June 15, 2020

Via Email

Chair Megan Decker
Commissioner Letha Tawney
Commissioner Mark Thompson
Oregon Public Utility Commission
201 High Street SE, Suite 100
Salem, OR 97301-3398

RE: Report on Executive Order 20-04 Comments

Dear Commissioners:

I. INTRODUCTION

The Renewable Energy Coalition (the "Coalition") submits these comments responding to the Oregon Public Utility Commission (the "Commission") request for written comments addressing how the Commission should implement Governor Brown's Executive Order 20-04 ("EO 20-04"). EO 20-04 recognizes that there is limited time to act to avert catastrophic climate change and that various state agencies, including the Commission, have both the authority and the obligation under Oregon law to drive reductions in greenhouse gas ("GHG") emissions. The Coalition appreciates the opportunity to provide its take on these important issues. The Coalition respectfully requests that the Commission think broadly and act boldly to implement EO 20-04. The Coalition views the Commission's draft report as a step in the right direction, but there is still a long way to go. The Commission should prioritize taking steps that improve the

Commission's implementation of the Public Utility Regulatory Policies Act ("PURPA"), which has untapped potential to significantly reduce GHG emissions.

PURPA is highly relevant to this discussion of EO 20-04, because PURPA exists to foster cleaner sources of generation. The federal PURPA has always aimed to reduce use of fossil fuels by increasing development of renewable hydro, wind, solar, biomass, waste, or geothermal resources, as well as efficient cogeneration facilities.[1] The statute specifically requires the Federal Energy Regulatory Commission to promulgate regulations "to *encourage* cogeneration and small power production" including regulations that "require electric utilities to offer to . . . purchase electric energy from such facilities."[2] FERC's regulations in turn require state regulators to further this goal. Similarly, Oregon's PURPA aims to "[p]romote the development of a diverse array of permanently sustainable energy resources using the public and private sectors to the highest degree possible."[3]

The Coalition and its members offer these comments from their shared perspectives as experts on the problems and possibilities in PURPA implementation. The Coalition is comprised of nearly forty members who own and operate over fifty large and small qualifying facility ("QF") projects throughout the region. The majority of the Coalition's members have been pioneers in the renewable industry, establishing some of the first PURPA contracts and fighting to maintain their right to sell renewable energy, primarily to monopoly investor owned electric utilities ("IOUs"), ever since. Together, they established the Coalition in 2009. The Coalition's mission is to support all kinds of QFs with technical and regulatory expertise needed to navigate PURPA. Much of the Coalition's focus is on regulatory activism at the state level and assisting

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1 *FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982).
2 16 U.S.C. § 824a-3(a) (emph. added).
3 ORS 758.515(2)(a).

new and existing QFs in negotiating their power purchase agreements ("PPAs") and interconnection agreements with regulated IOUs.

EO 20-04 provides a timely opportunity for the Commission to recognize the rising threats of climate change as well as monopoly power. IOUs currently own the majority of existing renewable generation, and are poised to own, the majority of the new renewable generation in and serving Oregon because of their reluctance to purchase power from independent power producers like REC's members. Oregon's rules and policies implementing PURPA have also been a significant obstacle. For example, while QFs in Oregon generally provide lower cost and more beneficial electricity than the IOUs,[4] they are not adequately compensated for their electricity sales. Similarly, the inability to obtain fair, just and reasonable interconnection service is limiting independent power producers' market operations. In short, competition in the energy sector is at risk. This warrants the Commission's careful consideration.

[4] The utilities often argue that QFs are more expensive. While there have been brief periods of time in which this is true, over the history of PURPA and most periods of time, this is false. *Qualifying Facilities Rates and Requirements; Implementing Issues Under PURPA*, FERC Docket Nos. RM19-15-000 & AD16-16-000, Comments of the Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association, Renewable Energy Coalition, and Oregon Solar Energy Industries Association at 32 (December 3, 2019) ("the all-in costs approved by the Idaho PUC for Idaho Power's non-QF generation plants to the average annual costs actually paid to QFs under such long-term contracts in a recent year, and demonstrates that the costs of the PURPA facilities are lower than the approved costs for all but one of those non-QF plants."); The Community Renewable Energy Association's Testimony in Support of HB 2857 and HB 3274 Oregon Small-Scale Renewable Facilities and Strengthening the Public Utility Regulatory Policies Act at 5 (March 26, 2019, House Energy and Environmental Committee) (showing that PGE's contemporaneous Schedule 201 prices were lower than PGE's Biglow 1, Biglow III and Tucannon wind resources.).

How the Commission responds could affect not only Oregon but the region. In the Coalition's experience before utility commissions throughout the West and Northwest, Oregon's direction tends to have a ripple effect throughout the region.

In these initial comments, the Coalition recommends that the Commission take a hard look at the farthest extents of its legal authority. The Coalition believes there are many actions to reduce GHG emissions that are well within the Commission's legal authority. More fully implementing PURPA is one area in which the Commission's authority and obligation are clear, which makes prioritizing it a logical choice.

II. COMMENTS

A. The Commission Should Think Broadly and Boldly about Potential Actions

EO 20-04 calls upon the Commission and other agencies to exercise "any and all authority and discretion vested in them by law."[5] To comply, the Commission must stretch its jurisdictional limits. The EO does not ask the Commission to do only what is *clearly* within its authority but to do *all* that it is authorized to do, and the Commission has broad authority to act.

Oregon courts have recognized that the Commission's enabling statutes are broad and are to be liberally construed.[6] These statutes include Oregon Revised Statute ("ORS") 756.040, which outlines the Commission's general powers and calls upon the Commission to "supervise and regulate every public utility and telecommunications utility in this state, and to do all things

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5 EO 20-40 at 5.

6 *E.g., Gearhart v. Pub. Util. Comm'n*, 356 Or 216, 244, 339 P.3d 904, 921 (2014) ("the PUC's statutory authority is phrased in sweeping terms"); *see also Springfield Educ. Ass'n v. Springfield Sch. Dist. No.19*, 290 Or 217, 230, 621 P.2d 547, 556 (1980) (recognizing the legislature could have provided the Commission with a specific and limited mandate but instead "empowered [the Commission] to regulate and, in so doing, to make delegated policy choices of a legislative nature within the broadly stated legislative policy").

necessary and convenient" to do so.[7] The Commission's overarching mandate is to protect customers and to balance the interests of regulated utilities and customers.[8] Other statutes, such as ORS 758.515, make clear that this mandate includes the following: 1) promoting the development of a diverse array of permanently sustainable energy resources; 2) allowing for diverse ownership of generation; 3) increasing the marketability of electric energy produced by qualifying facilities; and 4) creating a settled and uniform institutional climate for qualifying faculties.[9] In short, the Commission exists to ensure customers receive adequate services at reasonable costs by promoting competition, renewable energy and the independent ownership of electric generation.

The Coalition understands that the Commission has limited resources with which to fulfil its mandates, such as implementing EO 20-04.[10] The Coalition urges the Commission to think broadly about how the energy sector could evolve to reduce its carbon footprint.[11] Many scholars view the historical purpose of regulatory commissions as to substitute for the competitive forces that, if present, would pressure utilities to provide adequate service at reasonable rates.[12] The Commission has the statutory mandate to go beyond simulating competitive forces, and to actively promote them. As the Commission considers various ways to implement EO 20-04, the Commission may benefit from recognizing where competitive forces

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7 ORS 756.040(2).

8 *Id* at (1).

9 *See* ORS 758.515.

10 Or. Pub. Util. Com'n, *Report on Executive Order 20-04* at 12 (2020).

11 The Coalition notes some of this thinking and stakeholder engagement has already been done in prior discussions of SB 978. *See generally* Or. Pub. Util. Com'n, *SB 978 Actively Adapting to the Changing Electricity Sector* (2018).

12 *See generally* J. Lazar, Regulatory Assistance Project, *Electricity Regulation in the US: A Guide* (2nd Ed.) at 3-7 (2016), available at https://www.raponline.org/wp-content/uploads/2016/07/rap-lazar-electricity-regulation-US-june-2016.pdf.

could themselves act to realize the goals of EO 20-04. In turn, then, the Commission's task needs not be to achieve those goals but instead to facilitate and drive competition towards realizing the goals. Where the commission has opportunities to foster competition, the Commission can both reduce its administrative workload and fulfil its mission.

The Coalition does not attempt to cover in these initial comments all of the opportunities to foster competition that the Commission could pursue. Instead, the Coalition focuses its recommendation of priority actions specifically on fostering competition through improving the Commission's implementation of PURPA.

B. The Commission Should Prioritize its Implementation of PURPA

For decades, PURPA has provided an avenue for facilitating the development and operation of clean and affordable energy resources. PURPA is the only federal statute that mandates competition in the electric industry and has been most important historic tool in lowering electricity costs in the modern era by creating independent power producers. While there are additional opportunities to sell power to utilities today, PURPA remains relevant today because of monopsony utility purchasers, which is especially for small scale developers.

Both the federal and Oregon PURPA statutes require utilities to procure clean power from QFs at no more than the utilities' avoided-cost prices.[13] The Commission is one entity responsible for ensuring compliance, yet there are few new QFs in Oregon and existing QFs are struggling. The Commission could improve its implementation of PURPA and so facilitate market forces that drive carbon reductions in accordance with EO 20-04. While there are numerous areas for improvement, the Coalition highlights two areas in which significant changes

[13] PURPA, Pub. L. 95–617, 92 Stat. 3117, § 210(f); 16 USC § 824a-3(f); ORS 758.505 to 758.555.

could dramatically help meet the Governor's climate goals: 1) improving the interconnection process for all QFs; and 2) ensuring that existing QFs are paid for the capacity value that they provide utilities. These changes would help more renewable energy facilities come online and keep operating.

One barrier to the market that limits the entry of new QFs is restrictions on interconnection service, which may be the most important long-term issue. At a high level, interconnection service involves: 1) studying a new or an existing QF's proposed operations relative to existing IOU operations; 2) identifying equipment and technology necessary to enable the QF's operations to contribute to the IOU's operations; 3) and constructing and installing that equipment and technology. In Oregon, interconnection service is virtually a monopoly service, available only from the IOUs with few exceptions. Unfortunately, interconnection issues have become extremely controversial and major impediment to the development of non-utility owned renewable energy in Oregon. Interconnection customers are entitled to all the same statutory protections related to fair, just, reasonable and non-discriminatory rates as other customers. However, interconnection deserve greater attention because, while IOUs need retail customers to sell power to, the IOUs are competing against and can operate without the existence of independent power producers like QFs.

The Commission could significantly improve interconnection service by making portions of the service itself competitive and by changing the IOUs' pricing for non-competitive portions. While utilities will need to contribute their system data, the engineering studies, analyses, and construction are not tasks which only an IOU is capable of performing. Third-party consultants and contractors are available and ready to step into the IOUs' shoes to provide these portions of interconnection service. Therefore, the Commission can solve many interconnection issues by

fostering competition and reducing the need for interconnection customers to take service from a monopoly.

There are some aspects of the interconnection process that must be performed by the utility, but these aspects are not priced in a fair, reasonable, just, or non-discriminatory manner. On the contrary, many QFs suffer from recurring issues, including cost overruns, the gold-plating of services, and inaccurate (and untransparent) cost estimates. Interconnection and power deliveries are becoming more expensive and complicated, and prohibitive is certain circumstances. These issues associated with ever increasing interconnection costs could be mitigated or resolved if the Commission adopted new avoided cost pricing policies.

Existing QFs have the benefit of already entering the market, but they remain susceptible to inaccurate and unfair pricing policies. The first step in achieving the Governor's and this state's climate policies is ensuring that already operating renewable energy generators can continue to operate. All QFs are entitled by law to be paid the utilities' avoided-cost rates for all energy and capacity provided by the QFs. However, existing QFs are not currently compensated for all of the capacity they provide to the system. Under Oregon's standard QF policy, utilities pay QFs capacity payments for years in which the utility recognizes a capacity need, called a utility's "deficiency period." Over time, utilities' deficiency periods change. It is rare, if not impossible, for a QF to execute a PPA and receive a capacity payment in the early years of the PPA.

As a result, existing QFs typically receive capacity payments when their PPAs terminate, execute new PPAs, and do not receive capacity payments for several years. Stable cashflows are necessary to enable existing QFs to continue operations, undertake critical maintenance, and invest in efficiency upgrades. Unlike new QFs who have some limited flexibility to align the

start of their operations with the start of utility deficiency periods, existing QFs cannot adjust their existing contract termination dates. This problem threatens the viability of all existing QFs. Whether or not they will receive capacity payments could be the determining factor for whether a QF decides to renew its PPA or not. This could result in a perverse outcome where a capacity need could emerge specifically because existing capacity is not adequately compensated. The Coalition has been raising this issue since early 2013, and despite the Commission issuing some favorable orders over the years, the pricing paid to QFs continues to not include full capacity payments for existing QFs.[14]

The Commission should adopt clear requirements for utilities that ensure existing QFs that renew their PPAs are fully compensated for the services they provide, including capacity contributions. There are a number of ways in which this could occur, including but not limited to extend the prior capacity payments, and paying existing QFs for capacity if they commit to sell their electricity to their utility prior to contract termination. While it would not fully pay existing QFs for the capacity value they provide, the Commission could implement a levelization policy that brings forward higher payments in later contract years. This will at least allow existing QFs to avoid significant increases and decreases in their cashflows due to factors outside of their control.

III. CONCLUSION

The Coalition thanks the Commission and all of the stakeholders involved in this important process and looks forward to seeing the Commission's revised and expanded action

[14] In contrast, the Idaho Commission requires full capacity payments for existing and operating QFs, and the Washington Commission recently required full capacity payments for QFs in all years for utilities with a capacity need, including PacifiCorp and Puget Sound Energy.

plans for implementing EO 20-04. Compliance will require the Commission to act boldly, potentially in areas new to the Commission. As an initial priority, the Commission should focus on fostering competition, which is clearly within its jurisdiction. Specifically, the Commission should improve its implementation of PURPA, which has the potential to reduce GHG emissions. Authorizing third-party vendors to offer interconnection service and requiring IOUs to pay capacity payments to existing QFs are two improvements that would have significant benefits, both for the climate and for Oregon.

Sincerely,

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