BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 631

In the Matter of Rulemaking to Address Procedures, Terms, and Conditions Associated with Qualifying Facilities (QF) Standard Contracts	JOINT COMMENTS OF THE COMMUNITY RENEWABLE ENERGY ASSOCIATION, NORTHWEST & INTERMOUNTAIN POWER PRODUCERS COALITION, AND RENEWABLE ENERGY COALITION ON STAFF'S PROPOSED RULES GROUP 1

I. INTRODUCTION

The Community Renewable Energy Association ("CREA"), the Northwest & Intermountain Power Producers Coalition ("NIPPC"), and the Renewable Energy Coalition (the "Coalition") (collectively the "QF Trade Associations") respectfully submit these Comments on Group 1 Issues from the Administrative Law Judge's ("ALJ's") Ruling.[1] These Comments address Staff's latest draft of proposed administrative rules related to contracting process and power purchase agreement ("PPA") terms circulated October 14, 2021 ("Staff's Draft Rules")[2] for implementation of the Public Utility Regulatory Policies Act of 1978 ("PURPA") by the Public Utility Commission of Oregon ("OPUC" or the "Commission").

The QF Trade Associations appreciate Staff's collaborative efforts in the informal rulemaking process, but the QF Trade Associations continue to have numerous outstanding concerns and recommendations for improvement of Staff's Draft Rules for the formal rulemaking process.

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[1] Ruling at 1 (Jan. 21, 2022).

[2] *See* Order No. 21-353, Appendix A at 14-41 (Oct. 26, 2021).

There will be new and aggressive clean energy need in Oregon due to the clean energy standards set in House Bill 2021.[3] Specifically, it sets a 100 percent clean energy standard by 2040.[4] PURPA is one tool to help meet that clean energy need. Thus, it is vital these rules changes take HB 2021 into consideration so that PURPA can be an effective tool to meet these clean energy goals. Any rule change should promote and encourage the development of QFs, not hinder QF development. The Oregon legislature has recognized the importance of QFs. Specifically, the legislative assembly found:

> (2) It is the goal of Oregon to:
> (a) Promote the development of a diverse array of permanently sustainable energy resources using the public and private sectors to the highest degree possible; and
> (b) Insure that rates for purchases by an electric utility from, and rates for sales to, a qualifying facility shall over the term of a contract be just and reasonable to the electric consumers of the electric utility, the qualifying facility and in the public interest.
> (3) *It is, therefore, the policy of the State of Oregon to:*
> *(a) Increase the marketability of electric energy produced by qualifying facilities located throughout the state for the benefit of Oregon's citizens; and*
> *(b) Create a settled and uniform institutional climate for the qualifying facilities in Oregon.*[5]

Thus, any changes to the rule need to promote the development of QFs and the Commission should take this into consideration when reviewing proposed rule changes.

[3] HB 2021, 81st Leg. Assemb., Reg. Sess., Sections 1, 3 (Or. 2021).
[4] Or. HB 2021, Sections 1, 3.
[5] ORS 758.515 (emphasis added).

II. COMMENTS

A. New Rule #2 Eligibility for Standard PPAs

1. REC Ownership

The QF Trade Associations recommend changing Staff's Proposed New Rule #2 at section (3) to require that renewable qualifying facilities ("QFs") retain ownership of the Renewable Energy Credits ("RECs") they produce after the end of the fixed-price period in the standard contract. Requiring renewable QFs to surrender their RECs without adequate compensation is unfair, likely unconstitutional, and violates a recent Ninth Circuit precedent regarding utilities' PURPA obligations.

RECs are valuable commodities that are different and distinct from the power generated and sold to the utility, and QFs may sell RECs outside of their PURPA PPA. Renewable QFs have the option of contracting to sell their RECs to the utility along with their energy and capacity. If a QF chooses to sell its RECs, then its fixed period avoided costs are based on a renewable resource (i.e., one that would have otherwise provided the utility with RECs). However, after the fixed price period ends, renewable QFs only receive a variable market price. Market prices represent the costs the utility would incur for energy and capacity, but not for RECs. Thus, renewable QFs are forced to surrender their RECs to the utility during the market-price period without being paid for them. This is unfair and should be changed.

In UM 1610, Staff agreed with the Coalition that the QF should retain the RECs during the last five years of the contract because QFs would be harmed if they had to give the RECs to

the utility when they were not compensated for the RECs' value.[6] In that proceeding, CREA also explained that refusing to compensate QFs for their RECs during the last five years of the contract would be an unconstitutional taking without just compensation.[7] The Commission ultimately disagreed and held that RECs would continue to transfer to the utility once a utility became resource deficient, regardless of the price being paid to the QF.[8] Staff's Proposed Rules, at proposed New Rule #2(3), do not conclusively correct this error and instead leave it open to be addressed by Commission order, which in effect perpetuates the unfair and unconstitutional status quo on this issue.

After the Commission issued its decision in UM 1610, additional guidance has become available. In *Californians for Renewable Energy v. California Public Utilities Commission*, the Ninth Circuit recognized that, when a state has a renewable portfolio standard ("RPS") and the utility is using RECs from the QF to meet the RPS, "the utility cannot calculate avoided costs based on energy sources that would not also meet the RPS."[9] As a result, either the utilities need to increase the market prices they pay to include the value of RECs, or QFs need to retain their RECs after the fixed-price period because the utilities cannot use them.

In summary, the Commission should allow QFs to retain their RECs unless the utilities are providing just compensation for them. Under current policy and Staff's Proposed Rules, the utilities are not paying the just compensation to QFs that PURPA requires.

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6 *In re OPUC Staff Investigation into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Staff Post-Hearing Brief at 2-3 (Oct. 13, 2015).

7 *See, e.g.*, Docket No. UM 1610, Post-Hearing Legal Brief of CREA at 11-13 (June 17, 2013).

8 Docket No. UM 1610, Order No. 16-174 at 5 (May 13, 2016).

9 *Californians for Renewable Energy v. CA Pub. Utils. Comm'n*, No. 17-55297 at 18 (9th Cir. 2019).

2. Five Mile Rule

The QF Trade Associations recommend correcting Staff's Proposed New Rule #2 to mirror the partial stipulation from UM 1129 on the Commission's Five-Mile Rule, which governs entitlement to standard rates and standard contracts.[10] The partial stipulation states that "two facilities will not be held to be owned or controlled by the same person(s) or affiliated person(s) solely because they are developed by a single entity."[11] Additionally, it provides for use of common interconnection and other infrastructure as follows:

> QFs otherwise meeting the above-described separate ownership test and thereby qualified for entitlement to the standard rates and standard contract will not be disqualified by utilizing an interconnection or other infrastructure not providing motive force or fuel that is shared with other QFs qualifying for the standard rates and contract so long as the use of the shared interconnection complies with the interconnecting utility's safety and reliability standards, interconnection contract requirements and Prudent Electrical Practices as that term is defined in the interconnecting utility's approved standard contract.[12]

Proposed New Rule #2 attempts to codify the stipulation but in an attempt to reconfigure the language, the current version of the rule appears to not accomplish this objective. This is a significant concern to the QF Trade Associations. As with the ability to use common interconnection, the common developer exception is an important element of the existing five-mile rule, and it should be retained just as with the other components of the rule.

It is important to recognize that the common developer exception is more of a clarification than an "exception." The common developer exception does not excuse other

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[10] *See, e.g.*, Docket No. UM 1129, Order No. 06-586 (Oct. 19, 2006).

[11] Docket No. UM 1129, Oregon Department of Energy's Motion to Admit Partial Stipulation, Exhibit "A" at 1 (Feb. 6, 2006).

[12] *Id.* at 1-2.

violations of the Five-Mile Rule, like common ownership of two operating facilities. In adopting the common developer exception, the testimony supporting the Partial Stipulation stated as follows: "This addition makes it clear that a developer can develop two adjacent projects as long as two different persons or entities will own the projects. It also allows a developer to have part-ownership in one of the two or more projects (s)he is developing."[13] As this testimony demonstrates, this clarification was a material part of the Partial Stipulation for the renewable energy development community. It has now been relied upon by the renewable energy development community for almost 15 years, and if the proposed rules intend to retain the Five-Mile Rule, this clarification should be included in the rules.

Finally, no party has asked for this exception to be removed, nor provided any compelling justification for the removal.

B. New Rule #3 Process for Obtaining Standard PPAs

1. The Utility Should Not Be Permitted to Challenge a QF's Status in the Contracting Process

The QF Trade Associations do not agree with Staff's Proposed Rules to require a QF to demonstrate the ability to obtain QF status in order to obtain a draft PPA from a utility.[14] Staff explained to parties in the informal process that this requirement was adopted from PacifiCorp's current Oregon Standard Avoided Cost Rate Schedule, so all utilities would follow the same requirement. The Joint Utilities had similarly proposed that, to obtain a draft PPA, a QF developer or owner must file with the Federal Energy Regulatory Commission ("FERC"), and

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13 Docket No. UM 1129, ODOE/8, DeWinkel/3 (Jan 20, 2006).

14 Staff's Proposed Rules at OAR 860-029-XXXX(2)(c)(a) [New Rule #3].

serve on the utility, a Form 556 "and to demonstrate that the facility described in its FERC Form 556 is identical in all material respects to the project for which the QF requests a draft PPA."[15]

The QF Trade Associations understand that this provision is intended to ensure that the utilities only negotiate contracts with independent power producers that are eligible to sell power under PURPA. The QF Trade Associations object to the Joint Utilities' recommendations because a QF need not file a FERC Form 556 to obtain a legally enforceable obligation ("LEO"), a QF may make material changes in its project during the course of contract negotiations (often to overcome hurdles and obstacles raised by the utilities), any objections to whether the project is a QF should be raised at FERC, and (in the end) the administrative burden will land on QFs because these requirements are essentially a tool to delay and obfuscate the contracting process.

PURPA's structure and FERC's regulations "reflect Congress's express intent that [FERC] exercise exclusive authority over QF status determinations."[16] Thus, the utilities do not have the discretion to question the status of a QF at the state level and must raise any disputes regarding a QF's status at FERC. Similarly, this Commission does not have jurisdiction to resolve a utility challenge over an independent power producer's QF status. If a utility takes issue with the status of an existing or proposed QF or its self-certification form, then it can intervene and protest the FERC Form 556 with FERC under the process outlined by federal law.[17] Adopting the Joint Utilities' proposal would effectively allow a utility to scrutinize or

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[15] Joint Utilities' Initial Comments in Response to Staff's Proposal at 5 (Mar. 30, 2021) [hereinafter Joint Utilities' Initial Comments].

[16] *Indep. Energy Producers Ass'n v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 853-54 (9th Cir. 1994). This case was relied upon in *Franklin Energy Storage One, LLC v. Kjellander*, WL 265278 at *34 (D. Idaho 2020.).

[17] 18 CFR 292.207(c)(1).

entirely reject a FERC Form 556 in the state contracting process by providing the utility discretion to question whether an existing or proposed facility meets the qualification criteria to be a QF. The Commission should not authorize utilities to usurp FERC's exclusive statutory authority to determine a QF's status.

The FERC Form 556 is also not technically required until the QF is delivering power. In *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995), a utility attempted to rely on an alleged flaw in a cogeneration QF's certification as a basis to argue that an LEO could not be formed. However, FERC held: "QF certification or recertification is an entirely separate matter from when, for purposes of calculating avoided costs in accordance with sections 292.304(b)(5) and 292.304(d)(2)(ii) of our regulations, a 'legally enforceable obligation' is incurred" and stated that legal arguments to the contrary "border[ed] on the frivolous."[18] Technically, there is no penalty for failing to file a self-certification prior to operation of the facility, and it is not technically required for purposes of complying with FERC regulations prior to that time. Failure to file it after the facility is operational generally results in disgorgement of payments at avoided cost rates and maybe other penalties.[19]

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18 *West Penn*, 71 FERC at 61,496-97.

19 This is a requirement that has evolved over time. Prior to 2006, there was no requirement to file a self-certification at all; it was basically optional. Since FERC Order 671, a QF operating as a QF must have a self-certification on file with FERC (Form 556 or perhaps even just a prior version of that form or notice). FERC Order No. 671, FERC Stats. and Regs. ¶ 31,203 at PP. 81-83 (Feb. 15, 2006); *see Iowa Hydro, LLC*, 146 FERC ¶ 61,207 (2014) (ordering refunds for failure to file a self-certification). Relatedly, FERC allows developers to file the form 556 for "proposed facilities" based its expected configuration to obtain assurances that go with having it filed and requires it to be updated when changes occur. 18 CFR § 292.207(a).

PacifiCorp has noted that, generally, developers provide a FERC 556 self-certification Form in order to demonstrate an ability to obtain QF status, which a QF only needs to demonstrate at the time it begins generating electricity.[20] Historically, though, PacifiCorp has been unclear whether it absolutely requires a FERC Form 556 in order for a QF to obtain a draft PPA. For example, in *Dalreed Solar, LLC v. PacifiCorp*, its Answer stated that PacifiCorp was not even "required to provide indicative avoided cost pricing until Dalreed Solar provided a FERC Form 556."[21] Then, in its next filing in that docket, PacifiCorp backtracked, suggesting that a "notice of having filed a FERC Form 556, or other demonstration of [a project's] ability to obtain QF status" may also be enough to satisfy the requirement and receive a draft PPA.[22] More recently, PacifiCorp admitted that requiring a FERC Form 556 would be an additional requirement that is currently not part of their current Standard Avoided Cost Rate tariff.[23] PacifiCorp also creatively argued that Dalreed Solar not providing the FERC Form 556 (despite PacifiCorp's failure to ask for the FERC Form 556) constituted an independent basis to refuse to contract with the QF. PacifiCorp's inconsistent application of this rule with only one publicly known example demonstrates how seemingly minor requirements can be used to delay and raise obstacles to a QF obtaining a contract.

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20 *Dalreed Solar LLC v. PacifiCorp*, Docket No. UM 2125, PacifiCorp's Response to Motion for Summary Judgment at 9 (Jan. 19, 2021). Notably, expecting QF certification is a higher bar to meet than demonstrating the ability to achieve QF status.

21 Docket No. UM 2125, PacifiCorp's Answer to the Complaint at 21 (Nov. 23, 2020).

22 Docket No. UM 2125, PacifiCorp's Response to Motion for Summary Judgment, Declaration of Bruce Griswold at ¶ 10.

23 *See* Joint Utilities' Initial Comments at 5 (recommending additional requirements than those in PacifiCorp's current Standard Avoided Cost Rates tariff).

The Joint Utilities' proposal that the FERC Form 556 be identical in all material respects to the project for which the QF requests a draft PPA is inconsistent with how the contracting process works, and the intent and purpose of the form. The Joint Utilities understand this well, and this requirement is simply a trap for the unwary QF developer designed to allow the utilities a new tool to slow down the contracting process.

The FERC Form 556 is not always going to reflect the final project design when it is filed, as the details typically change over time as the project specifics evolve prior to contract execution and ultimate construction. Many details will and are intended to change before commercial operation, let alone contract execution, including project contacts, wheeling utilities, utility providing backup power, names of owners, power production, conversion and station service information, etc. The actual designed and constructed facility will generally be different than what is initially in the FERC Form 556, so it makes no sense to require a perfect match between the initial form for an unbuilt, proposed facility, and the final design of the constructed facility at the time in which the QF is only asking for a *draft* contract.

The Joint Utilities completed FERC Form 556 proposal should be understood as a requirement to alter (in a materially harmful manner) how a QF obtains a contract. There are numerous details which a developer may not have finalized prior to requesting a contract. A developer does not need to identify whether it will sell power as a QF or as non-QF in the interconnection process until the System Impact or Cluster Study stage, and the developer may wish to know what the overall interconnection costs are (and whether they will be able to have them refunded) prior to executing a contract. A developer may be considering multiple project configurations (e.g., with and without storage, different sizes to minimize interconnection costs,

etc.). An off-system developer may be pursuing transmission arrangements with multiple wheeling utilities or station service purchase from multiple interconnected utilities. Many, but not all, of the details will be finalized by contract execution, but they are often not known at the time a contract request is made—often because they will change in response to utility-imposed obstacles. Each time a utility rejects a FERC Form 556 (which may be illegal in and of itself) or the QF is required to re-file the form and make changes, the contracting process gets unnecessarily delayed further. When contract negotiations are delayed, QFs' avoided cost prices can change during that delay, potentially hindering a QF's ability to finance the project.[24]

In sum, the Commission should not adopt the requirements from PacifiCorp's Oregon Standard Avoided Cost Schedule as the new rules for a QF to receive a draft PPA without modifications. PacifiCorp has already used these standards to unreasonably require 556 Forms in practice before it will provide a draft PPA. Additionally, it would be beneficial for the Commission to clarify whether PacifiCorp's actions requiring and nitpicking the QF's FERC 556 Forms have been appropriate to date.

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24 *But see* ORS 758.515(3); *In Re Investigation Related to Electric Utility Purchases from QFs,* Docket No. UM 1129, Order No. 05-584 at 16 (May 13, 2005) ("We continue to adhere to the policy, as articulated in Order No. 91-1605, that standard contract rates, terms and conditions are intended to be used as a means to remove transaction costs associated with QF contract negotiation, when such costs act as a market barrier to QF development"); *In Re Idaho Power Company Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Change, and for Change in Resource Sufficiency Determination*, Docket No. UM 1725, Order No. 16-129 at 6 (Mar. 29, 2016) ("A primary advantage of the standard contract is that it guarantees for the applicant the certainty of fixed avoided cost rates for the project's output over a long term.").

2. Clarification is Needed Regarding Evidence of Site Control

Further clarification is needed on the requirement of evidence of site control for eligibility to obtain a draft PPA. In Order No. 872, FERC clarified that a state may not require final site control as the basis for the creation of a LEO, and therefore requiring proof of final site control as a requirement to obtain a draft PPA is unlawful. FERC stated: "we clarify that it is appropriate for states to require a QF to demonstrate that it is in the process of obtaining site control . . ., rather than requiring a QF to show that it has obtained site control . . ."[25] and explained all that can be required is that the QF "take meaningful steps to seek site control[.]"[26] In so limiting the requirement for site control and other similar requirements, FERC agreed with commenters, including QF Trade Associations, that "QFs need a LEO to obtain financing."[27] Thus, requiring a fully executed lease or other more final property right for the site would go too far.

Staff's Proposed Rules are more onerous than what Order No. 872 allows. Staff's Proposed Rules require the QF to show ownership, a leasehold interest, an option, or "another document that *clearly demonstrates the commitment of the grantor* to convey sufficient rights to the developer to occupy a site of sufficient size to construct and operate the qualifying facility, such as an executed agreement to negotiate an option to lease or purchase the site."[28] The problem with this proposal is that it requires the QF to obtain a "commitment" from the landowner in order to meet the new site control requirement.

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25 Order No. 872, 172 FERC ¶ 61,041, at P 685 (July 16, 2020).
26 *Id.* at P 687.
27 *Id.*; *see also* Order No. 872-A, 173 FERC ¶ 61,158, at P 375 (Nov. 19, 2020).
28 Staff's Proposed Rules at OAR 860-29-XXXX(2)(b)(A)-(C) [New Rule # 3] (emphasis added).

In the related context of the requirements necessary to enter the interconnection queue, FERC requires reasonable demonstration of a fee interest, leasehold interest, an option to obtain the same, or even as little as an "exclusivity or other business relationship" with the landowner enabling the interconnection customer to obtain such rights.[29] Further, there is no requirement for site control to request interconnection and, even PacifiCorp's recently approved queue reform using a new and more limited definition of site control, does not require evidence of that site control at the time of the interconnection application, but allows a deposit in-lieu of demonstrating site control.[30] The rules for obtaining a draft PPA or creating a LEO should not be more onerous than those used in the interconnection process and should allow use of such exclusivity agreements to negotiate a lease.

3. The QF Should Be Allowed to Identify Multiple Points of Interconnection with the Request for a Draft PPA

It is reasonable for a QF to identify its preferred points of interconnection ("POI"); however, the specific POI can change throughout the interconnection study process and sometimes even after the interconnection agreement has been executed. The Commission's rules should clarify this right to change the POI, but the Proposed Rules fail to do so. This is

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29 Order No. 2003-A, 106 FERC ¶ 61,220, at Appendix B, Large Generator Interconnection Rules, Definitions (March 5, 2004) ("Site Control shall mean documentation reasonably demonstrating: (1) ownership of, a leasehold interest in, or a right to develop a site for the purpose of constructing the Generating Facility; (2) an option to purchase or acquire a leasehold site for such purpose; or (3) an exclusivity or other business relationship between Interconnection Customer and the entity having the right to sell, lease or grant Interconnection Customer the right to possess or occupy a site for such purpose."). This definition has remained unchanged since 2004. *See* https://www.ferc.gov/sites/default/files/2020-04/LGIP-procedures.pdf.

30 *In re PacifiCorp Application for an Order Approving Queue Reform*, Docket No. UM 2108, PacifiCorp Compliance Filing, Attachment 1 at § 3.3.1(iii)(b) (Aug. 31, 2020).

particularly the case for off-system projects which may be in the service territory of consumer owned utilities with different interconnection processes, or between two different utilities. There is no harm to the utility when the QF at the time of contracting is considering multiple interconnection locations and has not finalized where it will inject its power onto its interconnected utility's system. Ultimately, for an off-system project, the utility should be indifferent to the specific POI. The QF's responsibility is to ensure that its power is transmitted to the utility's system, and the contract can assure deliverability without requiring specific POIs that create new risks for default, or make it more difficult for the developer to solve problems creatively and practically.

Therefore, if a QF is required to identify its POI, then it should be recognized that the point may change up to the time of construction, and the QF be allowed to provide multiple points when it requests its power purchase agreement. In addition, the final executable PPA should recognize that the final as built supplement may identify a different POI than last listed in the contract.

This is another example of why the utilities should not be allowed to require the FERC Form 556 to match the proposed project. The FERC Form 556 requires the QF to "[i]dentify utility interconnecting with the facility."[31] It is well understood that this is the best estimate at the time the form is filed, and that it may be easily changed depending on the final project construction. However, if the QF is proposing multiple POIs, this would not be "materially" consistent with the FERC Form 556 and provides the utilities an opportunity to refuse to provide a draft PPA until the QF revises the then best estimate of the utility that it will be interconnected

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[31] Form No. 556 at 7.

to. Similarly, there should be some flexibility in wheeling power to the utility and changing transmission providers in a pragmatic manner that does not increase costs to the utility's ratepayers.

4. There Should Not Be a Catch-All Provision Regarding Information Required to Obtain a Draft PPA

The QF Trade Associations recommend deleting the catch-all provision added in Staff's Proposed New Rule #3(2)(c)(N) regarding information required to obtain a draft standard PPA. Stakeholders have discussed the list at length and were close to a compromise on a list without any catch-all.[32] Staff now proposes to require that small QFs additionally provide "[o]ther information specified in the utility's avoided cost rates schedule or standard power purchase agreement approved by the Commission."[33] The QF Trade Associations had understood the purpose of codifying a single, generically applicable set of requirements was to eliminate the confusion and discrepancies that occur with different utility filings that might change over time. Achieving this purpose will be impossible with a catch-all that allows future changes to occur and evolve in utility-specific filings. As a result, the catch-all undermines stakeholders' progress towards a compromise. For every requirement that Staff agreed was unnecessary to include in Staff's Proposed Rules, stakeholders may need to re-litigate the issue every time a utility files an updated avoided cost schedule or standard PPA.

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32 The current language is not perfect. For instance, the QF Trade Associations continue to have concerns with the proposed requirement regarding demonstration of QF status. *See* Joint Comments of CREA/REC/NIPPC on Staff's Updated Proposal at 4-10 (June 9, 2021). However, resolving this concern could be wasted effort if Staff retains the new catch-all.

33 Staff's Proposed Rules at OAR 860-029-XXXX(2)(c)(N) [New Rule #3].

Additionally, the catch-all invites confusion and utility abuse on those small QFs eligible for standard PPAs and those least able to overcome hurdles in the contracting process. The history of PacifiCorp's Schedule 38 is illustrative on this point. Schedule 38 is applicable to large QFs, but the same concerns could arise with revisions to any schedule applicable to small QFs.

PacifiCorp first filed its Schedule 38 in UM 1129, and PacifiCorp proposed language requiring interconnection studies before PacifiCorp would even provide the PPA.[34] Staff opposed the insertion, stating that "PacifiCorp should not require that interconnection studies be completed prior to providing the QF with the draft power purchase agreement," and the Commission agreed that "the requirement of a completed interconnection study should be removed" from that schedule.[35] Subsequently, in PacifiCorp's compliance filing, the final filing included the provision that a QF may be asked for "evidence that any necessary interconnection studies have been completed and assurance that the necessary interconnection arrangements are being made…."[36] The Commission approved the language at issue in this proceeding under the express condition that PacifiCorp cannot require the completion of an interconnection study before it provides a QF with a draft PPA. Nonetheless, PacifiCorp implemented its Schedule 38 to "require[] that a QF provide an interconnection study before receiving a draft PPA."[37]

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34 Docket No. UM 1129, Order No. 07-360 at 6-7 (Aug. 20, 2007).
35 Docket No. UM 1129, Order No. 07-360 at 6-8.
36 *Pacific Power & Light*, Advice No. 07-021, Initial Utility Filing at Attach. Schedule 38 at 4 (Nov. 2, 2007).
37 Docket No. UM 2125, Defendant's Letter Revising its Position at 1 (Feb. 3, 2021).

PacifiCorp only recently changed this position during a complaint with a 20 MW QF, Dalreed Solar, LLC, that alleged PacifiCorp's requirement violated PURPA.[38]

The Commission should carefully consider every decision point where a utility might impose contracting burdens on QFs, particularly those small enough to qualify for standard PPAs. The Commission should also keep in mind its obligation to uphold Oregon state policy to "[c]reate a settled and uniform institutional climate for the qualifying facilities in Oregon."[39] The QF Trade Associations believe a single, generically applicable list codified in rules is the best way to avoid confusion, abuse, and ultimately litigation. The proposed catch-all undermines this approach and should therefore be deleted.

5. PPA Contracting Timeline in Proposed New Rule #3

The QF Trade Associations appreciate that Staff has made some positive changes to the proposed terms for contracting timelines. However, they continue to recommend that the adopted rules: 1) impose a shorter timeline for non-substantive changes, such as correction of typos; and 2) explicitly recognize a good faith requirement. The QF Trade Associations' recommendations apply equally to standard and non-standard contracting.

i. Utilities Should Not Take More Than Five Business Days to Correct Typos

The rules should not allow a utility to wait fifteen business days to correct a simple typo. The QF Trade Associations maintain the recommendation in their March 30th Comments to allow no more than five business days for non-substantive changes (e.g., change Linn County to Lane County, etc.) and to correct utility drafting mistakes.

38 Docket No. UM 2125, Defendant's Letter Revising its Position at 1-2.
39 ORS 758.515(3)(b).

The QF Trade Associations regret that it is necessary to require utilities to respond in less than fifteen (or ten) business days for matters that obviously require less time, but history demonstrates that it *is* necessary to impose such a requirement. For example, in the past, PGE has taken the position that it would take the entire 15 business days to respond when there was a pending avoided cost price reduction in less than 15 business days. PGE would even take this additional time when it was PGE that made a mistake in the draft contract or if there was a minor or typographical error to correct. The QF Trade Associations understand that PGE has changed its business practices. However, in these circumstances, the PPA should include an affirmative good faith requirement and expect that the utility will provide the executable PPA prior to the avoided cost price reduction.

ii. The 15 Business Day Response Time to Provide a Draft Standard PPA Should be Shortened

The QF Trade Associations propose that the 15-business-day response time to provide a draft standard PPA should be shortened. The standard PPA is a form that merely needs to have its blank spaces completed, and it should not take 15 business days to do so after the QF has supplied the necessary information. Likewise, it should not take 15 business days to determine that the QF has supplied insufficient information and to communicate that conclusion to the QF. In the past, the utilities have often waited until the last day of whatever period is set, currently 15 business days. Having the deadline be 15 business days results in a contracting process that is far longer than necessary which unnecessarily increases costs, uncertainty, and risk for the QF developer. The end result is that fewer renewable energy facilities are successfully developed. Thus, we propose a maximum time period of 10 business days and a requirement that the utility use good faith and reasonable efforts to respond as promptly as possible.

iii. Either Party Should Have the Ability to Complete the Standard PPA

The QF Trade Associations also recommend that both the utility and the QF should have the ability to complete the standard contract. The contracting process could be made much smoother and with greater clarity if QFs are also able to fill-in-the-blanks on the standard form or otherwise propose changes or correct utility typos in a redline format. A QF could more clearly show what edits it is requesting, reduce ambiguity, and reduce contracting time.

iv. Utilities Should Act in Good Faith at All Times, Including by Expediting Responses After Utility Delays and When Avoided Cost Changes Are Imminent

As a general matter, utilities should be expected (and required) to act reasonably and in good faith. To reflect that this basic expectation also applies in the QF contracting timelines, the rules should state: "In all cases, the utility should use good faith and reasonable efforts to promptly respond sooner than the deadlines established herein," as proposed in the QF Trade Associations' March 30th Comments.

In addition, the rules recognize that acting in good faith can require changed behavior in certain circumstances, including expediting responses: 1) after a utility has caused a delay by missing an earlier deadline; and 2) when avoided cost updates are imminent. In ordinary circumstances, the QF Trade Associations recognize that a contracting utility may need up to fifteen (or ten) business days to respond substantively, due to the press of other business. However, a utility that has missed a deadline should seek in good faith to remedy the harm by expediting responses thereafter. Similarly, a utility should recognize the heightened importance of finalizing and executing a contract prior to avoided cost changes for both QFs and QF financing parties by acting in good faith to expedite responses during those times as well. The

QF Trade Associations appreciate that Staff stated that "it is important to recognize the clock ticking down to the next avoided cost update" in its notes accompanying the original proposal.[40] The QF Trade Associations agree and recommend incorporating this in the proposed rules.

C. OAR 860-029-0120 Standard Power Purchase Agreements (PPAs) (1)-(10), (19-20)- Commercial Operation Date (COD) Requirements, Qualifying Facility (QF) Status, Jurisdictional Disclaimer

1. Fixed Price/Contract Term

The QF Trade Associations recommend revising the contract term indicated in Staff's Proposed Rules at OAR 860-029-0120(2) and existing OAR 860-029-0130(2) to incorporate the 20-year fixed price term required by Oregon law, rather than the 15-year fixed-price term proposed in Staff's Proposed Rules. This was also one of the primary purposes of Oregon's mini-PURPA statute. The text, context, and legislative history lead to this conclusion under Oregon's rules of statutory interpretation.[41]

ORS 758.525(1) requires utilities to provide a schedule of avoided costs "over at least the next 20 years," and ORS 758.525(2) entitles QFs to sell energy and capacity at the utility's "projected avoided costs."[42] Thus, the statutory text provides that the utility must provide price schedules setting forth forecasted prices for at least 20 years, and the QF then has the option to select those projected avoided costs to be included in its contract. The relevant legislative

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[40] Staff Initial Proposal Related to PURPA Contracting Process and PPA Terms at 3 (Jan. 15, 2021) [hereinafter Initial Staff Proposal]. The Initial Staff Proposal was attached to Staff Letter to Participants Laying Out Strategy for Processing of this Rulemaking.

[41] *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042, 1050-51 (2009).

[42] ORS 758.525.

history confirms this interpretation.[43] The Commission's rules should uphold Oregon law and offer QFs the option to sell energy and capacity at prices fixed for at least 20 years.

Given that avoided costs fluctuate up and down over a 20-year period, the obvious purpose of requiring the utility to forecast avoided cost prices for at least 20 years is to allow QFs to enter into a fixed price contract containing such rates, which is precisely what the sponsors of this legislation stated when it was enacted. Indeed, that was one of the two primary purposes of the legislation, with the other purpose being to ensure that the state's cooperatives transmit QF power to its investor-owned utilities. The House sponsor of H.B. 2320, Representative William Bradbury, described the purpose of the legislation, in pertinent part, to the Senate Committee on Energy and Environment as follows: "The other thing the bill requires that the federal law does not require is that utilities, all utilities, must forecast their avoided cost *over a 20-year period* looking out into the future*. And they have to be willing to enter into contract with power producers based on those forecasted avoided costs*."[44] The point of the legislation was "*you have to forecast your avoided cost into the future and enter into contracts based on that forecast.*"[45] Likewise, the Oregon Department of Energy, which was instrumental in crafting the legislation, explained in a section-by-section written summary specifically relied upon by legislators as follows regarding the statute: "*it requires avoided costs to be forecasted and, if desired by the facility owner, obligated under contract for at least the next twenty years . .*

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43 *See* Docket No. UM 1725, Pre-hearing Brief of CREA at 13-15 (Nov. 12, 2015) (explaining the legislative history).

44 Audio Recording, Senate Committee on Energy and Environment, H.B. 2320, June 15, 1983, Tape 168, Side A (comments of Representative William Bradbury) available at: http://records.sos.state.or.us/ORSOSWebDrawer/Record/7372560 (emphasis added).

45 *Id.* (emphasis added).

. ."[46] The legislative history could not be more clear, and therefore the Commission should offer 20-year fixed-price power sale terms consistent with Oregon's legislative intent.

This issue was fully briefed by CREA in Docket Nos. UM 1725 and UM 1734.[47] In those cases, the Commission concluded that the statute did not require 20-year fixed-price contracts,[48] but the QF Trade Associations respectfully submit that conclusion was incorrect and should be revisited.

2. Time to Construct a Facility (Interval Between PPA Execution and Scheduled Online Date)

Staff's Proposed Rules (OAR 860-029-0120(6)) allows the QF to elect a development period of three years, with the possibility of four years only if the utility agrees or if an interconnection study supports the need for the fourth year, but the QF loses a portion of its 15-year fixed-price period and 20-year purchase term for every day beyond the three-year threshold. The QF Trade Associations continue to have concerns with Staff's Proposed Rules on this point. The QF Trade Associations stand by the position taken in previous comments. The utilities'

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46 Testimony, Senate Committee on Energy and Environment, June 15, 1983, Ex. B at 3 (Statement of David Philbrick, ODOE) (emphasis added); *see also* Audio Recording, Senate Committee on Energy and Environment, H.B. 2320, June 15, 1983, Tape 168, Side A (comments of Senator Steven Starkovich citing ODOE's summary for the intent of the legislation) available at: http://records.sos.state.or.us/ORSOSWebDrawer/Record/7372560.

47 *See, e.g., in re PacifiCorp QF Contract Term and Eligibility Cap*, Docket No. UM 1734, CREA's Pre-hearing Brief at 8-12 (Jan. 5, 2016); Docket No. UM 1734, CREA's Post-Hearing Reply Brief at 8-17 (Feb. 19, 2016). *See, e.g.*, *in re Idaho Power Standard Contract Eligiblity Cap*, Docket No. UM 1725, CREA's Pre-hearing Brief at 5-16 (Nov. 12, 2015); Docket No. UM 1725, CREA's Post-Hearing Brief at 4-6 (Dec. 10, 2015).

48 *See* Docket No. UM 1725, Order No. 16-129 at 7 (Mar. 29, 2016) (stating: "We find the legislative history to be inconclusive and conclude that we are not constrained in setting policy in the matter of contract duration by either the language of ORS 758.525 itself or by the legislative history that gave rise to it.").

interconnection timelines, for QFs at least, are longer than they have been historically. Further, failing to provide QFs with sufficient flexibility in the implementation of the issues related to the scheduled commercial operation date will make it much more difficult to successfully bring renewable energy facilities online. This means the Commission should not shorten the time to reach commercial operations and should maintain the current option to obtain periods longer than four years if the QF can demonstrate that a later COD is reasonable and necessary.

i. A QF Should Be Able to Select a COD More than Three Years from Contract Execution

a. Flaws with Staff's Proposed Rules

Staff's Proposed Rules on the permissible development period for the QF to establish through its choice of scheduled commercial operation date in the PPA is unreasonably restrictive. In essence, Staff proposes providing QFs the option of a three-year development period, after which Staff's proposed 15-year fixed-price period diminishes, except in extreme cases of the utility's contractual default (discussed further below). Additionally, Staff's proposal provides only a very limited exception for a scheduled commercial operation date up to four years after execution if agreed to by the utility or supported by an interconnection study; but, it subjects the QF to diminishment of the 15-year period for each day of the three-year cutoff. Further, Staff's Proposed Rules strictly proscribes any development period in excess of four years under any circumstances – even in a case of utility malfeasance.[49] The QF Trade Associations oppose these strict cutoffs, which provide reluctant utilities with the ability to impose unreasonable obstacles to QF development.

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[49] Staff's Proposed Rules at OAR 860-029-0120(6)(d).

Instead of Staff's Proposed Rules, the QF Trade Associations propose that the new rule should build off of the general three-year framework of existing rules, but there are exceptions that should be recognized and reflected in the rule. While the QF Trade Associations are sympathetic to the concern with the prices becoming stale when the fixed-price period begins after a longer development period than three years, this is often a problem that is beyond the control of the QF and is a result of a lengthy interconnection process.

Therefore, given the flaws with the current interconnection processes which are controlled by the utility, Oregon energy policy should not give the utility the right to diminish the critical fixed-price period of a developer's PPA by delaying the utility's own construction schedule in excess of three years. A longer lead time than three years is appropriate where it is needed for the interconnecting utility to complete the interconnection.

b. Flaws with the Commission's Current Rules

The problem with the Commission's current rule, which in theory allows development periods in excess of three years, is that the utilities have interpreted it as giving the utility complete discretion as to whether it will agree to a development period in excess of three years, and the QF Trade Associations are only aware of one instance where a utility agreed to a longer period than three years under the current policy.[50] Thus, the existing administrative rule should be changed to state that the utility shall not unreasonably withhold consent to a longer development period when justified by the QF, and it should not include an arbitrary four-year

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[50] The one instance is PGE's contract with OM Power. *In re PGE Information Filing of QF Contracts or Summaries*, Docket No. RE 143, OM Power 1 LLC PPA (Sept. 14, 2016). The QF Trade Associations have not conducted a comprehensive analysis and there may be other examples.

cutoff. Staff's Proposed Rules introduce the requirement that the utility not unreasonably withhold consent to a fourth year of a development period for any legitimate reason presented by the QF, but it does not allow for development periods in excess of four years even with such consent.[51]

ii. Staff's Rule Unreasonably Fails to Hold QFs Harmless in the Case of Utility-Caused Delays in Proposed OAR 860-0029-0120(7)(d)

Next, distinct from establishment of the scheduled commercial operation date in the PPA, Staff's Proposed Rules have included an unreasonably narrow relief to QFs in the case where the utility is the cause of the delays. Staff's Proposed Rule OAR 860-0029-0120(7)(d) only excuses a QF's delay in the case of force majeure or where the utility commits a contractual default under the PPA, the interconnection agreement, or interconnection study agreements. Thus, if the utility causes a delay through any action that does not rise to the level of a contractual default, the utility can use its own delay as a basis to terminate the QF's PPA.

The Commission-approved PPAs should include a carve-out that holds the QF harmless for delays caused by the purchasing utility. It is a basic principle of contract law that one party's prevention of the other party's performance excuses the harmed party's obligation. The Oregon Supreme Court has held that "where the conduct of the defendant has prevented the performance of a contract provision by the plaintiff, he cannot avail himself of any such failure to perform."[52] "[O]r, viewed another way, the condition is considered waived or fulfilled."[53] Thus, if the utility is the cause of a delay, such as through a failure to timely complete the interconnection

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[51] Staff's Proposed Rules at OAR 860-029-0120(6)(b)(B).
[52] *Anderson v. Allison*, 256 Or 116, 121, 471 P2d 772, 774 (1970).
[53] Richard A. Lord, *Williston on Contracts* § 39.4 (4th ed. 2012).

construction, the QF's obligation to achieve commercial operation by the scheduled commercial operation date should be excused, and the QF should not lose any time from its fixed-price sale period or its overall power sales term. This issue was recently litigated in Washington after Avista refused to include an exception in its proposed standard PPA for utility-caused delays, and the WUTC concluded that its standard PPA must provide such an exception to the delay default provision.[54]

The major problem with Staff's Proposed Rules is that it only excuses the QF from delay default in the case where the utility's actions rise to the level of a contractual default.[55] That is inadequate because contractual defaults are not the only actions or inactions by a utility that could cause the QF to be unable to timely achieve commercial operation. For example, the utility may delay furnishing an interconnection study in a manner that does not rise to the level of a clear violation of the applicable interconnection study agreements. Or the utility might furnish an inadequate or erroneous interconnection study that necessitates further discussions and studies. Such delays are common in Oregon's interconnection processes. Under basic contract law, if any such delays are caused by the utility, the QF should be held harmless. By limiting the scope of utility-caused delays that apply, Staff's proposal provides less protection than general contract law provisions. Given that the Commission is supposed to be encouraging QFs with these rules, there is no basis to afford less protection than general contract law would provide without addressing the issue in the PPA.

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54 WUTC Docket No. UE-190663, Order No. 02 at 5-6 (Oct. 30, 2020).

55 Staff's Proposed Rules at OAR 860-029-0120(7)(d).

Instead of Staff's Proposed Rules, the PPA should simply excuse a QF's delayed commercial operation for all "utility-caused delays" without trying to exclude types of utility-caused delays.

3. The 15-Year Fixed Price Period and 20-Year Purchase Periods Should Commence on the Commercial Operation Date, Not the Scheduled Commercial Operation Date

Additionally, the QF Trade Associations recommend changes to the mechanics of Staff's Proposed Rules on measurement of the term length. We recommend that the 15-year fixed-price and 20-year purchase period run from the commercial operation date, not the scheduled commercial operation date to ensure the QF can receive the benefit of the full 15-year and 20-year periods previously deemed necessary by the Commission to adequately encourage QFs.

As noted above, Staff proposes to begin the 15-year period from the scheduled commercial operation date instead of the commercial operation date.[56] However, doing so subjects the QF to the risk that a utility-caused delay will eat away at the critical fixed price period without any relief to the QF under Staff's narrow use of the "Excused Delay" concept discussed above.[57] An even easier fix to this problem than properly defining "Excused Delay" and related provisions is to simply begin the fixed-price and purchase periods from the actual commercial operation date. That is how PPAs are ordinarily structured. Under that framework, as long as the QF's delay does not justify termination of the PPA by the utility, the QF's 15-year and 20-year rights will be preserved after commercial operation is achieved. Conversely, unlike

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56 *See* Staff's Proposed Rules at OAR 860-029-0120(2), (5).

57 Note that the term "Excused Delay" was defined in a previous version of the draft rules, and while Staff has not defined that term in this version of the draft rules, the concept is still present. *See* note following Staff's Draft Rules at OAR 860-029-0120(5).

what would appear to occur under Staff's Proposed Rules, the QF will not receive additional fixed-price or purchase period in the case where its actual commercial operation date is before the scheduled commercial operation date. This common-sense solution eliminates the need to debate definitions of "Excused Delay" and encourages renewable energy development by preserving the necessary fixed-price period.

4. Jurisdiction Over Disputes

The QF Trade Associations recommend removing OAR 860-029-0120(20) of Staff's Proposed Rules, which requires contracts to include language referencing "the jurisdiction of those governmental agencies and courts having control over either party or [the contract]."[58] Historically, this provision was intended to clarify that "if a governmental agency or a court orders the QF to halt generation, the utility is no longer obligated to purchase power under the contract."[59] Recent litigation, however, has raised the question of whether this language is seeking to expand the Commission's jurisdiction to cover QF contracts.[60] Oregon law prohibits such an expansion.[61] The Commission should eliminate rule language that is inconsistent with Oregon law, specifically Section 860-029-0120(20) of Staff's Proposed Rules.

58 Staff's Proposed Rules at OAR 860-029-0120(20).

59 *In Re Utility Purchases from QFs,* Docket No. AR 114, Order No. 85-099, 1985 Or PUC LEXIS 2, at *4 (Feb. 12, 1985).

60 *E.g.,* Docket No. UM 1931, Order No. 18-174 at 4 n.7 (May 23, 2018).

61 *Diack v. City of Portland*, 306 Or 287, 293, 759 P2d 1070 (1988) (explaining an agency cannot expand its jurisdiction through an administrative rulemaking).

D. Applicability and Reasonableness Requirements

1. Reasonableness Requirement

The QF Trade Associations recommend adding a requirement that, in implementing these administrative rules related to contracting process and power purchase agreement terms, the utilities must act reasonably at all times. The Commission has the power to require the utilities to act reasonably.[62] However, omitting this requirement from the rules could undermine the Commission's authority to hold utilities accountable for unreasonable behavior. Even one inadvertent omission of the word "reasonable" in a provision could lead to litigation. Rather than attempt to impose reasonableness in a piecemeal fashion, the QF Trade Associations recommend a generic provision that requires the utilities to implement the entire rule chapter reasonably.

The case of *Sandy River Solar, LLC v. PGE* highlights the importance of adding a generic requirement that, in implementing these rules, the utilities must act reasonably. In that proceeding, a QF, Sandy River Solar, LLC, argued that PGE had unreasonably refused the QF's request to hire a third-party consultant to perform the interconnection upgrades in violation of OAR 860-082-0060(8)(f).[63] The rule states, "[a] public utility and an applicant may agree in writing to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades, subject to public utility oversight and approval."[64] Notably, the

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[62] *See, e.g.,* ORS 756.040 (addresses the Commission's general powers and states that in addition to any duties otherwise vested in the Commission, the Commission shall "protect [] customers, and the public generally, from unjust and unreasonable exactions and practices [by the utilities]."); ORS 757.325 (requires utilities to not act unreasonably in giving preference or advantage to any person).

[63] *Sandy River Solar, LLC vs. PGE*, Docket No. UM 1967, Complaint at 4 (Aug. 24, 2018).

[64] OAR 860-082-0060(8)(f).

Commission's interconnection rules lack an explicit reasonableness standard regarding third-party consultants, but the interconnection customer argued that such a requirement was implicit.

PGE responded by arguing the term "may" gives the utility total discretion to deny such requests without any reasonableness standard because "may" is permissive, not mandatory.[65] PGE noted several examples elsewhere in the small generator interconnection rules where reasonableness is a requirement.[66] PGE used these examples to contrast against the third-party consultant rule, OAR 860-082-0060(8)(f), that does not expressly contain a reasonableness requirement.[67] The Commission ultimately agreed with PGE, holding that the utility had discretion to decide whether to hire a third-party consultant and that discretion was not subject to a reasonableness standard.[68] In effect, PGE argued that utilities may act unreasonably whenever the rules do not explicitly proscribe it, and the Commission agreed. Under this precedent, the Commission may not have authority to require utilities to implement rules reasonably unless the rules themselves explicitly require the utilities to do so.

A reasonableness requirement that is applicable to all of these PPA contracting rules would avoid the confusion, ambiguity, and potential litigation demonstrated in *Sandy River*

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65 Docket No. UM 1967, PGE's Motion for Partial Summary Judgment at 12-13, 17 (Feb. 27, 2019).

66 Docket No. UM 1967, PGE's Reply in Support of Motion for Partial Summary Judgment at 11-12 (Apr. 4, 2019). For example, a "public utility may not unreasonably refuse to grant expedited review of an application to renew an existing small generator facility interconnection if there have been no changes" and the "public utility must make reasonable, good-faith efforts to follow the schedule set forth in the feasibility study agreement for completion of the study." OAR 860-082-0025(1)(e)(A), -0060(6)(d); *see, e.g.*, OAR 860-082-0060(6), (8)(a).

67 Docket No. UM 1967, PGE's Reply in Support of Motion for Partial Summary Judgment at 12 (Apr. 4, 2019).

68 Docket No. UM 1967, Order No.19-218 at 25 (Jun. 24, 2019).

Solar. Without an explicit reasonableness requirement, utilities will likely argue that they have complete discretion and may act unreasonably.[69] Under *Sandy River Solar*, it may be difficult for any QF or even the Commission to hold utilities accountable for unreasonable, potentially illegal behavior. The Commission should mitigate the risk for utility abuse and impose a generically applicable reasonableness requirement.

2. Applicability

The QF Trade Associations recommend that Staff's Proposed Rules be revised to clarify their applicability.

The task of determining the applicability of the rules' various provisions may be more complicated than it might initially seem. On one hand, existing law and regulation is normally incorporated by law into every contract absent express intent to the contrary by the parties, which means the rules could become de facto provisions of PPAs entered into at the time of the rulemaking.[70] On the other hand, PURPA proscribes retroactive modification of long-term PURPA PPAs.[71] The Commission's rules should be careful to require inclusion of certain rule provisions on a prospective basis in new PPAs while not inadvertently purporting to override provisions of existing PPAs. Doing so is complicated by the disparate effective date of the various rule provisions. Specifically, some of the provisions in the rules at issue have existed for many years, and therefore would be expected to be incorporated into existing PPAs executed while such rule provisions were in effect, while other provisions of the rules are being

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69 *But see, e.g.,* ORS 757.325.

70 *E.g.*, *Blizzard v. State Farm Automobile Ins. Co*, 86 Or App 56, 61, 738 P2d 983**,** *rev den* 304 Or 149 (1987).

71 *Oregon Trail Electric Consumers Coop., Inc. v. Co-Gen Co.*, 168 Or App 466, 482, 7 P3d 594 (2000).

implemented for the first time and should clearly not be intended to override contractual arrangements predating the effectiveness of such provisions.

The QF Trade Associations do not understand Staff's intent to be that rules implementing a new policy (as opposed to merely codifying a preexisting policy) should apply to existing PPAs executed before finalization of the rules, and the QF Trade Associations would likely oppose any such retroactive modification of existing PPAs. However, the provision in Staff's Proposed Rules addressing this point is somewhat unclear because it uses a catch-all application to the entire set of rules without taking into account that some provisions have been in effect for many years while others are entirely new. It also overlooks that some provisions of the rules are not intended for inclusion in PPAs at all. The proposed OAR 860-029-0005(1), which is the same as the existing provision, provides:

> These rules apply to all interconnection, purchase, and sale arrangements between a public utility and qualifying facilities as defined herein. *Provisions of these rules do not supersede contracts existing before the effective date of this rule*. At the expiration of such an existing contract between a public utility and a cogenerator or small power producer, any contract extension or new contract must comply with these rules.

(emphasis added). The Commission revise the phrase "effective date of this rule" at the end of the second sentence to better account for various effective dates of the individual provisions of the rules.

Additionally, only isolated sections of the rules, such as proposed OAR 860-029-0120, and New Rule #'s 1, 4, 5, and 6, are clearly intended to mandate certain contractual provisions that must be incorporated into new PPAs. Many other sections of the proposed rules address matters other than required terms and conditions of PPAs, such as rate calculations and filings

(e.g., proposed OAR 860-029-0040, -043, -046, -0050, -0080, -0085), the utility's obligation to offer contracts and the negotiation processes (e.g., existing OAR 860-029-0030 & -0100, New Rule #3), and eligibility for standard contacts (e.g., proposed New Rule #2). Other proposed rule provisions mandate certain outcomes without making it clear whether the rule provision is intended to override or "gap fill" PPAs or whether such rule provisions are intended to be included as a provision within PPAs. For example, the proposed rule provision on "System Emergencies," OAR 860-029-0070, falls into this last category by declaring the utility possesses certain curtailment rights but not necessarily requiring such a corresponding term or condition be expressly included in PPAs offered by the utility.

Further, while this docket title reads "Procedures, Terms, & Conditions Associated with QF *Standard* Contracts" (emphasis added), the scope of Staff's Proposed Rules is far broader than that. Staff adds New Rules #1, #2, #3, #4, #6, #7 and amends OAR 860-029-0120, which all by their titles appear to be limited to standard contracts. Yet, the remainder of the additions and amendments in the rules do not appear to be so limited. This includes revisions to the definitions section (OAR 860-029-0010) and force majeure provisions applicable to all QFs (New Rule #5). Therefore, in addition to clarifying whether each of the rules mandate specific contractual language, the rules should clarify which contractual provisions are mandated only for standard PPAs and which are mandated for all PPAs. Staff could potentially accomplish this with a catch-all provision that states that such provisions are mandated only for standard PPAs unless otherwise specifically stated that they are also applicable to non-standard PPAs.

To avoid confusion, the QF Trade Associations recommend that Staff clearly identify in the rules which provisions are intended be required for inclusion in standard and/or non-standard

PPAs and which, if any, are intended to override or fill in the gaps within existing or future PPAs. As a general matter, the right of the QF to elect to enter into standardized provisions can be desirable because it can minimize transactional costs involved in contract negotiation; however, for non-standard PPAs, there may be reasonable grounds for both parties to agree to different terms and conditions. Once Staff's intent is better understood on the applicability of the various rules to existing and future PPAs, the QF Trade Associations may have additional comments on this point.

E. Definitions as Applicable

The QF Trade Associations have no comment right now but reserve the right to comment in the future.

F. OAR 860-029-0120 Standard PPAs (16)-(18) – Insurance and Security Requirements

1. Insurance

The QF Trade Associations are still evaluating this proposal and reserve the right to comment in the future.

2. Security

The QF Trade Associations oppose Staff's Proposed Rules to subject small[72] QFs under the standard contract size threshold to burdensome security requirements. The QF Trade Associations recognize a security requirement may be reasonable for large QFs, but it is unduly burdensome for small QFs. Under Staff's Proposed Rules, all QFs that cannot satisfy the

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[72] Unless otherwise indicated, the QF Trade Associations use the word "small" here to refer specifically to QFs eligible for standard contracts. This usage is for brevity, as there are some QFs considered "small" in other contexts but who are not eligible for standard contracts.

utility's creditworthiness requirements must a post liquid form of security (i.e., cash or a letter of credit from a bank) to be used by the utility as a source from which to collect damages prior to commercial operations ("Project Development Security") and after commercial operations ("Default Security").[73] Finally, Staff's Proposed Rules require QFs to forfeit the security in unreasonable circumstances.[74] As a matter of policy, if damages or security provisions will increase, then there should be changes to increase flexibility and accommodation to reach the COD to compensate for this additional cost and risk.

The Commission has previously addressed the question of what security is appropriate under standard PURPA PPAs. In UM 1129, Staff explained that:

> The issue simply involves the level of security requirements that are appropriate for small QFs, given (1) the magnitude of the risk to the utility, (2) the relative risk to ratepayers of large utility-owned resources compared to small QF purchases, and (3) the interest of the Commission in facilitating the development of QFs in Oregon.[75]

The Oregon Department of Energy represented that the "risks arising from potential default by a QF are likely small" but no party (including the utilities) quantified the risk nor provided "any empirical evidence of the risks associated with QF default."[76] Therefore, the Commission concluded that

> it would not be prudent to subject utilities and, in turn, their ratepayers, to an unknown level of unsecured risk. We agree, however, that the risk may be relatively low and that an unreasonably high level of security may create a major impediment to the development of QF projects. Consequently, the question is

73 Staff's Proposed Rules at OAR 860-029-0120(16), (17).
74 Staff's Proposed Rules at OAR 860-029-XXX(10) [New Rule #6].
75 Docket No. UM 1129, Staff/800, Morgan/4 (Oct. 14, 2004); *see* ORS 758.515 (describing the Commission's obligation to foster QF development in Oregon).
76 Docket No. UM 1129, Order No. 05-584 at 44 (May 13, 2005).

> not whether to require *any* default security, but rather what level of default security requirements should be required?[77]

Ultimately, the Commission adopted the current policy for standard contracts that: 1) creditworthy QFs do not need to post security; and 2) QFs unable to demonstrate creditworthiness have the right to choose how to post security through one of four options.[78] Those four options are a senior lien, step-in rights, a cash escrow, or a letter of credit.[79]

Further, the Commission determined that the situation for Project Development Security is "effectively no different than" for Default Security and imposed the same requirements, with the caveat that the utility must be in a resource deficient position.[80] If a utility is in a resource sufficient position, the Commission determined that there is no need for any Project Development Security.[81]

It appears that the Joint Utilities, and Staff, wish to revert to the contracting policies and practices in effect prior to the Commission's UM 1129 decisions and which the Commission effectively rejected.[82] It is important to remember that UM 1129 examined QF contracting issues specifically because of a concern about "the lack of recent QF development."[83] The

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[77] Docket No. UM 1129, Order No. 05-584 at 45 (emphasis in original). Note that the Commission used the term "Default Security" in UM 1129 to refer to both pre- and post-operational security, or what Staff's Proposed Rules now call "Project Development Security" and "Default Security."

[78] Docket No. UM 1129, Order No. 05-584 at 45; Docket No. UM 1129, Order No. 06-538 at 2, 11 (Sept. 20, 2006) (stating that "When entering into a standard contract, QFs must demonstrate creditworthiness, or provide a specified amount of default security" and clarifying the prior order).

[79] Docket No. UM 1129, Order No. 05-584 at 45.

[80] Docket No. UM 1129, Order No. 05-584 at 47.

[81] Docket No. UM 1129, Order No. 05-584 at 47.

[82] *See* Docket No. UM 1129, Order No. 05-584 at 42, 46 (describing the utilities' prior requirements for liquid security, which the Commission declined to maintain).

[83] Docket No. UM 1129, Order No. 05-584 at 11.

Commission has statutory obligations to foster QF development and should not revert to harmful practices.[84]

In essence, the QF Trade Associations recommend adhering to current policy for small QFs and revising Staff's Proposed Rules to the extent they conflict with this longstanding Commission policy. Specifically, the Commission should maintain its policies of: 1) exempting creditworthy QFs from any security requirements; and 2) allowing QFs unable to demonstrate creditworthiness to post security through step-in rights or senior liens.

As additional support, the QF Trade Associations explain below that: 1) recent QF failure rates are primarily the result of the flawed interconnection process and different understandings of contract provisions, and do not justify additional security requirements that will only reward utilities for hindering QF development; and 2) the Washington Utilities and Transportation Commission ("WUTC" or the "Washington Commission") recently addressed security for its standard contracts and generally exempted small QFs from security requirements, adopting a more lenient security standard than the Commission's current policy.

i. Excuse Small QFs From Posting Any Liquid Security

Staff's Proposed Rules do not go far enough in exempting small QFs from security requirements. Staff imposes both a Project Development Security and a Default Security after operations on all QFs, including the smallest QFs, unless the QF can meet the utility's proprietary creditworthiness criteria that are undefined in the rule.[85] The QF Trade Associations recommend exempting all small QFs from any liquid security requirements.

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[84] *See* ORS 758.515.
[85] Staff's Proposed Rules at OAR 860-029-0120(16), (17).

As a preliminary matter, the QF Trade Associations note that their previous comments explained that it may be reasonable to modify the Commission's Project Development Security requirements for large QFs but *not* for small ones.[86] In distinguishing these groups, the Commission should remember its policy:

> as articulated in Order No. 91-1605, that standard contract rates, terms and conditions are intended to be used as a means to remove transaction costs associated with QF contract negotiation, when such costs act as a market barrier to QF development. Standard contracts are designed to eliminate negotiations and to thereby remove transaction costs. … In addition to transaction costs, … other market barriers such as asymmetric information and an unlevel playing field … obstruct the negotiation of non-standard QF contracts. Just like transaction costs, these market barriers can render certain QF projects uneconomic to get off the ground if an individual contract must be negotiated.[87]

The QF Trade Associations recommend not imposing new burdens on QF development, particularly not in standard contracts whose existence aims to support those small QFs least able to afford the transaction costs and other barriers to QF development. The Joint Utilities have argued that security is necessary to show that QFs have some "skin in the game" and incentive to complete the project because they have money at risk in case of failure to construct and/or operate the project. From a factual perspective, this ignores that QF developers and their financiers must invest often significant resources which generally provides them with sufficient economic incentives. Entering into a power purchase agreement requires expenditures and time

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[86] *See* Joint Comments of CREA/REC/NIPPC on Staff's Updated Proposal at 8-26 (Aug. 12, 2021); *see also* Joint Comments of CREA/REC/NIPPC on Staff's Initial Proposal at 9 (Mar. 30, 2021) (discussing how, until the Commission resolves the flawed interconnection process, QFs should not need to provide interconnection studies to obtain PPAs; and discussing how it might be reasonable to require *large* QFs to provide Project Development Security as an alternative to requiring interconnection studies).

[87] Docket No. UM 1129, Order No. 05-584 at 16.

investment related to obtaining land and site control, permits, governmental approvals, and numerous studies, generally including interconnection studies. Once the interconnection studies are complete and an interconnection agreement is executed, then the QF developer generally must pay significant deposits and is responsible for all "reasonable" interconnection costs.[88] The QF must also contract with suppliers, construction companies and numerous others to build the actual project. All of these amounts are sunk costs that will be lost if they fail to become commercially operational and put huge risk on the QF.

If the Commission adopts a more stringent security policy, then there will be a certain category of small PURPA developers that will likely be unable to afford, or unwilling to take the risk, of failure. Thus, the Commission should recognize that it will be making an affirmative decision that certain business models and types of small developers will likely not be able to operate in Oregon.

ii. Retain the Option for QFs Unable to Demonstrate Creditworthiness to Post Security through Step-In Rights or Senior Liens

The next concern that the QF Trade Associations have with Staff's Proposed Rules is the removal of step-in rights or senior liens as options for how QFs unable to demonstrate creditworthiness may post security. For clarity, the QF Trade Associations discuss this issue separately for Default Security and Project Development Security.

QFs should not lose the option of providing step-in rights. As background, step-in rights authorize a contractual party to take over the development or operation of a project. Thus, if a small QF developer or owner becomes unable to proceed, for whatever reason, a utility may

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88 *See* OAR 860-082-0035.

nevertheless develop or operate the facility as if it were the utility's own. This may mitigate the risks associated with small business management for the QF from the risks associated with resource development for the QF and by extension the utility. Note that the benefit of step-in rights typically increases as the project becomes more developed and achieves operations, which correlates to the utility's increasing expectation that the project will meet its contractual obligations.

a. Retain the Option for QFs Unable to Demonstrate Creditworthiness to Post Default Security through Step-In Rights or Senior Liens

The QF Trade Associations strongly oppose requiring operational QFs to post liquid security and prohibiting the use of senior liens or step-in rights. If a facility is actively operating, failure is unlikely. Once it is operating, the QF owner has every incentive to continue operations because it is only paid for energy delivered and can only recoup its capital investments by continuing to operate. The utilities have identified no specific instances of failure in Oregon of operating QFs that have recently caused harm to the utility. Thus, there is very little risk of default after operations, and any risk that might exist could be ameliorated through the right of the utility to exercise step-in rights and take over the operations. Therefore, the Commission should retain the option for QFs unable to demonstrate creditworthiness to post Default Security through the use of Step-In Rights or Senior Liens.

If anything, due to the limited risk of default during operations, the Commission should reduce its requirements for Default Security. As a reminder, the Commission only adopted its requirement for Default Security because it felt that the risks of QF defaults after commercial

operations were too speculative and unknown.[89] Experience since then shows that is rare that an existing QF will default after they achieve commercial operations. As far as we know, the utilities have not identified any recent instances of harm to a utility by a default by an operating Oregon QF. Therefore, the risk to ratepayers from a small QF defaulting after operations is very small.

In UM 1129 the Oregon Department of Energy commented that Default Security might be warranted but only if payments are levelized.[90] Commission Staff agreed in that docket, and therefore proposed default security for use *with levelized rates*.[91] Therefore, in addition to the other reasons, the Commission should eliminate the requirement for a liquid security because there are no levelized rates in Oregon.

b. Retain the Option for QFs Unable to Demonstrate Creditworthiness to Post Project Development Security through Step-In Rights or Senior Liens

The QF Trade Associations also object to prohibiting the use of step-in rights or senior liens for projects that are not yet operational. Again, in UM 1129, Commission Staff specifically recommended that "utilities should not be allowed to require a letter of credit or escrow deposit as … security for small QFs."[92] While step-in rights *might* provide less value for Project Development Security than Default Security, step-in rights and senior liens are not "effectively

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[89] Docket No. UM 1129, Order No. 05-584 at 42, 45 (describing circumstances when a QF might default after operations and explaining that the risk, while likely low, was not quantified).

[90] Docket No. UM 1129, Order No. 05-584 at 44.

[91] Docket No. UM 1129, Order No. 05-584 at 43 ("Should a QF receive levelized payments, Staff recommends that the utility allow the QF to select one of the following default security measures: credit rating requirements; a senior lien on the facility; step-in rights; a cash escrow; or a letter of contract.").

[92] Docket No. UM 1129, Staff/800, Morgan/4.

meaningless" as Staff alleges.[93] Step-in rights provide value, even if that value may be difficult to quantify and may vary across QFs. The mere fact that a utility declines to exercise step-in rights is not *prima facie* evidence that the step-in rights were not valuable, nor that a project would not have been prudent for the utility to develop.

For example, the Commission recently determined that PacifiCorp's development of Pryor Mountain was prudent.[94] Pryor Mountain was originally a QF that struggled to become operational because of the low avoided cost prices provided by PacifiCorp and the expenses relating to interconnection upgrades.[95] The project failed. PacifiCorp obtained and developed the project because the QF site was valuable and constructed the QF at a higher cost to ratepayers (and PacifiCorp was able to include in rates the interconnection upgrades).[96] This was found by the Commission to be a good business decision by PacifiCorp and a prudent investment, and demonstrates that a utility's ability to step in and gain access to a QF's pre-operational development is valuable. Thus, Pryor Mountain is an excellent example of how step-in rights can be highly valuable in some circumstances.

The QF Trade Associations note that QF sites might become increasingly valuable in light of Oregon's relatively restrictive land use requirements. Thus, step-in rights might provide more value today than they did when the Commission originally decided that step-in rights provided adequate security for QFs unable to demonstrate creditworthiness.

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93 Staff's Description of Staff Proposed Rules for AR 631 (July 14 Proposal and August 2 Revisions) at 4-5.

94 *PacifiCorp Request for a General Rate Revision*, Docket No. UE 374, Order No. 20-473 at 50 (Dec. 18, 2020).

95 Docket No. UE 374, Order No. 20-473 at 49-50.

96 Docket No. UE 374, Order No. 20-473 at 131.

iii. The Recent High Rates of QF Failure in Oregon Stems in Part from Actions by PGE and the Commission Related to Interconnection Processes

The QF Trade Associations understand that one reason the Joint Utilities and Staff are proposing Project Development Security is to prevent "speculative" projects and because of the recent high rate of failure among Oregon QFs.[97] It is true that many (but not all) QFs less than 10 MWs are smaller business entities, private individuals, and governments than those that bid into utility RFPs; given this fact, one might expect, all things being equal, a higher rate of failure. Consistent with the Commission's positive obligation under state law to encourage QFs, this higher rate of failure among smaller QFs argues supports not requiring security because the Commission should encourage these developers and not further increase the chance of failure that would come from imposing higher costs in the form of security requirements.

Apart from this view, the current very high failure rates for small QFs, may be a historical anomaly. These failures are largely based on PGE's aggressive contract interpretation and interconnection issues, and the Commission's recent interconnection- and standard contract-related decisions that have made it more difficult to construct and finance projects in Oregon.

The main reason that QFs with executed contracts in Oregon have failed is because of the challenges associated with interconnecting to PGE. There has historically been little visibility into locations on PGE's system that would allow for easy interconnection, which has made it difficult to choose the optimum project siting. The QF Trade Associations note that there have been improvements in PGE's interconnection processing; however, the documented delays, inaccurate cost estimates, cost overruns, changing interconnection standards, and overall level of

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[97] Joint Utilities' Initial Comments at 4 (Mar. 30, 2021).

mistakes and errors have been beyond what a developer should reasonably expect in the normal course of business.[98] But for these solvable interconnection problems, the QF Trade Associations believe that numerous projects would likely have come on line and done so on time had they been provided adequate interconnection services.

The Commission's recent decisions on interconnection matters and interpreting PGE's standard contracts have also increased the challenges that lead to a higher failure rate among Oregon QFs. For example, the Commission's decision that the Oregon rules do not provide QFs a right to hire third party contractors to perform interconnection work removed a potential tool to addressing some of the PGE interconnection challenges.[99] The QF Trade Associations hope that future interconnection proceedings will improve the interconnection process and this rulemaking will provide greater clarity and less unexpected litigation that will allow QFs to rely upon a

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[98] *See generally, e.g., Zena Solar, LLC v. PGE,* Docket No. UM 2164, Complaint at 1-15 (May 24, 2021) (disputing whether QF required to pay for 3V0 protection even after third party identified substation was already exposed to 3V0 issues without the interconnection); *St. Louis Solar, LLC v. PGE*, Docket No. UM 2057, Second Amended Complaint at 1-7 (Feb. 18, 2021) (disputing harms from PGE's nearly 30 months of delay in the interconnection process); *Madras Solar PV1, LLC v. PGE,* Docket No. UM 2009, Complaint at 1-3 (Apr. 22, 2019) (disputing Point of Delivery, which causes delays to QF's efforts to enter into a PPA with PGE).

[99] Docket No. UM 1967, Order No. 19-218 at 1. The Commission also indicated in this June 2019 decision the issue could be revisited stating that: "Although we conclude that OAR 860-082-0060(8)(f) as written does not include a reasonableness standard, we note that requirements regarding the use of third-party consultants in the interconnection process can be further considered in Docket UM 2000." *Id.* at 26. While Commission has taken some efforts to improve the interconnection process for community solar projects, there has been no substantive action for regular QFs.

settled institutional climate for project development.[100] The Commission has ruled against QFs and in favor of PGE in at least three major contract interpretation cases which have had a material impact on the success rate for QFs.

In UM 1931, the Commission interpreted PGE's standard contract as the fifteen-year period for fixed prices starting at contract execution rather than commercial operation and power deliveries.[101] The development community understood, and the QFs that entered into these contracts believed, that the Commission had a policy, and that PGE's contract was consistent with the policy, that the fixed price period started at commercial operation and not contract execution. The ultimate Commission decision agreeing with PGE's interpretation of contract execution meant that projects lost up to 4 years of fixed prices or 26% of the total value. These developments directly impacted the success rate of projects. In their aftermath, for projects which had not yet invested significant sums of money, it may have been a wise economic

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[100] The QF Trade Associations do not intend, and urge the Commission not to interpret this section as attempting, to reargue past Commission decisions, or even allege that prior Commission decisions were erroneous. Instead, the intent of this section is to simply point out the practical impact that certain Commission decisions have had on the success rate for QFs, and that hopefully these circumstances will not repeat themselves if there are clearer rules. This has happened in two main ways. First, many QFs would not have entered into contracts if they had known how the Commission would ultimately interpret their provisions. For example, most QFs need 15 years of fixed prices to obtain financing. Numerous QFs entered into contracts based on the assumption that they would have 15 years of fixed prices. If those QFs knew that their fixed prices started at execution and were effectively less than 15 years, then they may never have executed contracts and thus the "failure" rate would be lower. Second, significant changes in expectations that impact the profitability of a project can cause a project that would have otherwise succeeded to fail. If the change in expectations is outside of the control or assumptions of the QF (e.g., a regulatory decision or utility action), then the "failure" should not be ascribed to the QF, assuming its original expectations were reasonable.

[101] *See PGE v. Alfalfa Solar I, LLC, et al.*, Docket No. UM 1931, Order No. 19-255 at 13-14 (Aug. 2, 2019), *appeal pending*; Docket No. UM 1931, Order No. 19-394 at 1 (Nov. 14, 2019).

decision to seek to deploy capital somewhere else, or seek to switch contracts from a standard PUPRA sale to community solar projects, after such an unexpected drop in forecasted revenues.

In UM 1894, the Commission interpreted PGE's standard contract as only allowing immaterial size changes prior to COD.[102] At least some developers understood that they could materially increase or decrease their project size after contract execution. The flexibility to change project size could be a significant benefit to becoming commercially operational when facing the interconnection challenges that occur in PGE's service territory. Regardless of the reasonableness of these developers' expectations, the fact that the Commission concluded that their contracts did not have the flexibility that they expected harmed the project economics and made development more challenging.

In UM 2051, the Commission interpreted PGE's standard contract provisions regarding termination and resource sufficiency and deficiency such that PGE was allowed to terminate Fossil Lake Solar's contract.[103] The PGE standard contract provision was substantially the same as the provision in PacifiCorp's standard contract. In DR 48, the Coalition petitioned for a declaratory ruling that the Commission interpret PacifiCorp's standard contract and its termination provisions as it relates to resource sufficiency and deficiency.[104] The developers reasonably relied upon prior Commission precedent and/or their contract to assume that PacifiCorp could not terminate their contracts unless it was actually resource deficient. In DR

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102 *PGE v. Pac. Nw. Solar, LLC*, Docket No. UM 1894, Order No. 18-284 at 5-6 (Aug. 2, 2018).

103 *Fossil Lakes Solar, LLC v. PGE*, Docket No. UM 2051, Order No. 20-340 at 11-14 (Oct. 12, 2020).

104 *See generally in re Renewable Energy Coalition Petition for Declaratory Ruling*, Docket No. DR 48, Renewable Energy Coalition Petition for Declaratory Ruling at 1 (Feb. 10, 2014).

48, the Commission Staff informally agreed with the QF parties. Then the Coalition, PacifiCorp, and the individual QF projects that were facing contract termination reached a settlement.[105] Now there are a number of small-scale hydro-electric facilities operating and selling power because of that settlement. These projects would not have been able to reach commercial operations under the Commission's order in Fossil Lake Solar, discussed above. Again, regardless of the correctness of the order in UM 2051, the case illustrates that the ability for QFs to reach commercial operation is highly dependent upon the approach that their purchasing utility takes toward disputes (i.e., settlement or litigation) and the resolution of those disputes.

Therefore, the recent historically low rate of QF survival until project completion in Oregon is related, at least in some cases, to PGE's interconnection and contract interpretation policies, and the Commission's recent decisions on both interconnection and contract interpretation—both of which are ultimately outside of the control of QFs.

iv. Consider New Standard Contracts for Avista and Puget Sound Energy

As a general matter, the QF Trade Associations strongly disagree with the Joint Utilities' previous suggestions that the security provisions in Staff's Proposed Rules are consistent with

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105 Docket No. DR 48, the Coalition and PacifiCorp's Motion to Withdraw at 2 ("The Coalition, four of its members, and PacifiCorp have resolved the outstanding issues that gave rise to the need for the Commission's interpretation of the provisions at issue in the Petition…. PacifiCorp avers that it has reached agreement on the interpretive issue raised in the Petition, either as part of the settlement of DR 48 or on a case-by-case basis, with all of the QF projects that are in or near a delayed commercial operation date.") After settlement, the Coalition and PacifiCorp sought expedited withdrawal of the petition because the Coalition explained "that more than one of the Projects are experiencing financing issues directly related to the uncertainty associated with whether PacifiCorp can terminate their Small Firm Contracts due to a delay in commercial operation at this time. Expeditious withdrawal of the Petition will remove this cloud of uncertainty over these Projects." *Id.* at 3.

Washington policy.[106] The Washington Commission recently approved new standard contracts for Avista, Puget Sound Energy ("PSE"), and PacifiCorp.[107] PacifiCorp's PPA is the *only* one to require a liquid security, and only for projects 2 MWs and above.[108] Mandating security is not a standard operating procedure, and the Commission should carefully review the evidence before abandoning its historical practices.

After a multi-year rulemaking, the Washington Commission adopted new administrative rules in June 2019 that required the utilities to file standard contracts, similar to Oregon.[109] The Washington's rules have significant differences from Oregon's rules, and it is difficult to do direct comparisons in the contract provisions. For example, the Washington Commission requires capacity payments in the sufficiency years based upon a simple cycle turbine rather than Oregon's approach of essentially no capacity payments, Washington has a lower size threshold, and Washington has effectively shorter contract lengths. Overall, the QF Trade Associations believe Washington's rules are less favorable to QFs than Oregon's.

After the Washington Commission adopted new rules, PSE, Avista, and PacifiCorp all filed standard contracts.

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106 Joint Utilities' Initial Comments at 2 (Mar. 30, 2021).

107 *In re Amending, Adopting, and Repealing Sections of WAC 480-106 and 480-107*, WUTC Docket No. U-161024, General Order R-597 at 1 (June 12, 2019). These are the three Washington investor-owned utilities that have standard contracts for qualifying facilities 5 MW and lower.

108 WUTC Docket No. U-161024, General Order R-597 at 24. Staff responds to PacifiCorp's request for security as a condition to the QF receiving levelized pricing saying they "are not convinced that the advantages of a security requirement are outweighed by the requirement's potential disadvantages – making tariffs and contracting processes lengthier, more expensive, and less transparent for all participants." *Id.*

109 WUTC Docket No. U-161024, General Order R-597 at 1.

- The review of PSE's standard contract was pro forma and without litigation because PSE already had a WUTC-approved standard contract.[110]

- Avista's standard contract was controversial and litigated with the Washington Commission resolving a number of contested issues. There were multiple rounds of comments, two open meetings (essentially the same as an Oregon PUC public meeting), and multiple Staff recommendations.[111]

- PacifiCorp's standard contract was not litigated, and it was allowed to go into effect after PacifiCorp made material changes to its originally filed contract. In the end, NIPPC and the Coalition did not oppose it. It is important to note that there was no Staff Report, and it was not specifically approved by the Washington Commission but instead was simply allowed to go into effect.[112]

The Avista and PSE standard contracts include material differences from each other as well as the PacifiCorp contract, and there are even more significant differences between the three Washington contracts with respect to the Oregon standard PPAs and Oregon policy. Therefore, the relevance of any of the Washington contracts to Oregon's policies is limited, and the QF Trade Associations caution that it is very difficult to compare them to each other, or to any specific Oregon contract.

That said, the security provisions adopted in Washington are relevant to the Commission's consideration of whether to revise its historical security policies. Importantly, there is no security deposit in either the Avista or PSE standard contract.[113] PSE's contract did

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110 *See generally Utility PURPA Compliance Filings*, WUTC Docket No. UE-190665, Puget Sound Energy Revises Tariff No. WN U-60 (Dec. 5, 2019).

111 *See Schedule 62 Tariff Revision*, WUTC Docket No. UE-190663, Order No. 02 at 7 (Oct. 30, 2020).

112 *See* Washington Commission, Minutes and Public Agenda for Open Meeting (Mar. 11, 2021), https://www.utc.wa.gov/event/2021-03/open-meeting-2021-03-11t093000-0800 (click on Minutes for 03-11-2021.pdf and Public Agenda for 03-11-2021.pdf) (showing filing on consent agenda was adopted).

113 *See generally* WUTC Docket No. UE-190663, Avista Corp. Standard PPA (Oct. 29, 2020); WUTC Docket No. UE-190665, Attachment "A" Agreement: Schedule 91 Purchase from QF of Five MW or Less – New QF (Nov. 22, 2019).

not have a security deposit. Avista's originally filed contract included a security provision (former Section 9.2); however, upon objection by Staff, the Coalition, and NIPPC, Avista removed the security provision.

PacifiCorp's Washington standard contract has a security requirement for projects above 2 MW. The QF Trade Associations believe that if the parties had litigated the issue before the Washington Commission, then the administrative record indicates a material likelihood that PacifiCorp would have been required to remove it:

- In the administrative rulemaking, PacifiCorp requested that the rules require the QF to post a security deposit. The Commission declined to include security. Note that the discussion was in the context of whether there should be security for levelized prices.[114]

- The first time it was addressed, in the summary in the Washington Commission Notice, there was an explanation in response to PacifiCorp: "The commission disagrees. The avoided cost rate provides sufficient incentives for long-term performance."[115]

- PacifiCorp responded by making its recommendation again in comments and noted that "In the summary of comments the Commission provided with the Notice, it rejected Pacific Power's suggested addition of a provision allowing levelized pricing security."[116]

- The second time the issue was addressed, the Staff explained that "We are not convinced that the advantages of a security requirement are outweighed by the requirement's potential disadvantages – making tariffs and contracting processes lengthier, more expensive, and less transparent for all participants."[117]

- The Washington Commission's order approving the PURPA administrative rules did not specifically address the security deposit issue (the WUTC order did not address most of the contested issues), but the Washington Commission did not make the changes PacifiCorp had repeatedly requested.[118]

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[114] WUTC Docket No. U-161024, General Order R-597 at 24.

[115] WUTC Docket No. U-161024, PURPA SBEIS Comments Summary Matrix at 7 (Feb. 22, 2019).

[116] WUTC Docket No. U-161024, Pacific Power & Light Company's Comments on Proposed Rules at 4 (Apr. 1, 2019).

[117] Docket No. U-161024, General Order R-597 at 24.

[118] *See generally* Docket No. U-161024, General Order R-597.

The QF Trade Associations object to reliance upon PacifiCorp's WUTC-approved standard contract for many reasons. One reason, particularly relevant to this discussion, is that the Washington Commission approved the opposite approach for two of the three utilities. If the Oregon Commission wishes to follow Washington Commission policy, it should look to Avista and PSE's security policies (which exempt small QFs from posting any security) and not rely on PacifiCorp's outlier position.

v. Conclusion on Staff's Security Proposal

In summary, the QF Trade Associations recommend that for QFs under the standard contract size threshold, the Commission's rules should continue to allow QFs unable to demonstrate creditworthiness to post security through step-in rights or senior liens. We reserve the right to further comment on any other requirements the Joint Utilities may propose to the Commission.

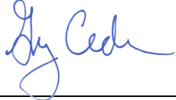
II. CONCLUSION

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

Dated this 11th day of March 2022.

Respectfully submitted,

Richardson Adams, PLLC



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