BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 629

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

I. INTRODUCTION

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

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

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

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

II. COMMENTS

A. Mediation Should Not Be Mandatory for QFs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Commission Should Adopt More Simple Dispute Resolution Processes

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

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

C. The Commission Should Adopt an Unexecuted Filing Option

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

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Respectfully submitted,

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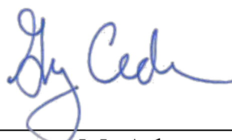

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