letter.	Similar to Red Prairie, the QF requested a PPA in early May, provided additional info in early June, and PGE continued to drag out its responses until QF sent final demand letter on 7/31.	Yes (7/31/2017).	
UM 1862	Tickle Creek Solar v. PGE	8/7/2017	See above.	Yes, by way of demand letter.	Similar set of facts to Red Prairie Solar and Volcano the cases above	Yes (7/26/2017).	

					only the QF started asking for PPA in late February and was ready to sign in late May.		
UM 1863	SSD Marion 4 v. PGE	8/7/2017	PGE refused to execute PPA because of pending rate reduction.	Yes, by way of demand letter.	Yes, QF developer filed complaint 7 days after it provided a demand letter which is what Joint Utilities have recommended in this proceeding.	Yes (7/31/2017 & 8/02/2017).	
UM 1864	SSD Clackamas 4 v. PGE	8/7/2017	See above.	Yes, by way of demand letter.	Yes, QF filed complaint 5 days after sending a demand letter. However, PGE could have foreseen the imminence of these demand letters given similar disputes were occurring on other projects that demand letters were sent.	Yes (8/02/2017).	
UM 1865	SSD Marion 1 v. PGE	8/7/2017	See above.	Yes, by way of demand letter.	Yes, QF filed complaint 5 days after sending a demand letter. PGE also could have foreseen the imminence of these demand letters given that were similar disputes on other projects that demand letters were sent.	Yes (8/02/2017).	
UM 1866	SSD Clackamas 7 v. PGE	8/7/2017	See above.	Yes, by way of demand letter.	Yes, QF filed complaint 7 days after it provided a demand letter which is what Joint Utilities have recommended in this proceeding.	Yes (7/31/2017 & 8/02/2017).	
UM 1867	SSD Marion 2 v. PGE	8/7/2017	See above.	Yes, by way of demand letter.	Yes, QF filed complaint 5 days after sending a demand letter. PGE also could have foreseen the imminence of these demand letters given that were similar disputes on other projects that demand letters were sent.	Yes (8/02/2017).	
UM 1868	SSD Clackamas 6 v. PGE	8/7/2017	See above.	Yes, by way of demand letter.	Yes, QF filed complaint 7 days after it provided a demand letter which is what Joint Utilities have recommended in this proceeding.	Yes (7/31/2017).	
UM 1869	SSD Clackamas 1 v. PGE	8/7/2017	See above.	Yes, by way of demand letter.	Yes, QF filed complaint 5 days after sending a demand letter. PGE also could have foreseen the imminence of these demand letters given that were similar disputes on	Yes (8/02/2017).	

					other projects that demand letters were sent.		
UM 1870	SSD Clackamas 2 v. PGE	8/7/2017	See above.	Yes, by way of demand letter.	Yes, QF filed complaint 5 days after sending a demand letter. PGE also could have foreseen the imminence of these demand letters given that were similar disputes on other projects that demand letters were sent.	Yes (8/02/2017).	
UM 1871	SSD Marion 3 v. PGE	8/7/2017	See above.	Yes, by way of demand letter.	Yes, QF filed complaint 5 days after sending a demand letter. PGE also could have foreseen the imminence of these demand letters given that were similar disputes on other projects that demand letters were sent.	Yes (8/02/2017).	
UM 1872	SSD Marion 5 v. PGE	8/7/2017	See above.	Yes, by way of demand letter.	Yes, QF filed complaint 7 days after it provided a demand letter which is what Joint Utilities have recommended in this proceeding.	Yes (7/31/2017).	
UM 1873	SSD Marion 6 v. PGE	8/7/2017	See above.	Yes, by way of demand letter.	Yes, QF filed complaint 5 days after sending a demand letter. PGE also could have foreseen the imminence of these demand letters given that were similar disputes on other projects that demand letters were sent.	Yes (8/02/2017).	
UM 1874	SSD Yamhill 1 v. PGE	8/7/2017	See above.	Yes, by way of demand letter.	Yes, QF filed complaint 7 days after it provided a demand letter which is what Joint Utilities have recommended in this proceeding.	Yes (7/31/2017 & 8/02/2017).	
UM 1875	Klondike Solar v. PGE	8/7/2017	PGE requested information new and unnecessary information while simultaneously refused to execute PPA because PGE made its filing to lower standard price eligibility from 10 MW to 3 MW.	No.	Yes, QF provided updated information to PGE on 6/28/2017 via email and asked for a Standard PPA over a month before filing complaint. Utility created dispute with no time for extensive discussions before rate reduction.	N/A.	The Complainant sent first letter on 7/24/2017 requesting a draft PPA and sent second letter letting PGE know it was ready and willing to sign a PPA, and it stated that the request to sign was urgent. (8/3/2017)

							By making a surprise filing and suddenly refusing to continue negotiations, PGE provided the QF with no opportunity to resolve the dispute prior to filing a complaint.
UM 1876	Saddle Butte Solar v. PGE	8/7/2017	PGE requested information new and unnecessary information while simultaneously refused to execute PPA because PGE made its surprise filing to lower standard price eligibility from 10 MW to 3 MW.	No.	Yes, QF provided updated information to PGE on 6/28/2017 via email and asked for a Standard PPA over a month before filing complaint. Utility created dispute with no time for extensive discussions before rate reduction.	N/A.	The Complainant sent a letter requesting a draft PPA immediately. By making a surprise filing and suddenly refusing to continue negotiations, PGE provided the QF with no opportunity to resolve the dispute prior to filing a complaint.
UM 1877	Bottlenose Solar v. PGE	8/7/2017	PGE refused to execute PPA because of pending rate reduction.	Yes, by way of demand letter.	Yes, PGE: 1) provided a late draft PPA on May 23; 2) refused requests to meet in person twice; 3) ignored requests for expedited processing on twice; 4) requested that QF resubmit its app. on 3/22, then requested reformatting on 4/13;5) ignored two requests for an executable PPAs;6) waited to inform QF about 6/1 rate change; and 7) completely ignored a partially executed PPA QF submitted on 5/31.	Yes (8/02/2017).	
UM 1878	Valhalla Solar v. PGE	8/7/2017	PGE refused to execute PPA because of pending rate reduction.	Yes, by way of demand letter.	Yes, but instead PGE engaged in a similar delay pattern as the facts described above.	Yes (8/02/2017).	
UM 1879	Whipsnake Solar v. PGE	8/7/2017	PGE refused to execute PPA because of pending rate reduction.	Yes, by way of demand letter.	Yes, but instead PGE engaged in a similar delay pattern as the facts described above.	Yes (8/02/2017).	
UM 1880	Skyward Solar v. PGE	8/7/2017	PGE refused to execute PPA because of pending rate reduction.	Yes, by way of demand letter.	See above.	Yes (8/02/2017).	

UM 1881	Leatherback Solar v. PGE	8/7/2017	PGE refused to execute PPA because of pending rate reduction.	Yes, by way of demand letter.	See above.	Yes (8/02/2017).	
UM 1882	Pika Solar v. PGE	8/7/2017	PGE refused to execute PPA because of pending rate reduction.	Yes, by way of demand letter.	See above.	Yes (8/02/2017).	
UM 1883	SSD Clackamas 3 v. PGE	8/8/2017	PGE refused to execute PPA because of pending rate reduction.	Yes, by way of demand letter.	Yes, QF filed complaint 7 days after it provided a demand letter which is what Joint Utilities have recommended in this proceeding.	Yes (7/31/2017).	
UM 1884	Cottontail Solar v. PGE	8/10/2017	PGE refused to execute PPA because of pending rate reduction.	Yes, by way of demand letter.	Yes, QF filed complaint 6 days after sending a demand letter. PGE could have foreseen the imminence of these demand letters given the 20 filed days earlier for the same dispute.	Yes (8/04/2017).	
UM 1885	Osprey Solar v. PGE	8/10/2017	PGE refused to execute PPA because of pending rate reduction.	Yes, by way of demand letter.	Yes, QF filed complaint 6 days after sending a demand letter. PGE could have foreseen the imminence of these demand letters given the 20 filed days earlier for the same dispute.	Yes (8/04/2017).	
UM 1886	Wapiti Solar v. PGE	8/10/2017	PGE refused to execute PPA because of pending rate reduction.	Yes.	Yes, QF filed complaint 6 days after sending a demand letter. PGE could have foreseen the imminence of these demand letters given the 20 filed days earlier for the same dispute.	Yes (8/04/2017).	
UM 1888	Bighorn Solar v. PGE	8/14/2017	PGE refused to execute PPA because of pending rate reduction.	N/A.	Yes.	N/A.	Public information states that QF sent a demand letter on 8/11/2017 requesting that PGE execute the PPA that had been signed and provided back to PGE on 5/31/2017; QF owner sent demand letters specifically threating the filing of a complaint for nine other projects.

UM 1889	Minke Solar v. PGE	8/14/2017	See above.	N/A.	See above.	N/A.	See above.
UM 1890	Harrier Solar v. PGE	8/14/2017	See above.	N/A.	See above.	N/A.	See above.
UM 1902	Pacific Northwest Solar (Amity Project) v. PGE	10/9/2017	PGE failed to follow OPUC interconnection timeline and policies.	Yes.	Yes, demand letter was served over a month before complaint was filed.	Yes (8/28/2017).	
UM 1903	Butler Solar v. PGE	10/9/2017	See above.	Yes.	Yes, demand letter was served over a month before complaint was filed.	Yes (8/28/2017).	
UM 1904	Pacific Northwest Solar (Duus Project) v. PGE	10/9/2017	See above.	N/A.	Yes, PGE was sent a letter informing them of ongoing disputes. Complaint further stated that "PGE has repeatedly lost emails, lost letters and checks sent via U.S. mail, and delayed the interconnection process."	N/A.	Not called a demand letter in the complaint but the letter explained how PGE's delays have been harming PNW Solar. (6/23/2017) Publicly available complaints identify that demand letters sent for 3 of the 5 projects by the same owner with same issues.
UM 1905	Pacific Northwest Solar Firwood Project) v. PGE	10/9/2017	See above.	N/A.	Yes, though PGE was sent a letter informing them of ongoing disputes. Complaint further stated that "PGE has repeatedly lost emails, lost letters and checks sent via U.S. mail, and delayed the interconnection process."	N/A.	Sent letter on how PGE's delays have been harming PNW Solar. (6/23/2017). Publicly available complaints identify that demand letters sent for 3 of the 5 projects by the same owner with same issues.
UM 1906	Pacific Northwest Solar (Starlight	10/9/2017	See above.	Yes, by way of demand letter.	Yes, demand letter was served over a month before complaint was filed.	Yes (8/28/2017).	

	Project) v. PGE						
UM 1907	Pacific Northwest Solar (Stringtown Project) v. PGE	10/9/2017	See above.	Yes, by way of demand letter.	Yes, demand letter was served over a month before complaint was filed.	Yes (8/28/2017).	
UM 1941	Kaiser Solar v. PGE	4/30/2018	PGE delayed contract negotiations due to a typographical error.	No.	Utility created dispute with no time to resolve before rate reduction.	N/A.	QF indicated to PGE its desire to finalize the PPA before annual rate change. (4/25/2018) PGE created the dispute by refusing to process a contract immediately prior to a request for expedited avoided cost rate reduction
UM 1942	Marquam Creek Solar v. PGE	4/30/2018	See above.	No.	See above.	N/A.	PGE created the dispute by refusing to process a contract immediately prior to a request for expedited avoided cost rate reduction
UM 1943	Ridgeway Solar v. PGE	4/30/2018	See above.	No.	See above.	N/A.	See above.
UM 1944	Walker Creek Solar v. PGE	4/30/2018	See above.	No.	See above.	N/A.	PGE created the dispute by refusing to process a contract immediately prior to a request for expedited avoided cost rate reduction.
UM 1945	Parrott Creek Solar v. PGE	4/30/2018	See above.	No.	See above.	N/A.	PGE created the dispute by refusing to process a contract immediately prior to a request for expedited avoided cost rate reduction.

UM 1949	Cow Creek Solar v. PGE	5/21/2018	See above.	No.	See above.	N/A.	PGE requested early avoided cost reduction and refused to commit to provide an executable PPA until after the PUC order re timing of rate change.
UM 1950	Williams Acres Solar v. PGE	5/21/2018	See above.	No.	See above.	N/A.	See above.
UM 1951	Zena Solar v. PGE	5/21/2018	See above.	No.	See above.	N/A.	See above.
UM 1963	Dunn Rd. Solar v. PGE	7/26/2018	PGE provided little to no detail in its interconnection studies and explanation as to why certain interconnection facilities and system upgrades were required.	Yes, by way of demand letter.	Yes. Dunn Road Solar informed PGE on 5/22 that it would file a complaint if PGE did not provide appropriately specific and reasonable information.	Yes (5/22/2018 email from Complainant and 7/26/2018 letter from attorney).	Complainant's deadline to execute the interconnection agreement was 7/27.
UM 1967	Sandy River Solar v. PGE	8/24/2018	PGE delayed and made inconsistent statements in the interconnection study process and unreasonably refused to allow Sandy River to hire a third-party to complete the work.	Yes, by way of demand letter.	Yes, PGE received two demand letters in and around a month before QF filed complaint.	Yes (7/19/2018 & 8/02/2018).	
UM 1971	Waconda Solar v. PGE	9/28/2018	PGE refused to allow Waconda Solar to hire third party contractor to preform studies.	No.	Yes, QF was tried to resolve issue with PGE for over a month prior to filing complaint.	N/A.	QF's attorney sent a demand letter on (8/24/2018) requesting that PGE allow it to use 3rd party consultants. The letter did not specifically threaten litigation. PGE's response denied QF's request without explanation.
UM 1994	Klamath Hills Geothermal v. PGE	1/11/2019	PGE withheld the standard non-variable, off-system contract prior to 9/1/17.	Yes.	Yes, the complaint notes that KHG has attempted to resolve these issues with PGE since late 2017, but PGE has rebuffed all of those settlement efforts.	N/A.	

UM 1995	Middle Fork Irrigation District v. PGE	1/15/2019	PGE rejected QF's PPA on the grounds that it will not execute an agreement more than one year in advance of the expiration of the existing PPA.	Yes.	Yes.	N/A.	Three separate letters were sent requesting draft contracts and suggesting that PGE had violated the law. (9/20/2018, 10/31/2018, & 12/07/2018).
UM 1998	Evergreen Biopower v. PGE	1/29/2019	PGE refuses to do monthly balancing for off-system QF, refuses to waive any ownership of T-RECs or to accept T-RECs when settling under delivery damages.	Yes, by way of demand letter.	Yes.	Yes (date unknown).	QF counsel sent three rounds of letters to utility prior to filing a complaint, the first of which stated an intent to litigate if not resolved amicably.
UM 2009	Madras PV1 v. PGE	4/22/2019	Negotiated QF PPA; PGE delayed contract negotiation process, insisted on unreasonable terms, and insisted on IA prior to draft PPA.	Yes, by way of demand letter.	Yes, Negotiations ongoing for one and half years. Complaint filed the day prior to avoided cost reduction on 4/23.	Yes (4/19/2019).	
UM 2051	Fossil Solar v. PGE	12/31/2019	Fossil Lake filed a complaint against PGE to prevent PGE from terminating the PPA between the parties, asserting that PGE's notice of termination is invalid because PGE is not currently renewable resource deficient.	Yes, by way of demand letter.	Yes, PGE received a demand letter more than 10 days before QF filed complaint.	Yes (12/20/2019).	
UM 2057	St. Louis Solar v. PGE	2/3/2020	St. Louis Solar filed a complaint against PGE because PGE has failed to complete interconnection, causing SLS to miss its COD.	Yes.	Yes, PGE received two letters, the first of which expressed several concerns and the more recent letter asked PGE to amend the PPA. PGE refused explaining actions PGE would take if the matter proceeded to litigation, and a complaint was filed nine days later.	Yes (7/26/2019 & 1/24/2020).	

UM 2074	Zena Solar v. PGE	3/27/2020	Zena Solar raised various interconnection issues.	Yes, by way of demand letter.	Yes, various interconnection issues in dispute since 2019.	Yes.	
UM 2079	Marquam Creek Solar v. PGE	4/23/2020	Marquam Creek Solar asks the OPUC to order PGE to either accept Marquam Creek Solar's notice of termination or terminate the PPA itself, so that Marquam Creek Solar can participate in the CSP.	Yes, PGE asked QF to file "placeholder" complaint.	Yes, PGE and QF met and conferred.	N/A.	PGE asked Complainant to file placeholder complaints in meet and confer, so there was a 'conferral' in lieu of a letter.
UM 2080	Sesqui-C Solar v. PGE	5/1/2020	QF filed complaint as a "placeholder" in the event that PGE did not agree to terminate its PPA. If PGE agreed to terminate, QF agreed to withdraw this complaint.	Yes, see above..	See above.	N/A.	See above.
UM 2082	Sandy River Solar v. PGE	5/7/2020	See above.	Yes, see above	See above.	N/A.	See above.
UM 2084	Kaiser Creek Solar v. PGE	5/8/2020	See above.	Yes, see above.	See above.	N/A.	See above..
UM 2083	Carned Creek Solar v. PGE	5/8/2020	See above.	Yes, see above.	See above.	N/A.	See above
UM 2086	River Valley Solar v. PGE	5/11/2020	See above.	Yes, see above.	See above.	N/A.	See above.
UM 2085	Fruitland Creek Solar v. PGE	5/11/2020	See above.	Yes, see above.	See above.	N/A.	See above.
UM 2087	Mt. Hope Solar v. PGE	5/12/2020	See above.	Yes, see above.	See above.	N/A.	See above.
UM 2090	Cusack Solar v. PGE	5/13/2020	See above.	Yes, see above.	See above.	N/A.	See above.
UM 2089	Cosper Creek v. PGE	5/13/2020	See above.	Yes, see above.	See above.	N/A.	See above.

UM 2088	Belvedere Solar v. PGE	5/13/2020	See above.	Yes, see above.	See above.	N/A.	See above.
UM 2093	Williams Acres Solar v. PGE	5/14/2020	See above.	Yes, see above.	See above.	N/A.	See above.
UM 2092	Dunn Rd. Solar v. PGE	5/14/2020	See above.	Yes, see above.	See above.	N/A.	See above.
UM 2091	Ashfield Solar v. PGE	5/14/2020	See above.	Yes, see above.	See above.	N/A.	See above.
UM 2096	Zena Solar v. PGE	5/15/2020	See above.	Yes, see above.	See above.	N/A.	See above.
UM 2095	Gun Club Solar v. PGE	5/15/2020	See above.	Yes, see above.	See above.	N/A.	See above.
UM 2094	Buckner Creek Solar v. PGE	5/15/2020	See above.	Yes, see above.	See above.	N/A.	See above.
UM 2097	Auburn Solar v. PGE	5/18/2020	See above.	Yes, see above	See above	N/A.	See above
Cases Where PGE Was The Complainant							
UM 1887	PGE v. Covanta	8/11/2017	PGE refused to execute PPA because QF proposed to reduce its nameplate capacity.	Yes.	Yes.	N/A.	Covanta brought complaint to FERC, PGE intervened and brought complaint to the OPUC.
UM 1894	PGE v. Pacific Northwest Solar	8/31/2017	Contract dispute about whether a QF can increase or decrease its nameplate capacity.	Yes.	Yes.	PGE did not send a demand letter.	
UM 1931	PGE v. Alfalfa Solar I	1/25/2018	Contract dispute about whether PGE must pay 15 years of fixed prices.	Yes.	Yes.	PGE did not send a demand letter.	

APPENDIX B

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 629

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON, Community Solar Implementation.	COMMENTS OF THE RENEWABLE ENERGY COALITION, THE NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, AND THE COMMUNITY RENEWABLE ENERGY ASSOCIATION

I. INTRODUCTION

The Renewable Energy Coalition (the "Coalition"), the Northwest & Intermountain Power Producers Coalition ("NIPPC"), and the Community Renewable Energy Association ("CREA") (collectively the "QF Trade Associations") submit these comments responding to the Chief Administrative Law Judge ("ALJ") Nolan Moser's questions regarding the framework for alternative dispute resolution ("ADR") in the context of the Oregon Public Utility Commission's (the "Commission" or "OPUC") implementation of the state and federal Public Utility Regulatory Policies Act ("PURPA").

The QF Trade Associations appreciate the Commission's willingness to re-evaluate its dispute resolution processes during a time in which there has been an unprecedented level of utility and qualifying facility ("QF") disputes. QF developers simply want to build renewable energy facilities and sell electricity, and none go into the process in order litigate with their utility (and many would never have gone into the process if such burdensome litigation was expected to secure basic contractual and

statutory rights). However, given that PURPA requires utilities to purchase power from electricity generators from whom they do not necessarily want to purchase power, some conflict is likely inevitable and the small renewable power production community welcomes this rulemaking process to improve the dispute resolution process. We understand that these initial comments are merely starting off the informal process, and the QF Trade Associations are providing broad feedback rather than detailed recommendations. These comments also specifically respond to each of the Chief ALJ's questions in the order asked.

To summarize the QF Trade Associations' overall position, in order to provide access to justice, highlight utility harmful actions, and to implement PURPA, the Commission should adopt lower-cost dispute resolution processes that are available to QFs.[1] Specifically, the purpose of any ADR process the Commission must adopt should be to provide a less time-consuming and less costly dispute resolution option than the complaint dispute processes currently available to QFs through the Commission and courts. The primary currently available option of a fully litigated complaint is not viable for most disputes and for most developers of QF projects because it is simply too long and too costly. The delay and cost of the process directly inures to the utility's benefit because the utility has a disincentive to enter into the transaction with the QF in the first place, and has seemingly unlimited and ratepayer-paid-for resources to litigate against the

[1] The QF Trade Associations recommend that the Commission should consider examining the QF and utility contracting and contract implementation process so that the Commission is informed about issues and solutions. Individual QFs, however, should be able to obtain prompt resolution for their disputes.

QF. The available options could include binding or non-binding arbitration, or even consider less litigious, more collaborative, streamlined and informal dispute resolution, such as mediation by Commission Staff.

II. COMMENTS

A. What Should Be the Goal or Goals of an ADR Process in the PURPA Context?

The Commission's goals for any dispute resolution process, whether ADR or a fully-adjudicated contested case, should be to ensure that it resolves disagreements in a fair, timely and cost-effective manner, while enabling access to just outcomes. In the regulatory context, including PURPA, the Commission should also strive for achieving stable and enforceable decisions that are consistent with state and federal law and regulations. In addition, as to disputes regarding QFs when purchasing electricity and interconnection services, the Commission must exercise its general and specific powers to protect QFs as utility customers from unjust and unreasonable utility actions and obtain for them fair, reasonable and sufficient rates.

All judicial and regulatory bodies first look to what their constitutional or statutory purpose is, before deciding what procedures are warranted to achieve those goals. In the context of administrative proceedings, the due process requirements depend upon the nature of the administrative agency's actions. Thus, the first step in this dispute resolution rulemaking should be to look at the Commission's state and federal mandates related to PURPA and determine how its dispute resolution process should be designed to ensure that these legally-mandated goals are met. Examples from other areas of law can be illustrative. For example, one goal of a specialized family court is not to just resolve

disputes between adverse litigants, but to improve the lives of families and children who find themselves within the family justice system. Thus, the procedures in family court may be designed to promote the development of enduring solutions and provide specialized advocates for children rather than issue decisions with clear winners or losers. Similarly, a fundamental goal of the federal bankruptcy laws enacted by Congress is to give debtors a financial "fresh start" from burdensome debts. While creditors have a role in the process and certain due process rights, the goal is to prevent a creditor from taking actions to collect debts that would otherwise be owed to them absent the bankruptcy.

It should be no different in the PURPA context. The dispute resolution process should be designed to implement the specific goals of PURPA, and not to provide the parties the same exact rights that they would have if they were regular buyers and sellers of products in an unregulated free market. PURPA disputes are in the context in which the utility is obligated to purchase a product over its objection. The basis for that objection is that the utility loses an investment opportunity when it purchases power from a QF rather than own and rate-base the generation resources. To make things even more complex, the utility is a monopoly supplier of distribution and interconnection services to its competitor (the QF) and the utility is a monopsony purchaser of power in a wholesale generation market with many sellers, one of which is that same utility.

The Commission should build a dispute resolution process that recognizes these basic regulatory, legal and economic realities. This includes the unequal bargaining position between QFs and utilities, which allows utilities to impose their preferred outcome on a QF and evade their obligations, unless a QF chooses to fully litigate a complaint proceeding. The failure to properly account for its statutory goals will result in

a dysfunctional process that will not produce fair results, and which would violate the due process rights of QFs and deny ratepayers and the environment the benefits that PURPA was enacted to achieve.

1. The Primary Goal of the Commission's Dispute Resolution Policies and Rules Should Be to Implement Federal and State PURPA Requirements so that the Commission Encourages the Development of Renewable Energy Development by Requiring Utilities to Purchase QF Net Output

The Commission's dispute resolution process should ensure that it meets PURPA's primary goal, which is to "encourage the development of cogeneration and small power production facilities."[2] This is not a generic law that provides vague encouragement for renewable energy or mandates to purchase renewable energy regardless of ownership, but it is designed to address one specific barrier to the development of cogeneration and small power production facilities: that "traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities".[3] The Commission has long recognized that utilities are biased in the resource procurement process to select ownership options over power purchase agreements.[4] In addition, another of Congress' core goals in enacting PURPA was to address the fact that state regulatory agencies were often a barrier to non-utility owned

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2 *FERC v. Mississippi*, 456 U.S. 742, 750 (1982).

3 *Id.*

4 *Re OPUC investigation regarding performance based ratemaking mechanisms to address potential build-vs.-buy bias*, Docket No. UM 1276, Order No. 11-001 at 2, 5 (Jan. 3, 2011). The Commission concluded that this bias exists because utilities can recover their costs and earn a profit on their own capital investments. *Id.*

cogenerators and renewable energy generators selling their net output to utilities.[5] PURPA attempts to remove this barrier put in place by both utilities and state regulatory commissions by *requiring* utilities to offer to sell electricity to, and purchase electricity from, such facilities.[6]

What does the statutory purpose of PURPA mean for the Commission adopting dispute resolution processes? As explained above, the Commission's role and the entire dispute resolution process should focus on and have the goal of facilitating this statutory requirement of requiring the utilities to purchase QF power and overcoming the utilities' reluctance to purchase it. At its core, any rules must recognize that utilities do not want to buy QF power, and, despite this reluctance, they are required by law to buy QF power. Establishing a dispute resolution process that pretends that a utility and QF are equal parties entering into arm's length transactions like normal business people will fail to achieve PURPA's statutory mandate.

Oregon also has its own mini-PURPA statute, which provides policy-level direction to this Commission when establishing dispute resolution procedures. Similar to the federal law, Oregon law also includes a mandatory purchase obligation and requires utilities to "offer to purchase energy or energy and capacity whether delivered directly or indirectly from a qualifying facility".[7] More unique to Oregon, however, is that it is:

> the policy of the State of Oregon to:
> (a) Increase the marketability of electric energy produced by qualifying facilities located throughout the state for the benefit of Oregon's citizens; and

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5 *See* Mississippi, 456 U.S. at 750-51.
6 *Id.* at 751 (quoting PURPA § 210(a); 16 U.S.C. 824a-3(a)).
7 ORS 758.525(2).

(b) Create a settled and uniform institutional climate for the qualifying facilities in Oregon.[8]

While this is a state-wide policy, this Commission is the primary state agency charged with implementing PURPA, and ensuring that this policy is met. Thus, unless this Commission aggressively attempts to implement this policy, then it will not be achieved.

What does the statutory policy of Oregon's PURPA mean for the Commission adopting dispute resolution processes? It means that the Commission's adjudicatory process should be an important tool in achieving the state-wide policy of increasing the marketability of QF power and to creating a settled and uniform institutional climate for the QFs in Oregon. Again, the Commission is not simply resolving disputes among ordinary business litigants to enforce generic contract or business law. Instead, the Commission must establish dispute resolution procedures that have the explicit goal of meeting Oregon's energy policy, which is to *increase* the ability of QFs to sell their power and to *create* a fixed, orderly and consistent set of prevailing economic practices, relationships, and regulations with the explicit purpose of benefiting QFs.

2. A Dispute Resolution Goal Should Be to Protect QFs Which Are Utility Consumers Paying for Power and Interconnection Services From A Monopoly Utility

The Commission must consider that QFs are entitled to the same protections that apply to all persons and utility customers. In Oregon, distribution and interconnection service is largely a *de facto* and *de jure* monopoly, but generation service is not. QFs are captive utility customers because they need to purchase supplementary power, back-up

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[8] ORS 758.515(3).

power, maintenance power, and interruptible power, as well as certain interconnection services from utilities. PURPA recognizes that QFs cannot operate without these services. While other utility consumers need protection because utilities are monopolies providing them necessary services, in the end the utilities still need residential, commercial and industrial consumers to continue to operate so that there is someone to purchase their power. In contrast, QFs need these protections as utility customers, but they also need additional protections because they are competitors to the utilities in the generation sector. Not only do utilities not need QFs, they may prefer they did not exist.

Federal and state PURPA laws recognize that QFs, as interconnection consumers and purchasers of power, are entitled to even greater statutory protections than other consumers.[9] Under the federal PURPA statute, QFs have the right to interconnect with a utility by paying a nondiscriminatory interconnection fee approved by the state regulatory authority or a nonregulated electric utility.[10] Federal law also provides specific statutory protections for QFs purchasing power from utilities in that they have the right to purchase supplementary power, back-up power, maintenance power, and interruptible power at rates which are just and reasonable, based on accurate data and consistent system-wide costing principles, and that are non-discriminatory.[11]

QFs also are protected under Oregon law as both interconnection customers and purchasers of power, and the Commission "shall" represent all utility customers

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9 In addition to these affirmative rights, QFs are further protected because they are exempt from state laws and regulations respecting their rates, and financial and organizational aspects. 18 CFR 292.602.

10 18 CFR 292.306.

11 18 CFR 292.305.

(including QFs purchasing power and interconnection services) in "all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction." The Commission is provided broad and expansive direction so that it "shall make use of its jurisdiction and powers of its office to protect such customers from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates."[12] The Commission is obligated to protect QFs as end-use consumers of power and interconnection service.

Oregon law also protects QFs from unjust discrimination and states that no utility "shall make or give undue or unreasonable preference or advantage to any particular person or locality, or shall subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect."[13]

What do the statutory protections against unjust discrimination, unjust and unreasonable practices, and fair and reasonable rates mean for the Commission adopting PURPA dispute resolution processes? Again, this means that the Commission should not be considered an ordinary tribunal for dispute resolution, and it is fundamentally unlike an ordinary court proceeding in which the decision-maker is supposed to assume the equality of the parties. Instead, the dispute resolution process must recognize that the Commission's statutory mission and duties are to protect QFs as interconnection and electricity consumers from utilities, and that QFs warrant even greater protections than other utility consumers.

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12 ORS 756.500(1).
13 ORS 757.325(1).

3. The Commission Generally Should Not Consider the "Ratepayer Indifference" Standard or the Impact on Utility Shareholders in Dispute Resolution

Ratepayers benefit from wholesale competition lowering prices, but are also protected by state commissions setting the rate for such purchases at no more than the "avoided costs" or, in other words, "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source."[14]

There are different types of utility and QF disputes, and for most of them, determination of the avoided cost price is not relevant. For small QFs under the appropriate size threshold for standard rate eligibility, the avoided cost rate is irrelevant and there is no reason for the Commission to even consider the impact on consumers because the Commission has already determined that the administratively-determined price is correct at the time of commencement of the dispute. For post-contract execution disputes, the avoided cost rate is similarly irrelevant because the Commission has already determined that the price is correct, but also because the Commission is prohibited as a matter of law from revising the price.[15]

Accurately setting avoided cost prices, however, is relevant when the Commission must set the price during a pre-contract execution dispute about what the appropriate price is in a negotiation for non-standard rates for larger QFs. However, here the

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14 18 C.F.R. § 292.304(a); 18 C.F.R. § 292.101(b)(6).

15 *Freehold Cogeneration Associates v. Board of Regulatory Commission of the State of New Jersey*, 44 F.3d 1178, 1189 (3rd Cir. 1995); *Indep. Energy Prod. Ass'n, Inc. v. California Pub. Util. Comm'n*, 36 F.3d 848, 848-9, 858 (9th Cir. 1994).

controlling question is determination of the lawful avoided cost rate under the framework that the Commission has already developed for calculating those rates.

B. In Order to Achieve Stated Goals, What Elements Are Necessary in the ADR Process?

The Commission should achieve its PURPA and consumer protection mandates by adopting a dispute resolution process that is fair, timely, cost-effective, and enables access to justice. One seminal list of due process requirements was articulated in Judge Henry Friendly's seminal and still relevant article "Some Kind of Hearing", which listed in general priority as follows: 1) an unbiased tribunal; 2) notice of the proposed action and the grounds asserted for it; 3) an opportunity to present reasons why the proposed action should not be taken; 4) the right to present evidence, including the right to call witnesses; 5) the right to know opposing evidence; 6) the right to cross-examine adverse witnesses; 7) a decision based exclusively on the evidence presented; 8) the opportunity to be represented by counsel; 9) the requirement that the tribunal prepare a record of the evidence presented; and 10) the requirement that the tribunal prepare written findings of fact and reasons for its decision.[16] Not all of these are required when there is alternative dispute resolution. In the PURPA context, the Joint QF Parties would add: 1) the right to a speedy resolution; and 2) the right to a cost-effective resolution for all impacted stakeholders: the QFs, the utilities, the Commission, and ratepayers.

In this context, some of the key elements that are necessary in the dispute resolution process are:

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[16] https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5794&context=penn_law_review

- Considering the interests and incentives of the parties, particularly the utilities;

- Recognizing that QFs are diverse in terms of size, generation type, ownership, operational characteristics, and generation type;

- Understanding that there is a variety of different types of disputes between QFs and utilities;

- Considering how the Commission's PURPA implementation has rewarded aggressive actions by utilities to avoid their obligations to purchase power by forcing the QF to incur delays and costs of litigation; and

- Addressing the resource and information imbalance between QFs and utilities.

1. The Commission Should Consider the Incentives of the Parties

As explained above, a core element of any PURPA dispute resolution will be to recognize the incentives in the regulatory construct which create the reluctance and disincentive for utilities to purchase power from QFs and other non-utility owners of generation. This does not mean that the Commission should assume ill-intent or lack of professionalism on utility employees. However, the Commission should consider ways to mitigate against utility incentives to not purchase electricity at each stage of the dispute resolution process.

2. The Dispute Resolution Process Should Recognize that QFs are Diverse in Terms of Size, Ownership, Operational Characteristics, and Generation Type

While the absolute numbers and megawatts of currently operating QFs is relatively modest in Oregon,[17] QFs have a remarkable diversity in size, ownership,

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[17] PacifiCorp has almost 60 operating projects for about 320 MWs, and PGE has about 19 operating projects for about 60 MWs. Except one 200 kW project, PacifiCorp has not had any new QF PPAs since late 2016 and no solar QF PPAs

operational characteristics, and generation type. This means that the Commission should consider different types of dispute resolution to account for the unique aspects QFs. What dispute resolution process may be appropriate for a large industrial cogenerator or solar developer may be entirely inappropriate for a small family-owned diary digester or an irrigation district hydro facility.

QFs include renewable energy projects up to 80 MWs and cogeneration of any size. Unlike other states, Oregon does not have any truly large QFs, with PacifiCorp's only large projects being the 20 MW Roseburg Forest Products Dillard biomass project and the 32 MW Biomass One project, and PGE's only "large" project being the 13 MW Covanta Marion biomass project. The lack of large Oregon projects is due to a variety factors, including the lack of certain types of industrial facilities (e.g., little Oregon mining or chemical manufacturing) and the reduced timber economy. However, the most

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since 2015. PGE has 112 QFs with executed PPAs that have not yet become operational (and not terminated), with a total 493 MW. In contrast, Idaho has been historically one of the most successful PURPA implementation states with over 130 QF projects and about 1,150 MWs of nameplate capacity. While the Idaho Public Utilities Commission recently decided to stop new solar and wind QFs, in the case of Idaho Power, PURPA projects constitute the vast majority of renewable generation in the utility's portfolio, constituting almost 20 percent of its current portfolio, and will greatly assist the utility in meeting its recently announced corporate goal of serving 100 percent of its retail load with carbon-free electricity by 2045. *See* https://www.idahopower.com/energy-environment/energy/clean-today-cleaner-tomorrow/. Similarly, the Montana unit of NorthWestern Energy reports that it has over 381 MW of wind QF contracts and 97 MW of solar QF contracts, which makes up a substantial quantity of that relatively small utility's portfolio and constitutes carbon-free energy that would not otherwise be on the grid in a state that relies heavily on coal. *See* NorthWestern's 2019 Resource Plan, Chapter 4, available at http://www.northwesternenergy.com/docs/default-source/documents/environment/draft-2019-electricity-supply-resource-procurement-plan.pdf.

important factor in the lack of large Oregon QFs may be this Commission's PURPA implementation, which REC, NIPPC, and CREA view as historically being more focused on utility interests than QF interests compared to many other states.[18]

Oregon has a modest number of very small projects 1 MW and lower, including about a half dozen 1 MW or less small projects with contracts with PGE, and over twenty operating and selling power to PacifiCorp. Some of these include the 0.03 MW City of Portland Hydro Bureau project, the 0.04 MW Loyd Fery Farms hydro facility, the 0.2 MW Three Sisters Irrigation District Watson Hydro Project, the Oregon Institute of Technology 0.28 MW geothermal project, the 0.17 MW RES Ag-Oak Lea biogas project, and the 0.025 MW Starbuck Properties solar project.[19]

What does the diversity in Oregon QF sizes from very small to mid-sized mean for the dispute resolution process? It means that the Commission's dispute resolution processes should be flexible enough to reflect this range from the very small to mid-sized QF projects (and contemplate the possibility that there may one day be large QFs in

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[18] For example, the International Paper biomass cogeneration project shut down because PacifiCorp refused to provide a contract and the Commission ruled that it had no established be a legally enforceable obligation to a new contract. *See International Paper Co. v. PacifiCorp, dba Pacific Power*, Docket No. UM 1449, Order No 09-439 (Nov. 4, 2009). About 270 Albany area workers lost their jobs. https://www.oregonlive.com/business/2009/10/paper_mill_to_close_near_alban.html. While Wyoming and Utah are natural resource rich for wind and solar, eastern and southern Oregon are also resource rich. In Wyoming PacifiCorp has 8 wind and solar PPAs above 60 MWs, and in Utah it has 12 wind and solar operating projects 50 MW and above, and both states also have large cogeneration QFs.

[19] The QF data in these comments is based on best available information that is publicly available or provided on a non-confidential basis in regulatory proceedings. Some information may be outdated.

Oregon). No QF has negotiation leverage with a utility, nor can any QF match or absorb the litigation costs the way a utility's ratepayer-funded litigation budget can. However, "larger" Oregon projects can at least afford to litigate certain issues. The smaller projects, unless they receive *pro bono* assistance, simply cannot access the Commission's current dispute resolution process and must accept whatever the utility wants—regardless of the reasonableness. In addition, many of the smaller- to mid-sized projects in the 1 to 10 MW range may be able to afford to litigate to some extent, but the cost-benefit ratio, along with the litigation risk, generally forces these projects simply to accept whatever the utilities provide. Thus, in order to provide access to justice and to implement PURPA, the Commission will need to adopt lower-cost dispute resolution processes than anything as time-consuming and expensive as litigating a complaint in the current version of the Commission's contested case process.

There is a wide range of owners of QF projects in Oregon, including farmers, municipalities, irrigation districts, small and large companies, sole proprietors, small businesses, cooperatives, water districts, dairies, recycling companies, counties and schools. At least at the start of any negotiation process to obtain a power purchase agreement, these entities generally have a positive relationship with, and a high degree of trust in their utility as it provides them and their communities with safe and reliable electric service. The majority of the currently-operating Oregon QFs are not sophisticated developers and their primary mode of business is not the sale of electricity.

What does the range of QF owners mean for the Commission's dispute resolution process? The Commission should be aware that it can be extremely difficult for most cities, counites, irrigation districts, individuals, businesses, etc. to understand their legal

rights in the unique regulatory world of electricity sales. In addition, many of these entities, especially public agencies, may have other business relationships with their local utility, or internal or political factors which may prevent or limit their ability to exercise their legal rights in a litigated proceeding. The Commission should consider less litigious, more collaborative, streamlined and informal dispute resolution, such as a non-binding mediation option. It might be appropriate to lead these efforts by an internal Commission employee (e.g., Commission PURPA Staff) or a neutral, outside third-party that allows entities that do not want or cannot exercise all their due process rights to bring a legitimate disagreement and obtain a resolution.

3. The Type of Dispute Can Dictate the Type of Dispute Resolution

There is also a wide variety of the types of disputes between QFs and utilities. They can involve legal interpretations, policy determinations, factual disputes, etc. Some of the major types include (and they often overlap):

- Whether a QF has formed a legally enforceable obligation,
- Whether a utility can insist on particular contract terms, which Oregon utilities have even found ways to force into standard contracts through use of contract addendums or otherwise,
- Interpretation of an executed contract's provisions,
- Factual questions about whether a utility has complied with its legal obligations,
- Resolving disputes about the appropriateness of certain interconnection, metering, or other technical requirements, and
- Interpretation of law or FERC or Commission policies.

Here is a limited set of examples of different types of disputes and improved dispute resolution processes to illustrate how different types of disputes might warrant their own processes. The Joint QF Parties look forward to working with the Commission and stakeholders to expand these examples of potential disputes and how they may benefit from more specific types of dispute resolution.

i. Interconnection and/or Technical Disputes.

The Commission currently does not have the internal technical and engineering expertise to adjudicate and resolve detailed engineering and technical factual matters. This is because, until recently, issues related to detailed interconnection matters have not come before the Commission for resolution.

How can the process be improved? Given the limited resources the Commission may currently have to devote to a dispute resolution function, the Commission could retain additional specialized employees or retain outside third-party experts to help resolve technical interconnection disputes during the interconnection study and contract negotiation process.

ii. Questions of Legal or Contract Interpretation and Policy Decisions

The Commission should have a quick method of resolving simple disputes about legal, policy and contract matters. The QF Trade Associations sought to obtain the Commission's interpretation of its policy regarding the start date for the 15-year fixed price term in UM 1805. It took from December 2016 to August 2018 for the Commission to answer that question as a matter of generic policy. PGE pursued an

aggressive litigation approach[20] and the Commission issued three substantive orders on the merits and two orders on the compliance filing. PGE's litigation approach resulted in the expenditure of QF and ratepayer resources, and delayed resolution of the case, which resulted in some QFs executing an older version of the contract during the pendency of the litigation, which may start the 15-year fixed price period at contract execution rather than power deliveries. The delay of resolution of this issue has quite literally killed renewable energy facilities that would have otherwise been developed in Oregon. Then in UM 1931, PGE and individual QFs litigated a protracted and expensive proceeding regarding the start time of fixed prices in existing contracts. The Joint QF Parties appreciate that the Commission is considering a more simple and expedited manner to address similar disputes in the future.

The Commission also appears to seek to avoid resolving policy issues raised by QFs.[21] This means that when disputes are brought to the Commission, they are often

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[20] https://www.oregon.gov/puc/eDockets/Pages/default.aspx
PGE's substantive filings included: 1) a Motion to Strike and Motion to Make More Definite and Certain; 2) Comments and Recommendations regarding Declaratory Ruling Option; 3) Answer, 4) Motion for Summary Judgment, 5) Response in Opposition to Complainants' Summary Judgment, 6) Reply in Support of Motion for Summary Judgment, 7) Response to Motion for Official Notice, 8) Response to Compliance Filing Comments, 9) Objection to Joint Petition to Intervene Out of Time, 10) Request to Stay Response to Motion for Clarification and Application for Rehearing or Reconsideration, 11) Response in Opposition to Petition for Clarification and Application for Rehearing or Reconsideration, Application for Rehearing or Reconsideration and Application to Amend Order No. 17-465, 12) Reply in Support of Application for Rehearing or Reconsideration and Application to Rescind, Suspend or Amend Order No. 17-465, Response to Bench Request, and 13) Response to Motion to Strike and Motion To Waive.

[21] In contrast, when a utility claims that they are being harmed and requests a change in prices, contract terms, standard contract eligibility, etc. the Commission

longstanding issues of tension between QFs and the utilities. For example, PacifiCorp's interconnection process has shut down new QF development in its service territory for years now. When CREA and the Coalition asked the Commission to fix the problem, their concerns were brushed aside and the Commission expressed no interest in interconnection matters,[22] until the interconnection issues jeopardized the success of the community solar program. The Commission has been adjudicating "load pocket" issues since *2011*, during which PacifiCorp has used load pockets to prevent the development of many projects by unilaterally imposing its preferred outcome of the dispute into individual QF contracts through unapproved addenda to the standard contract.

Similarly, the Commission has been made aware of PGE's interconnection delays, wildly inaccurate cost estimates, inaccurate calculations of available transmission, unreasonable requirements and other interconnection issues for years now. The Commission's only substantive decision to date is to let PGE know that it is free to

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generally acts on an expedited basis. For example, Idaho Power requested changes to certain terms and conditions governing its obligations under PURPA, and requested a temporary stay or interim relief of its obligations related to PURPA pending a review of Idaho Power's filing. The Commission granted Idaho Power interim relief that became effective retroactively to the date of Idaho Power's filing (April 24, 2015). *Re Idaho Power Applications to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Change, and for Change in Resource Sufficiency Determination*, Docket No. UM 1725, Order No. 15-199 at 7 (June 23, 2015).

[22] *Re Commission Investigation into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 18-181 at 4-5 (May 23, 2018) ("We are not addressing QF interconnection issues, which have been thoroughly litigated and addressed in previous proceedings, nor are we addressing any options that may have been offered to a QF related to interconnection in the context of PacifiCorp Transmission's QF interconnection studies.").

unreasonably withhold its consent to allow third-party involvement in the process, unless the rules explicitly require PGE to be reasonable.[23]

In another example, the Coalition has been litigating for years the capacity value associated with operating QFs that renew their contracts, then obtained a favorable Commission decision, which PacifiCorp ignored, and now the issue is unlikely to be resolved for another year or two.[24] During this time, currently operating QF projects that need to renew their expiring PPAs will be unable to obtain capacity payments in a new PPA and may well stop operating altogether.

How can the process be improved? The Joint QF Parties are open to discussing options with the Commission and stakeholders. A QF, utility, or organization should be able to take a simple legal or policy question to the Commission for resolution and have it answered in a few months without exhaustive pleadings. There is no reason that any QF policy issue or contract interpretation should take almost a decade to resolve while it

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23 *Re Sandy River Solar, LLC v. PGE*, Docket No. UM 1967, Order No. 19-218 (June 24, 2019).

24 The Coalition first raised the issue with testimony from Don Schoenbeck in March 2013 in UM 1610, and again raised the issue with a different recommendation in testimony from Kevin Higgins in April 2015. The Commission adopted Mr. Higgins recommendation in April 2016 (Order No. 16-174 at 19). However, PacifiCorp choose to disregard the order, and the Coalition raised the issue in PacifiCorp's next two IRPs. The Commission recently decided to open a new proceeding "docket to investigate the treatment of QFs in the utility integrated resource planning (IRP) process." *Re Commission Request to Adopt a Scope and Process for the Investigation Into PURPA Implementation*, Docket No. UM 2000, Order No. 19-254, at Attachment A at 1. However, it is unclear whether this proceeding will also implement the 2016 Order No. 16-174 direction to actually pay QFs for the capacity value associated with their contract renewals, or if that capacity payment will be deferred to a future proceeding, which would likely mean a 4-5 year time lag between the Coalition winning the issue and any effective relief.

presents an insurmountable obstacle to many QFs being able to operate. One potential approach is to expand upon current processes available under the Commission's "declaratory ruling" process for PURPA matters. While there are limits to the matters upon which the Commission may issue a declaratory ruling under ORS 756.450, the Commission may be able to issue more expedited declaratory determinations related to PURPA contracting issues under the Commission's inherent authority to resolve disputes related to PURPA contracting under the state's mini-PURPA statute or the federal PURPA statute's delegation of authority to the Commission. Additionally, the Commission could consider offering an informal arbitration service that would resolve disputes between individual QFs and a utility with respect only to the transaction at hand without issuing a broader order with applicability to other parties.

iii. Non-Standard Contract Terms

Non-standard contracts are for mid-sized to larger QFs above 10 MWs, and there already is a more expedited dispute resolution process for these QFs.[25] This process was used to obtain a prompt order at least once.[26]

How can this process be improved? The Commission could get ahead of any disputes by requiring the utilities to file, at least for informational purposes, non-standard contract provisions,[27] provide more clear non-standard contract rules, and require that,

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25 OAR 860-029-0100.

26 *International Paper Co. v. PacifiCorp, dba Pacific Power*, Docket No. UM 1449, Order No 09-439 (Nov. 4, 2009).

27 The Washington Utilities and Transportation Commission recently adopted rules that require the utilities to provide their non-standard contract forms on their website. These are the starting place for negotiations. WAC 480-106-030(5) ("All utilities shall post upon the utility's web site nonbinding term sheets with

except for limited QF-specific confidential material, executed non-standard contracts be made publicly available. Decreasing transparency and maintaining informational advantages are classic tactics of monopolies to preserve their market position and prevent the success of their competitors. The Commission should take steps to remove the informational advantage currently maintained by the utilities with respect to non-standard contracts in Oregon.

iv. Settlements

Currently, settlement agreements between utilities and QFs can be made confidential, which hides the terms from both the Commission, ratepayers, and other QFs. While the QF Trade Associations agree that there may be circumstances where a unique case could be resolved only through the use of confidential settlement, there is also concern that the confidentiality of PURPA settlements is becoming a standard term of any settlement agreement with some utilities. One downside to such confidential settlements is that the utility can force subsequent parties to litigate an issue that does not warrant any further litigation. Such confidential settlements also prevent the Commission from understanding the scope, extent and factual issues regarding disputes, and does not promote equal and non-discriminatory treatment between QFs.

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limited contract provisions for qualifying facilities with capacities greater than [the size for standard contract eligibility]. Such contract provisions need not be the same as the standard contract provisions required pursuant to subsection (3) of this section, but shall be consistent with the commission's rules.") Likewise, the Idaho Public Utilities Commission provides all PURPA contracts as a publicly available documents on its dockets webpage, and in Montana Public Service Commission proceedings all PURPA contracts are publicly available documents.

How can this process be improved? The Commission should consider establishing guidelines that limit the use of confidential settlement agreements.

4. The Commission Should Substantively Revise Many of Its Policies to Reduce the Incentives for Utilities to Take Unreasonable Positions and Take Unreasonable Actions

The Commission's implementation of PURPA has provided the incentives to utilities that increase the chance of disputes and unreasonable actions. Some examples include:

i. Legally Enforceable Obligations

The Commission's policy on legally enforceable obligations has the practical impact of requiring a QF to either agree to a utility's (reasonable or unreasonable) actions, or file a complaint to potentially litigate all issues. Litigation of issues means that the QF can potentially lose its right to avoided cost prices, even if the dispute is unrelated to the avoided cost price.

This means that, if a utility and QF disagree about a particular requirement to obtain a contract or about an interpretation of a contact provision, then a QF may be faced with a choice. It can either agree to the utility's position, expressly disagree and hope that its execution of the contract does not waive its rights in the future, or it can file a complaint. If it files a complaint, however, the utility may argue that the QF has not committed itself to sell its power and it is no longer eligible for the avoided cost rates at the time of the dispute.

How should the Commission's legally enforceable obligation policies be changed to reduce the length and cost of disputes? The Commission should adopt a dispute resolution process that allows a QF to commit to sell its net output to the utility to form a

legally enforceable obligation, but obtain Commission resolution of a disputed issue without risking the loss of the avoided cost rate that existed at the time the dispute arose. Easier establishment of legally enforceable obligations will resolve many of the disputes associated with utility stonewalling or taking unreasonable positions in the contracting process.

CREA made a proposal in UM 1610 that would have allowed for expedited resolution of contracting issues while preserving the QF's right to the LEO at the time it initiated the process.[28] The proposal was that the Commission simply use the same process that FERC has used for years in resolving disputes arising under FERC's form agreements for transmission service and interconnection service, wherein the QF would be required to progress through the negotiations to a point of disagreement, and then have the unexecuted agreement filed with the Commission for expedited resolution of the disputed issue. Both parties would thereafter be bound by the resolution in the contract. FERC promptly resolves such unexecuted filings, typically after receiving a round of comments from the parties. Instead, the Commission adopted a policy where the only option is for the QF to file a complaint and where there is no assurance the LEO will be honored after the case is resolved. No substantive reason was provided in the Commission's order to not use an unexecuted filing process.[29] The QF Trade Associations recommend that the Commission consider adoption of the unexecuted filing process in this proceeding.

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28 *See CREA's Opening Post-Hearing Brief*, Docket No. UM 1610 Phase II, at 4-7 (Oct. 13, 2015).

29 Order No. 16-174 at 26-27.

ii. Resolution of All Disputes in a Proceeding

The Commission's orders in PURPA matters often do not resolve all the disputed issues. The QF Trade Associations understand that there is a well-established judicial philosophy of only resolving disputes on the narrowest grounds and that this principle makes sense only in the case of appellate decisions. However, in the PURPA context, this is not be the best approach because it fails to provide guidance to the utilities and QFs on important issues the Commission is charged with resolving to facilitate development of QF projects.

Examples of the Commission not resolving all disputed issues include:

In UM 1894, the Commission decided that a QF could not materially change its nameplate capacity prior to its commercial operation date.[30] The QF at issue requested that the Commission provide further clarification about the extent of its order, which would have provided guidance to the QF and the utility to resolve other similar issues. The Commission declined,[31] which for all practical purposes would have required the QF to re-start expensive and time-consuming litigation when the Commission could have resolved all such issues at once.

In UM 1931, the Commission decided that certain previously executed PGE contracts provided that the 15-year fixed price term started at contract execution. PGE took the position that if PGE expresses an interpretation of a contract provision to the QF,

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30 *PGE v. Pacific Northwest Solar*, Docket No. UM 1894, Order No. 18-284 at 1 (Aug. 2, 2018).

31 *PGE v. Pacific Northwest Solar*, Docket No. UM 1894, Order No. 18-369 at 4 (Oct. 9, 2018).

and the QF signs the contract and does not litigate, then the QF has agreed to PGE's interpretation, even if PGE's interpretation is later shown to be incorrect.[32] Thus, PGE's view is that it can unilaterally change Commission policy by stating an incorrect view of Commission policy in the contract negotiation process. The Commission elected not to address this fully briefed issue, and there is now uncertainty regarding the standard contracting process, which will provide utilities with discretion and raise the legal risks of doing business in Oregon.

How should the Commission address disputed issues in PURPA proceedings? The Commission's decision in PURPA matters should not only resolve the core disputed issue, but should provide as much guidance as possible so that the parties do not need to commence time-consuming and complex litigation anew or be exposed to unreasonably regulatory uncertainty.

5. The Commission Should Address the Resource and Information Imbalance Between QFs and Utilities

In QF and utility disputes, the QF must spend its own money on any litigation, while the utility can use ratepayer money to put its competitors out of business. In addition, the utility generally has more information at its disposal and can simply win cases by financially exhausting the QF through unjustified discovery conduct when a QF seeks to obtain the minimum information necessary to win its case. If a utility takes unreasonable actions in PURPA related issue, then there are no consequences even if it loses the case. Simply taking an unreasonable position and litigating a case can result in

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[32] *See PGE v. Alfalfa Solar I, LLC et al.*, Docket No UM 1931, Order No. 19-255 ta 8 (Aug. 2, 2019).

a "win" for the utility because it delays eventual resolution of an issue and may make the QF uneconomic even if the QF technically "wins" the case. Also, the Commission almost always rules in favor of the utilities on discovery and procedural matters.

How can the Commission address these resource imbalance issues? The Commission should take steps to resolve these imbalances, with these suggestions:

- Disallow from utilities' rates the costs to pay for utility legal and internal staff costs litigating QF matters, especially in instances where the utility's position is not upheld;
- Require transparency, in the form of regular reports, on the amount of staff time and expenditures and in-house and outside legal time and expenditures for each adjudicated QF dispute;
- Require compensation for the costs for QF legal, internal staff and expert consultant costs when they are the prevailing party, and
- Ensure that QF contract provisions entitle them to direct, punitive and consequential damages, and have access to a jury trial for all factual disputes.

C. What Concerns Do We Have in the Development of an ADR Process?

There is a concern that the Commission may adopt new policies and procedures that an ADR process could be used by utilities to frustrate QF development if not carefully thought out and developed with the objective of meeting PURPA goal to encourage QF development.

D. How Can an ADR Process Be Structured to Ensure All Due Process Rights and Obligations Are Observed?

The QF Trade Associations need to better understand the dispute resolution options under consideration before fully answering this question. However, as a general matter, if the parties agree to an alternative form of dispute resolution, there should be no

violations of due process. Therefore, there are likely many different types of processes that could be offered without compromising due process rights.

E. How Engaged in the Process Should an Arbitrator or Facilitator Be?

The QF should have the option to have an arbitrator or facilitator be actively involved. Consistent with PURPA's intent of encouraging QF development and the unequal bargaining positions of the parties, this should be a unilateral right that the QF may elect, but the QF should *not be required* to have an arbitrator or facilitator be first evaluate the dispute as a precondition to filing a formal complaint. Preliminarily, the viable forms of ADR appear to be: 1) a non-binding and informal mediation service offered by Commission Staff or another qualified party on a very expedited bases; and 2) a more formal non-binding or binding arbitration process that can be resolved on much more quickly than the Commission's contested case process.

F. Should the PURPA Dispute ADR Process be Facilitative or Evaluative, or Some Combination of Both Approaches?

Due to the difference types of QFs and disputes, the Commission should establish the options for both facilitative and evaluative dispute resolution. The Joint QF Parties look forward to discussing these options and the circumstances in which they would apply.

G. Should an ADR Process Allow for Ultimate Decision by the Commission that Is Binding on Parties?

Yes, upon the election of the QF. The QF should not be required to participate in a binding alternative dispute resolution over its objection. The Joint QF Parties look forward to establishing a fair and well-balanced arbitration process, including ensuring that a quality and unbiased arbitrator is selected.

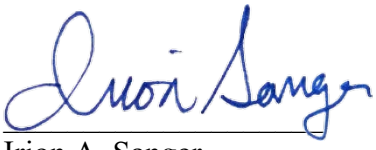
III. CONCLUSION

The QF Trade Associations appreciate the opportunity for further comments and look forward to continued participation in this rulemaking.

Dated this 4th day of October 2019.

Respectfully submitted,

Sanger Thompson, PC



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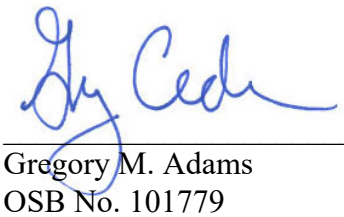

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 629

In the Matter of Rulemaking to Address Dispute Resolution for PURPA Contracts	JOINT COMMENTS OF THE RENEWABLE ENERGY COALITION, THE NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, AND THE COMMUNITY RENEWABLE ENERGY ASSOCIATION ON STRAW PROPOSAL

I. INTRODUCTION

The Renewable Energy Coalition (the "Coalition"), the Northwest & Intermountain Power Producers Coalition ("NIPPC"), and the Community Renewable Energy Association ("CREA") (collectively the "QF Trade Associations") submit these comments responding to the Chief Administrative Law Judge ("ALJ") Nolan Moser's straw proposal ("Straw Proposal") for changes to alternative dispute resolution ("ADR") in the context of the Oregon Public Utility Commission's (the "Commission" or "OPUC") implementation of the state and federal Public Utility Regulatory Policies Act ("PURPA").

The QF Trade Associations appreciate the Straw Proposal's efforts to consider ways to reduce litigation by adopting more collaborative, streamlined and informal dispute resolution. As a preliminary matter, it appears that an Oregon Department of Justice ("DOJ") opinion recommends not adopting some of the suggestions identified by stakeholders because they are not viable under current Oregon law. The QF Trade Associations are not at this time addressing DOJ's legal positions, but recommends that

the Commission consider all options. If the Commission needs to propose legislation that would allow it to effectively protect the rights of QFs, then that option should be on the table. The Commission could adopt any specific changes at this time and in this proceeding on a trial and interim basis, until more effective relief is made available.

The QF Trade Associations recommend the following revisions to the Straw Proposal: 1) mediation should not be mandatory for a QF; 2) more simple complaint procedure options should be further developed; and 3) an unexecuted filing option, with limited revisions, should be adopted.

II. COMMENTS

A. Mediation Should Not Be Mandatory for QFs

Mediation should be optional and not mandatory. Voluntary mediation is always an option, and the QF Trade Associations strongly support the Commission establishing a formalized mediation process guided by trained ALJs or Staff to help resolve disputes. However, absent agreement by both parties, mandatory mediation will simply increase costs on litigants in cases where mediation is clearly not viable from the outset, and will have the practical result of discouraging some QFs from even attempting to engage in any form of dispute resolution. If the Commission adopts mandatory mediation it should at a minimum exempt small, family owned and community based projects; ensure that mediation is only required after the QF files its complaint; include exemptions for good cause; and compensate QFs for the additional time and expense of participating.

At a minimum, the Straw Proposal will require the QF to prepare written documents that are exchanged between the parties, comment on an ALJ recommendation,

and attend at least one meeting. The Straw Proposal also encourages attorneys to participate, which is reasonable but also increases costs.

The QF Trade Associations understand that the Straw Proposal's recommended mandatory mediation provisions will add cost and expense on QFs and ratepayers,[1] and process upon QFs, utilities and the Commission. While the additional mediation costs will be immaterial for the utilities and less than rounding errors for ratepayers, for the QFs they are meaningful and could exceed the cost of the initial complaint filing. Retaining counsel to review the applicable documents and correspondence, any applicable Commission rules or orders, and to assist in drafting the position statement and attending a mediation session could easily cost the small QF well into the thousands of dollars. When a small QF or developer can only allocate a limited budget to resolving its dispute with the utility, this will be a material expense in the overall process. Additionally, these costs and process may be imposed upon an unwilling participant in a potentially futile process with no hope of agreement. The Straw Proposal's process will also add approximately an additional month onto the schedule on what is an already extremely long existing complaint process. Any delay in resolving disputes generally benefits utilities, which can sometimes simply wait out the dispute resolution process with the practical impacts of financially exhausting QFs and QFs losing their financing or otherwise giving up their complaint.

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[1] The QF Trade Associations are unaware of the Commission disallowing any utility litigation costs as imprudent in a rate proceeding. Thus, ratepayers fund the utility's QF litigation costs, which have the practical impact of limiting or harming the utilities' competitors (QFs) ability to sell their power.

There are also numerous disputes in which mandatory mediation will be essentially valueless. For example, PGE and QFs have disagreed about whether the Commission's policy and PGE's standard contact provisions require fifteen years of fixed prices. Neither PGE nor the QFs were willing to compromise their positions, and mediation would have simply been an additional waste of the Commission's and the parties' resources.

If the Commission proceeds with a mandatory mediation process, then the QF Trade Associations recommend the following revisions:

- Projects that are five megawatts or less, sole proprietorships or family owned, or community based should be exempt from mandatory mediation.
- There should be exemptions for good cause, including matters warranting expedited processing.
- The costs of both the QFs and utilities' participation should fall upon the utilities' shareholders, not QFs or ratepayers. The Commission, upon the recommendation of the utilities, would be mandating additional process and cost on QFs and ratepayers, even when there is no chance of reaching a successful compromise. If the utilities really want this process, then they should be willing to put their money in furtherance of this solution, rather than their competitors' and captive ratepayers' money.

Certain projects should be exempt from any mandatory mediation processes, including small, family owned or community based projects. The Straw Proposal does not appear to have taken into consideration a core issue raised in the QF Trade Associations' initial comments, which is that there is a wide diversity of QF types that need to be accounted for in any dispute resolution process. Instead, it assumes the utilities' highly inaccurate talking point arguing that QFs are monolithic, large and out-of-state developers. No QF—even the best funded out-of-state developer or even another utility—has any leverage against a monopsony utility purchaser in the negotiation

process, other than the threat of a complaint. However, some QFs may be better able to absorb the (potentially unnecessary) extra costs associated with mandatory meditation. Many QFs are small businesses with limited resources, and they have disputes with the utilities with economic impacts that, while important to the QF, are less than the cost of litigation and for which they cannot obtain legal support without pro bono assistance.

For example, Loyd Ferry Farms (65 kW) and Roush Hydro (75 kW), two small hydro facilities filed complaints against PacifiCorp over monthly disputes of less than $2,000 each.[2] The QF Trade Associations agree that these are the types of disputes that could benefit from early participation by a mediator to resolve issues in a more cost effective manner. However, in order to have their dispute heard by the Commission, they should not be *required* to participate in both mediation and a contested case.

Another example of the issues facing small QFs was a declaratory ruling to obtain the Commission's interpretation of a contract provision filed by the Coalition in 2014.[3] The dispute centered around PacifiCorp's standard contract, which provided that the utility could not terminate a QF for failure to meet its commercial operation date, unless the utility was in an actual resource deficient position. PacifiCorp was attempting to terminate a number of small QFs' contracts where the QFs had missed their commercial operation dates even though the utility was actually resource sufficient. However,

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2 *Re the Complaint of Loyd Fery Farms, LLC v. PacifiCorp dba Pacific Power*, Docket No. UM 1694, Complaint at 2-3 (March 4, 2014); *Re the Complaint of Roush Hydro, Inc. v. PacifiCorp dba Pacific Power*, Docket No. UM 1695, Complaint at 2-3 (March 4, 2014).

3 *Re the Renewable Energy Coalition Petition for Declaratory Ruling*, Docket No. DR 48, Petition (Feb. 10, 2014).

PacifiCorp made the creative argument that it should be able to terminate the contracts based on the resource deficiency date at the time the contracts were entered into, rather than the actual resource sufficiency/deficiency date at the time of the delay default. The Coalition filed a declaratory ruling rather than a complaint in the hopes that it would be processed more expeditiously and at lower cost. A full complaint process would have been expensive and potentially too protracted for these small projects, which were already struggling to even become operational and for which even the threat of termination was devastating.

The case was ultimately settled with PacifiCorp not terminating the PPAs because PacifiCorp was not in an actual resource deficient state. Staff played an important role in helping both sides evaluate the strength of their arguments and obtaining a settlement. A voluntary mediation process could have been a valuable option. At least two projects with the disputed contract provision ultimately became operational, in no small part due to the assistance of Staff. However, if there had been a mandatory mediation requirement, which would have added additional time and expense on top of a litigated process, then it might have precluded even formally filing the dispute.

Finally, the QF Trade Associations support the Straw Proposal's provision that allows a QF to file a complaint prior to any mediation process, if they wish. The QF Trade Associations are concerned that the secrecy associated with QF and utility disputes hides from the Commission, the public, and other QFs the extent of disagreements and disputes between utilities and QFs. There should not be any more restrictions on the ability of QFs to bring attention to the difficulties they are facing.

B. The Commission Should Adopt More Simple Dispute Resolution Processes

The QF Trade Associations support the basic components of the Straw Proposal that identify options for simpler dispute resolution processes. Some of these include different complaint elements, oral presentation of a case before an ALJ rather than briefing, an ALJ order presented to the Commission, comments rather than testimony, and decisions being issued no more than 30 days from the close of the record in certain circumstances. The ALJ should consider further exploration of all the simpler complaint procedures outlined in the Straw Proposal. Additional information is needed to provide more definitive opinions.

As explained in the QF Trade Associations' initial comments, utilities and QFs are not similarly situated in terms of their interests, economic resources, and the purposes and goals of PURPA. Therefore, the Commission should not require any QF to waive its rights to any process that it would otherwise be entitled to before a court of law. The QF Trade Associations continue to strongly object to the Commission's assertion of jurisdiction over executed QF contracts. However, if the Commission is going to, over their objection, require QFs to litigate contractual matters before the Commission instead of a court of law, then the Commission should ensure that they have all the procedural protections that the QFs would have if the dispute was adjudicated by a judge.

C. The Commission Should Adopt an Unexecuted Filing Option

The Straw Proposal includes an option for a QF to file an executed PPA with disputed contract provisions and establish a legally enforceable obligation at the time of the complaint, although major contractual provisions may be disputed. The details of the

proposal need to be developed, but the approach would provide considerable value to QFs by allowing them to obtain Commission guidance on appropriate contract terms, without risking their right to then-current avoided cost prices.

Currently, if a QF files a complaint against a utility, the QF risks the possibility that the Commission will determine that the avoided costs in effect at the time of the final order rather than the time of the filing of the complaint will be included in the final contract. This risk encourages the utilities to leverage this price risk and to insist upon unreasonable contract terms and conditions. Most QFs will not risk losing the then-current avoided costs to litigate the vast majority of disputes.

The QF Trade Associations recommend two revisions to the Straw Proposal in which the QF files the unexecuted contract, agreeing to be held to the disputed terms ultimately approved by the Commission. First, the QF Trade Associations agree with ALJ Moser's suggestion that further edits are needed to the draft rules to clarify that the unexecuted filing process may only be initiated by the QF, and the utility should not be allowed to initiate the process. That is how the process works in an Open Access Transmission Tariff ("OATT"), which is approved by the Federal Energy Regulatory Commission, which is designed to allow the transmission or interconnection customer to commence service under the disputed contract while its dispute is resolved. The utility should not be allowed to initiate the unexecuted PPA process that then binds the QF to the result of the disputed provision. That makes sense in this context (as it does in the OATT) because the QF has the option to create its Legally Enforceable Obligation and the utility should not be able to prematurely bring the case to the commission before the QF believes it has exhausted its efforts with the utility.

Second, the QF Trade Associations agree that the QF should be required to accept the Commission's ultimate resolution, if it wants to have the right to the avoided cost rates at the time the dispute was filed in the newly proposed unexecuted filing process, but the rule should also clarify that there are circumstances in which the QF should not be required to enter into a PPA and build their project, if they lose their dispute with the utility. Thus, if the QF loses on the merits of the disputed issue, it should have the choice not to execute the contract, at least in certain circumstances. An illustrative example may be helpful: assume that a QF and utility dispute certain interconnection cost upgrades, and the QF triggers the unexecuted filing process to resolve the dispute. The QF's position is that interconnection cost upgrades should be $3 million while the utility's position is that the interconnection cost upgrades are $300 million, which would make the project uneconomic. Assume that the Commission issues a ruling in favor of the utility (i.e., that the interconnection cost upgrades are $300 million and that the QF should pay this amount if the project is built). Under these conditions the practical reality is that the QF will be unable to move forward with the project under the terms and conditions adopted by the Commission. The QF should not be required to proceed with a project that cannot be constructed simply because it sought the Commission's assistance in adjudicating a dispute.

The QF Trade Associations' proposal will allow QFs to commit themselves to their proposed terms and conditions at then-current rates, and seek Commission resolution of disputes without fear of losing rights to then-current avoided cost rates. If a QF triggers the unexecuted filing process, and the Commission largely agrees with the

QF, then the QF's avoided cost rates should be those in effect at the time the dispute began.

Similarly, if the Commission rules against the QF, then the parties should return to the point at which negotiations broke down and memorialize the Commission's resolution into the final PPA that is executed by both parties with the avoided cost rates in effect at the start of the unexecuted filing process. In other words, the QF must accept the condition or requirement in order to maintain the avoided cost rates. This is what would have happened if the QF had not initiated the unexecuted filing process and had agreed to the utility's proposal in the first place.

If QFs cannot resolve disputes without losing their rights to the then-current avoided cost rates, then the utilities will be able to force them to agree to unreasonable restrictions or delays. The QF Trade Association's recommendation simply intends to provide the QF with the same rights and obligations that it would have if the negotiation process happened in the manner in which it is intended. In other words, a QF should not lose its right to then-current avoided cost rates because it attempted to informally or formally resolve a dispute.

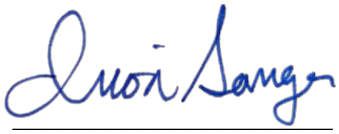
III. CONCLUSION

The QF Trade Associations appreciate the opportunity for further comments and look forward to continued participation in this rulemaking.

Dated this 23rd day of January 2020.

Respectfully submitted,

Sanger Law, PC



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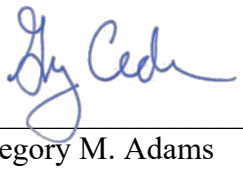

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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

AR 629

In the Matter of Rulemaking to Address Dispute Resolution for PURPA Contracts	JOINT COMMENTS OF THE RENEWABLE ENERGY COALITION, THE NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, AND THE COMMUNITY RENEWABLE ENERGY ASSOCIATION ON SCOPE

I. INTRODUCTION

The Renewable Energy Coalition (the "Coalition"), the Northwest & Intermountain Power Producers Coalition ("NIPPC"), and the Community Renewable Energy Association ("CREA") (collectively the "QF Trade Associations") submit these comments responding to the Chief Administrative Law Judge ("ALJ") Nolan Moser's draft Scoping Memorandum ("Scoping Memo") recommending the scope of issues to be considered in this dispute resolution rulemaking the context of the Oregon Public Utility Commission's (the "Commission" or "OPUC") implementation of the state and federal Public Utility Regulatory Policies Act ("PURPA").

The QF Trade Associations entered this process with hope that revised rules would create an option for a less burdensome, less costly process as an alternative to the traditional complaint process, while still providing a qualifying facility ("QF") with appropriate access to justice through the complaint process and acting as a check on harmful utility actions. However, the QF Trade Associations are very concerned with the current version of the draft rules on informal dispute resolution and proposed scope for this docket because so far the informal draft rules include a number of the utility-

suggested reforms that would serve to add more process, cost, and unnecessary litigation risk to many QF-utility disputes. The proposed draft rules would exacerbate harmful utility actions that already occur and harm a QF's ability to have its case heard and resolved on the merits. The most glaring problem with the proposed rules is that they would make the new dispute resolution process mandatory before any formal complaint could be pursued, but there are several other major concerns raised by the proposed draft rules. Overall, the proposed draft rules reflect a lack of recognition of the inherent biases and structural incentives provided to the utilities that increase litigation costs, delay resolution, and undermine the goal and purposes of PURPA.

If the Commission is seriously inclined to pursue the dispute resolution process currently proposed in the draft rules, the QF Trade Associations request that the Commission simply close this docket and retain the current complaint process and infrequently used dispute resolution option. If, however, the Commission expressly recognizes that the currently effective process disadvantages QFs and commits to exploring rule changes that would help level the playing field, then the QF Trade Associations may be open to exploring further process in this docket. The QF Trade Associations' October 19, 2019 Comments provide a framework for moving forward in this docket.

II. COMMENTS

A. The Current Dispute Resolution Is Set Up For Litigation Between Two Equal Counterparties, But Is Inconsistent with Achieving Stable and Enforceable Decisions that Are Consistent with State and Federal Law and Regulations.

The dispute resolution process should be designed to implement the specific goal of PURPA, which is to allow independent power producers and renewable energy

generators to sell their net output to the utilities in a non-discriminatory manner and at avoided cost rates. In Oregon, the dispute resolution process also needs to ensure that it does not undermine the state's goals of promoting the development of a diverse array of permanently sustainable energy resources, increasing the marketability of electric energy produced by QFs located throughout the state for the benefit of Oregon's citizens and creating a settled and uniform institutional climate for the QFs in Oregon. It will be difficult to achieve significant and meaningful progress as long as the Commission does not recognize these statutory goals as well as the utility incentives, and the Commission continues to focus on providing the parties the same exact rights that they would have if they were regular buyers and sellers of products in an unregulated free market.

There are numerous examples that the QF Trade Associations discussed in their October 19, 2019 comments, but these comments will address the delays and length of Commission proceedings as an illustrative example. The current complaint process is lengthy and cumbersome, which favors the utility. It requires a complaint and an answer and typically includes dispositive motion practice, discovery, as well as the possibility of multiple rounds of written testimony, cross-examination at a hearing, and post-hearing legal briefs. These can take several months to resolve, even in cases where the parties agree to resolve the issues on motions for summary judgment.

In considering an alternative dispute resolution process, the Commission should recognize that delay in and of itself has disparate impacts on the two litigants in this unique setting. In coming up with a solution, the Commission should consider that a key utility behavior which needs to be checked is utility delay. The more a utility can delay a QF project, the more likely that QF project will fail. This is so because the QF is

managing multiple concurrently running timelines for its power purchase agreement ("PPA"), interconnection, site control, land use permitting, and other licensing or permitting required for development. A delay in one area can mean expiring permits or failure to meet certain milestones. As a general matter, any utility hoping to limit its PURPA contract exposure has incentive to delay any QF-related litigation, and the current process enables such delays to the disadvantage of the QF.

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Should the Commission choose to proceed with this docket, it should expressly recognize that QFs are at a disadvantage in the current process, including but not limited to the time and litigation expense it takes to resolve disputes. The Commission should commit to exploring not only options that the utilities proposed but options that will help to even the playing field, if it does not close the docket.

B. The Draft Rules Make Dispute Resolution More Lengthy and Cumbersome

The QF Trade Associations support alternative dispute resolution ("ADR"), in principle, but do not support it as simply one additional and mandatory step in the process. Without other revisions to the dispute resolution process, the addition of mandatory mediation at the outset of the complaint process will often merely serve as an additional hurdle for the QF before it can be heard on the merits. This additional mandatory procedural step will be a trap for the unaware that will result in additional procedural motions regarding compliance with the mandatory mediation process, and the new process will add thousands of dollars in unavoidable litigation expense to the QF. Where a utility wants delay and has no intent to reach a mediated agreement, the additional mediation step acts in their favor, while adding additional process and costs, without giving the QF any measurable benefit. Yet the QF would have no ability to avoid the mediation under the proposed rules. Therefore, if the proposed ADR mechanism is to be considered, additional revisions need to also be considered to help alleviate the already burdensome process for QFs.

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Should the Commission expressly acknowledge the disadvantage QFs face in the current complaint process and decide to expand the scope of this docket, then the Commission should not limit itself to the possible solutions noted in the Scoping Memo. Some reforms not listed could provide a better and more balanced process, but by eliminating them from the beginning, the Commission will not even have a chance to consider them. Additionally, while some worthy reforms may require a legislative change to implement, such need for legislation does not mean a reform should be excluded from the discussion. The QF Trade Associations are not opposed to exploring a legislative fix if it would be the best solution for an improved process.

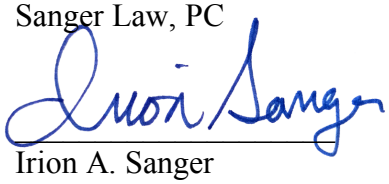
III. CONCLUSION

The QF Trade Associations request that the Commission simply close this docket unless the Commission expressly commits to considering not only the proposed ADR process and specific list of proposed reforms in the Scoping Memo, but also other revisions to the rules designed to address the disadvantage that QFs face under the current dispute resolution process.

Dated this 28th day of February 2020.

Respectfully submitted,

Sanger Law, PC



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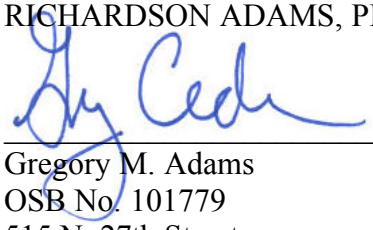

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Of Attorneys for the Community Renewable Energy Association

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

AR 629

In the Matter of Rulemaking to Address Dispute Resolution for PURPA Contracts	JOINT COMMENTS OF THE RENEWABLE ENERGY COALITION, THE NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, AND THE COMMUNITY RENEWABLE ENERGY ASSOCIATION ON SCOPE

I. INTRODUCTION

The Renewable Energy Coalition (the "Coalition"), the Northwest & Intermountain Power Producers Coalition ("NIPPC"), and the Community Renewable Energy Association ("CREA") (collectively the "QF Trade Associations") submit these comments responding to the Chief Administrative Law Judge ("ALJ") Nolan Moser's draft Scoping Memorandum ("Scoping Memo") recommending the scope of issues to be considered in this dispute resolution rulemaking the context of the Oregon Public Utility Commission's (the "Commission" or "OPUC") implementation of the state and federal Public Utility Regulatory Policies Act ("PURPA").

The QF Trade Associations entered this process with hope that revised rules would create an option for a less burdensome, less costly process as an alternative to the traditional complaint process, while still providing a qualifying facility ("QF") with appropriate access to justice through the complaint process and acting as a check on harmful utility actions. However, the QF Trade Associations are very concerned with the current version of the draft rules on informal dispute resolution and proposed scope for this docket because so far the informal draft rules include a number of the utility-

suggested reforms that would serve to add more process, cost, and unnecessary litigation risk to many QF-utility disputes. The proposed draft rules would exacerbate harmful utility actions that already occur and harm a QF's ability to have its case heard and resolved on the merits. The most glaring problem with the proposed rules is that they would make the new dispute resolution process mandatory before any formal complaint could be pursued, but there are several other major concerns raised by the proposed draft rules. Overall, the proposed draft rules reflect a lack of recognition of the inherent biases and structural incentives provided to the utilities that increase litigation costs, delay resolution, and undermine the goal and purposes of PURPA.

If the Commission is seriously inclined to pursue the dispute resolution process currently proposed in the draft rules, the QF Trade Associations request that the Commission simply close this docket and retain the current complaint process and infrequently used dispute resolution option. If, however, the Commission expressly recognizes that the currently effective process disadvantages QFs and commits to exploring rule changes that would help level the playing field, then the QF Trade Associations may be open to exploring further process in this docket. The QF Trade Associations' October 19, 2019 Comments provide a framework for moving forward in this docket.

II. COMMENTS

A. The Current Dispute Resolution Is Set Up For Litigation Between Two Equal Counterparties, But Is Inconsistent with Achieving Stable and Enforceable Decisions that Are Consistent with State and Federal Law and Regulations.

The dispute resolution process should be designed to implement the specific goal of PURPA, which is to allow independent power producers and renewable energy

generators to sell their net output to the utilities in a non-discriminatory manner and at avoided cost rates. In Oregon, the dispute resolution process also needs to ensure that it does not undermine the state's goals of promoting the development of a diverse array of permanently sustainable energy resources, increasing the marketability of electric energy produced by QFs located throughout the state for the benefit of Oregon's citizens and creating a settled and uniform institutional climate for the QFs in Oregon. It will be difficult to achieve significant and meaningful progress as long as the Commission does not recognize these statutory goals as well as the utility incentives, and the Commission continues to focus on providing the parties the same exact rights that they would have if they were regular buyers and sellers of products in an unregulated free market.

There are numerous examples that the QF Trade Associations discussed in their October 19, 2019 comments, but these comments will address the delays and length of Commission proceedings as an illustrative example. The current complaint process is lengthy and cumbersome, which favors the utility. It requires a complaint and an answer and typically includes dispositive motion practice, discovery, as well as the possibility of multiple rounds of written testimony, cross-examination at a hearing, and post-hearing legal briefs. These can take several months to resolve, even in cases where the parties agree to resolve the issues on motions for summary judgment.

In considering an alternative dispute resolution process, the Commission should recognize that delay in and of itself has disparate impacts on the two litigants in this unique setting. In coming up with a solution, the Commission should consider that a key utility behavior which needs to be checked is utility delay. The more a utility can delay a QF project, the more likely that QF project will fail. This is so because the QF is

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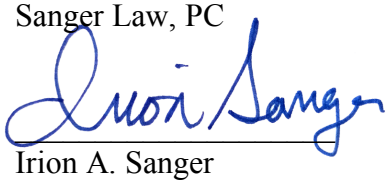

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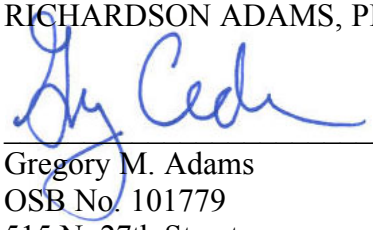

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