BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

AR 629

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

I. INTRODUCTION

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

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

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

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

II. COMMENTS

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

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

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

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

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

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

Moreover, in addition to delay, there are differences in litigation budget in almost all QF-utility disputes before the Commission. In the typical case before the Commission, the QF is merely a proposed facility that is still under development, and any litigation budget must consider the fact that the QF project has no source of revenue or any guarantee it will ever generate revenue from the project at issue in the litigation. Even an operating facility – such as a small hydropower project seeking to renew its PPA – will typically have a very limited budget to spend on resolving disputes with a utility. Each dollar spent in the litigation effort directly undercuts the potential profitability of the renewable energy project.

In contrast, the utility's retail rates are set to incorporate dollar-for-dollar recovery of its litigation expense in proceedings before the Commission and in the courts. Each of Oregon's utilities has well-qualified and well-financed in-house legal and expert witness teams, as well as seemingly unlimited budgets to spend on outside counsel from top regional and national law firms to litigate QF complaint cases before the Commission, the Federal Energy Regulatory Commission, and the courts. In this context, the utility can be expected to pursue every defensive motion that has any colorable merit in order to protract the dispute and to run up the costs on its QF opponent. Doing so is not

necessarily a violation of any rules; but the fact of the matter is that the utility can be expected take actions that protract the duration of the dispute and increase the costs of resolving it.

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

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

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

C. The Scope Should be Broader Than the Limited Reforms Suggested in the Scoping Memo

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

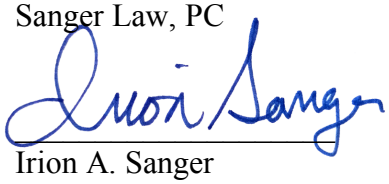
III. CONCLUSION

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

Dated this 28th day of February 2020.

Respectfully submitted,

Sanger Law, PC



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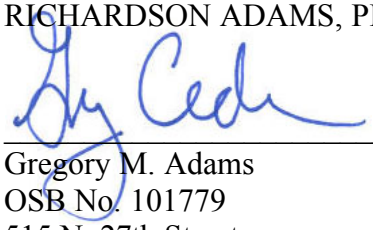

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