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January 11, 2023

**VIA ELECTRONIC FILING**

Attention: Filing Center  
Public Utility Commission of Oregon  
P.O. Box 1088  
Salem, Oregon 97308-1088

**Re: AR 631 –Rulemaking to Address Procedures, Terms, and Conditions Associated with Qualifying Facilities (QF) Standard Contracts.**

Attention Filing Center:

Attached for filing in the above-captioned docket are the Joint Utilities' Response Comments to the QF Trade Associations' and OSSIA's Comments.

Please contact this office with any questions.

Sincerely,

Alisha Till  
Paralegal

Attachment

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**AR 631**

In the Matter of

PUBLIC UTILITY COMMISSION OF  
OREGON,

Rulemaking to Address Procedures, Terms, and  
Conditions Associated with Qualifying Facilities  
Standard Contracts.

**JOINT UTILITIES' RESPONSE  
COMMENTS TO THE QF TRADE  
ASSOCIATIONS' AND OSSIA'S  
COMMENTS**

**January 11, 2023**

1 **I. INTRODUCTION**

2 Portland General Electric Company (PGE), PacifiCorp dba Pacific Power (PacifiCorp),  
3 and Idaho Power Company (Idaho Power) (together, the Joint Utilities) offer these comments in  
4 response to the comments of the Community Renewable Energy Association (CREA), Northwest  
5 & Intermountain Power Producers Coalition (NIPPC), and Renewable Energy Coalition  
6 (Coalition) (together, the QF Trade Associations) filed on December 16, 2022, and the comments  
7 of the Oregon Solar + Storage Industries Association (OSSIA) filed on December 23, 2022,  
8 regarding amendments to the proposed rules (Draft Rules) published with the Secretary of State  
9 on November 23, 2022.<sup>1</sup> The Draft Rules represent changes to the Public Utility Commission of  
10 Oregon’s (Commission) implementation of the Public Utility Regulatory Policies Act of 1978  
11 (PURPA) standard contracting process and the terms for standard Power Purchase Agreements  
12 (PPAs) with Qualifying Facilities (QFs). The Joint Utilities provide these brief comments to  
13 clarify the Joint Utilities’ *current* positions on various topics—which in certain cases were not  
14 accurately reflected in the QF Trade Associations’ comments and attached matrix—and to respond  
15 to new proposals and arguments by the QF Trade Associations and OSSIA.

16 **II. RESPONSE COMMENTS**

17 **A. The QF Trade Associations’ Representations of the Joint Utilities’ Current Positions**  
18 **are Not Accurate in Many Cases.**

19 As an initial matter, the QF Trade Associations’ December 16, 2022, comments and matrix  
20 often refer to the Joint Utilities’ comments from March or May 2022, and the Joint Utilities wish

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<sup>1</sup> See Comments of the Community Renewable Energy Association, Northwest & Intermountain Power Producers Coalition, and Renewable Energy Coalition on Amendments to Rules Dated November 23, 2022 (Dec. 16, 2022) [hereinafter, “QF Trade Associations’ Comments”]; Comments of the Oregon Solar + Storage Industries Association on Amendments to Rules Dated November 23, 2022 (Dec. 23, 2022) [hereinafter, “OSSIA’s Comments”].

1 to clarify that in various instances their positions have evolved since that time. For example, the  
2 QF Trade Associations represent that the Joint Utilities still support “adding language in the rules  
3 purporting to give the Commission jurisdiction over disputes arising from a standard PPA.”<sup>2</sup>  
4 However, the Joint Utilities did not oppose the removal of the jurisdictional provision after the  
5 Administrative Hearings Division (AHD) received guidance from the Commission.<sup>3</sup> Furthermore,  
6 as discussed in more detail below, contrary to the QF Trade Associations’ December 16, 2022,  
7 comments and matrix, the Joint Utilities do not oppose the November 23, 2022, Draft Rules’  
8 provision clarifying when a legally enforceable obligation (LEO) is established.<sup>4</sup> In short, for an  
9 accurate reflection of the Joint Utilities’ *current* substantive concerns and positions regarding the  
10 Draft Rules, the Joint Utilities recommend that the Commission focus on the Joint Utilities’ most  
11 recent comments submitted on December 16, 2022.

12 **B. The Joint Utilities Do Not Oppose the Draft Rules’ Provision Clarifying When a**  
13 **LEO is Established.**

14 The QF Trade Associations inaccurately state that the Joint Utilities propose to narrow the  
15 concept of a LEO.<sup>5</sup> To be clear, the Joint Utilities do not oppose proposed OAR 860-029-0046(9),  
16 which provides: “A legally enforceable obligation will be considered established on the date on  
17 which the qualifying facility executes the final executable form of the power purchase agreement  
18 or such earlier date that the Commission may order.” The QF Trade Associations reference the  
19 Joint Utilities’ May 10, 2022, comments, which sought to clarify that *a PPA* does not become

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<sup>2</sup> QF Trade Associations’ Comments, Matrix at 9 (citing Joint Utilities’ Initial Comments on Staff’s Proposed Rules at 26 (Mar. 11, 2022)).

<sup>3</sup> See Joint Utilities’ Initial Comments Regarding Group 2 Rules, Attachment A: Group 2 Draft Rules – Redline at 22 (Sept. 16, 2022).

<sup>4</sup> See QF Trade Associations’ Comments at 14-15 & Matrix at 12-13 (citing Joint Utilities’ Final Comments Regarding Group 1 Rules at 37-38 (May 10, 2022)).

<sup>5</sup> QF Trade Associations’ Comments at 15.

1 effective prior to the utility’s countersignature, but rather it is *a LEO* that may be established when  
2 a QF executes the final executable form of the PPA.<sup>6</sup> The Joint Utilities did not oppose and do not  
3 oppose AHD’s proposed OAR 860-029-0046(9), which clarifies that a LEO may also be  
4 established “at such earlier date that the Commission may order.”

5 **C. The Joint Utilities’ Recommended Creditworthiness Requirements and Proposed**  
6 **Exception Address the QF Trade Associations’ Concerns Regarding Small QFs.**

7 The QF Trade Associations continue to argue that creditworthiness requirements should be  
8 based on the smallest QFs, and that S&P and Moody’s ratings are irrelevant to irrigation districts  
9 or other public entities.<sup>7</sup> As an initial matter, a significant majority of small QF PPAs are not with  
10 “irrigation districts and public entities,” and therefore developing general creditworthiness  
11 requirements based on these entities is inappropriate, and does not reflect market terms and  
12 conditions ensuring customer indifference. Furthermore, contrary to the QF Trade Associations’  
13 assertion that “the utilities have refused to cooperate with the QF Trade Associations to develop  
14 objective creditworthiness criteria in the rules that such entities could actually meet,”<sup>8</sup> the Joint  
15 Utilities have already proposed an exception to the Joint Utilities’ proposed creditworthiness  
16 requirements for QFs 1 MW and smaller that are owned, directly or indirectly, by persons or  
17 entities who hold no other beneficial interests in any other QF.<sup>9</sup> Specifically, these smaller QFs  
18 will not be required to adhere to the utility’s creditworthiness requirements or to provide Project  
19 Development or Default Security if the owner of the QF provides certain representations and

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<sup>6</sup> Joint Utilities’ Final Comments Regarding Group 1 Rules at 37; *see also Lexington Inv. Co. v. Watson*, 98 Or 379, 390 (1921) (“But in the instant case the writing was never signed by all the parties in interest, and without such signing it was never intended to become valid and binding.”).

<sup>7</sup> QF Trade Associations’ Comments at 7-11.

<sup>8</sup> QF Trade Associations’ Comments at 9.

<sup>9</sup> This exception was initially proposed in the Joint Utilities’ May 10, 2022, comments and was reiterated in the Joint Utilities’ December 16, 2022, comments. *See* Joint Utilities’ Comments Regarding the Group 2 Draft Rules at 42-43 (Dec. 16, 2022); Joint Utilities’ Final Comments Regarding Group 1 Rules at 23-24.

1 warranties regarding the financial condition of the QF and its primary equity owners, subject to  
2 verification by the utility based on financial information provided by the QF:

- 3 1. Neither the qualifying facility nor any of its principal equity owners is or has within  
4 the past two years been the debtor in any bankruptcy proceeding, is unable to pay  
5 its bills in the ordinary course of its business, or is the subject of any legal or  
6 regulatory action, the result of which could reasonably be expected to impair the  
7 qualifying facility’s ability to own and operate the Facility in accordance with the  
8 terms of the standard power purchase agreement.
- 9
- 10 2. Neither the qualifying facility nor any of its principal equity owners is or has at any  
11 time defaulted on any of its payment obligations for electricity purchased from the  
12 utility.
- 13
- 14 3. The qualifying facility is not in default under any of its other agreements and is  
15 current on all financial obligations, including construction-related financial  
16 obligations.
- 17

18 This limited exception from the utility creditworthiness requirements, including the  
19 security requirements that are triggered when credit requirements are not met, is intended to both  
20 (1) address the financial constraints of truly small, unsophisticated QFs, and (2) limit the utilities’  
21 customers’ exposure to damages. Finally, these credit and security requirements ensure that  
22 project risk that is not addressed in avoided cost pricing is not transferred to utility customers when  
23 the QF defaults on its obligations.

24 Relatedly, the Joint Utilities oppose the QF Trade Association’s novel recommendation  
25 that Project Development Security and Default Security for non-creditworthy QFs should be  
26 satisfied by a surety bond.<sup>10</sup> A surety bond is generally used to secure construction contracts and  
27 not PPAs. For this reason, in the case of a QF default, the utility would find itself unable to access  
28 the funds from the surety bond absent an investigation and agreement by the company issuing the

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<sup>10</sup> QF Trade Associations’ Comments at 10-11. Under the utilities’ current Commission-approved standard PPA templates, surety bonds are properly not included as an option for provision of security.

1 bond. This process can be time consuming and often results in litigation with the surety bond  
2 owner, both of which may impose unnecessary costs to customers. In contrast, cash or letters of  
3 credit security are customary forms of security under PPAs because they provide liquid security—  
4 the utility simply presents a written certification to the issuing bank that a default has occurred in  
5 order to draw from the funds. For these reasons, the Joint Utilities oppose allowing QFs to satisfy  
6 Project Development Security and Default Security through a surety bond.

7 **D. The Joint Utilities Do Not Intend for OAR 860-029-0123(1)(i) to Represent an**  
8 **Automatic Cross-Default Provision.**

9 Proposed OAR 860-029-0123(1)(i) provides that “[b]reach of any warranty or  
10 representation in the power purchase agreement” may, if uncured within the applicable cure period,  
11 constitute a default by the QF for which the utility may terminate the PPA. As an initial matter,  
12 the Joint Utilities recommended retaining “breach of any warranty or representation in the power  
13 purchase agreement” to clarify that—in addition to the specified events of default in the Draft  
14 Rules—any other general breach in warranties and representations under the PPA will also qualify  
15 as an event of default. Contrary to the QF Trade Associations’ assertions,<sup>11</sup> this provision is  
16 necessary to ensure compliance with the entirety of the representations and material obligations in  
17 the PPA and is consistent with the utilities’ current standard form QF PPAs.<sup>12</sup>

18 Furthermore, the QF Trade Associations argue that even if “the cross-default provision will  
19 be included, it must contain at least the same cure periods that apply to other defaults”—i.e., a 30-  
20 day cure period with an option to extend no more than 90 days under certain conditions—and that

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<sup>11</sup> QF Trade Associations’ Comments at 11-14.

<sup>12</sup> See, e.g., PGE Standard In-System Non-Variable Power Purchase Agreement, Section 9.1.1. at 10 (Sept. 13, 2017), available at [https://assets.ctfassets.net/416ywc1laqmd/MQc266oY2oOoEWrbN3ua/a5e852905590b8843c5a977f101adbe8/contract\\_201\\_in\\_system\\_nonvariable.pdf](https://assets.ctfassets.net/416ywc1laqmd/MQc266oY2oOoEWrbN3ua/a5e852905590b8843c5a977f101adbe8/contract_201_in_system_nonvariable.pdf) (“Breach by Seller or PGE of a representation or warranty, except for Section 3.1.4, set forth in this Agreement.”).

1 providing no cure period under OAR 860-029-0123(4)(c)<sup>13</sup> is inappropriate.<sup>14</sup> As stated in the  
2 Joint Utilities’ December 16, 2022, comments, it is the Joint Utilities’ understanding that  
3 OAR 860-029-0123(4)(c) is intended to refer to a QF’s failures to meet the Mechanical  
4 Availability Guarantee and Minimum Delivery Guarantee, and references  
5 OAR 860-029-0123(1)(i) in error. Thus, the proposed redlines regarding  
6 OAR 860-029-0123(4)(b) in the Joint Utilities’ December 16, 2022, comments address the QF  
7 Trade Associations’ concerns by clarifying that default under OAR 860-029-0123(1)(i) would be  
8 subject to a 30-day cure period with an option to extend the cure period no more than 90 days  
9 subject to certain conditions.<sup>15</sup> The Joint Utilities and the QF Trade Associations do not materially  
10 disagree regarding the cure period for defaults arising from any breaches of any warranty or  
11 representation in the PPA.

12 **E. Contrary to the QF Trade Associations’ and OSSIA’s Assertions, a 90 Percent**  
13 **Minimum Delivery Guarantee (MDG) is Reasonable and Appropriate, and Would**  
14 **Not Require QFs to Control the Weather.**

15 In their comments, the QF Trade Associations and OSSIA support a 70 percent MDG for  
16 solar resources,<sup>16</sup> and OSSIA asserts that a 90 percent MDG for solar resources is inappropriate  
17 because a solar facility “has no control over the weather” and a “developer cannot ensure that there  
18 is adequate sun 90 [percent] of the time.”<sup>17</sup> As an initial matter, both the QF Trade Associations’<sup>18</sup>  
19 and OSSIA’s<sup>19</sup> reliance on Duke Energy Corporation’s 70 percent output requirement (i.e., MDG)

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<sup>13</sup> Proposed OAR 860-029-0123(4)(c) provides that “There is no cure period for a Notice of Default issued under subsection (1)(h) or (1)(i).”

<sup>14</sup> QF Trade Associations’ Comments at 13-14.

<sup>15</sup> Joint Utilities’ Comments Regarding the Group 2 Draft Rules at 36-37.

<sup>16</sup> QF Trade Associations’ Comments at 4-7; OSSIA’s Comments at 2.

<sup>17</sup> OSSIA’s Comments at 2.

<sup>18</sup> QF Trade Associations’ Comments at 4-7.

<sup>19</sup> OSSIA’s Comments at 2.



1 for large QF PPAs in the Carolinas is unpersuasive in light of the Joint Utilities’ various examples  
2 from both QF and non-QF PPAs for solar resources in the Pacific Northwest demonstrating that a  
3 90 percent MDG is both reasonable and achievable.<sup>20</sup> Second, OSSIA seems to misconstrue how  
4 a MDG is calculated and when termination for failure to meet the MDG would occur under the  
5 Draft Rules. The MDG is compared to the QF’s *expected* energy for the year, which should  
6 account for periods of cloudy weather and seasonal variation, and therefore the MDG *does not*  
7 require the sun to shine 90 percent of time. As previously discussed in the Joint Utilities’  
8 comments, it is unlikely that solar resources would experience significant year-to-year swings in  
9 generation such that they would be unable to meet a 90 percent MDG.<sup>21</sup> For example, PGE  
10 reviewed seven small *solar* facilities and found that the variation in generation ranged between 0  
11 and 11 percent between 2019 and 2020 and between 2020 and 2021.

12 Furthermore, contrary to OSSIA’s concerns that a 90 percent MDG “would allow for little  
13 space before a QF is hit with a financial penalty and potential termination,”<sup>22</sup> the Draft Rules  
14 would allow termination for failure to satisfy the MDG only if the QF failed to meet the MDG for  
15 *three consecutive years*.<sup>23</sup> In addition, the Draft Rules allow for a pro rata decrease in the MDG  
16 for reasons of Force Majeure, among others.<sup>24</sup> For these reasons, the Joint Utilities continue to  
17 support a 90 percent MDG for solar, geothermal, biomass, and baseload hydroelectric QFs, which  
18 the Joint Utilities continue to maintain is consistent with industry practice, but would not be

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<sup>20</sup> See, e.g., Joint Utilities’ Comments Regarding the Group 2 Draft Rules at 14-15.

<sup>21</sup> Joint Utilities’ Comments Regarding the Group 2 Draft Rules at 14-15.

<sup>22</sup> OSSIA’s Comments at 2.

<sup>23</sup> Draft Rules, OAR 860-029-0123(1)(h).

<sup>24</sup> Draft Rules, OAR 860-029-0120(14)(d).

1 opposed to a MDG at 85 percent in an effort to find common ground while remaining sufficiently  
2 protective of customers.

3 **F. The Compliance Filings Should Not Be Restricted.**

4 OSSIA recommends that the Commission should “direct the utilities to submit a narrowly  
5 tailored redline of the current standard contract.”<sup>25</sup> The Joint Utilities disagree that the compliance  
6 filings should be restricted in this way. As an initial matter, OSSIA’s unclear proposal is likely to  
7 lead to more disputes, not fewer. If OSSIA’s proposal is adopted, the parties would likely disagree  
8 not only about whether the changes are in compliance with the Commission’s order but also  
9 whether they constitute a “narrowly tailored redline of the current standard contract.” Not only is  
10 such a newly minted compliance standard poorly designed for its purpose, but it is also particularly  
11 ill-suited to the needs of this docket. Due to the complex and interrelated nature of the Draft Rules  
12 and the outdated nature of the current standard contracts, restricting the utilities to a “narrowly  
13 tailored redline” of the utilities’ current standard form QF PPAs is simply unreasonable. While the  
14 utilities can present redlines of the new standard form QF PPAs against the current standard form  
15 QF PPAs, such redlines will likely be extensive due to the significant changes in these Draft Rules.  
16 Also, the Draft Rules are not designed to cover every provision that will be included in a standard  
17 contract. In any case, OSSIA’s recommendation is premature and should be addressed in the  
18 utilities’ compliance filings. For the above reasons, the Commission should reject OSSIA’s  
19 recommendation to restrict the utilities’ compliance filings to narrowly tailored redlines of the  
20 utilities’ current standard contracts.

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<sup>25</sup> OSSIA’s Comments at 3-4.

1 **G. The Joint Utilities Do Not Oppose Clarifying that Proposed OAR 860-029-0122**  
2 **Applies Only to Standard QF PPAs.**

3 OSSIA asserts that, in certain sections of the Draft Rules, the amended sections are either  
4 vague as to their applicability or inappropriately apply to all PPAs, rather than to just standard QF  
5 PPAs—the subject of this rulemaking.<sup>26</sup> For example, OSSIA notes that proposed  
6 OAR 860-029-0122 (Force Majeure) applies to “[e]very power purchase agreement[.]”<sup>27</sup> The Joint  
7 Utilities do not oppose clarifying that OAR 860-029-0122(1) applies only to standard QF PPAs.

8 However, the Joint Utilities do not agree that clarification is needed in the case of OSSIA’s  
9 other example sections, which were either not amended in this docket (OAR 860-029-0043), were  
10 amended as necessary for internal consistency (OAR 860-029-0005),<sup>28</sup> already explicitly apply to  
11 standard avoided cost prices *and* standard PPAs (OAR 860-029-0045),<sup>29</sup> or *should* apply to both  
12 non-standard and standard PPAs (OAR 860-029-0010).<sup>30</sup>

13 **III. CONCLUSION**

14 The Joint Utilities look forward to finalizing terms and conditions for standard PPAs that  
15 will implement PURPA consistent with legal requirements and sound public policy, thereby  
16 encouraging efficient development of QFs while protecting utility customers. In addition to these  
17 response comments, the Joint Utilities intend to provide suggested clean-up edits later in the

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<sup>26</sup> OSSIA’s Comments at 4.

<sup>27</sup> Draft Rules, OAR 860-029-0122(1) (“(1) Every power purchase agreement shall include a Force Majeure provision that complies with the requirements of this section.”).

<sup>28</sup> Subsection (3) from OAR 860-029-0005 was removed because the subsection addresses the contracting process, which is now covered by proposed OAR 860-029-0046 (previously referred to as New Rule #3), and subsection (3) is therefore redundant. No party has previously objected to this change, which was proposed by the Joint Utilities in their May 10, 2022, comments. *See* Joint Utilities’ Final Comments Regarding Group 1 Rules at 29.

<sup>29</sup> OAR 860-029-0045 (“**RULE TITLE: Eligibility for Standard Avoided Cost Prices and Purchase Agreements**”) (emphasis added).

<sup>30</sup> OAR 860-029-0010 is the definitions section for Division 29 and should address the terms used in rules for both non-standard and standard PPAs.

- 1 process or to AHD directly. The Joint Utilities request that the Commission adopt the Joint
- 2 Utilities' recommendations in these comments.

DATED: January 11, 2023

**McDOWELL RACKNER GIBSON PC**



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