NewSun ENERGY

March 30, 2021

Via Electronic Filing

Oregon Public Utility Commission
Attention: Filing Center
201 High Street, Suite 100
Post Office Box 1088
Salem, OR 97308-1088

Re: AR 631 – Comments on Staff January 15, 2021 Initial Proposal Related to PURPA Contracting Process and Terms

Dear Staff and Stakeholders:

NewSun Energy LLC (NewSun) submits these comments in response to Staff's request for feedback on its January 15, 2021 initial proposal related to the Public Utility Regulatory Policies Act (PURPA) contracting process and terms at this initial informal phase of this rulemaking. NewSun has a number of concerns with the proposal and also other issues not addressed in the proposal. NewSun further understands that Staff expects to raise more topics for discussion. As such, these comments only begin to address the breadth and depth of issues that need to be addressed, and NewSun is ready and willing to continue these conversations as ideas develop.

NewSun helped bring a number of PURPA projects online in the last couple years and continues to work on solar and storage development in Oregon, which may sell under PURPA or other offtake arrangements. This practical experience and dedication to Oregon development makes NewSun uniquely positioned to provide meaningful input in this rulemaking. NewSun is particularly concerned about contract provisions that may place an unreasonable burden on the qualifying facility (QF) and provisions that will create barriers in the financing process. Any policies adopted in this rulemaking should promote the development of QFs to the highest degree possible, increase the marketability of electric energy produced by QFs in Oregon, and create a settled and uniform institutional climate.[1]

PURPA is or can be the most effective tool to move Oregon towards greater decarbonization. It is designed to unleash renewable development when it can be done at the same or less than the utility's cost to otherwise acquire power. It is unfortunate that utilities resist PURPA. However, by creating a robust framework that eliminates a utility's ability to delay or obstruct the process, or rather that incentivizes the utility to foster PURPA development, the Public Utility Commission (PUC) can greatly streamline the process, drive decarbonization, protect ratepayers, and meet its statutory objectives under PURPA.

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[1] ORS 758.515.

NewSun's feedback on Staff's initial proposal is provided below:

1. **Standard or Negotiated PPA:** As a preliminary matter and going forward, it would be helpful for Staff to clarify for each of its proposals whether it is proposing that the proposal applies to the contracting process and terms for both standard and negotiated power purchase agreements (PPAs) or just one other the other. NewSun believes that many of the standardized contract provisions for small projects can apply equally to large projects and that a modified version of standard contract should be available for large projects. Applying standardized provisions to the larger projects would eliminate a lot of issues in the contracting process.

2. **Eligibility for Draft PPA:** NewSun largely agrees with Staff's proposal for eligibility for a draft PPA except that:

    a. The site control requirement should be modified to require only that steps are being taken towards site acquisition including by providing indicia of landowner intent. This is appropriate given that pricing and contract terms may influence whether a developer should proceed with its project and execute binding land agreements. The term "site control" has a unique legal meaning and should not be used. Whatever term is used, should be defined.
    b. The informational requirement must be reasonable. Utilities have asked for an unreasonable amount of information in the past and those requirements have changed over time.

    Relatedly, this docket should also review what should be required to receive an indicative pricing proposal. There is very little the utility should need to provide pricing and a QF should be able to request multiple pricing options. For example, different DC/AC ratios and different storage configurations can influence pricing. Additionally, there needs to be a framework around when and how a utility can update the inputs to the indicative pricing proposals it provides. For example, in providing indicative pricing proposals, at what point is it appropriate for the utility to move into the next increment of solar capacity pricing: only after executing sufficient other solar contracts to fill up the current increment, or after it has received indicative pricing requests to fill up that bucket, or something else? NewSun believes that this particular input should not be updated based on the number of indicative pricing requests submitted prior to the current request but should be based on executed contracts. As articulated further below, pricing should persist so long as PPA negotiations continue.

3. **Eligibility for Executable PPA:** Staff's proposal to require a Cluster Study or System Impact Study with an in-service date withing four years of contract execution is NewSun's biggest concern. NewSun strongly believes that this will result in the studies simply saying that interconnection is possible within 4-7 years. The PUC should not adopt rules that would create gaming exposure for utilities and risks and unnecessary disputes and litigation. The interconnection study is completely controlled by the utility and they can write whatever date they want in there. Also, given the risk of restudies, Staff's rules should permit a project to proceed with PPA contracting when there is a risk for a restudy.

4. **Avoided Cost Updates:** NewSun supports Staff's attempt to simplify the avoided cost pricing update and bring it in line with other processes; however, NewSun believes that additional discussion is needed on this topic. At a minimum, NewSun agrees generally, that the prices should not be changing at times of the year when there are likely to be other conflicting processes that will require our attention. The annual update process should be simplified to remove updates made in an acknowledged IRP Update. The IRP Update has simply become a means for utilities to cherry-pick updates that will lower avoided costs pricing without a more holistic analysis of other issues that may increase avoided cost prices. As for the out-of-cycle updates, if it is eliminated, NewSun is concerned that the utilities will still request a waiver of the PUC's rules and at times when we least expect it or are less able to participate. NewSun believes that out-of-cycle updates need to have a strict framework detailing what conditions permit or require an out-of-cycle update and a clearly stated timeframe for when those prices take effect. To the extent that the pricing persists during negotiation, this out of cycle update issue will be mitigated.

   As a related matter, Staff should consider how its proposal overlays with the non-standard PPA negotiating process. While the standard PPA negotiation process is relatively simple and follows proscribed timelines, there is more flexibility and therefore more room for utility abuse in the non-standard PPA process. Any single term could have material consequences to the financeability or economics of a PPA. NewSun recommends a modified standard PPA to limit the issues and dispute opportunities. Similarly, when a utility delays negotiation, it can push the final execution to a time when a later and lower avoided cost will be effective. Therefore, a QF should have a pathway to execute a PPA at the prices contained in its indicative pricing proposal at the commencement of negotiation.

5. **Contracting Timelines:** The contracting timelines can be much shorter. There is no reason why it should take a utility 15 business days to fill in some blanks on the standard PPA form. A QF should be able to fill out the form PPA ourselves. Given that utilities often say they do not have enough bandwidth, there is no reason why they should have the only power of the pen in both standard and non-standard contract negotiations. This just creates another avenue for a utility to delay the process. By allowing a QF to provide redlines, the QF can more clearly show a utility what changes it needs, it will eliminate or dramatically decrease the utility's need to request a clarification, and it will allow the process to move forward more quickly. Relatedly, the detail required in exhibits should be limited to high-level information to avoid drafting complexity and disputes.

6. **Time to Construct Facility:** Given the number of unexpected delays that have proven out in the interconnection processes, additional flexibility is needed in reaching commercial operations. A QF should be permitted to select a scheduled commercial operation date (COD) three years from the date of execution, unless longer is shown to be necessary, but no longer than five years. After execution, extensions of the scheduled COD should be allowed for up to seven years with documentation of interconnection or transmission delays. However, for those delays that go beyond five years from execution, it reduces the fixed-price term.

7. **Contract Term:** The fixed-price contract term should be 25 years or longer in line with utility requests for proposals (RFP), and it should, at a minimum, not be shorter than RFP PPAs.

8. **Default for Failure to Meet Scheduled COD/Damages/Termination:** A small QF 20 MW or under should have the option to unilaterally terminate within first couple years after contract execution. There are many issues that may arise in facility development, and this would incentivize a QF to terminate earlier. As Staff noted, sufficient time is needed for a utility to acquire replacement power. This proposal would provide an incentive for QFs to provide that advance notice and create a healthy contract relationship. At a minimum Staff should clarify that the contract may be terminated under any means permissible under Oregon contract law. NewSun takes no position on the proposal to use liquidated damages and looks forward to hearing what level of liquidated damages Staff would propose. The liquidated damages should be discretely limited to a reasonable number so as to not discourage QF development and/or financing. NewSun generally does not feel that changes are needed to the status quo. NewSun affiliates paid damages this year, and that combined with the lost investment is sufficient to deter speculative PPAs. By adding additional flexibility to reach COD, as NewSun recommends above, many of the concerns in this section would be mitigated.

9. **Ability to Come Online Prior to Scheduled COD:** There should be no restrictions whatsoever on a QF's ability to come online early. It is inconsistent with PURPA's must-purchase obligation. Limiting the COD to a very narrow time frame raises a lot of concerns given that the interconnection process and its delays have been a consistent and continuing factor in delaying commercial operations. It is incredibly difficult to pin down a precise date because that process has proven unpredictable. Trying to pinhole a QF to such a narrow window is like trying to land on the moon. This is because the QF is entirely at the mercy of the utility of the utility interconnection process. The PUC should be providing greater flexibility, not less. Further, these tighter windows would be a material change to the investment backdrop.

   If the Commission is concerned about stale prices at the end of fixed-price term, then there is no reason to make it unreasonably difficult for a QF to come online sooner and commence its fixed-price term sooner. Additionally, historically, the pricing earlier in the PPAs is also lower (essentially Mid-c pricing until the deficiency period starts), therefore, allowing a QF to come online early may result in a lower overall price. NewSun believes that QFs are more likely to be late than to be early, so this scenario may rarely, if ever, arise. As such, there should be little to no reason to penalize a QF if it is able to come online before its originally expected COD.

10. **Eligibility for Standard PPA – Nameplate Capacity Rating:** The minimum size threshold for standardized PPAs should be raised to 20 MW. The 20 MW size threshold would be consistent with the projects that qualify as "small generators" under FERC's *pro forma* open access interconnection tariff and under PacifiCorp's recently approved small generator interconnection procedures in Oregon. This is also consistent with what the Oregon legislature considers to be community-based small-scale renewable energy

projects.[2] NewSun also supports Staff's proposal to measure the size based on the "send out" power production capacity of the facility as a whole as was recently clarified in FERC's Broadview decision. Finally, NewSun believes that there is value in providing an option for a modified standard PPA for larger projects up to 80 MW perhaps with additional security posted. NewSun has found numerous terms proposed by utilities in the non-standard agreements to be entirely unreasonable and unworkable. In addition, disputes could be avoided through clearer contracting requirements.

11. **Eligibility for Standard PPA – Same Site Rule:** NewSun appreciates that Staff is attempting to simplify the siting requirements to align with FERC's new rule; however, there are some consequences that do not appear to have been considered. FERC's rule is aimed at ensuring that one owner does not have more than 80 MW at the same site, but the proposed rule is aimed at creating a threshold for standard PPAs and rates. Given these two purposes, we believe the two definitions of site do not need to be consistent. Additionally, we currently have clarity on shared gen tie and co-development, and we believe the proposed rule will create ambiguity. NewSun supports moving to a one-mile rule but doing so should not undermine the current clarity. NewSun would appreciate additional discussion on this topic.

12. **Modification to QF Prior to COD and After COD:** PPAs should permit reasonable modifications to the facility both before and after COD, but such modifications should be subject to some clear sideboards. For example, changes should be permitted pre-COD because of equipment changes and reductions should be allowed where necessary to avoid major interconnection costs or siting development issues. After COD, NewSun would recommend some sort of an established metric around the originally contracted size, such that as long as the modifications keep within that metric, the QF is entitled to the contract price. Outside of that, the additional output would be paid at a set discount of the original contract price. This creates a clear and certain path for the treatment of any future modifications. At a minimum, the utility should not be permitted to terminate the PPA if such modifications are made, particularly given its must-take obligations under PURPA

13. **Default Security:** There should be no security for small projects up to 20 MW. The PPAs should also allow for a surety bond as a form of security.

As noted in Staff's initial proposal, there are additional topics Staff intends to address and to raise as this docket progresses. NewSun provides the below additional recommendations to address in this docket:

1. Limit what information is required to go in the PPA exhibits.
2. Clarify that all net output will be compensated at the full purchase.
3. Place damages or penalties on utilities for evading their PURPA obligations.
4. Clarify that if a facility becomes partially constructed, it can still energize.
5. Confirm that utility consent is not required for assignment of the PPA as collateral to the lender for financing.

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[2] ORS 469A.210.

6. Restrict initial information requests and limit utility discretion around design or other criteria inconsistent with their mandatory purchase obligation.
7. Allow QFs to request indicative pricing for multiple variations on the same project.
8. Consider how the rules can be structured to help meet the community based renewable energy standard in ORS 469A.210.

NewSun looks forward to continuing to work on these issues with Staff and stakeholders.

Sincerely,

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