BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2299

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY; PACIFICORP dba PACIFIC POWER; AND IDAHO POWER COMPANY, Joint Utilities Application for Approval of Proposed Schedules and Standard Power Purchase Agreement for Qualifying Facilities up to 10 MW.	THE COMMUNITY RENEWABLE ENERGY ASSOCIATION, NORTHWEST & INTERMOUNTAIN POWER PRODUCERS COALITION, AND RENEWABLE ENERGY COALITION'S REPLY COMMENTS ON REMAINING DISPUTED ISSUES

I. INTRODUCTION

In accordance with the Scheduling Memorandum, the Community Renewable Energy Association ("CREA"), the Northwest & Intermountain Power Producers Coalition ("NIPPC"), and the Renewable Energy Coalition (the "Coalition") (collectively the "QF Trade Groups") respectfully submit Reply Comments on the Remaining Disputed Issues related to the Standard Power Purchase Agreement ("PPA") proposed by the Joint Utilities[1] to the Public Utility Commission of Oregon ("OPUC" or "Commission").

[1] The Joint Utilities are Portland General Electric Company ("PGE"), PacifiCorp, dba Pacific Power ("PacifiCorp"), and Idaho Power Company ("Idaho Power").

The QF Trade Groups previously submitted detailed Initial Comments and marked-up revisions to the Joint Utilities' proposed Standard PPA on October 3, 2023 ("Initial Comments"), as well as subsequent rounds of detailed follow-up comments and response to ongoing edits proposed by the Joint Utilities. The QF Trade Groups continue to support all of their prior edits and comments, and these Reply Comments will only address discrete issues raised in the Joint Utilities' and Staff's Comments filed on December 12, 2023 (hereafter "Joint Utilities' December 12th Comments" and "Staff's December 12th Comments", as applicable).

In sum, the QF Trade Groups remain concerned that the Joint Utilities have not implemented the language or spirit of the QF Trade Groups' proposed edits with respect to many provisions of the Joint Utilities' proposed new form of the Standard PPA. Many issues therefore remain disputed. On the whole, the QF Trade Groups continue to find that the Joint Utilities' proposed Standard PPA, as most recently revised in the Joint Utilities' December 12th Comments, remains unacceptable because the Joint Utilities rejected numerous necessary and reasonable revisions proposed by the QF Trade Groups. Those individual rejections of our edits have a very significant cumulative effect. The QF Trade Groups note that the Joint Utilities' proposal, even as revised in the Joint Utilities' December 12th Comments, is still almost two-and-a-half times as long (based

on word count) as their pre-existing Standard PPAs.[2] The Joint Utilities' proposal is also still approximately 5,000 words longer than the marked-up version of their new Standard PPA form submitted with the QF Trade Groups' Initial Comments—5,000 words of unnecessary complexity that largely favors the purchasing utility and likely would undermine successful development and operation of individual small-scale renewable energy projects in Oregon. Thus, while it may seem from assertions in the Joint Utilities' December 12th Comments that the Joint Utilities have agreed to most edits proposed by the QF Trade Groups, the Joint Utilities have not significantly reduced the overall length and complexity of their proposed Standard PPA from their initial proposal, and the Joint Utilities have rejected a number of significant, material revisions that have been proposed to limit the adverse impact of the Joint Utilities' preferred form of contract.

Finally, as previously noted, the QF Trade Groups reiterate that they still could also support revising the pre-existing PGE or PacifiCorp standard contracts to bring one of those documents into compliance with the newly adopted administrative rules and serve as the single standard contract for use by all three utilities to the extent that the ongoing disagreements with the Joint Utilities' newly proposed Standard PPA form cannot be resolved. While progress has been made with the new form of the Standard

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[2] The Joint Utilities' December 12, 2023, draft of the Standard PPA contains 31,788 words, whereas the current Oregon standard contracts are roughly 13,000 words (depending on version of the form). The length of the proposed Standard PPA with all of the QF Trade Groups' edits submitted with Initial Comments would be closer to 27,000 words.

PPA proposed by the Joint Utilities, it still may be simpler and less controversial to implement only the changes needed to one of the existing PPA forms.

II. REPLY COMMENTS ON REMAINING ISSUES IN DISPUTE

Unlike the QF Trade Groups' prior rounds of comments, these Reply Comments on the Remaining Disputed Issues set forth below only address discrete issues where Staff's December 12th Comments or the Joint Utilities' December 12th Comments requested further comment or warrant an additional response to newly raised points or authorities. To the extent that an issue is not addressed in these Reply Comments, the QF Trade Groups rely on their position stated in their December 12th Comments.

Additionally, to ensure the record is clear, the QF Trade Groups have included attached as Exhibit 1 an updated version of the list of the issues initially raised by the QF Trade Groups but that the QF Trade Groups now understand to be resolved based on the Joint Utilities' December 12th Comments.

Section 1.1 – Definitions

- **"Abandonment"**

The Joint Utilities' December 12th Comments propose to "define abandonment as Utility's receipt of notice from Seller informing Utility of Seller's intent to not proceed with development of the facility."[3]

[3] Joint Utilities' December 12th Comments at 5.

The QF Trade Groups find this counter-proposal and the Joint Utilities' corresponding edit to the proposed Standard PPA to be acceptable, and this issue is therefore resolved.

- **"Commercial Operation", "Expected Monthly Net Output", and "Expected Net Output"**

The remaining dispute regards the proposed subparts (iii) and (iv) of the definition of "Commercial Operation" contained in the version of the Standard PPA with the Joint Utilities' December 12th Comments. The QF Trade Groups continue to recommend deletion of these provisions, as was proposed in the revisions to the PPA included with the QF Trade Groups' Initial Comments.

  - **"Commercial Operation" Subpart (iii)**

As to the provision currently labeled as subpart (iii), the QF Trade Groups stand by their Initial Comments (on then-subpart (iv)) and their December 12th Comments on now-subpart (iii), that the proposed certifications requested by Seller are overly broad and potentially problematic. For example, the proposal that Seller certify that it is not in violation of or subject to any liability under any "Requirements of Law" could easily include minor violations or liabilities that are being addressed or resolved and will not impede the ability to reliably deliver power under the PPA. The Joint Utilities' December 12th Comments assert: "If permitting issues remain, as in the QF Trade Groups' hypothetical, then the facility is not ready to begin operating in a legal manner."[4]

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[4] Joint Utilities' December 12th Comments at 6.

However, this is a simplistic argument that pretends a major permitting issue must remain unresolved to bar commercial operation and thus ignores the words proposed for the PPA by the Joint Utilities.

The Joint Utilities' proposed contract provision bars commercial operation due to any "violation" or "any liability" related to the facility under any "Requirements of Law" and broadly defines "Requirements of Law" to include: "any applicable federal, state, and local law, statute, regulation, rule, action, order, code or ordinance enacted, adopted, issued or promulgated by any Governmental Authority (including those pertaining to electrical, building, zoning, environmental and wildlife protection, and occupational safety and health)."[5] That could include any number of minor "liabilities" or "violations" that do not preclude the facility from operating and selling power to the utility reliably. Indeed, even when a relatively significant violation of some permitting or environmental requirement is identified by the facility owner or a governmental authority, it can take months to work with the affected agency to devise an agreeable permitting solution, but the facility is rarely shut down completely in the interim. Certainly, examples could be found related to the Joint Utilities' own generation facilities that have encountered permitting problems but managed to continue operating until a solution was fully approved. For example, Idaho Power was recently found to have been operating 15 of its hydroelectric projects without the necessary Clean Water Act permits due to an apparent

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5 Joint Utilities' December 12th Comments, Attachment A (Standard PPA), at § 1.1.

misunderstanding of the applicable legal requirements and reported the omission to authorities in January 2022, which resulted in a compliance agreement calling for Idaho Power to apply for the required permits and pay penalties.[6] Idaho Power appears to have been able to reliably operate these facilities during the lengthy period between discovery of the permitting problem and final resolution through issuance of necessary permits. However, the Joint Utilities' proposal would, in effect, bar the small renewable energy facility from achieving commercial operation due to such circumstances, or even for much less significant permitting issues. The QF Trade Groups oppose that result.

- **"Commercial Operation" Subpart (iv) and "Expected Net Output"**

As to the provision currently labeled as subpart (iv), this provision was not even included in the Joint Utilities' initial filing, and this new proposal would, among other steps, require Seller's certification as to the final Expected Monthly Net Output prior to the Commercial Operation Date ("COD") and "conveying Seller's agreement to be bound by such document(s) under this Agreement." This new provision also states that the revised Expected Monthly Net Output will not take effect until after "countersignature by Utility."

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6 *See, e.g., Final amended consent judgments against Idaho Power Company available for public review*, Idaho Department of Environmental Quality (July 1, 2022), available at: https://www.deq.idaho.gov/final-amended-consent-judgments-against-idaho-power-company-available-for-public-review/?utm_source=rss&utm_medium=rss&utm_campaign=final-amended-consent-judgments-against-idaho-power-company-available-for-public-review.

The QF Trade Groups have opposed this new proposed certification prior to achieving COD because it contradicts the right to provide notice of reasonable modifications in design through an as-built supplement up to 90 days *after* COD in OAR 860-029-0120(14)(a), and it creates significant confusion as to how the Seller will be "bound" by the "Expected Monthly Net Output." Additionally, the QF's right to update the Expected Net Output prior to COD is not conditioned on the utility's agreement or countersignature in the administrative rules, OAR 860-029-0046(2)(c)(F).

As previously stated, the update for any modifications supplied with the As-Built Supplement required by the revised Section 6.1, to which we do not object, should be sufficient to provide supporting documentation to the purchasing utility. Additionally, to be clear, the QF Trade Groups' proposal was also to require the QF to update the Expected Net Output amounts contained in Exhibit A *prior* to commercial operation, and the marked-up PPA provided with our Initial Comments contained a statement to that effect in Exhibit A and the definition of "Expected Monthly Net Output" and "Expected Net Output." The Joint Utilities' counter proposal in this new subpart (iv) of "Commercial Operation" is an unnecessarily lengthy provision that turns a relatively simple matter of the QF updating its Expected Net Output amounts into an additional half-page of PPA length and burdensome certification process that could easily impede timely achievement of COD. Must the QF now wait for the Utility's countersignature on its revised estimates of Expected Net Output to achieve COD and even be subjected to Delay Damages while it waits for the Utility or debates whether it supplied sufficient supporting documents to convince the Utility its estimates are reasonable? As noted

above, the Joint Utilities' proposal also creates a new ambiguity as to whether the Seller is "bound" by the Expected Net Output by suggesting that QF has a minimum delivery obligation when instead a Minimum Availability Guarantee ("MAG") may apply to the facility. The QF Trade Groups' proposal is preferrable to the lengthy and problematic provision proposed by the Joint Utilities.

Finally, the Joint Utilities' lengthy counter proposal and extra certifications are a prime example of how the Joint Utilities have overly complicated the proposed Standard PPA for small renewable energy facilities with extra PPA length that creates new burdens and risks for the renewable project proponent.

- **"Contract Year"**

The QF Trade Groups had expressed concern that the Joint Utilities' proposal to start Contract Years on January 1 results in the first contract year and last contract year being shorter than a full year, which makes it very difficult to implement the requirements of the administrative rules for the MAG and Minimum Delivery Guarantee ("MDG"). The QF Trade Groups continue to believe that the easiest fix is just using a Contract Year that starts on COD.

In response to Staff's December 12th Comments requesting examples of the QF Trade Groups' concern, the risk that arises is the risk that the QF would be held to less than a full year—perhaps far less—to achieve compliance with its MAG or MDG. For example, a QF with a 15-year PPA term starting, and thus ending, on February 15 could have an unexcused outage for a week in the last January in its term that would cause it to easily fall below the MDG if the "Contract Year" is intentionally or

unintentionally defined in the PPA to be the period from January 1 to February 15, even if expected net output were prorated from the annual amount to a 46-day amount. In contrast, if the contract year ran from mid-February to mid-February, as the QF Trade Groups propose, there is always a full contract year to absorb these types of lumpy outages and still meet the MDG or MAG.

However, the QF Trade Groups agree that the Joint Utilities' December 12th Comments and PPA edits have improved their proposal to use the January 1-based contract year through introduction of an express definition of "Full Contract Year" (being a full, twelve-month period) to clarify that the MAG and MDG only apply to applicable Full Contract Years. While the provision is improved, the Joint Utilities edits did not import the use of the term "Full Contract Year" to all necessary provisions of the MAG and MDG in Exhibit F to unambiguously provide that only Full Contract Years will be covered. Thus, while acknowledging the improvement, we continue to believe our proposed edits to Exhibit F are preferable for that reason and others.

- **"Delay Damages", "Replacement Power Costs", "Utility's Cost to Cover", and Seller-Owed Damages Calculations**

The Joint Utilities failed to provide any contract pricing caps on the various damages provisions in the Standard PPA proposed with their initial filing, and in response the QF Trade Groups proposed a catch-all damages cap that could easily apply throughout the contract through the definition of "Utility's Cost to Cover" included in our marked-up version of the PPA. Subsequently, the Joint Utilities have

proposed different damages cap formulations that would apply to different types of Seller defaults, but continue to maintain a single damages formulation for Utility defaults through a single definition of "Seller's Cost to Cover." The QF Trade Groups have continued to recommend their simple solution to this issue and explained that the Joint Utilities' various reformulations of the contract pricing cap on damages are somewhat confusing and unclear and, in our view, do not correctly implement the intent of the Commission in adopting the administrative rules. Staff appears to also favor a simple approach.[7] To be clear, the simplest approach is that contained in the QF Trade Groups' marked-up PPA submitted with their Initial Comments.

The Joint Utilities' December 12th Comments now explain that the Joint Utilities believe that damages should be "aggregated for the purposes of applying the damages caps" differently for different types of Seller defaults based on the wording of the administrative rules that differs in describing the contract pricing cap on damages for different types of defaults.[8] Rather than cap the damages at the contract price the same way for all types of defaults through the definitions of Replacement Power Costs and Utility's Cost to Cover, as the QF's propose, the Joint Utilities want to create a separate damages calculation and contract pricing cap method for each type of default.

The QF Trade Groups do not agree that the Commission intended to aggregate

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7 Staff's December 12th Comments at 4.

8 Joint Utilities' December 12th Comments at 9-11.

the damages differently for purposes of implementing the contract price cap on damages for different types of defaults. Instead, the QF Trade Groups continue to recommend the simpler approach of capping the "Utility's Cost to Cover" at the "Contract Price" in the PPA and applying that cap to each MWh that would otherwise be delivered but for the applicable default throughout the contract. The Joint Utilities' counter proposal would, in effect, largely negate the contract price cap on damages for the QF Seller by allowing the utility to charge the QF for damages far in excess of the contract price for a given hour or day with a spike in market prices so long as there were no, or negative, replacement price damages in another day in the month or year (depending on the default at issue) to offset the damages in excess of the contract price.

The Joint Utilities' proposed definition for Delay Damages is one such provision, which would aggregate the cap across a whole month. Similarly, the Joint Utilities' aggregation method for calculating and then capping damages owed under the MAG and MDG calculates the damages owed on an individual monthly basis (which defies the intent of an annual MAG or MDG), but then for purposes of calculating the damages cap it aggregates the contract prices that would have been paid across a whole year to increase the level of the cap and thereby significantly

negate the cap on the Seller's damages at the contract price.[9] Likewise, the Joint Utilities' latest revision to Section 11.2.1, Remedy for Seller's Failure to Deliver, also creates a larger cap on damages the QF might owe by aggregating over the applicable period.[10] Further, in Section 11.5, Termination Damages, the Joint Utilities propose to aggregate the damages cap across the entire 24-month period of calculation.[11]

In addition, the Joint Utilities' proposed Delay Damages cap creates ambiguity by setting the cap at "the aggregate amount Utility would have incurred to purchase Seller's Net Output *and Environmental Attributes* during that month or partial month."[12] Similarly, the Joint Utilities' latest revision to Section 11.2.1, Remedy for Seller's Failure to Deliver, contains the same type of language that caps damages at the price of Net Output and Environmental Attributes. This could create a cap that

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9 *See* QF Trade Groups' December 12th Comments at 50-55 (discussing problems with the Joint Utilities' proposed damages calculation for the MAG and MDG). The Joint Utilities damages cap for the MAG and MDG states:

> Notwithstanding the foregoing, the total Availability Shortfall Damages in a given Contract Year *may not exceed the aggregate amount Utility would have incurred to purchase Seller's Net Output and RECs during the Contract Year* if Seller had met the Availability Guarantee, which amount shall be the sum of (i) the product of the monthly On-Peak Availability Shortfall and the applicable monthly On-Peak Contract Price during each calendar month of the Contract Year and (ii) the product of the monthly Off-Peak Availability Shortfall and the applicable monthly Off-Peak Contract Price during each calendar month of the Contract Year.

Joint Utilities' December 12th Comments, Attachment A at 65 (emphasis added, alterations removed).

10 Joint Utilities' December 12th Comments at 54.

11 Joint Utilities' December 12th Comments at 56.

12 Joint Utilities' December 12th Comments at 10 (emphasis added).

even exceeds the contract price applied to the expected net output in the case where the QF sells only net output and not environmental attributes to the utility. Thus, in addition to being one-sided and unfair, the Joint Utilities' proposal also creates unnecessary ambiguity and risk of further unfairness.

The QF Trade Groups continue to object to the Joint Utilities' latest proposal and support the proposal included with the QF Trade Groups' Initial Comments. In this context, it is important to again emphasize that the Joint Utilities have capped their own damages at the contract price through the definition of the Seller's Cost to Cover with no exceptions where the QF may recover additional amounts than what the Utility would have paid for delivered power during any given hour of the default in question had it not breached. The QF Trade Groups have not objected to that treatment, which is consistent with their proposal for the Utility's Cost to Cover.

- **"Excused Delay"**

The Joint Utilities' December 12th Comments assert that their proposed limitation of Excused Delays to applicable delays caused by "Utility Transmission"—as opposed to "the public utility" as worded in the administrative rules—"appropriately reflects the terminology used in OAR 860-029-0120(6)(d)."[13] As we previously explained, OAR 860-029-0120(6)(d) protects the QF against defaults by the "public utility" under applicable agreements related to interconnection and is not limited to defaults by a particular business unit or division within the public utility. We reiterate that the Joint

[13] Joint Utilities' December 12th Comments at 11-12.

Utilities' proposed limiting language—to require the default be proven to have been attributable to "Utility Transmission"—could materially limit the rights of the QF due to circumstances that are currently unpredictable and unknowable, and there is no basis to create such risk to the QF in the Standard PPA. The Commission should reject the Joint Utilities' proposal and their ongoing attempts to require small QFs to somehow prove a purchasing utility's breaches were attributable to individual offices, divisions, or other forms of fictitious entities within the single, corporate entity constituting the purchasing utility.

- **"Fixed Price Period End Date"**

Staff and the Joint Utilities' December 12th Comments expressed disagreement with the QF Trade Groups' recommendation that the allowance for use of an interconnection study with COD later than three years after the Effective Date of PPA should also be available for an Interconnection Provider other than Utility Transmission, such as Bonneville Power Administrative ("BPA") or an electric cooperative. They argue primarily that the administrative rules limit the exception to interconnection studies by the "purchasing utility."[14]

However, as the QF Trade Groups explained in their December 12th Comments, this proposal is justified by changed circumstances since the Commission's promulgation of the administrative rules, which now demonstrate that

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[14] Joint Utilities' December 12th Comments at 13-14 (citing OAR 860-029-0120(5)(b)).

delays beyond three years in interconnecting a facility should be expected not just by the purchasing utility's potential delays, but by any regional transmission provider.[15] Thus, the proposal to deviate from the administrative rules is justified in this instance, if the Commission intends for its standard contract to encourage QF development, as PURPA and related state law require.

- **"Forced Outage", "Maintenance Outage", "Planned Outage" and Exhibit I**

The QF Trade Groups have consistently argued that the administrative rules intentionally provided a specific definition that can be plugged into the PPA for Forced Outage, Maintenance Outage, and Planned Outage, which does not cross reference NERC definitions.[16] The Joint Utilities' December 12th Comments continue to insist on cross referencing the NERC definitions in the PPA and including additional NERC definitions for intermediate forms of these types of outages in their proposed Exhibit I to the PPA, and state that they do not agree with the "more generally worded language in the rules."[17] The QF Trade Groups continue to oppose the proposed cross reference to NERC definitions in the PPA, and submit that this issue was already considered and addressed by the precise wording of the administrative rules. Nothing argued by the Joint Utilities justifies deviation from the rules in this case.

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15 QF Trade Groups' December 12th Comments at 10-11.
16 OAR 860-029-0010(24), (28), (43).
17 Joint Utilities' December 12th Comments at 14-16.

It is not reasonable or necessary to require small QFs to cross reference NERC definitions to understand how such definitions may change over time and affect their rights and obligations with respect to outages in the PPA. Although the Joint Utilities' December 12th Comments suggest that all of their PPAs must precisely match current NERC definitions for outages for ratemaking and resource adequacy purposes, this assertion is plainly incorrect because no existing PPAs with QFs do so and likely many existing PPAs with non-QFs do not do so. We continue to recommend deleting reference to NERC definitions and use of Exhibit I.

However, the Joint Utilities' December 12th Comments agreed to the QF Trade Groups' discrete proposal to delete the clause stating that a Maintenance Outage is any outage involving 10% of the Facility's Net Output. Thus, that discrete point within the definition of "Maintenance Outage" is resolved, and Staff's December 12th Comments' inquiry on the point is moot.

- **"Nameplate Capacity Rating"**

The QF Trade Groups have recommended deleting reference to the Form No. 556 in the definition of Nameplate Capacity Rating because it could cause confusion. The Commission's administrative rules define "Nameplate Rating" for purposes of eligibility to the standard contract and/or standard rates in accordance with FERC's current send-out rule for eligibility to be an 80-MW or less QF.[18] To the extent FERC policy could change or something in a Form No. 556 may be inconsistent with the

[18] OAR 860-029-0010(32) (measuring capacity at the point of interconnection).

OPUC rules, the OPUC definition should control. Additionally, Form No. 556 now uses a 10-mile separation rule that is already inconsistent with the OPUC's five-mile rule for aggregation of nearby facilities. The edits in our Initial Comments should be adopted.

The Joint Utilities' December 12th Comments now reveal their intent is to use the reference to the FERC Form No. 556 in the PPA's definition of Nameplate Capacity Rating to "ensure" that the description of the Nameplate Capacity Rating in the PPA "is identical to the nameplate rating reported by the QF to FERC for its QF certification."[19]

This argument demonstrates that cross referencing the FERC Form No. 556 in the PPA is indeed likely to impede small renewable energy developers in obtaining an executed PPA and cause disputes under PPAs. Any particular QF's information reported on the FERC Form No. 556 is not assured to precisely mirror the definition of "Nameplate Capacity Rating" in the Commission's administrative rules and appropriate for use in the Standard PPA even today, and it is reasonable to expect the information reported on a FERC Form No. 556 may change during the 15-year to 20-year term of a PPA executed today in a ways that could further lead to discrepancy between the definition in the administrative rules and the way the power production capacity is reported on the Form No. 556. There will be non-material differences, and the Commission should not encourage the utilities to raise obstacles to the contracting

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[19] Joint Utilities' December 12th Comments at 16-17.

process and provide new grounds for litigation.

To give just one example that proves the point, the Commission need look no further than the seminal Broadview Solar case. In that case, FERC determined that the proposed solar-plus-storage QF would have an AC send-out capacity of 80 MW and was thus a small power production QF—meaning that it would have a "Nameplate Capacity Rating" of 80 MW under this Commission's administrative rules and the QF Trade Groups' proposed definition for the Standard PPA. However, due to the format of the FERC Form No. 556, the information reported on the form filed by Broadview was interpreted by the purchasing utility (and a dissenting FERC Commissioner) to suggest that the facility would have a power production capacity of 155 MW.[20] Broadview had in fact filed three different Form No. 556s over time, for the same proposed facility, each of which reflected the inputs for calculation of power production capacity differently.[21] FERC had initially relied on this information reporting inconsistency to reject Broadview's proposed certification before later reversing itself and explaining that it would take a "pragmatic approach" to completion of the information on the Form No. 556.[22] FERC explained in detail how the Form No. 556 had changed multiple times over the years and stated: "Form No. 556 would

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20 *Broadview Solar, LLC*, 175 FERC ¶ 61,228 at PP 11-30 (June 17, 2021) (Order Addressing Arguments on Rehearing); *see also Broadview Solar, LLC*, 175 FERC ¶ 61,228 at P 1 (June 17, 2021) (Danly, C., *concurring in part and dissenting in part*).

21 *See Broadview Solar, LLC*, 174 FERC ¶ 61,199 at PP 6, 8-9 (March 19, 2021) (Order Addressing Arguments on Rehearing and Setting Aside Prior Order).

22 *Broadview Solar, LLC*, 174 FERC ¶ 61,199 at PP 6, 8-9, 34-40.

not be a perfect fit for all possible QFs"; "the Commission never intended to turn this data collection tool into a mechanical rule that dictated whether a facility constituted a QF"; and "the form acknowledges that its design may not be suitable for all instances."[23] As FERC itself has stressed, the Form No. 556 is not necessarily going to precisely be completed the same way every time, especially with new technologies, and can lead to confusion and disputes if relied upon in a mechanical fashion.

Thus, the Joint Utilities' proposal to impose a new requirement that the Form No. 556 precisely match the proposed QF's information provided on the Standard PPA is not reasonable. Additionally, the Commission has no control over how the Form No. 556 may change over time and whether such changes may, or may not, be consistent with this Commission's definition of "Nameplate Capacity Rating", which entitles a QF to standard rates and a standard contract under Oregon's implementation of PURPA. For example, after having lost at the D.C. Circuit Court of Appeals, the utilities in the Broadview case have continued to attempt to reverse FERC's decision through a petition for writ of certiorari to the United Supreme Court.[24] If FERC's decision is reversed and the FERC Form No. 556 altered as a result, the Oregon Commission may still determine that FERC's "send-out" rule is still appropriate as the measure of capacity for purposes of qualifying for standard rates and standard contracts in Oregon—as OAR 860-029-0010(32) currently requires.

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23 *Broadview Solar, LLC*, 174 FERC ¶ 61,199 at PP 39-40.

24 *See* US Supreme Court Docket No. 22-1246.

- **"Net Output"**

The QF Trade Groups have proposed using the precise wording of OAR 860-029-0010(34) for the definition of "net output" in the Standard PPA. Most recently, the QF Trade Groups' December 12th Comments expressed significant concern with the Joint Utilities' insertion of confusing language that would deduct "Seller's load other than station use" from net output, which would contradict FERC's buy-sell rule under which an industrial cogenerator (or any QF with load other than station use) may sell all gross output minus only its station power related to power production, and buy its industrial/retail power for non-station use from the utility. The Joint Utilities' December 12th Comments have removed the deduction of "Seller's load other than station use" from their Net Output definition, but continue to propose other deviations from the language of the administrative rules, including a deduction of "transmission losses" which contradicts the concept of measuring losses at the Point of Interconnection and not transmission losses between the Point of Interconnection and the Point of Delivery.[25] Thus, while the QF Trade Groups acknowledge the recent improvement to the Joint Utilities' proposal, the QF Trade Groups continue to recommend the Commission use the precise wording of the administrative rules in this instance. Because PGE's rate schedule utilizes the same definition of "Net Output" as the Joint Utilities' December 12th Comments recommend for the Standard PPA, the QF Trade Groups also oppose PGE's definition in its rate schedule for the same

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[25] Joint Utilities' December 12th Comments at 18.

reason.[26]

- **"Required Facility Documents"**

The QF Trade Groups have expressed concern that the Joint Utilities' proposed definition is too open ended and could lead to disputes over how minor an agreement or authorization falls within the definition. The QF Trade Groups thus recommend that "Required Facility Documents" be limited to the items that would be identified by the parties in a PPA Exhibit to remove ambiguity. Otherwise, this broad definition of "Required Facility Documents", along with Sections 3.2.3, and 11.1.2(e), could lead to a default for any issue that arises under a contractual arrangement that is very unlikely to preclude reliable delivery of power to the utility, including everything from a contract with the facility's janitor to its various financing arrangements or bank accounts. The Joint Utilities' Reply Comments and their December 12th Comments suggest they would only enforce this provision with respect to significant contracts and permits or in a circumstance where there were damages to the utility. But as we have explained, if that is the case then the Joint Utilities should have no problem accepting our edit, which limits the Required Facility Documents to the discrete list of significant permits and agreements the parties will list in the applicable PPA exhibit.

- **"Schedule Recovery Plan" and Section 2.3**

The proposed Schedule Recovery Plan, approved by the utility, as used in the initially proposed Section 2.3 and 11.1.2(b) of the Joint Utilities' proposed PPA, was

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[26] *See* Joint Utilities' December 12th Comments at 74.

an unreasonable new condition on exercise of the QF's one-year cure rights for a delay default, as provided in OAR 860-029-0123(4)(a). The Joint Utilities' December 12th Comments have clarified that their deletion of the "Schedule Recovery Plan" concept is not conditioned upon their continued inclusion of quarterly "reporting requirements" in the newly proposed Section 2.3, and therefore the discrete issue of the Schedule Recovery Plan is resolved.

With respect to Section 2.3, the Joint Utilities' Reply Comments introduced a newly proposed quarterly reporting requirement in Section 2.3. The QF Trade Groups are concerned that a quarterly reporting requirement creates a new risk of a pre-COD default and reporting burden on small QFs not required by the administrative rules. However, the QF Trade Groups' December 12th Comments indicated willingness to not oppose an annual reporting requirement to the extent that the purchasing utility provides a written request for such an annual update at least 30 days before the update would be due, and the QF Trade Groups provided proposed edits for the proposal.

Staff's December 12th Comments have proposed an annual reporting requirement until the year before scheduled commercial operation when a quarterly reporting requirement would be imposed.[27] The QF Trade Groups continue to support the proposal in our own December 12th Comments over Staff's proposal. However, if Staff's proposal is adopted, it should also include language that only triggers the reporting requirement upon a written request by the purchasing utility for the update.

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[27] Staff's December 12th Comments at 4.

Main PPA Sections

- **Sections 1.2.4, 6.3, & 9.4 – Utility's Liability**

Section 1.24 and the last sentences of Sections 6.3 and 9.3, along with several others throughout the agreement, attempt to insulate the purchasing utility against any accountability or liability for financial harm to the QF caused by the utility's interconnection and/or transmission function employees. However, with respect to Section 1.2.4 and the last sentences of Sections 6.3 and 9.3, the Joint Utilities' December 12th Comments stated that their deletion was not conditioned on any other proposals related to this issue, and therefore the issue with respect to Sections 1.2.4, 6.3, and 9.3 is resolved.

- **QFs' Proposed Section 1.3 – Good Faith and Fair Dealing**

In Staff's Comments, Staff requested more information on the QF Trade Groups' proposal to include a reasonableness standard in the Standard PPA.[28] The QF Trade Groups have proposed including the following provision on the draft Standard PPA:

> 1.3 Parties' Good Faith. The Parties shall act reasonably and in accordance with the principles of good faith and fair dealing in the performance of this Agreement. Unless expressly provided otherwise in this Agreement, (i) where this Agreement requires the consent, approval, or similar action by a Party, such consent or approval shall not be unreasonably withheld, conditioned or delayed, and (ii) wherever this Agreement gives a Party a right to determine, require, specify or take similar action with respect to a

[28] Staff's December 12th Comments at 5.

> matter, such determination, requirement, specification or similar action shall be reasonable.[29]

The QF Trade Groups note that the Joint Utilities December 12th Comments agree to retain most of the first sentence of the above-quoted Section 1.3. The QF Trade Groups continue to support inclusion of the entire section as quoted above for the reasons stated in our prior comments. However, below we provide additional context in response to Staff's request for further comment on the subject.

The Commission rejected including a blanket reasonableness requirement in the rules, but it is unclear to the QF Trade Groups whether the Commission addressed including a reasonableness provision in the Standard PPA. The Commission noted concerns about potential litigation and concerns related to the lack of clarity and confusion with a reasonableness standard.[30]

The QF Trade Groups believe adding a reasonableness standard in addition to the good faith and fair dealing provision in the Standard PPA will reduce confusion and decrease potential litigation. First, a reasonableness standard would deter a utility from acting unreasonably because it knows the Commission could review its actions. Second, inserting a reasonableness standard into the Standard PPA would decrease litigation costs and confusion because it would eliminate the need to fight over whether there is a

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29 QF Trade Groups' December 12th Comments at 19.

30 Special Public Meeting AR 631 Rulemaking to Address Procedures, Terms, and Conditions Associated with Qualifying Facilities (QF) Standard Contracts at 2:07:45-2:14:55 (May 25, 2022), available at: https://oregonpuc.granicus.com/player/clip/955?view_id=2&redirect=true&h=d27c6503407fd4264d385024dcb554c6.

reasonableness standard and instead focus attention on whether a utility's actions were reasonable. The QF Trade Groups have provided several examples that would have benefited from a reasonableness standard and does not repeat those here.[31]

Adopting a reasonableness standard in the Standard PPA will add incremental value to the good faith and fair dealing provision. There is an implied duty of good faith and fair dealing in every Oregon contract, but there can be litigation about whether it applies to the contractual provision at issue, and it is very important for the standard contract to specifically include it. The purpose of good faith and fair dealing is to prohibit improper behavior in the performance and enforcement of contracts, and to ensure that the parties will refrain from any act that would "have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."[32]

The duty of good faith and fair dealing already includes a limited reasonableness standard, which applies to the "objectively reasonable expectations of the parties." In determining whether a party has violated the duty of good faith and fair dealing, Oregon courts consider whether an action was taken in good faith by looking at the party's conduct in light of the reasonable expectations of the parties.[33] However, only the

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31 *See In re Rulemaking to Address Procedures, Terms, and Conditions Associated with Qualifying Facilities (QF) Standard Contracts*, Docket No. AR 631, Joint QF Trade Associations' Final Group 1 Comments at 12-26 (May 10, 2022).

32 *Iron Horse Engineering v. Northwest Rubber*, 193 Or App 402, 421, 89 P3d 1249 (Or. App. 2004) (quoting Perkins v. Standard Oil Co., 235 Or 7, 16, 383 P2d 107 (1963) (internal quotes emitted).

33 *Best v. US Nat. Bank of Or.*, 303 Or 557, 562-63, 739 P2d 554, 557 (1987); *Swenson v. Legacy Health System*, 169 Or App 546, 554–555, 9 P3d 145, 149-50 (Or. App. 2000).

parties' "objectively reasonable expectations" will be examined to determine whether the discretion was exercised in good faith.[34]

It can be disputed whether the duty of good faith and fair dealing protects against subjectively unreasonable actions and it does not "provide a remedy for an unpleasantly motivated act that is permitted expressly by contract."[35] In addition, the contractual duty of good faith and fair dealing is different from the tortious concept of good faith and fair dealing.[36] The tortious duty of good faith and fair dealing can occur when there is a special relationship between the parties.[37] A special relationship could exist between the utility and QF given the QF's dependence and reliance upon the utility, which has unequal bargaining power and the QF depends upon the utility to take certain actions.

A reasonableness standard places higher protection upon the contracting parties. Within the utility context, the Commission has described a reasonableness standard as an inquiry into "whether the utility exercised the standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility

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34 *Uptown Heights Associates LP v. Seafirst Corp.*, 320 Or 638, 645, 891 P2d 639, 645 (1995); *Slover v. State Bd. of Clinical Social Workers*, 144 Or App 565, 572, 927 P2d 1098, 1102 (Or. App. 1996).

35 *See Pacific First Bank v. New Morgan Park Corp.*, 319 Or 342, 352-53, 876 P2d 761 (1994); *Stevens v. Foren*, 154 Or App 52, 58, 959 P2d 1008, 1011 (Or. App. 1998).

36 *See Uptown Heights Associates LP*, 320 Or at 648-51.

37 *Eulrich v. Snap-On Tools Corp.*, 121 Or App 25, 853 P2d 1350 (1993), vacated on other grounds, 512 US 1231 (1994).

management at the time the decision had to be made."[38] A reasonableness standard would go a step further than good faith and fair dealing to hold parties of the contract to the standard of care of a reasonable person, and would prevent the utilities or the QFs from an "unpleasantly motivated act that is permitted expressly by contract." A reasonableness standard could also specifically incorporate the tortious duty of good faith and fair dealing because of the special relationship between the QF and the utility.

It is important for the Commission to recognize that excluding an explicit reasonableness standard will not mean that the Commission will avoid litigation over what is a reasonable action. There is an implied reasonableness standard in all Oregon contracts with the duty of good faith and fair dealing. What will instead occur if the Commission does not include a reasonableness standard is there will be litigation in PURPA contacts about whether any particular action was based on the "objectively reasonable expectations" (which is required under the duty of good faith and fair dealing) or whether the particular action was a subjectively unreasonable action or an unpleasantly motivated action (which the parties may argue is permitted under the duty of good faith and fair dealing). There will also be litigation over whether there was a special relationship between the utility and the QF, which bars additional unreasonable actions. The Commission should limit its litigation over what types of unreasonable actions are permitted in different contexts, which reduces litigation

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38 *In re PacifiCorp, dba Pacific Power, Request for a General Rate Revision*, Docket No. UE 374, Order No. 20-473 at 74 (Dec. 18, 2020).

expense and time, and simply state that the parties must act reasonably.

Thus, the Commission should direct the Joint Utilities to include a reasonableness standard in the Standard PPA. If the Commission is opposed to a reasonableness standard in the Standard PPA, then at a minimum the Commission should include the good faith and fair dealing provision that the Joint Utilities and the QF Trade Groups have agreed to related to implementation of the Standard PPA in Section 1.3.

- **Section 2.7 – Utility Right to Monitor**

This section would have imposed new and unreasonable monthly reporting requirements on QFs beyond anything required in the administrative rules. However, the Joint Utilities' December 12th Comments clarify that their agreement to delete the initially proposed Section 2.7 is not conditioned on any other edits they have proposed being accepted, and thus the issue is resolved.

- **Sections 4.1, 5.1, & 6.8.1 – Purchase and Sale**

The Joint Utilities selectively accepted and rejected the reasonable proposals of the QF Trade Groups in these sections and the issue remains in dispute.

The first remaining dispute regards the Joint Utilities' proposal for an unreasonable clause in Section 4.1 and 5.1 that would penalize the QF for delivering in excess of its Maximum Delivery Rate to the extent that is the maximum amount of Network Transmission the utility reserves internally on its own system. As has been explained repeatedly, this proposal is not reasonable because such deliveries are necessary and in fact the premise behind Exhibit L for off-system QFs, which will

often deliver energy in whole MW quantities that exceed the Maximum Delivery Rate of the Facility to the interconnected utility. The Joint Utilities claim they will incur penalties if a QF delivers energy in excess of the amount the utility has designated as a network resource under its internal transmission reservation across the utility's own system to load. However, the Joint Utilities continue to ignore the fact that the QF has no control over how much Network Transmission the purchasing utility reserves on its own system, and that their proposed PPA provision here would penalize the QF even when the utility failed to properly designate a reasonable cushion of generation to avoid such penalties.

Additionally, the second disputed issue is that the Joint Utilities reinstated the final sentence in Section 4.1 from their initial proposal, which creates ambiguity as to Exhibit L's applicability by stating the Utility is under no obligation to purchase anything other than the Net Output or pay for Net Output that is not delivered, when in fact the purpose of Exhibit L is to facilitate the delivery and purchase of whole MW blocks of energy that are not going to match the Net Output as measured on an hourly basis. Thus, the QF Trade Groups continue to recommend adoption of all the edits proposed in their Initial Comments on these sections and rejection of the Joint Utilities' most recent edits in their December 12th Comments.

- **Section 4.2(a) – "Designation of Network Resource"**

The QF Trade Groups continue to oppose the Joint Utilities' proposal to limit the utility's obligation to request to designate an on-system QF as a network resource until after it obtains an interconnection agreement because there is no

limitation in the administrative rules, or any apparent basis to create this limitation. The Joint Utilities do not dispute that under the OATT, the utility is allowed to request the QF be so designated at the time it signs the PPA, and it should be required to do so. Instead, they continue to claim, without citation to any authority or even any convincing explanation, that the on-system QF could avoid network upgrade costs that would be allocated to it in the interconnection process if the Utility requests network resource designation of its PPA prior to completion of an interconnection study.[39] The QF Trade Groups continue to oppose the limiting language in the Joint Utilities' proposal because it goes beyond what is required by the administrative rules.

- **Section 4.5 – Curtailment**

Staff previously pointed out that the Joint Utilities' curtailment proposal would authorize the purchasing utility to curtail a QF's deliveries in broader circumstances than allowed by FERC's rules and precedent. In response, the QF Trade Groups' December 12th Comments proposed a provision that closely tracks the language from 18 CFR § 292.307(b)(1) & § 292.101(b)(4), which generally limits uncompensated curtailment to system emergency conditions.[40]

In contrast, the Joint Utilities' December 12th Comments made a proposal to edit only one of the four subparts of their initially proposed Section 4.5 and left in

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39 Joint Utilities' December 12th Comments at 33-34.

40 QF Trade Groups' December 12th Comments at 28-29.

place the rest of the lengthy list of reasons the utility could curtail. Those reasons include obvious opportunities for the purchasing utility to curtail the QF's output beyond the narrow emergency condition authorized by FERC. For example, the Joint Utilities' proposed Section 4.5 would still allow curtailment without compensation to the QF if "the Market Operator or Transmission Provider directs a general curtailment, reduction, or redispatch of generation in the area (which would include the Net Output) for any reason required or permitted under applicable Federal laws and regulations, NERC standards or directives, and/or tariffs of the Market Operator, Transmission Provider, or Interconnection Provider, even if and no matter how such curtailment or redispatch directive is carried out by Utility."[41] Given that the purchasing utility is likely the applicable "Transmission Providers," "Interconnection Provider", and/or the "Utility" with ample discretion to curtail in the quoted provision, the purchasing utility clearly has more leeway to curtail the QF in this provision than the narrow emergency circumstance allowed by FERC.

To resolve Staff's concern and ensure the Commission's standard PPA is consistent with PURPA, the Commission should adopt the QF Trade Groups' proposal.

- **Section 4.7(b) – Ownership of Env. Attributes**

The Joint Utilities' latest revisions to this section are largely agreed to by the QF Trade Groups, with the exception being the Joint Utilities' ongoing efforts to

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[41] Joint Utilities' December 12th Comments, Attachment A at 24 (Section 4.5).

include a clarification in the last sentence of Section 4.7(b) suggesting that the purchasing utility might be able to claim credit for the "nonemitting" nature of the energy even when the purchasing utility does not purchase the facility's RECs. Previously, the QF Trade Groups indicated that resolution of this issue should await the Commission's determination in Docket No. UM 2273. Now that the Commission has issued its Order No. 24-002 in that docket, the QF Trade Groups continue to oppose the Joint Utilities' last sentence proposed for Section 4.7(b).

The Joint Utilities propose the following language in Section 4.7(b):

> Output of the Facility has the greenhouse gas emission attributes of the generating resource regardless of the disposition of the Environmental Attributes under this Agreement and such greenhouse gas emissions shall be excluded from, and may not be imputed in, the Utility's total greenhouse gas emissions for purposes of compliance with the clean energy targets in ORS 469A.410 pursuant to ORS 469A.435(2).[42]

The Joint Utilities' December 12th Comments argue this provision is necessary to ensure "nothing in the in the PPA regarding ownership of Environmental Attributes will interfere with or override ORS 469A.435(2) specifying that GHG emissions from QF generation are excluded from the utility's total GHG emissions calculation for compliance with HB 2021 clean energy targets."[43]

The QF Trade Groups oppose this language because it could be construed by a potential purchaser of RECs as impairing the QF's ability to sell the RECs to a third party by undermining a QF's right to claim all the environmental attributes of the

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42 Joint Utilities' December 12th Comments at 36-37.

43 Docket No. UM 2273, Order No. 24-002 at 15 (Jan. 5, 2024).

facility's generation. Notably, in Order No. 24-002, the Commission ruled that nothing in HB 2021 requires utilities to retire RECs in order to report the GHG content of facilities in their portfolio for purposes of HB 2021 compliance, but the Commission also explained that "purchasers [of RECs] will need clear information to determine whether RECs associated with electricity reported to [Department of Environmental Quality ('DEQ')] will meet their needs."[44] The Commission thus recognized that purchasers of RECs will potentially be concerned with the very type of language that the Joint Utilities proposed for the Standard PPA here.

Further, as the Commission ruled, the Joint Utilities do not need to own any environmental attributes under the PPA in order to claim the GHG component of the generation to DEQ for purposes of establishing compliance with HB 2021, and therefore the above-quoted sentence they propose to insert into the Standard PPA does not appear to be necessary for the utility to claim the GHG content of the energy for purposes of the Commission's determination of compliance with HB 2021. All this language would do in the Standard PPA is cause potential problems for a QF attempting to sell the RECs to a third-party purchaser, and the QF Trade Groups oppose the language for that reason. .

- **Section 6.6.2 – RTO Scheduling Coordinator Costs**

The Joint Utilities continue to propose to impose new and unknown costs on small QFs in the event that the purchasing utility joins an RTO, by requiring the small

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[44] Docket No. UM 2273, Order No. 24-002 at 15 (Jan. 5, 2024).

QF to contract with a scheduling coordinator in the case of the utility joining an RTO. The QF Trade Groups continue to oppose this proposal because it is unreasonable, and there has also been no demonstration that these potential costs are accounted for and included within the compensation paid to the QF by including such costs in the proxy resource or market price forecast used to calculate the avoided costs. The Joint Utilities' December 12th Comments even confirm our concerns by stating "[t]hese costs are not included in avoided cost pricing."[45] Thus, the Joint Utilities appear to confirm that this is simply a general administrative cost of running a utility—that will apply to both utility-owned and independently owned facilities—not a unique cost associated with QFs.

- **Sections 6.9, 6.11, & 6.12.1-6.12.8 – Telemetry, Dedicated Communication Circuit, and Reports and Records**

The QF Trade Groups continue to maintain that all of these provisions should simply be deleted. Staff's December 12th Comments sought additional comments on these provisions, and the QF Trade Groups refer Staff to the QF Trade Groups' December 12th Comments.[46] In sum, each of these proposals go beyond the requirements of the administrative rules and create new burdens, costs, and risks for small QFs. For example, under proposed Section 6.12.2, the Joint Utilities propose that a QF must promptly supply the requesting utility with all data related to the

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45 Joint Utilities' December 12th Comments at 39.

46 QF Trade Groups' December 12th Comments at 34-36.

construction, operation, and maintenance of the facility, including, among others, requests by "any other party achieving intervenor status in any Utility rate proceeding," and the QF may annually incur up to $5,000 to collect and provide such information to the utility. In the QF Trade Groups' view, this requirement is new and burdensome. Additionally, the provision appears to be an attempt to turn the QF into a regulated utility by effectively subjecting it to data requests by intervenors in utility rate proceedings. However, PURPA expressly bars state rate and organizational regulation over QF's affairs, and this provision also appears to run afoul of that proscription.[47]

The Joint Utilities' December 12th Comments claim these types of advanced communications and reporting requirements are consistent with the current "market" PPA and thus must be included in the Commission's Standard PPA, and in support they continue to cite PacifiCorp's Washington Standard PPA.[48] However, this claim is defeated by the fact that other recent PPAs approved for use by small QFs do *not* contain anything resembling these burdensome communications and reporting provisions. For example, at the same time that PacifiCorp's PPA was accepted for use in Washington, another major utility in the state—Avista—also had its PPA approved for use for small QFs, and Avista's PPA did not include these types of requirements

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47 18 CFR § 292.602(c).

46 Joint Utilities' December 12th Comments at 44-45 (electronic fault log); Joint Utilities' December 12th Comments at 46 (Information to Governmental Authorities); Joint Utilities' December 12th Comments at 47-48 (Notice of Material Adverse Events).

for electronic fault logs, telemetry, extensive reporting requirements, much less response to rate case intervenor data requests.[49] The fact that PacifiCorp insisted on inclusion of such provisions in Washington or any other state where there was not a fully litigated proceeding and full scrutiny of the PPA does not make these requirements consistent with the "market" for small QFs.

Finally, as of the most current public information known to the QF Trade Groups (February 2022), there were only ***two*** operating QFs selling power to PacifiCorp in Washington. These are both owned by Yakima Tieton Irrigation District, so there could effectively be considered only one entity selling power under PURPA to PacifiCorp in Washington. Of all the different states and utilities to consider as examples for PURPA policy, PacifiCorp's Washington service territory is likely the worst example from a QF perspective, which is likely why the Joint Utilities keep seeking to import what PacifiCorp has been able to achieve in Washington into Oregon.

- **Section 8.2 – Project Dev. Security**

The issues regarding this section have been resolved as to all points except the Joint Utilities' Reply Comments' proposal that the utility have 30 days to refund the Project Development Security upon QF request at COD. In contrast, the QF Trade

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[49] *In re Avista Corporation, d/b/a Avista Utilities, Schedule 62 Tariff Revision*, Washington Util. and Transportation Comm'n Docket No. UE-190663, Avista's Schedule 62 Standard Power Purchase Agreement (Oct. 29, 2020) (containing final accepted PPA).

Groups maintain that their proposal for five business days should be sufficient. Staff's December 12th Comments express interest in finding middle ground. It is not clear to the QFs why the utility would need more than five business days after a formal request by the QF to refund the money it is holding, or cancel the letter of credit, and the Joint Utilities provide no explanation why. Absent any basis to conclude five business days (which is at least a full calendar week) is insufficient, the QF Trade Groups are not in a position to compromise on the point.

- **Section 8.3 – Default Security**

The QF Trade Groups stand by all of the edits to Section 8.3 in their Initial Comments for the reasons stated therein and do not agree to the revisions in the Joint Utilities' Reply Comments or arguments they have made in their more recent December 12th Comments. Staff's December 12th Comments ask for response to the Joint Utilities' position that step-in rights should not be included in the PPA and whether inclusion of step-in rights transfers risk to utility customers.[50]

At the outset, it is important to note that the administrative rules *require* that step-in rights be offered as a form of Default Security, and therefore the Commission has already determined that step-in rights should be an option over utility objections that step-in rights transfer risk to utility customers.[51] Additionally, detailed provisions for step-in rights are currently included in the PacifiCorp and Idaho Power standard

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50 Staff's December 12th Comments at 8.

51 QF Trade Groups' December 12th Comments at 37-39.

PPAs. The QF Trade Groups' proposed edits mirror the provisions in those existing PPAs.

The most significant procedural problem with the Joint Utilities' position is that they proposed to require each QF to separately "negotiate" a stand-alone step-in rights agreement with the purchasing utility rather than including step-in right provisions within the Standard PPA (or at least an addendum thereto) that could easily be reviewed by the QF and timely executed without delaying execution of the PPA itself. The Joint Utilities continue to insist that they be allowed to provide a step-in rights agreement to individual QFs, but after several months of back and forth on this issue, they have still not yet even shared a proposed form of agreement they would supply to individual QFs, if one even exists.

It appears that the Joint Utilities wish to retain the right to negotiate a "non-standard" step-in rights agreement with each QF. At best, this approach will delay execution of standard PPAs because the QF will need to separately request and negotiate a step-in rights agreement. The QF may not even know to start that negotiation process for the step-in rights agreement until after the purchasing utility determines the QF does not meet the utility's creditworthiness requirements, potentially late in the negotiation process, which is very likely to lead to disputes. At worst, the Joint Utilities' proposal will give them discretion to propose onerous and unreasonable step-in rights provisions that no QF will be able to use, and the right to use step-in rights as a form of Default Security, as expressly allowed in the administrative rules, will be rendered illusory. In that regard, the Commission should

consider the fact that the Joint Utilities opposed step-in rights in the rulemaking, and their initially filed PPA proposal failed to even state that step-in rights were an option. It is apparent to the QF Trade Groups at this point that—having lost in their effort to eliminate step-in rights altogether during the rulemaking—the Joint Utilities now wish to discourage using step-in rights as a form of security through implementation of the Standard PPA. Thus, it would be inappropriate to give the utilities the discretion to individually devise and negotiate terms for step-in rights with individual QFs.

The most significant substantive issue is that Joint Utilities appear to oppose giving the QF's project lender the right to have first priority rights to step in and cure any defaults. That would be problematic for any QF that is still subject to financing terms with a lender and may limit use to step-in rights to legacy or existing QFs without a lender. The Commission can expect that any step-in rights agreement offered by a utility will therefore contain this preference of the Joint Utilities, even though, as we have pointed out, the existing PacifiCorp and Idaho Power Standard PPAs do allow the project lender to cure the default before the utility steps in to operate the facility. It remains unclear how the utility would be harmed by the project's lender stepping in to cure the default, which would relieve the utility of the need to step in itself to operate the plant.

In contrast to the Joint Utilities' approach, the QF Trade Groups proposed detailed provisions that are consistent with existing PPAs approved in Oregon and which would be publicly available for evaluation by individual QFs before they submit their PPA request. There would be no delay in executing a PPA for a QF electing step-

in rights, and the substantive provisions governing step-in rights would be known and approved by the Commission—not unilaterally dictated by a purchasing utility that dislikes step-in rights.

- **Section 11.1.2(d) – Mechanic's Lien Default**

The Joint Utilities continue to propose a new mechanic's lien event of default that is not included in the administrative rules. In addition to being beyond the requirements of the administrative rules, this proposal is poorly defined and thus imposes additional unreasonable risk to the small QF that a contractor at the facility could cause a default under the PPA by sending a "notice of foreclosure" (which is undefined in the PPA) on an unpaid lien. A "notice of foreclosure" could be understood to mean the *commencement* of legal action by the contractor to foreclose on, and sell through such foreclosure, the facility or related property to pay off the disputed invoice(s) giving rise to the lien, but the facility itself would continue to operate unless such legal action by the contractor were successful.[52] Thus, as drafted by the Joint Utilities, the default could occur prematurely during the pendency of such action by the contractor while the lien is being legitimately disputed by the QF in the suit.

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52 *See* ORS 87.060(3) ("In a suit to enforce a lien perfected under ORS 87.035, the court shall allow or disallow the lien. If the lien is allowed, the court shall proceed with the foreclosure of the lien and resolve all other pleaded issues. If the lien is disallowed, and a party has made a demand for a jury trial as provided for in subsection (4) of this section, the court shall impanel a jury to decide any issues triable of right by a jury. All other issues in the suit shall be tried by the court.").

Fundamentally, the Joint Utilities appear to seek to accelerate the default under the PPA to have it occur at the point where the contractor initiates such an action as opposed to the point where the contractor prevails and proceeds with a foreclosure sale. The Joint Utilities' December 12th Comments all but acknowledge this flaw and assert that "if a QF disputes foreclosure in a lawsuit with the contractor, then the foreclosure will likely be stayed pending the outcome of the litigation", and the Joint Utilities claim there would then be no default as they have drafted the PPA.[53] However, even if this is correct, the QF would only be able to avoid default under the PPA if it can achieve preliminary success of a stay in such foreclosure action, and under the Joint Utilities' proposal such stay must be issued within 30 days.[54] The QF Trade Groups continue to submit this new default—which is not included in the administrative rules—introduces unnecessary and unreasonable risk into the PPA and should be rejected.

- **Section 11.4 – Termination of Duty to Buy**

The QF Trade Groups stand by all of their proposed edits to this section. Staff requests comment in response to the Joint Utilities' argument that inclusion of the utility's "sole discretion" terminology is consistent with PGE's existing standard PPA. In response, the QF Trade Groups reiterate that they proposed deletion of the use of the term "sole discretion" proposed by the utilities because it is not included in the administrative rules. Under applicable law, the inclusion of the "sole discretion"

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53 Joint Utilities' December 12th Comments at 53.

54 Joint Utilities' December 12th Comments, Attachment A at § 11.2.1.

terminology would likely eliminate the duty of good faith and fair dealing in the utility's exercise of discretion under this provision of the PPA.[55] The QF Trade Groups oppose elimination of the utility's obligation to act in good faith, particularly where the administrative rules do not contain any suggestion of intent to do so.

- **Section 14 – Force Majeure**

The QF Trade Groups stand by the proposed Force Majeure provision included in their Initial Comments, which was based on PGE's existing standard PPA for small QFs in Oregon. As with other issues, the Joint Utilities' December 12th Comments argue that the lengthy, one-sided, utility-favorable force majeure provision they propose is consistent with the "market" and again cite PacifiCorp's Washington PPA, on which the Joint Utilities' proposal here is based, as the "market" PPA for small QFs.[56]

However, it bears repeating that PacifiCorp's Washington PPA is not reflective of the typical small QF PPA in the region. For example, another major utility in Washington—Avista—also had its PPA approved for use for small QFs, and Avista's PPA did not include an extremely lengthy and utility-favorable force majeure

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55 *Pac. First Bank by Wash. Mut. v. New Morgan Park Corp.*, 319 Or 342, 344 & 350-54, 876 P2d 761 (1994) (through use of "sole discretion" terminology in a lease, "parties expressly agreed to a unilateral, unrestricted exercise of discretion by Landlord").

56 Joint Utilities' December 12th Comments at 56-58.

provision or a 180-day limitation of the duration of force majeure events.[57]

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[57] Washington Util. and Transportation Comm'n Docket No. UE-190663, Avista's Schedule 62 Standard Power Purchase Agreement (Oct. 29, 2020) (containing final accepted PPA). The Avista PPA Section 13 provides:

> **13. FORCE MAJEURE**
> **13.1** Except as expressly provided in Section 13.6, neither Party shall be liable to the other Party, or be considered to be in breach of or default under this Agreement, for delay in performance due to a cause or condition beyond such Party's reasonable control which despite the exercise of reasonable due diligence, such Party is unable to prevent or overcome ("Force Majeure"), including but not limited to:
> (a) fire, flood, earthquake, volcanic activity; court order and act of civil, military or governmental authority; strike, lockout and other labor dispute; riot, insurrection, sabotage or war; pandemic or epidemic; unanticipated electrical disturbance originating in or transmitted through such Party's electric system or any electric system with which such Party's system is interconnected; or
> (b) an action taken by such Party which is, in the sole judgment of such Party, necessary or prudent to protect the operation, performance, integrity, reliability or stability of such Party's electric system or any electric system with which such Party's electric system is interconnected, whether such actions occur automatically or manually.
> **13.2** In the event of a Force Majeure event, the time for performance shall be extended by a period of time reasonably necessary to overcome such delay. Avista shall not be required to pay for Net Output which, as a result of any Force Majeure event, is not delivered.
> **13.3** Nothing contained in this Section shall require any Party to settle any strike, lockout or other labor dispute.
> **13.4** In the event of a Force Majeure event, the delayed Party shall provide the other Party notice by telephone or email as soon as reasonably practicable and written notice within fourteen days after the occurrence of the Force Majeure event. Such notice shall include the particulars of the occurrence. The suspension of performance shall be of no greater scope and no longer duration than is required by the Force Majeure and the delayed Party shall use its best efforts to remedy its inability to perform.
> **13.5** Force Majeure shall include any unforeseen electrical disturbance that prevents any electric energy deliveries from occurring at the Point of Delivery.
> **13.6** Notwithstanding anything to the contrary herein, Force Majeure shall not apply to, or excuse any default under, Sections 17.1(a), 17.1(b), 17.1(c), or

- **Section 19 – Governmental Authorities**

Staff's December 12th Comments seek additional clarification on the basis for dispute over this section, and the QF Trade Groups' simultaneously filed December 12th Comments provided additional explanation.[58] The QF Trade Groups stand by their previously argued position.

- **Sections 24 – Alternative Dispute Resolution**

Staff's December 12th Comments ask for additional information "regarding the potential limiting of QFs' rights to dispute resolution."[59] It is not clear what additional information Staff seeks, but the QF Trade Groups continue to recommend against any direct reference or suggestion in the Standard PPA that the QF should agree to alternative dispute resolution ("ADR"). Options for ADR will exist to the parties and our edits do not limit the option to pursue ADR. If specific parties want to agree to have a particular dispute resolved by the OPUC's dispute resolution service, and it has jurisdiction over the particular dispute, then the parties are free to do so without the PPA stating they should think about doing so.

17.1(d) [related to events of bankruptcy or insolvency or loss of QF status]. For the avoidance of doubt, Avista may declare Seller in Default if an event described in any of Sections 17.1(a), 17.1(b), 17.1(c), or 17.1(d), occurs and Avista may pursue any remedy available to it under this agreement.

58 QF Trade Groups' December 12th Comments at 44-46.

59 Staff's December 12th Comments at 9.

PPA Exhibits

- **Exhibit F – Mechanical Availability Guarantee -** "Availability Guarantee", "Operational Hours", and Damages Calculation

The QF Trade Groups stand by all prior edits and continue to assert that the edits proposed in our Initial Comments should be adopted instead of the Joint Utilities' latest revision to the MAG filed with their December 12th Comments. The QF Trade Groups' December 12th Comments addressed all issues raised in the Joint Utilities' December 12th Comments.[60]

- **Exhibit F – Minimum Delivery Guarantee -** "Seller Uncontrollable Minutes", "Output Shortfall", and Damages Calculation

The QF Trade Groups stand by all prior edits and continue to assert that the edits proposed in our Initial Comments should be adopted instead of the Joint Utilities' latest revision to the MDG filed with their December 12th Comments. The QF Trade Groups' December 12th Comments addressed all issues raised in the Joint Utilities' December 12th Comments.[61]

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60 *See* QF Trade Groups' December 12th Comments at 48-52.

61 *See* QF Trade Groups' December 12th Comments at 52-55.

Dated this 17th day of January 2024.

Respectfully submitted,

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Exhibit 1

List of Resolved Issues

Definitions § 1.1

- "Abandonment" - The administrative rules do not define "abandonment" so we have proposed an edit using the word's normal meaning, i.e., a *permanent* setting aside, should apply.[1] For example, the utilities' proposed 90-day cessation of construction is not an "abandonment" of a project, so the utilities' proposed definition is not consistent with the rules or reasonable. Alternatively, if the Commission chooses to apply a period of cessation of construction activity, a period of significantly longer than 90 days is needed because 90 days does not even allow for cessation of construction during the normal period of winter when it is too cold to perform construction in many parts of Oregon. If used, the construction cessation would need to be at least 180 days with the opportunity to demonstrate that a longer period is for a reason other than abandonment.
    - **Status of Issue**: Resolved by Joint Utilities' December 12th Comments' counter proposal.
- "Ancillary Service" should be deleted. The utilities appear to have included this new defined term in the PPA along with "Capacity Rights" with the intent of requiring the QF to provide more than its entire net output, which is all QFs are currently compensated for under the OPUC avoided cost rates. *See, e.g.,* Sections 4.8 and 11.2.3.
    - **Status of Issue**: Resolved.

[1] *See* https://www.dictionary.com/browse/abandonment.

- "Capacity Rights" should be deleted. The utilities appear to have included this new defined term in the PPA along with "Ancillary Services" with the intent of requiring the QF to provide more than its entire net output, which is all QFs are currently compensated for under the OPUC avoided cost rates. See, e.g., Sections 4.8 and 11.2.3.
    - **Status of Issue**: Resolved.
- "Commercial Operation" –
    - Our edits to the first sentence mirror the language of OAR 860-029-0010(9).
        - **Status of Issue**: Resolved as to first sentence.
- Subpart (v) The proposed requirement to pay network upgrade costs prior to COD is not possible in most cases because the final invoice under the GIA is not due from the utility until *after* the facility is placed in service. Additionally, a dispute over the proper amount of the invoices for those costs should not preclude COD under the PPA; as proposed here by the utilities in the PPA, the utility could charge whatever it wanted under the GIA and the QF would have to agree to pay whatever the utility charges, even far in excess of cost estimates in interconnection studies, to avoid default under the PPA. So (v) should be deleted.
    - **Status of Issue**: Resolved as to subpart (v), which Joint Utilities agreed to delete.
- "Contract Price" - Per above comments, we recommend deleting the suggestion that the contract price pays the QF for these broadly defined capacity rights and ancillary services.
    - **Status of Issue**: Resolved.

- "Credit Requirements" - the word "reasonable" from the administrative rules is missing so we added it. See OAR 860-029-0120(18)(b).
    - **Status of Issue**: Resolved.
- "Cure Period Deadline" - Footnote 9 - We object to limiting the cure period for an operational QF to just 30 days. This limitation is not included in the rules, and the most likely cause of delay—the utility's need to upgrade interconnection facilities in a new GIA upon PPA expiration—is often beyond the control of the QF.
    - **Status of Issue**: Resolved.
- "Maintenance Outage" The utilities' proposed addition that a Maintenance Outage is any outage involving 10% of the Facility's Net Output is beyond the requirements of the administrative rules, and we recommend deleting it.
    - **Status of Issue**: Resolved by the Joint Utilities' December 12th Comments. Other issues related to cross referencing NERC definitions remain in dispute for all outage types.
- "Maximum Delivery Rate" - It appears that Maximum Delivery Rate is used elsewhere in the agreement, including Exhibit L Example 1, to mean the maximum amount that is delivered to the POI, not the POD in the case of an off-system QF. So, we recommend defining that way.
    - **Status of Issue**: Resolved.
- "Schedule Recovery Plan" - The proposed Schedule Recovery Plan, approved by the utility, as used in the newly proposed Section 2.3 and 11.1.2(b) of the utilities' proposed PPA, is an unreasonable new condition on exercise of the QF's one-year cure rights for a delay default, as provided in OAR 860-029-0123(4)(a).

- **Status of Issue**: Resolved by the Joint Utilities' December 12th Comments' deletion of the "Schedule Recovery Plan."

Main PPA Sections

- Section 1.2.2 - The form contract has been drafted by the utilities, so we do not agree it should contain a provision disavowing the construed against the drafter rule, and this provision should thus be deleted. If the utilities believe someone else drafted some provision that becomes subject to a dispute, they will remain free to so argue and prove that, but even if all of our edits were accepted the vast majority of this PPA, as well as its overall structure and form, are a product of the utilities' drafting. The QF Trade Groups volunteer and offer to draft the form contract, and if so, would be willing to include a provision that the contract should not be construed against the ~~d~~ the utilities.
    - **Status of Issue**: Resolved.
- Sections 1.2.4, 6.3, & 9.3 - These sections, along with several others throughout the agreement, attempt to insulate the purchasing utility against any accountability or liability for financial harm to the QF caused by the utility's interconnection and/or transmission function employees.
    - **Status of Issue**: Resolved, with respect to Sections 1.2.4, 6.3, & 9.3.
- Section 2.2 & footnote 13 - The QF Trade Groups agree that a QF should generally have an effective GIA and Transmission Agreement to deliver their net output. However, the utility should be required to pay for all net output in the circumstance in which the utility is at fault for not providing an effective GIA.

    Subpart(a) - For new QFs, the proposal to require an executed and effective GIA and Transmission Agreement by the Scheduled Commercial Operation

Date is a new potential default that undermines the one-year delay default cure period, and should be deleted.

- **Status of Issue**: Resolved as to subpart (a).

Footnote 13 - The Milestones for existing QFs are not all reasonable as proposed. For example, a renewing QF will often need a new GIA and this can be delayed just the same as it can be delayed for a new QF; there is no basis in the administrative rules to require a replacement GIA, much less a new wheeling agreement, to be executed *before* the PPA for an existing QF renewing its PPA.

- **Status of Issue**: Resolved as to footnote 13.

Likewise, there is no basis in the rules to require the existing QF to post Default Security under the replacement PPA 30 days after it signs that PPA, which could be up to 3 years prior to the COD in that replacement PPA.

- **Status of Issue**: Resolved as to deletion of old Section 2.2(c).

- New Section 2.2(b) – The Joint Utilities proposed to require site control to be demonstrated at COD in this new section. The QF Trade Groups agree to this proposal.

  - **Status of Issue**: Resolved as to proposed § 2.2(b).

- Section 2.6 - Delay Damages invoicing - OAR 860-029-0123(5) provides a 30-day period to pay damages invoices. The rule also requires reasonable explanation of the damage calculation and that the amount is only due if there is no reasonable dispute. The utilities' proposal of 10 days, no requirement they explain the calculation, and no clear statement of the tolling of the 30-day due date to resolve reasonable

disputes is inconsistent with the rule. Our edits add these points in an unambiguous fashion, consistent with the rules. We note also that this entire Section 2.6 appears to be duplicative to Section 11.2.1, which uses the 30-day due date. We have made edits to both sections to ensure consistency.

  - **Status of Issue**: Resolved. The QF Trade Groups agree that the Joint Utilities' revised language is acceptable.

- Section 2.7 - Utility Right to Monitor - This section would have imposed new and unreasonable monthly reporting requirements on QFs beyond anything required in the administrative rules.

  - **Status of Issue**: Resolved by Joint Utilities' December 12th Comments.

- Section 2.9 - Option to Extend SCOD - OAR 860-029-0120(6)(a) states that the QF may exercise this termination right upon receipt of "an interconnection study" meeting the requirements, not just the "first interconnection study" as the utilities propose here. It is often the case that a second or subsequent study contains major unexpected costs or delays not included in prior studies, and thus those circumstances should also allow for the early termination right. Our edit corrects this issue and tracks the rule's language, which does not use the word "reasonable" in describing the QF's determination as in subpart (b) of the utilities' proposal here. Additionally, the rules do not limit this right to new QFs and therefore the footnote 18 should be deleted as this could be an important right for existing QFs facing large upgrade costs.

  - **Status of Issue**: Resolved. The QF Trade Groups agree that the Joint Utilities' revised language is acceptable.

- Section 3.2.5 - Control of Premises - OAR 860-029-0046(2)(b) only requires "reasonable steps" towards site control to enter into the PPA, which is consistent with Order No. 872. As drafted here, the utilities' proposed language would require fully executed leases for the full site for the full term at the time of PPA execution, thus repealing the administrative rule and Order No. 872. Our proposed edits correct this problem.
    - **Status of Issue**: Resolved. The QF Trade Groups agree that the Joint Utilities' revised language is acceptable.
- Section 3.2.10 – Subparts (b)-(c) - The utilities' proposed Seller representations that the Seller and its equity owners have never defaulted on any payment obligation to the utility, and the requirement to be current on all financial obligations create unreasonable cross default risk combined with Section 11.1.1(a), and should be deleted. There could be any number of minor payment defaults or oversights for a variety of excusable reasons. Such oversights should not forever bar an entity from entering into a QF PPA under PURPA or create unreasonable cross default risk. Under PURPA, there is no restriction on a QF entering into a contract because the equity owners defaulted under a separate contract. The utilities' proposal to impose a such requirement is likely illegal since it proposes limits on QF ownership and operation not existing in federal and state law. It's not contained in the administrative rules.

  Subpart (d) - The warranty that Seller owns the facility needs to be qualified by Seller's right to sell the facility and assign the PPA, so we added an edit to that effect.

- **Status of Issue**: Resolved for all subparts of Section 3.2.10.

- Section 3.2.11 - QF Status - OAR 860-029-0046(2)(c)(C) requires Seller to demonstrate ability to obtain certification status by COD, so we propose an edit to make the PPA consistent with that rule.
  - **Status of Issue**: Resolved. The QF Trade Groups agree that the Joint Utilities' revised language is acceptable.
- Section 4.2 - "Designation of Network Resource"-

  Subpart (b) - The words "in writing" are missing from the utilities' proposed draft regarding the obligation to inform the QF if upgrades costs should be allocated. See OAR 860-029-0044(e).
  - **Status of Issue**: Resolved as to subpart (b), but not subpart (a)

  Subpart (d) - The utilities' proposed Section 4.2(d)(b) confusingly purports to limit the QF's right to terminate in a case where the utility incurs any costs in addressing the network transmission issue, which is not a condition on the QF's termination right under the applicable administrative rule, OAR 860-029-0044(6). It is also very unreasonable and would appear to eliminate the QF's right to terminate the PPA expressly allowed in the rules because the utility will always incur some costs in processing this type of dispute/negotiation. It should be deleted. Also, we propose an edit that clarifies that the fixed price term and term should also clearly be stated to be extended in the case of utility a Commission proceeding.
  - **Status of Issue**: Resolved as to subpart (d).
- Section 4.3 - Per the above comments, we recommend deleting use of the broadly defined Ancillary Services and Capacity Rights.

- **Status of Issue**: Resolved.

- Section 4.4 - Per the above comments, we recommend deleting use of the broadly defined Ancillary Services and Capacity Rights.
  - **Status of Issue**: Resolved.
- Section 4.8 - Purchase and Sale of Capacity Rights and Ancillary Services - As noted above, we recommend deleting the provisions requiring Seller to convey the broadly defined "Capacity Rights" and "Ancillary Services" to the utility for no additional compensation. The avoided cost rates do not, to our knowledge, account for such additional services. For example, a utility is required to pay the QF for certain ancillary services, like voltage support, under the form GIA, and this provision would appear to require QFs to now provide that costly service for free.
  - **Status of Issue**: Resolved.
- Section 5.2 - Our insertion of the qualifier in the first sentence of this section regarding the QF's cost responsibility mirrors the qualifier in the second sentence of this section regarding the utility's cost responsibility, and is fair.
  - **Status of Issue**: Resolved.
- Sections 5.4 & 5.5 - Section 5.5's last clause appears to suggest the QF would be responsible for any taxes on the Environmental Attributes even if it is a tax that applies after the EAs are transferred to the utility, which is inconsistent with the general treatment of taxes that should govern as set forth in Section 5.4, that is, tax responsibilities prior to point of transfer apply to the Seller and tax responsibilities after the point of transfer belong to the Utility. We made edits to confirm this treatment for EAs too.

- **Status of Issue**: Resolved.

- Section 5.6 - The utilities' proposal to subject the PPA to the Mobile-Sierra doctrine review is inconsistent with federal and state law, as held by the Oregon Court of Appeals in *Or. Trail Elec. Consumers Coop. v. Co.-Gen Co*., 168 Or. App. 466, 482, 7 P.3d 594, 605 (2000). The reference to Mobile-Sierra review should thus be deleted, as it was when PacifiCorp proposed this same contract form in Washington.
  - **Status of Issue**: Resolved.
- New Proposed Section 6.1 – Modifications - The Joint Utilities proposed a new wording in Section 6.1.
  - **Status of Issue**: Resolved. The QF Trade Groups agree that the Joint Utilities' revised language is acceptable.
- Section 6.2.2 - The utilities' proposal to impose a "Qualified Operator" requirement on small QFs is likely illegal since it proposes limits on QF ownership and operation not existing in federal and state law. It's not contained in the administrative rules. It's also unreasonable for small QFs and will discourage development and operation of small renewable energy facilities. We recommend deletion.
  - **Status of Issue**: Resolved.
- Sections 6.5.1 & 6.5.2 - "Planned Outages" and "Maintenance Outages" - The utilities' draft does not clarify the right in OAR 860-029-0124(2) for the Seller to schedule Planned Outages during the two high demand months at times when no motive force is available, so we added that clarification. We also propose clarifying edits regarding the "High Demand Months" consistent with the rules.
  - **Status of Issue**: Resolved.

- Section 6.8.1 - See our comments on Section 4.1 for explanation of our edits Section 6.8.1. Deliveries of Net Output in excess of Maximum Delivery Rate should not be a breach of the PPA, especially for an off-system QF.
    - **Status of Issue**: Resolved as to Section 6.8.1. The QF Trade Groups agree that the Joint Utilities' revised language is acceptable.
- Section 6.12.5
    - **Status of Issue**: Resolved, as the Joint Utilities Reply Comments agreed to delete the original Section 6.12.5.
- Section 8.1 - The utilities' proposal that a creditworthy QF provide financial information every three months is burdensome and should be phrased in a manner that clearly specifies that the QF's obligation to supply such information is triggered only by a specific request from the utility—not an automatic submittal or blanket request for the information every three months. We propose a one-year interval or anytime circumstances lead the Utility to believe in good faith that the specific QF no longer is Creditworthy.
    - **Status of Issue**: Resolved.
- The utilities' proposed Sections 8.4 and 8.5 - These two provisions are relevant only to cash escrow and letter of credit security, so we reformatted and edited to make that more clear.

  Regarding proposed 8.4 (renumbered 8.3.3.1), Seller *would* be entitled to interest in a cash escrow scenario and therefore the title of this section should not be titled "No Interest on Security", and it should also expressly state Seller is entitled to interest on the cash escrow. That is all a PPA would normally state regarding interest on

security since interest is only relevant to cash. In short, this provision should only apply to cash escrow and it should clearly state Seller *is* entitled to interest. Regrading proposed Section 8.5 (renumbered 8.3.3.2) - We question the need for this extra provision, but do not necessarily object to it so long as it clearly states it only applies in the case of cash escrow or letter of credit security, which appears to be the utilities' intent as drafted. We propose a further clarification edit on that point.

  - **Status of Issue**: Resolved. The Joint Utilities' Reply Comments edits to Section 8.4, Interest on Security, and Section 8.5, Grant of Security Interest in Security, are acceptable.

- Section 11.1 - The Defaults section proposed by the utilities fails to properly include the cure periods specified in OAR 860-029-0123(3)(b) that apply to defaults other than delay default and the MAG/MDG. Our edits include the same cure periods of the administrative rules and without the additional limitations proposed by the utilities that undermine those cure rights (e.g., utilities' proposals that QF supply a "remediation plan", providing just 90 days from the breach rather than an additional 90 days after the initial 30 days as proposed in utilities' proposed Section 11.1.1(c), etc.).

  - **Status of Issue**: Resolved. The QF Trade Groups agree that the Joint Utilities' revised language is acceptable.

- Section 11.1.2(f) - Abandonment - OAR 860-029-0123(4)(b) provides an additional 90 days to cure if the cure is "commenced" within the first 30 days after notice of default. But the utilities' proposal requires the QF to produce a utility-approved "Schedule Recovery Plan", which goes beyond what is required to obtain the

additional 90-day cure period. Our edit brings the draft PPA into alignment with the rules.

- **Status of Issue**: Resolved.

- Section 11.1.3 & 11.2.2 - Utility Failure to Purchase - The Utilities' proposed language suggested the Utility would have no obligation to pay for the net output it failed to purchase during the period between the initial breach for failure to deliver and day when the 30-day cure period expires, which is unacceptable and unreasonable. The language we have proposed in this section mirrors that in Section 11.1.2(c) for damages owed by Seller to Utility if Seller sells the power to another entity.
    - **Status of Issue**: Resolved. The Joint Utilities' Reply Comments' edits to Sections 11.1.3 & 11.2.2 are acceptable.
- Section 11.2.3 - Section 11.2.3's confusing statement that Seller also owes Utility "actual" damages tied to undelivered capacity and environmental attributes is inconsistent with the contract price cap on damages owed by Seller, as explained in our comments on "Replacement Power Costs". So Section 11.2.3 should be deleted.
    - **Status of Issue**: Resolved.
- Section 12.1.3 - Subsection (a)(iii) unreasonably shifts costs of dealing with scheduling within an RTO to the Seller, see our comments on Section 6.6.2; and (a)(iv) confusingly suggests that Seller has "dispatch" obligations under the PPA when it does not and is not paid for such obligations. Our edits correct these problems.
    - **Status of Issue**: Resolved.
- Section 17 – We propose inclusion of the PURPA repeal provision that has been a

part of Oregon standard contracts as required in UM 1129 Order No. 05-584 (p. 57), and nothing in the administrative rules changed that requirement. The utilities' omission of this statement would be detrimental to QF financing of renewable energy facilities, and we propose it be included in this section.

  - **Status of Issue**: Resolved.

- Section 20.2.1 - Assignments to Affiliates - If the proposed assignee affiliate will agree to the security provisions, e.g. posting cash or letter of credit, it should not matter whether it has lower credit rating than the assignor QF and we propose an edit that clarifies that option.

  - **Status of Issue**: Resolved.

- QF's Proposed Section 20.2.3 - We have proposed a provision clarifying what we understand to be the utilities' normal practice with respect to collateral assignments for financing purposes. The language proposed here is consistent with PGE's proposal in its Revised PPA proposed in UM 1987 filed on Oct. 1, 2019 (*see* PGE's Revised Application, p. 4 and, e.g., On-System Non-variable PPA Section 13.8 & 13.9). We did not include the form consent agreement included as an appendix to the UM 1987 PPA, but would be willing to include such an exhibit if that is the utilities' preference.

  - **Status of Issue**: Resolved. The Joint Utilities' Reply Comments' edits to Section 20.2.3 are acceptable.

- Section 23 - Publicity - If there will be a requirement to get preapproval for publicity and marketing, then it needs to apply to both parties in order to be fair. Alternatively, we'd be happy to just delete this provision as well.

- **Status of Issue**: Resolved.

Exhibits

- Exhibit A – Expected Monthly Net Output - OAR 860-029-0046(2)(c)(F) allows Seller to update its expected net output up until COD, so the PPA should state so.
    - **Status of Issue**: Resolved with respect to language contained in Exhibit A of Joint Utilities' December 12th Comments. The QF Trade Groups do not object to references in the Exhibit to Sections 6.1 and 6.8.3 with respect to the process for updating expected net output, but note their objection to the Joint Utilities proposed pre-COD certification process for updating the Expected Net Output, as well as certain language proposed by the Joint Utilities' proposed Section 6.8.3, as discussed above.
- Exhibit F
    - MAG - "Invoicing or Output Shortfall" - The utilities' proposed invoicing and due dates are inconsistent with the administrative rules, OAR 860-029-0123(5), which require reasonable explanation of the utilities' damage calculation, give the QF 30 days to pay damages, unless subject to dispute. The last sentence in this proposed Section 3. is also inconsistent with Section 10.4 which gives parties up to 2 years to potentially raise an issue with an invoice they have already paid. It is not uncommon for a party to pay an invoice and then discovery sometime later there was an error, and Section 10.4 allows such issues to be addressed up to two years after the invoice, so the last sentence here should be deleted as undermining that two-year period. Our edits correct these issues.

- **Status of Issue**: Resolved as to Invoicing.

- MDG - "Invoicing for Output Shortfall" - See our comments on the MAG's "Invoicing for Output Shortfall" for explanation of our edits to this section.
  - **Status of Issue**: Resolved as to Invoicing.

- Exhibit H
  - Section 1.5 - We do not agree that the utility should be allowed to unilaterally update the insurance requirements every two years, so we have deleted that provision.
    - **Status of Issue**: Resolved.

- Exhibit L
  - Supplemental Provisions 1. - The Seller should have the same cure rights as provided in the administrative rules, per the comments we made on Section 11.1.2(i).
    - **Status of Issue**: Resolved as to Supplemental Provision1.
  - Supplemental Provisions 8. This section as drafted by the utilities contains no affirmative statement that the Utility will pay for the Supplemental Delivery; it is only implied by negative implication through the statement Utility will not pay for Surplus Delivery. There should be an affirmative statement that the Utility must pay for the Supplemental Delivery, so we have added that.
    - **Status of Issue**: Resolved.

Utilities' Avoided Cost Schedules

1. **PacifiCorp's Rate Schedule**

- Definitions
    - "Applicable" – PacifiCorp's draft limited applicability to "Baseload **Renewable** Qualifying Facilities" but the rate schedule also applies to any other Baseload Qualifying Facility, so we made that edit and also provided a definition for "Baseload Qualifying Facility".
        - **Status of Issue**: Resolved.
    - "Affiliated Persons", "Family Owned" and "Community Based" - We made edits to mirror the definition in the administrative rule, OAR 860-029-0045(4).
        - **Status of Issue**: Resolved.
- Pricing Options
    - 2. Renewable Fixed Avoided Cost Rates – PacifiCorp's use of the word "Green Tags" appears to be a hold-over from its currently effective rate schedule and PPA, which use the term "Green Tags" to described the limited category of Environmental Attributes conveyed during the Renewable Deficiency Period. Our proposed edits conform to the language of the newly proposed PPA in Section 4.7, as we have proposed to edit it, but arrives at the same result as the former use of the term "Green Tags." We also made corresponding changes elsewhere in the rate schedule where "Green Tags" is used. Also, there was an instance where "environmental attributes" was capitalized but it is not defined in the Rate Schedule, so we removed the capitalization.
        - **Status of Issue**: Resolved.
- Qualifying Facilities Contracting Procedure
    - I.B. 2. (k) & (p) - Interconnection Study Requirement - PacifiCorp's proposal

does not correctly implement OAR 860-029-0120(5)(b). PacifiCorp's draft suggests any QF proposing an SCOD over three years from Effective Date in the PPA must supply an interconnection study supporting the SCOD in all cases. However, the administrative rule only requires the QF to supply an interconnection study if it wishes to have the SCOD and fixed price/power sale terms begin later than three years after the Effective Date. The QF developer could select an SCOD between three years and five years after the Effective Date without having any interconnection study, in which case the fixed price period begins to run three years after the Effective Date. Our edit clarifies this point.

        - **Status of Issue**: Resolved. The edits to these subsections in the Joint Utilities' Reply Comments are acceptable.

    - QFs' Proposed 1.B.8 Procedures viii - We are proposing inclusion of the good faith requirement from 860-029-0046 (10) in the Rate Schedules of all three utilities.

        - **Status of Issue**: Resolved.

2. PGE's Rate Schedule

- I. Power Purchase and Sale
    - A. Standard PPA – PGE's proposal does not correctly implement OAR 860-029-0120(5)(b). PGE's draft suggests any QF proposing an SCOD over three years from Effective Date in the PPA must supply an interconnection study supporting the SCOD in all cases. However, the administrative rule only requires the QF to supply an interconnection study if it wishes to have the SCOD and fixed

price/power sale terms begin later than three years after the Effective Date. The QF developer could select an SCOD between three years and five years after the Effective Date without having any interconnection study, in which case the fixed price period begins to run three years after the Effective Date. Our edit clarifies this point as well as some other points consistent with rules.

- **Status of Issue**: Resolved. While the language the QF Trade Groups proposed to correct the error in PGE's initially filed rate schedule would provide more clarity, PGE's proposal to delete the subject and the initially offending language is acceptable.

- II. Process for Requesting and Executing a Standard PPA
  - 3. (o) - We provided an edit consistent with the interconnection study requirement and OAR 860-029-0120(5)(b), as discussed above.
    - **Status of Issue**: Resolved. PGE's edit on this subject is not as clear as the proposal made by the QF Trade Groups, but acceptable.
  - 3. (r) - We have proposed edits to clarify this section. As proposed by PGE, the language could be interpreted to make the PPA request non-compliant unless the developer submit evidence of creditworthiness, but in the rules the QF has the option to also use other forms of security, including cash, letter of credit, step-in rights, or security interest.
    - **Status of Issue**: Resolved.
  - QFs' Proposed Edit Contracting Process, p. 6 - We are proposing inclusion of the good faith requirement from 860-029-0046 (10) in the Rate Schedules of all three utilities.

- **Status of Issue**: Resolved.

- III. Off-System PPA
  - PGE's proposed language appears to suggest that the QF must have its point-to-point transmission agreement executed before it executes the PPA, which is not reasonable or consistent with current practice, and certainly not required by the new administrative rules. We proposed an edit referring to the requirements of the standard contract.
    - **Status of Issue**: Resolved.
- IV. Standard Power Purchase Agreement and Prices
  - A. Eligibility - We made a clarifying edit to the last paragraph clarifying that the passive investor exception to the five-mile rule applies to access to standard PPA *and standard pricing*.
    - **Status of Issue**: Resolved.

3. Idaho Power's Rate Schedule

- 2.b.Procedures ii. f) - FERC license - Idaho Power's proposal to require a FERC license with the initial contract submittal is not in the list of required materials in OAR 860-029-0046(2) and is not consistent with the level of project maturity otherwise required by that rule. Additionally, it omits other forms of hydropower permitting, such as exemptions. We proposed an edit to take these considerations into account.
  - **Status of Issue**: Resolved.
- 2.b.Procedures ii. o) - 12x24 Estimates - We propose and edit to include the language in OAR 860-029-0046(2), clarifying that the net output estimates and 12x24 are subject to change up until the commercial operation of the facility.

- **Status of Issue**: Resolved.

- QFs' Proposed 2.b. Procedures viii - We are proposing inclusion of the good faith requirement from 860-029-0046 (10) in the Rate Schedules of all three utilities.
  - **Status of Issue**: Resolved.