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 SUPPLEMENTAL 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 to the Public Utility Commission of Oregon ("Commission" or "OPUC") these Supplemental Comments on Group 1 Issues as follow-up to the discussion at the workshop on April 1, 2022. Specifically, these Supplemental Comments: (1) provide edits to more clearly reproduce the Commission's existing five-mile rule into the administrative rules, (2) provide additional, recently issued, authority that supports the QF Trade Associations' position with respect to New Rule #3 that the Commission should not condition access to a standard contract upon filing or updating a Form No. 556 with the Federal Energy Regulatory Commission ("FERC"), and (3) identify certain issues for further discussion if another workshop is held on April 8, 2022.

II. SUPPLEMENTAL COMMENTS

A. Rule # 2: Edits Are Necessary to More Clearly Set Forth the Existing Five-Mile Rule in Staff's Proposed Rule

As Staff's Report initiating the formal rulemaking explained, Staff's Proposed Rule was intended to "codif[y] the . . . previous decisions of the Commission regarding . . . the five-mile rule used to determine whether a qualifying facility is a single facility for the purpose of determining eligibility for standard prices or the standard purchase agreement."[1] Although Staff's Report correctly noted that "no stakeholder opposes adopting a rule to implement the current policy," Staff also noted that "the stakeholders have had objections to some of Staff's draft language implementing the Commission's 'Five-mile rule.'"[2] In opening comments in the formal rulemaking, the QF Trade Associations explained Staff's Proposed New Rule #2 attempts to codify the existing five-mile rule, but in an attempt to reconfigure the language initially adopting the rule, Staff's current version of the rule created some potential ambiguity.[3] This section of Supplemental Comments provides an edit to Staff's proposed rule language and reiterates the importance of two key elements of the five-mile rule.

It appears that there is a difference in opinion between the QF Trade Associations and Portland General Electric Company ("PGE"), PacifiCorp dba Pacific Power ("PacifiCorp"), and Idaho Power Company ("Idaho Power") (collectively the "Joint Utilities") regarding the meaning of the existing five-mile rule. The QF Trade Associations' position is that it applies to built

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1 Staff Report at 9 (Oct. 14, 2021). Note that Staff and all the stakeholders describe the Commission's policy as a "rule"; however, it is not a formal rule adopted and included in the Oregon Administrative Rules and was adopted in an order in contested case proceeding.

2 Staff Report at 9.

3 QF Trade Associations' Comments at 5-6 (March 11, 2022).

facilities and that common ownership is appropriate during the development process. The Joint Utilities appear to take the position that the rule applies to proposed facilities, regardless of whether they are ever constructed. The QF Trade Associations caution the Commission on providing a definitive interpretation of the existing five-mile rule in this forward-looking rulemaking. There may be projects that were developed prior to commercial operation in a way consistent with the QF Trade Associations' interpretation of the rule, but inconsistent with the Joint Utilities' apparent interpretation of the rule. The Commission should not inadvertently interpret existing contractual rights or provide the Joint Utilities with a tool to terminate now operating projects, if any, that may not satisfy the Joint Utilities' interpretation of existing policy. This supports simply codifying the existing rule in the Oregon Administrative Rules, or, in the alternative, revising the rule to be consistent with whatever forward looking policy the Commission elects to adopt in this rulemaking.

1. Background on the Five-Mile Rule

The five-mile rule was originally set forth in a partial stipulation approved by the Commission in Docket No. UM 1129 (the "UM 1129 Partial Stipulation").[4] It measures the facility's capacity, for purposes of access to the standard rates or standard contract, as "the nameplate capacity of the QF, together with any other electric generating facility using the same motive force, owned or controlled by the same person(s) or affiliated person(s), and located at the same site[.]"[5] It defines "same site," in pertinent part, as "a five-mile radius" as measured

[4] *In re Investigation Related to Electric Utility Purchases From Qualifying Facilities*, Docket No. UM 1129, Order No. 06-538 at 10-11 (Sept. 20, 2006) (approving Partial Stipulation); Docket No. UM 1129, Order No. 06-586, Appendix B (Oct. 19, 2006) (amending Order No. 06-538, to include a copy of the Partial Stipulation as Appendix B).

[5] Docket No. UM 1129, Order No. 06-586, Appendix B at 11.

from the respective QFs' "generating facilities or equipment providing fuel or motive force."[6] The five-mile rule also includes two very important clarifications that should be retained if the five-mile rule is to be retained as the qualification criteria – (1) the ability of a common entity to develop two or more adjacent projects, and (2) the ability for operational facilities to share common interconnection and infrastructure not supplying fuel or motive force.

First, the common developer rule in the UM 1129 Partial Stipulation provides as follows:

> As used above, the term "same person(s)" or "affiliated person(s)" means a natural person or persons or any legal entity or entities sharing common ownership, management or acting jointly or in concert with or exercising influence over the policies or actions of another person or entity. *However, 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*.[7]

Second, the common interconnection and infrastructure rule in the UM 1129 Partial Stipulation provided 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.[8]

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6 Docket No. UM 1129, Order No. 06-586, Appendix B at 11.

7 Docket No. UM 1129, Order No. 06-586, Appendix B at 11 (emphasis added).

8 Docket No. UM 1129, Order No. 06-586, Appendix B at 11-12. The former "passive investor" exception to the Partial Stipulation's Definition of Person, or Affiliated Person, as contained in Order No. 06-586, Appendix B at 11, was modified by the Commission in Docket No. UM 1610, and it is not discussed in these Supplemental Comments. *In re Investigation Into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 14-058 at 26-27 (Feb. 24, 2014).

The Oregon Department of Energy's ("ODOE") testimony describing the Partial Stipulation, which was relied upon by the Commission, further explained: "This definition now also includes the words 'and infrastructure' to make it clear that infrastructure such as service roads can be shared among separate project owners, without the facilities being considered a single QF. But we also made it clear that this infrastructure may not include infrastructure that provides motive force or fuel."[9]

As noted in the QF Trade Associations' prior comments, these two provisions are critical elements of the five-mile rule that have been relied upon by Oregon's small-scale renewable energy developers since approval of the five-mile rule in 2006. The common developer rule allows for common efforts by a single entity to develop nearby facilities while ensuring that the nearby facilities will be separately owned once development is complete and operation begins. The common interconnection and infrastructure rule allows operating facilities to jointly own and use interconnection and other infrastructure, such as roads, to avoid the unnecessarily duplicative energy infrastructure that would otherwise clutter the landscape without such an exception. These aspects of the rule should be unambiguously included if the five-mile rule is to be included in administrative rules.

2. The QF Trade Associations' Edits to Staff's Proposed Rule

Staff's Proposed Rule was intended to reproduce the above-quoted elements of the five-mile rule, but, in reconfiguring the language, Staff inserted words and formatting that could easily lead to confusion and disputes. The pertinent provisions of the five-mile rule and its

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[9] Docket No. UM 1129, ODOE/8, DeWinkel/4 (Jan 20, 2006); *see also* Docket No. UM 1129, Order No. 06-538 at 11 (relying on the "supporting testimony" filed with the Partial Stipulation).

common developer and interconnection provisions as proposed by Staff's Proposed Rule are set forth below with the QF Trade Associations' proposed edits:

> (4) The determination of nameplate capacity for purposes of determining whether a qualifying facility meets the size criteria in subsections (1) and (2) is based on the cumulative nameplate capacity of the qualifying facility seeking the standard avoided cost prices or power purchase agreement and any other Facilities owned by the same person(s) or affiliates(s) located on the same site.
>
> (a) Qualifying ~~F~~facilities are located on the same site ~~as a qualifying facility~~ if the ~~Facilities~~ generating facilities or equipment providing fuel or motive force associated with the qualifying facilities are located within a five-mile radius ~~of the qualifying facility~~ and the qualifying facilities use the same source of energy or motive force to generate electricity ~~as the qualifying facility or, are otherwise associated with, the qualifying facility~~.
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> (b) For purposes of this section:
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> (A) Person(s) are natural persons or any legal entities.
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> (B) Affiliate(s) are persons sharing common ownership, ~~or~~ management, or acting jointly or in concert with, or exercising influence over, the policies of another person or entity~~, or wholly owned subsidiaries that do not have common ownership~~.
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> (C) To the extent a person or affiliate is a closely held entity, a "look through" rule applies so that project equity held by LLCs, trusts, estates, corporations, partnerships, and other similar entities is considered to be held by the owners of the look through entity.

* * * *[10]

[10] Subpart (c) is omitted because the QF Trade Associations are not currently proposing edits to that section as proposed. The QF Trade Associations understand other parties may be proposing edits to the family-owned and community-based provisions to the rule and reserve the right to comment separately on such proposals.

> (d) Notwithstanding subsections (4)(a) and (b), two or more qualifying facilities that otherwise are not owned or operated by the same person(s) or affiliates(s) ~~or are not otherwise associated~~ will not be determined to be a single qualifying facility ~~or have~~ by utilizing a shared interest or agreement regarding interconnection facilities, interconnection-related system upgrades, or any other infrastructure not providing motive force or fuel. ~~For the purposes of this subsection,~~ Two or more qualifying facilities will not be held to be owned or controlled by the same person(s) or affiliates solely because they are developed by a single entity.[11]

The above edits attempt to reproduce, as closely as possible, the meaning of the words used in the UM 1129 Partial Stipulation into the new format Staff has proposed. The need for the specific edits is explained below:

- The QF Trade Associations are especially concerned with Staff's Proposed Rule's introduction of the additional limiting factor of "otherwise associated" in subparts (4)(a) & (d), which is undefined, ambiguous, and guaranteed to cause confusion as to whether it is intended to somehow limit applicability of the common developer or common interconnection and infrastructure rules. The "otherwise associated" terminology is not in the UM 1129 Partial Stipulation and should be deleted.
- Next, the language in the second sentence of Staff's Proposed Rule subpart (4)(d) limiting the common developer rule to "this subsection" is confusing. It could lead to misunderstandings as to whether this critical provision applies to the

[11] Staff Report, Attachment A at 10-11 (proposed rule 860-029-XXXX [New Rule #2]) (QF Trade Associations' deletions in red strikethrough and additions in red underline).

whole five-mile rule or just some subpart of the rule, such as just the language enumerated as (4)(d) and not also the rest of (4), and therefore the QF Trade Associations recommend deleting that language.

- The last clause in subpart (4)(b)(B)'s description of an Affiliate – "or wholly owned subsidiaries that do not have common ownership" – is very confusing because two wholly owned subsidiaries would, by definition, have common upstream ownership. This additional clause is unnecessary and not included in the UM 1129 Partial Stipulation, and it should also therefore be deleted.
- The additional edits in subsection (4)(a) are intended to clarify that the UM 1129 Partial Stipulation was written to ensure that the measure of the distance between two facilities is the distance from the generating equipment and equipment providing motive force or fuel, not some other element of the facilities. This aspect of the UM 1129 Partial Stipulation was specifically called out by the testimony supporting it and ensures no confusion exists as to the distance measurement.[12]
- Finally, the first sentence of subpart (4)(d) is missing the words "by utilizing" from the UM 1129 Partial Stipulation's description of the common interconnection and infrastructure rule, which makes the sentence grammatically

[12] Docket No. UM 1129, ODOE/8, DeWinkel/3-4 (discussing terminology used and stating: "This added language focuses on the equipment that is specifically associated with the generation of electricity and the equipment providing fuel or motive force. For example, a large well that provides the hot water for a geothermal electricity generating plant is considered 'equipment providing fuel or motive force', but the geothermal reservoir is not.").

incorrect, confusing, and ultimately renders the rule very difficult to understand.

The words "by utilizing" should be included.

The QF Trade Associations recommend adoption of these edits if the five-mile rule is to be retained in its current form.

3. Response to Joint Utilities' Reply Comments

The Joint Utilities appear to take issue with any common "ownership" of two unbuilt facilities, or perhaps certain development assets prior to the existence of any actual facility.[13] The Joint Utilities' Reply Comments selectively quote the testimony submitted by ODOE upon which the Commission relied in adopting the UM 1129 Partial Stipulation.[14] However, they have not proposed any edits to the rules and their position is far from clear.

The common developer rule is a clarification to the following sentence defining "Person" or "Affiliated Person" in the UM 1129 Partial Stipulation: "[T]he term 'same person(s)' or 'affiliated person(s)' means a natural person or persons or any legal entity or entities sharing common ownership, management or acting jointly or in concert with or exercising influence over the policies or actions of another person or entity."[15] And the full relevant quote of the ODOE testimony regarding the common developer rule is as follows:

> We included the following language in the Definition of Person(s) or Affiliated Persons:
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> > 'However, 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.'

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13 Joint Utilities' Reply Comments at 7-8 (March 25, 2022).
14 Joint Utilities' Reply Comments at 7-8 (March 25, 2022).
15 Docket No. UM 1129, Order No. 06-586, Appendix B at 11.

> This language was added because several intervenors believed that the first sentence in this paragraph is not clear about the role of a developer. *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.[16]

Therefore, the intent was clearly to allow for common development efforts of nearby proposed facilities without violating the five-mile rule. The ODOE testimony used the future tense – *will own* – because the rule allows common development so long as the future facilities will be owned by different entities. Development ends when a facility is successfully developed and placed in service, and the point in time for assessing impermissible affiliation thus occurs at energization. By definition, a common developer of two adjacent facilities would be the primary party responsible for key development assets and contract rights prior to operation. There is no reason to change this rule because it supports the successful development of Oregon's renewable energy resources.

In the related PURPA context, FERC has consistently concluded the relevant date for determination of whether a QF meets the ownership and affiliation provisions and other qualifying criteria in the PURPA statute itself is the date of first energization: "by definition, a facility cannot be a cogeneration facility before it produces electric energy, whether the facility satisfies the statutory and regulatory requirements for qualifying status before the facility produces electric energy is irrelevant."[17] FERC has applied this precedent extensively in the context of pre-2005 restrictions against utilities owning more than 50 percent equity in a QF,

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16 Docket No. UM 1129, ODOE/8, DeWinkel/3 (emphasis added).

17 *See CMS Midland, Inc*., 50 FERC ¶ 61,098, at 61,277-78, 61,280 (1990), *aff'd Mich. Municipal Coop. Group v. FERC*, 990 F2d 1377 (D.C. Cir. 1993).

with respect to both small power production facilities and cogeneration facilities.[18] More recently, FERC has confirmed that even under its new 10-mile rule, facilities will not be considered to be at the same site if they will be separately owned, stating as follows: "Definitionally, if the facilities are not owned by the same person(s) or its affiliates, then the issue of compliance with the one-mile rule, even as revised in this final rule, becomes irrelevant. *See* 18 CFR 292.204(a)(1). That is, two facilities owned by two different persons are definitionally not located at the same site."[19]

Although it is not entirely clear what the Joint Utilities are proposing, the QF Trade Associations would object to any modifications to the existing or proposed five-mile rule that would undermine use of the common developer rule or otherwise deny access to a standard

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18 *See Birchwood Power Partners, L.P.*, 65 FERC ¶ 62,048, 64,064 (Oct. 15, 1993) (certifying proposed facility even though it "does not currently satisfy the ownership requirements" because it will have proper ownership in place before energization); *Scrubgrass Generating Company L.P.*, 56 FERC ¶ 62,062, 63,070 (July 26, 1991) (noting "Scrubgrass does not currently satisfy the ownership requirements of section 292.206 of the Commission's regulations", but "the electric utility partners will be entitled to no more than 50% of the stream of benefits from and will have no more than 50% of the control of Scrubgrass"; thus, "Based entirely on the facts represented to exist as of the date the facility first produces electric energy, the facility will satisfy the ownership criteria of section 292.206 of the Commission's regulations."); *Citizens for Clean Air & Reclaiming Our Env't v. Newbay Co*., 56 FERC ¶ 61,428, 62,532-33 (1991) (reaffirming ownership requirements); *Georgetown Cogeneration, L.P*., 54 FERC ¶ 61,049, at 61,185 (1991) (reaffirming QF ownership status is determined upon initial energization); *CMS Midland Inc*., 38 FERC ¶ 61,244, 61,827-28 (1987) (finding applicant "will meet the ownership criteria after the initial operation date"); *see also Coso Energy Developers*, 86 FERC ¶ 61,209, 61,749 (March 1, 1999) (applying same rule for 13 separate QFs to be transferred and rejecting argument that applicant should make "a more definitive showing that [electric utility holding company] will not continue to control the facilities following divestiture of a 50 percent interest").

19 Order No. 872, 172 FERC ¶ 61,041, P 509, n.797 (July 16, 2020); *see also id.* at P 511, n.799.

contract any time a utility believes the common developer of two proposed facilities is somehow too involved in the development effort prior to operation of the facilities.

B. New Rule #3: Recent FERC Authority Regarding Requirements for a Form 556

The QF Trade Associations provided extensive comments explaining why the Commission should not adopt a rule that would allow a utility to withhold a draft standard contract or delay execution of a standard contract on the basis that a QF developer had not filed or updated a Form No. 556 with FERC.[20] The QF Trade Associations explained that FERC does not require that the Form No. 556 be filed until the facility begins operation, and that therefore the Commission should not allow utilities to condition access to a standard contract on filing the form at FERC or, if the QF developer elects to file the Form No. 556, that every detail regarding the proposed facility on file with FERC precisely matches the facility described in the proposed standard contract. A state cannot require a QF, which is a creature of federal law, to file the Form No. 556 in order to obtain a draft or even executed power purchase agreement when FERC itself does not require the QF to prepare the form until after the QF is commercially operational (which is well after contract execution).

Since the time that initial comments were filed, FERC has issued a decision, *Irradiant Partners, LP*, 178 FERC ¶ 61,215 (March 24, 2022), which further clarifies that FERC does not require that the Form No. 556 be filed until the facility is energized. In *Irradiant Partners*, Form No. 556s had been filed for a portfolio of small power production facilities under development but not yet in operation, and the question arose as to whether a recertification form was required upon a change in proposed ownership of the proposed facilities. FERC explained: "First, small

[20] QF Trade Associations' Joint Comments at 6-11 (March 11, 2022).

power production facilities are not required to obtain or maintain QF certification to qualify for exemption from section 205 of the FPA until such time as the facility begins operations and makes an otherwise FPA-jurisdictional sale."[21] Because Irradiant's facilities were not yet operational, FERC found "that there is no requirement for the facilities to be certified as QFs at this time."[22] Rather, "once one of the small power production facilities becomes operational – and assuming that the facility is making otherwise FPA jurisdictional sales – the owner or operator of that facility will need to file an updated Form No. 556 for recertification to re-obtain QF status in order to benefit from the exemption from section 205 of the FPA."[23] Finally, FERC rejected the request for a waiver of the requirement to update forms upon operation of the proposed facilities.[24] Thus, FERC has reconfirmed that there is no requirement to file a Form No. 556 whatsoever prior to operation, and further that even where the developer of the proposed facility elected to file the Form No. 556 prior to operation, there is no requirement to update such form to reflect changes in the proposed facility under development until the facility begins operating.

Relatedly, FERC's rules do not require QFs with a net power production capacity of less than 1 MW to ever file the Form No. 556, even after operations begin.[25] Thus, the Joint Utilities' proposal would be doubly unreasonable for QFs under 1 MW in capacity because it would

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21 *Irradiant Partners, LP*, 178 F.E.R.C. ¶ 61,215, at P 12.
22 *Irradiant Partners, LP*, 178 F.E.R.C. ¶ 61,215, at P 12.
23 *Irradiant Partners, LP*, 178 F.E.R.C. ¶ 61,215, at P 12.
24 *Irradiant Partners, LP*, 178 F.E.R.C. ¶ 61,215, at PP 12-17.
25 18 CFR § 292.203(d) ("Any facility with a net power production capacity of 1 MW or less is exempt from the filing requirements of paragraphs (a)(3) and (b)(2) of this section.").

require a QF to file the Form No. 556 with FERC, even though FERC itself does not require the filing.

This additional authority further supports the QF Trade Associations' position that the Commission should not permit the utilities to condition access to standard contracts on a federal requirement to file the Form No. 556 that federal law does not even require such QF developers to file in the first instance. Any such pre-operational filing requirement would invite disputes over whether the contents of the form precisely match the design and plans for the facility proposed for a draft standard contract and frustrate efforts of small QFs from entering into standard contracts.

C. Issues in Group 1 that May Warrant Additional Discussion in a Workshop

At the conclusion of the April 1st workshop, parties were requested to identify any additional topics that should be discussed if a further informal workshop is held on April 8, 2022. After considering additional potential topics, the QF Trade Associations identify the following potential topics:

- Creditworthiness Requirements: Proposed Rule OAR 806-029-0120(16) & (17) provides that a liquid form of security is required for QFs that do not meet the purchasing utility's "creditworthiness requirements." However, the rules do not propose any specific limitations or criteria for a utility to use in determining whether a particular QF owner or developer is creditworthy. Thus, in evaluating the Proposed Rule and potential revisions to it, the QF Trade Associations recommend that if a further workshop is held, the Joint Utilities should explain the following:

- What their internal creditworthiness requirements are and whether they have been approved by the Commission?
- How often such criteria change and whether there is any Commission oversight of such changes?
- How the criteria would be applied to typical types of small QFs, e.g., irrigation district-owned project, project-specific companies, etc., and what, if any, types of small QF owners would typically be able to meet the creditworthiness criteria?

The QF Trade Associations also welcome the opportunity to address any other issues useful to the Administrative Law Judges and Staff.

III. CONCLUSION

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

Dated this 6th day of April 2022.

Respectfully submitted,

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