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 UPDATED PROPOSAL

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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 in response to Staff's updated proposal related to contracting process and power purchase agreement terms dated April 29, 2021 (hereafter "Staff's Updated Proposal"). The QF Trade Associations appreciate Staff's collaborative efforts in this rulemaking process and, with some notable exceptions, the QF Trade Associations believe that the policy level proposals made by Staff's Updated Proposal would be a reasonable implementation of the Public Utility Regulatory Policies Act of 1978 ("PURPA") by the Public Utility Commission of Oregon ("OPUC" or "Commission").

However, as expressed in our comments dated April 30, 2021, the QF Trade Associations strongly oppose use of PacifiCorp's standard contract from Washington (hereafter "PacifiCorp's Washington PPA") as the template standard contract for all three utilities to use in Oregon. While Staff made a number of important and positive edits to that document, the QF Trade Associations continue to believe that document is not a reasonable starting point for discussions of a standard form for use in Oregon.

These comments will address two distinct subjects. First, we will first provide additional comments on certain subjects on the policy-level proposals included in Staff's Updated Proposal, including some of the issues raised by Portland General Electric Company ("PGE"), PacifiCorp, and Idaho Power Company ("Idaho Power") (collectively the "Joint Utilities"). Second, we will identify many additional flaws with PacifiCorp's Washington PPA that demonstrate that utility-

drafted document is not suitable for use as the template upon which Oregon's renewable energy policies and rules should be based. In both cases, if any issues are unaddressed, the silence on the subject does not necessarily reflect support for any one position.

The QF Trade Associations request that Staff provide additional clarification about the final rules and standard contract. As the QF Trade Associations' April 29, 2021 Comments describe, the QF Trade Associations strongly oppose discussion and negotiation of specific contractual provisions prior to reaching agreement or the Commission resolving critical policy issues. Similarly, it is unclear whether the final rules will primarily reflect policy decisions, similar to the current rules, or whether they will consist of specific standard contract language.

Finally, the QF Trade Associations request additional clarity regarding how this docket impacts non-standard contracts. Staff noted that this docket is limited to standard contracts; however, the policies adopted in this docket (and often the contract language) is relevant (and sometimes dispositive) to the negotiations of non-standard contracts. Staff should clarify which policies that are adopted in this proceeding will have an impact on non-standard contracts. This is particularly important given that non-standard contracting may be the predominant activity area for QFs going forward.

II. COMMENTS

A. Response to Staff's Updated Proposal

The QF Trade Associations provided detailed comments in response to Staff's Initial Proposal on March 30, 2021 (hereafter the "March 30th Comments"). For the most part, the QF Trade Associations' position on the individual issues has not changed, and therefore these comments will not restate our position on each issue. Instead, these comments will address new

or revised proposals by Staff's Updated Proposal and certain matters asserted by the Joint Utilities.

1. Eligibility for Draft PPA to begin contracting process

Staff's Updated Proposed Terms:[1]

QF has:

(1) Filed request for interconnection with host utility or appropriate transmission provider;

(2) provided evidence of meaningful steps to seek site control, including, but not limited to, an option to lease or purchase the site or an executed letter of intent or exclusivity agreement to negotiate an option to lease or purchase the site.

(3) Provided required information regarding facility (list of information approved by Commission).

*** Staff proposes to use PAC's informational requirements in Schedule 37, minus the "status of interconnection," as well as two of the information requirements included in the Joint Utilities' comments circulated earlier in this docket, as follows:**

PAC 37:

(a) demonstration of ability to obtain QF status; (b) design capacity (MW), station service requirements, and net amount of power to be delivered to the Company's electric system; (c) generation technology and other related technology applicable to the site; (d) proposed site location; (e) schedule of monthly power deliveries; (f) calculation or determination of minimum and maximum annual deliveries; (g) motive force or fuel plan; (h) proposed on-line date and other significant dates required to complete the milestones; (i) proposed contract term and pricing provisions as defined in this Schedule (i.e., standard fixed price, renewable fixed price); (j) status of interconnection or transmission arrangements; (k) point of delivery or interconnection.

Joint Utilities' Two Additional Requirements

a) Specific data re: latitude/longitude and site layout to allow evaluation of

[1] In quoting Staff's Updated Proposal, **Bolded** terms are added from Staff's Initial Proposal; ~~Strikethrough~~ terms are deleted from Staff's Initial Proposal.

FERC same site rule and Oregon's five-mile rule;

b) For a QF with battery storage system, clarification of the storage design capacity, storage system duration, net power output, description of technology used by battery storage system.

QF Trade Associations' Comments:

The QF Trade Associations supports Staff's Updated Proposal with respect to the requirement for site control for the reasons explained in our March 30th Comments. However, the QF Trade Associations have several concerns with Staff's proposal to adopt PacifiCorp's Oregon Standard Avoided Cost Schedule requirements. As explained below, the QF Trade Associations suggest the following revisions: 1) deleting the language "demonstration of ability to obtain QF status;" 2) revising the language "proposed on-line date and other significant dates required to complete the milestones;" and 3) revising the language "point of delivery or interconnection."

a. 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 Proposal to require a qualifying facility ("QF") to demonstrate the ability to obtain QF status in order to obtain a draft PPA from a utility.[2] Staff's proposal suggests adopting this requirement from PacifiCorp's current Oregon Standard Avoided Cost Rate Schedule,[3] so all utilities would follow the same requirement. The Joint Utilities have proposed a higher hurdle, which is that the developer or owner of an existing or proposed QF actually obtain QF status prior to starting the contracting process. Specifically,

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2 Updated Staff Proposal at 2.

3 Updated Staff Proposal at 2 (proposing to use PacifiCorp's schedule, which was previously known as Schedule 37).

the Joint Utilities propose that to obtain a draft PPA, a QF developer or owner must file a Form 556 with the Federal Energy Regulatory Commission ("FERC"), to serve the FERC Form 556 on the purchasing utility, "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."[4]

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."[5] 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

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4 Joint Utilities' Initial Comments in Response to Staff's Proposal at 5 [hereinafter Joint Utilities' Initial Comments].

5 *Indep. Energy Producers Ass'n v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 856 (9th Cir. 1994). This case was relied upon in *Franklin Energy Storage One, LLC v. Kjellander*, WL 265278 at *34 (D. Idaho 2020.).

intervene and protest the FERC Form 556 with FERC under the process outlined by federal law.[6] Adopting the Joint Utilities' proposal would effectively allow a utility to scrutinize or 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."[7] 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.[8]

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6 18 CFR 292.207(c)(1).

7 *West Penn*, 71 FERC at 61,496-61,497.

8 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

PacifiCorp has noted that, generally, developers provide a FERC 556 self-certification Form in order to demonstrate an ability to obtain QF status, which is notably a higher standard than simply showing an "ability" to obtain QF status.[9] 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."[10] 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.[11] 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.[12] PacifiCorp also creatively argued that Dalreed Solar's 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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to obtain assurances that go with having it filed, and requires it to be updated when changes occur. 18 CFR § 292.207(a).

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

10 Docket No. UM 2125, PacifiCorp's Answer to the Complaint at 21.

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

12 *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.

Requiring a completed FERC Form 556 or requiring the completed form to match the details provided when a draft contract is requested does not recognize how the actual contracting process works. The Joint Utilities are well aware of the contracting process; therefore, their 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 avoid 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 could drop during that delay, resulting in less profitable margins, which hinders a QF's ability to finance the project.[13]

Requiring the developer to have their project match in all material ways with the FERC Form 556 (that will change over time) is a significant change that requires projects to reach a higher level of completion prior to even being provided a draft PPA. However, the Joint Utilities

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13 *But see* ORS 758.515(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."); *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.").

do not inform the Commission that they are seeking a major policy change with this proposal, or justify why such a change is appropriate or reasonable.

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.

b. Milestones May Be Appropriate, But We Need a List of Approved Milestones

Another item on the list in PacifiCorp's Oregon Standard Avoided Cost Schedule that requires modification is the vague requirement for a list of "other significant dates required to complete the milestones."[14] While the QF Trade Associations are not opposed in principle to requiring the QF to provide a list of development milestones, any requirement must be transparent and clear to avoid confusion, abuse, and ultimately litigation. Rather than require a seemingly open-ended list of whatever dates the utility might ask for, the Commission should identify a single uniform list of milestones that QFs should provide, and require all three utilities to ask for only those specific milestones.

The QF Trade Associations note that this requirement, like several others, is intended to be informative for negotiations, and the Commission should make that purpose clear in its rules. While a utility may have questions or concerns about a QF's milestones, it and the QF can discuss and hopefully resolve those in the course of negotiations. What must not be allowed to

[14] Updated Staff Proposal at 2.

happen is for a utility to refuse to provide a draft PPA on the basis that it disagrees with a QF's selected milestones. The utility should raise any concerns with the milestones with the draft PPA. The requirement (if any) should be for the QF to provide the information and not for the utility to deem it acceptable or feasible. Allowing any sort of utility judgment will only introduce room for disagreement and litigation.

c. 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; however, the specific point for interconnection can change throughout the interconnection study process and sometimes even after the interconnection agreement has been executed. This is particularly the case for off-system projects which may be in the service territory of consumer owned utilities unfamiliar with the interconnection process, 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 the 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 point of interconnection, 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 point of interconnection then 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."[15] 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 points of interconnection, this would not be "materially" consistent with the FERC Form 556, and provide 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 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.

2. Eligibility for Executable PPA

Staff's Updated Proposed Terms:

All utilities:

(1) QF has satisfied informational requirements for draft PPA;

(2) No additional revisions to the draft PPA are requested or needed; **and**

(3) QF has submitted written request for final executable PPA. ~~; and~~

~~(4) QF has received a Cluster Study indicating interconnection within four years is possible or January 1 of the calendar year following the QF's participation in a Cluster Study, whichever is first. For PGE and IPCo: QF has received a SIS indicating interconnection with four years is possible or six months after the QF executed the SIS Agreement, whichever is first.~~

15 Form No. 556 at 7.

QF Trade Associations' Comments:

The QF Trade Associations support Staff's deletion of the requirement for an interconnection study prior to execution of a PPA for the reasons stated in our March 30th Comments and additional comments below responding to the Joint Utilities' comments on interconnection studies. The QF Trade Associations also respond to the proposal that milestones need to be included in the final, executable contract.

a. An Interconnection Study Should Not Be Required for Contract Execution

As explained in our March 30th Comments, the QF Trade Associations also oppose a per se bar against supplying an executable PPA to QFs that cannot supply an interconnection study indicating interconnection within four years is feasible, which is illegal under the FERC legally enforceable obligation ("LEO") rule and also unreasonable. The QF has almost no control over the dates proposed by an interconnecting utility in interconnection studies, and as we previously explained, the interconnection process contains provisions that allow the QF to expedite the interconnection process at the time it executes its interconnection agreement.[16] Simply put, the construction schedules established by the utility-supplied interconnection studies are not so set in stone that they should be used to bar a QF's right to a LEO or executed PPA.

The QF Trade Associations support Staff's revised proposal and urge the Commission not to revert nor adopt any of the Joint Utilities' proposed modifications, as discussed below. Requiring QFs to provide a System Impact Study or Cluster Study could delay contract negotiations by approximately 6-18 months for PacifiCorp and approximately 2-3 months for

16 *See* Joint Comments of the QF Trade Associations on Staff's Initial Proposal at 5-6 [hereinafter QF Trade Associations' Initial Comments].

PGE and Idaho Power, and potentially longer.[17] These delays would make QF development in Oregon onerous if not impossible for some projects. Staff's original proposal sought to account for the need for QFs to establish a LEO by excusing a QF from the requirement to have an interconnection study if the study was delayed by a certain amount of time (either six months or, for PacifiCorp, until January 1). This limited exemption would still impose an unnecessary risk on QF development. The QF Trade Associations strongly support the deletion of this requirement in Staff's revised proposal. As discussed above, none of the Joint Utilities' proposed modifications would redeem the deleted policy and instead would only make the deleted policy more harmful.

[17] These dates reflect the approximate timeframes for small QFs processed under Tier 4 Interconnection Review, as modified for PacifiCorp in Docket No. UM 2108, to obtain the applicable study without considering the additional delays that might occur as a result of interconnection re-studies and/or utility delays. *See* OAR 860-082-0025(7), -0060; *PacifiCorp Application for an Order Approving Queue Reform Proposal*, Docket No. UM 2108, PacifiCorp Compliance Filing, Attachment 6. For PGE and Idaho Power, the timeframes assume that: 1) the QF and utility agreed to skip a Feasibility Study; and 2) a System Impact Study is provided within 30 calendar days of a study agreement being signed by the QF. These timeframes also assume that the executable PPA was due no sooner than the day the QF requested interconnection, although there could be additional delays to contract negotiations if a utility is unwilling to *begin* contract negotiations unless the QF has obtained or is already in the process of seeking the study. *See, e.g.*, Docket No. UM 2125, Order No. 21-097 at 1 (Mar. 30, 2021) ("Furthermore, although we expect PacifiCorp to continue its new policy of offering draft PPAs prior to the completion of transmission [sic] studies for non-standard contracts, we are not convinced that PacifiCorp will be proactive in this area. Therefore, we direct Staff to propose procedural requirements that we may impose on PacifiCorp to ensure an efficient and fair processing of requests for PPAs").

i. The Joint Utilities' Proposal is Unduly Harmful to Off-System QFs

The Joint Utilities argue that only on-system QFs should be allowed a PPA when the interconnection study includes a scheduled operation date more than three years in the future.[18] This would prohibit off-system QFs from obtaining a PPA unless they had an interconnection study supporting a scheduled COD within three years. This argument overlooks, as noted above, that the applicable interconnection process for QFs selling off-system may allow for the interconnection schedule to be accelerated at the QF's election. If the QF believes it can successfully accelerate the interconnection construction to comply with its scheduled commercial operation date in its PPA and is willing to take on the risk of PPA default if it fails, the QF should be allowed to do so under FERC's LEO rule. In addition, there can be wide differences in the time that utilities propose in their interconnection studies, with some Northwest consumer owned utilities having little experience with interconnections and other utilities proposing unreasonably conservative timetables. BPA also often has long interconnection schedules. The Commission has no authority to regulate these interconnections to ensure that the time frames are reasonable because they are either FERC jurisdictional (an off-system investor owned utility), or not regulated (e.g., BPA). Therefore, if anything, there should be longer interconnection times for off-system QFs.

ii. The Joint Utilities' Proposal to Essentially Ignore Utility Delays for Months is Unreasonable

The Joint Utilities' first proposed modification is to impose this requirement on more QFs than Staff suggested by extending the timeframes where a utility can delay a study and

[18] Joint Utilities' Initial Comments at 8.

refuse to contract with a QF. The Joint Utilities suggest exempting QFs only when an annual avoided cost change is imminent.[19] The Joint Utilities assert this would be reasonable because it "will not compromise the QFs' ability to seek a LEO under the Commission's current LEO rule."[20] This approach overlooks that changes in PPA pricing are not the only harm from utility delays to interconnection and contracting. Developers face myriad challenges in aligning development timelines both with the utilities and with many other entities, including landowners, financiers, and various permitting agencies. Any of these can impose significant costs or kill a project. The Commission should not burden QF development by imposing on QFs excessive timing risks on the basis of a utility's delays, and the Commission should certainly not adopt the Joint Utilities' proposal to ignore utility interconnection delays until the utility asks for updated avoided cost pricing.

b. Milestones in the Executable PPA Should Not Be Binding

The QF Trade Associations are not opposed to including milestones in the final, executable PPA. The current standard PPA does not include milestones, but milestones are often (but not always) included in other power sales contracts. The QF Trade Associations have two concerns with inclusion of milestones: 1) the possibility of disputes about their reasonableness; and 2) the impact of missing the milestone.

The QF Trade Associations would not be concerned with disputes about specific milestones and their dates for completion if the utility and QF were two willing counterparties. However, adding the requirement that a QF provide milestones and specific dates provides the

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19 *See* Joint Utilities' Initial Comments at 9.

20 Joint Utilities' Initial Comments at 9.

utilities with an opportunity to abuse their discretion, raise obstacles to the completion of the contracting process, and potentially unreasonably terminate a contract for immaterial delays. First, as explained above, the utility should only be allowed to request milestones for specific Commission approved actions. Second, the utility should not have the discretion to refuse to provide an executable PPA based on the milestone dates selected by the QF. During the contracting process, the utility can ask questions and suggest different dates, but if the utility is empowered to do anything more, then this new requirement may be abused.

Missing a milestone should not be cause for default, a breach, or any grounds to terminate the PPA. It is the responsibility of the QF developer to solve problems and ensure that power is delivered by the deadline in the contract. The developer may not know what the sequence or actual timeline will be in actual practice because there are numerous factors outside of the developer's control. The QF should not be burdened with or distracted by the utility disputing and scrutinizing their decisions in the development process.

Therefore, the milestones should be for informational purposes for utility planning and cost recovery to better understand when, and if, projects will reach their commercial operations. The QF should provide notice if a milestone will be missed and an updated date. As long as the QF becomes commercially operational (within the appropriate cure period), then there is no reason to impose any penalties for missing a milestone.

3. Avoided Cost Updates

Staff's Updated Proposed Terms:

- **No change to current requirement that utility file updated avoided cost one month after IRP acknowledgement.**
- **Retain current requirement of May annual update.**

QF Trade Associations' Comments:

The QF Trade Associations support Staff's Updated Proposal for the reasons stated in our March 30th Comments.

4. Contracting Timelines

Staff's Updated Proposed Terms:

- **Utility has 15 business days to provide first draft of standard PPA or ask for missing information. In the event the utility asks for missing information, the utility has 15 business days from receipt of missing information to provide first draft of PPA.**

- **Thereafter utility has 10 business days to provide revised drafts upon request by QF for revisions. Once QF has met all eligibility requirements and asked for executable PPA in writing, utility has 10 business days to provide new draft.**

- **If utility is unable to comply with the deadline in this rule, utility will notify QF in writing that it will not meet the deadline and provide explanation as to why. The notice must be provided on or prior to the deadline.**

- **A utility's written notification that it will not meet the deadline does not excuse the utility's failure to meet the deadline. However, the Commission will consider the reasonableness of the utility's delay in determining whether the QF has established a legally enforceable obligation. The Commission will also consider the utility's failure to comply with the notice provision of this rule in determining whether a QF has established a legally enforceable obligation.**

QF Trade Associations' Comments:

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.

a. 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.

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. It is possible 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.

b. 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.[21] The QF Trade Associations agree and recommend incorporating this in the proposed rules.

5. Time to construct facility (interval between PPA execution and scheduled online date)

Staff's Updated Proposed Terms:

No Changes from Initial Proposal:

- QF's have unilateral right to select scheduled COD up to three years after PPA execution.
- If SIS or Cluster Study shows interconnection completion date more than three years after PPA execution but within four years, QF has unilateral right to select

[21] Staff Initial Proposal Related to PURPA Contracting Process and PPA Terms at 3 [hereinafter Initial Staff Proposal]. The Initial Staff Proposal was attached to Staff Letter to Participants Laying Out Strategy for Processing of this Rulemaking.

scheduled COD up to four years after PPA execution. For every month in the interval between PPA execution and scheduled online date that is after three years, the fixed-price term will be shortened. For example, if the scheduled COD is 3 years and six months after PPA execution, the fixed price term for the PPA will be 14 years and 6 months (15 years – 6 months).

- QF may not select scheduled COD more than four years after contract execution date.

QF Trade Associations' Comments:

The QF Trade Associations continue to have concerns with Staff's updated proposal on this point. The QF Trade Associations stand by the position taken in their March 30th Comments and provide the following additional response. The utilities' interconnection timelines, for QFs at least, are longer than they have been historically, which means the Commission should not shorten the time to reach commercial operations and should maintain the current option to obtain period longer than four years if the QF can demonstrate that a later COD is reasonable and necessary.

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

While the QF Trade Associations do not support Staff's lead proposal, we have even more concerns with the Joint Utilities' proposal. That proposal would not allow the QF to elect to use a scheduled commercial operation date more than three years after PPA execution even if the QF were willing to agree to a day-for-day loss of its fixed-price term and overall contract term for the period after the three-year mark.[22] The Joint Utilities appear to suggest that any PPA that allows a lock in of avoided cost prices for sales starting more than three years after the PPA execution date will necessarily result in "stale" avoided cost pricing that will harm utility

[22] Joint Utilities' Initial Comments at 14-16.

ratepayers for the entire term of the PPA.[23] This argument is misguided. It only holds true in a market where the forecasted avoided cost prices are continuously falling. But the utilities' avoided costs prices do not continuously fall over the long term during which these rules are intended to be in effect. The allegedly "stale" avoided cost prices could just as easily lock the QF and the utility into a contract with prices that are *lower* than the avoided costs being offered between years three and four after the PPA execution date. In that case, the utilities' ratepayers *benefit* by locking in low avoided costs in a contract from a QF whose development was made possible by the allowance for the QF to commit to a scheduled commercial operation date more than three years after the PPA execution date. The utilities' proposal would deprive ratepayers of a low-cost resource in that situation.

Additionally, there are other considerations that must be weighed against the risk that the allegedly stale avoided cost prices may be higher than the avoided costs offered between years three and four after the PPA execution date. PURPA is expressly intended to "encourage" QF development,[24] and the Commission is further required under Oregon law to "[i]ncrease the marketability of electric energy produced by [QFs] located throughout the state for the benefit of Oregon's citizens[.]"[25] In fact, PacifiCorp's recent cluster studies issued after our last round of comments on this topic indicate it will take 5 years *after* the interconnection agreement is executed.[26] A QF should be able to demonstrate that a later COD is reasonable and necessary, if the utility cannot interconnect the QF within four years.

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23 *Id.*

24 16 USC § 824a-3(a).

25 ORS 758.515(3)(a).

26 *See PacifiCorp Generation Interconnection Transition Cluster, Transition Cluster Study Report, Cluster Area 9*, at 34 (Mar. 31, 2021),

In situation where the utilities fail to provide interconnection studies that reasonably propose operation dates within three years of PPA execution, the QFs must be allowed to select a scheduled commercial operation date more than three years after PPA execution in order to reasonably implement the requirement to encourage development of such resources. The Joint Utilities' proposal to deny a PPA altogether on account of a schedule proposed in an interconnection study is not reasonable or consistent with encouragement of QF development.

b. Three Month Cure Period Is Unreasonable

The Joint Utilities' proposal to shorten cure periods to only three months is also an unreasonable major policy change that creates significant new burdens and risks. The Joint Utilities claim that QFs that require more than three months are "speculative" projects and claim as evidence that approximately 24-32% of QFs with standard PPAs executed by PacifiCorp and PGE within the past ten years did not come online until three and half years after PPA execution.[27] The fact that some QFs need a cure period is not evidence that providing that cure period is inappropriate. On the contrary, the QF Trade Associations maintain that the fact that these small projects need to overcome numerous obstacles demonstrates they need longer cure periods than the Joint Utilities propose. In addition, there is a lack of evidence that utilities are so harmed by QF operational delays (despite receiving damages) such that termination after a one-year cure period is more appropriate than some longer cure period. The QF Trade Associations maintain that the one-year cure period remains a reasonable compromise.

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http://www.oasis.oati.com/woa/docs/PPW/PPWdocs/TCA9CS.pdf ("The Transmission Provider estimates it will require approximately 60 months to design, procure and construct the facilities described in the ERIS sections of this report following the execution of Interconnection Agreements.")

[27] Joint Utilities' Initial Comments at 15-16.

A brief history is instructive. In Order No. 06-538, the Commission determined that "a QF's operational delay pursuant to a contract with a resource sufficient utility should result in default, but not in termination."[28] This effectively created a cure period that depended on the utility system conditions, as utilities could not terminate standard contracts so long as a QF achieved commercial operations prior to the utility's deficiency period.[29] In Docket No. UM 1610, stakeholders agreed to a stipulation of several disputed items, as the Joint Utilities themselves reference.[30] Among other issues, the stipulating parties there agreed that "a utility may terminate a standard contract after a QF defaults for failing to meet the scheduled COD regardless of the utility's resource sufficiency/deficiency position" but first "QFs have 12 months to cure a default for failure to meet the scheduled COD."[31] That remains the current policy in effect today, and the Joint Utilities' arguments do not justify upsetting the negotiated balance. Doing so will not reduce litigation, as this docket is intended.

6. Contract Term

Staff's Updated Proposed Terms:

- No changes from Initial Proposal

QF Trade Associations' Comments:

The QF Trade Associations stand by the changes to Staff's proposal made in our March

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28 *In Re Investigation Related to Electric Utility Purchases from QFs,* Docket No. UM 1129, Order No. 06-538 at 27 (Sept. 20, 2006).

29 *See generally Fossil Lake Solar v. PGE*, Docket No. UM 2051 (litigating whether PGE's notice of termination was effective when the parties disagreed about the start date of the deficiency period).

30 *In Re Investigation into QF Contracting and Pricing,* Docket No. UM 1610, Order No. 15-130 at 1-2 (Apr. 16, 2015) (stating the Commission's characterization of the stipulation); Joint Utilities' Initial Comments at 14.

31 Docket No. UM 1610, Order No. 15-130 at 2.

30th Comments for the reasons stated in those comments.

7. Default for failure to meet scheduled COD/Damages/Termination

Staff's Updated Proposed Terms:

- Utility may issue Notice of Default when QF fails to meet scheduled COD.
- QF has one-year period to cure after Notice of Default when scheduled COD is three years or less after PPA execution. QF has six-month period to cure when scheduled COD is more than three years after PPA execution.
- QF must provide written notice to utility 90 days in advance if not coming online by scheduled COD. (Later notice acceptable if QF had no way of knowing would not be coming online on scheduled COD 90 days in advance.)
- ~~If QF provides written notice will not be coming online by scheduled COD, QF will owe no damages to utility for replacement power costs during cure period.~~
- A QF that fails to meet scheduled COD but comes online during cure period ~~(or after with agreement from utility)~~, will have a shortened fixed-price term in contract (subtract number of months in cure period it took QF to come online from end of fixed-price term).
- Utility may terminate PPA after expiration of cure period if QF does not come online, but utility must provide written notice of intent to terminate one month prior to notice of termination. Notice period for termination and cure period may overlap.
- Utility may impose liquidated damages when PPA terminated because QF not coming online at (i.e., QF breaches commitment to sell energy and capacity).
- QF has no unilateral ability to terminate PPA.
- **Staff agrees with the following principle suggested by QFs: Notwithstanding the above requirements, the delay default provisions in the PPA must contain reasonable exceptions to the QF's obligation to pay damages in the case of a delay caused by the purchasing utility, and that extend the fixed-price and/or variable-price terms of the PPA to hold the QF harmless for the utility-caused delay.**

QF Trade Associations' Comments:

The QF Trade Associations generally support Staff's updated proposal on this subject for

the same reasons expressed in our March 30th Comments but have some remaining concerns.

Staff's Updated Proposal withdraws, without explanation, an important aspect of Staff's Initial Proposal. As noted above, Staff withdrew the proposal that the QF be allowed to avoid paying liquidated damages for a delay default if it provides the utility advance notice it will not achieve the scheduled commercial operation date. The Initial Staff Proposal was reasonable on this point because with advance notice the utility should be able to avoid any damages it might realistically experience by purchasing forward replacement power to the extent any is needed to replace the contracted QF power in the PPA. The QF Trade Associations continue to believe Staff's Initial Proposal on that point should be included in the rule to avoid punitive and unjustified liquidated damages assessments that will deter and prevent successful development of renewable resources.

The Joint Utilities unreasonably opposed the relief from automatic liquidated damages if the QF provides advance notice, but their comments in fact demonstrate the flaw in the liquidated damages scheme they support. The Joint Utilities claim "[i]t is not always true that the utility can cost-effectively acquire replacement energy and arrange for and procure any transmission service necessary for replacement energy" and "[t]here certainly is no guarantee that the cost of replacement energy will not exceed the cost of such energy under the PPA."[32] But the problem with this argument is that it apparently concedes that it is *often true* that the utility can acquire such replacement energy and that such replacement energy will not exceed the cost of such energy under the PPA. Additionally, it is also likely that the utility will have excess supply from its existing resources to absorb the shortfall from a small QF's delay. Yet the

[32] Joint Utilities' Initial Comments at 19-20.

liquidated damages the utilities support would *always* assess an automatic liquidated damages penalty on the QF when the wholesale market price exceeds the contract price. Such damages are a windfall to the utility in the case where the utility does not actually need or acquire any replacement power on the wholesale market, and such punitive damages provisions are unlawful. Staff made a reasonable proposal to mitigate some of this harm through supply of advance notice to the utility, and the Joint Utilities' opposition that proposal is without merit and a major change in policy.

8. Ability to come online prior to scheduled COD

Staff's Updated Proposed Terms:

No changes from Initial Proposal as follows:

(1) QF cannot come online sooner than 90 days before scheduled COD without consent of utility.

(2) QF may start deliveries up to 90 days before scheduled COD for compensation at as-available rate (or other comparable rate).

QF Trade Associations' Comments:

The QF Trade Associations stand by the position stated in their March 30th Comments and provide additional responsive comments on this 90-day rule, which is a major and meaningful change in policy.

PURPA requires that utilities "purchase all energy made available … [and] the price paid must not be less than the utility's avoided costs."[33] If the energy is made available, the utility must purchase it and pay no less than avoided costs. The QF Trade Associations therefore

[33] *Snow Mountain Pine Co. v. Maudlin*, 84 Or App 590, 595 (1987) (internal citations omitted) (internal quotations omitted); *see also* ORS 758.525; 18 CFR 292.304.

believe a blanket prohibition on QFs from delivering power more than 90 days before scheduled COD is unwarranted and unlawful.

Staff bases its proposal upon on the need for utilities to plan and to forecast power costs, and the Joint Utilities' support Staff's proposal on the basis that "a utility typically needs at least 90 days advance written notice to arrange for transmission services."[34] However, the utilities vague claims have not been supported with actual facts nor have any potential harms with providing different notice been identified. If there is a notice requirement, then the QF Trade Associations cannot respond to whether 90 or 365 days is appropriate given the lack of information. The Joint Utilities' comments implicitly acknowledge that less than 90 days' notice is sufficient in at least some cases.[35] The Joint Utilities should clarify what notice they would need to mitigate potential costs and allow QFs to come online ahead of schedule so long as they provide the specified notice. Only after the utilities provide detailed information can Staff and the QF Trade Associations properly evaluate any specific notice requirement.

The QF Trade Associations agree that some notice is needed, consistent with their prior recommendation that "QFs be permitted to achieve commercial operation and commence payments at the full contract prices up to six months in advance of the scheduled commercial operation date *with notice to the utility*, and an earlier time if the utility consents, with such consent not to be unreasonably withheld."[36] The QF Trade Associations note for comparative purposes that at least PGE and PacifiCorp allow Community Solar projects to come online more than 90 days in advance of Scheduled COD if the utility is able to make transmission

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34 Joint Utilities' Initial Comments at 22.
35 *See id.*
36 QF Trade Associations' Initial Comments at 27 (emphasis added).

arrangements at no added cost.[37] PacifiCorp's recent non-standard PPA with SkySol Solar (a 55 MW project) provides similar flexibility.[38] The QF Trade Associations assert any potential cost could be avoided so long as the QF provides adequate notice. The QF Trade Associations are not certain how much notice the Joint Utilities would consider to be necessary, and cannot make any specific recommendation until the utilities provide more information.

9. Eligibility for Standard PPA – Nameplate Capacity Rating

Staff's Updated Proposed Terms:

No changes from Initial Proposal as follows:

Definition of nameplate capacity should be based on the power production capacity of the facility as a whole, rather than just a component.

QF Trade Associations' Comments:

The QF Trade Associations continue to agree with Staff's proposal on this subject for the reasons stated in our March 30th Comments, but additional response to the Joint Utilities' comments is warranted. As we previously explained, we understand Staff's proposal to measure

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37 *In Re Community Solar Program Implementation*, Docket No. UM 1930, PGE's Community Solar PPA at Section 3.2 (filed Jan. 25, 2021 and approved by Order No. 21-192) ("If Project Manager desires to begin transmitting Start-up Test Energy to PGE at a date earlier than ninety (90) days prior to the Scheduled Commercial Operation Date, PGE will only be obligated to purchase such Net Output if PGE is able to modify its network resource designation for the Facility such that the output could be delivered using network transmission service as described in Section 3.1 above at no additional cost or other economic impact to PGE"); Docket No. UM 1930, PacifiCorp's Community Solar PPA at Section 3.2 (filed Jan. 27, 2021 and approved by Order No. 21-192) (containing identical language). Idaho Power's contract does not appear to impose any restriction on early deliveries. *See Idaho Power Advice No. 20-12 Community Solar Interconnection and PPA,* Docket No. ADV 1205, Idaho Power Community Solar PPA.

38 *See In Re Pacific Power – Qualifying Facility Contracts,* Docket No. RE 142, SkySol Solar PPA at Section 5.1.1.

the capacity of the facility in the same manner as articulated by FERC in its recent rehearing order in *Broadview Solar, LLC*, 174 FERC ¶ 61,199 (March 19, 2021). To be clear, this method measures the capacity as the alternating current (AC) "send-out" at the point of interconnection rather than the direct current (DC) rating of the individual components. Therefore, it allows for individual components of the facility to exceed the applicable capacity limit. The Broadview facility had a 200-MWh battery energy storage system and a 160-MW DC solar array, but FERC concluded its power production capacity was 80 MW under the "send-out" test due to the configuration of its inverters that precluded more than 80 MW AC from being injected at the point of interconnection. Translated to applicability to Oregon's 3-MW standard rate cap, the small solar-plus battery QF could have a solar array with DC capacity well over 3 MW, for example 8 MW DC, so long as battery storage and/or other output limiting devices result in no more than 3 MW AC from being injected at the point of interconnection. Therefore, it would be useful for Staff's proposal to expressly include the clarification that the point of measurement is the point of interconnection to the grid.

The Joint Utilities state that they agree with Staff's proposal, but it is not entirely clear that they understand Staff's proposal to be use of the *Broadview* rehearing order's send-out test. They propose use of the "Nameplate Capacity Rating" definition in PacifiCorp's Washington PPA, which is as follows:

> "Nameplate Capacity Rating" means the maximum installed instantaneous generation capacity of the completed Facility, expressed in MW (AC), when operated in compliance with the Generation Interconnection Agreement and consistent with the recommended power factor and operating parameters provided by the manufacturer of the generator.[39]

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39 Joint Utilities' Initial Comments at 22-23.

The Joint Utilities' proposal omits the definition of "Facility" in PacifiCorp's Washington PPA, which makes relatively clear that, consistent with Staff's proposal, that PPA is best interpreted to measure overall power production capacity as measured at the point of interconnection. The definition of "Facility" is as follows:

> "Facility" is defined in the Recitals and is more fully described in attached Exhibit B and includes all equipment, devices, associated appurtenances owned, controlled, operated and managed by Seller in connection with, or to facilitate, the production, generation, transmission, delivery, or furnishing of electric energy by Seller to PacifiCorp and required to interconnect with the System.

However, PacifiCorp's Washington PPA could be clearer on this point, and the QF Trade Associations do not agree it is the best model of language to use for purposes of adopting Staff's proposal to use the FERC send-out rule as the Oregon policy for access to standard rates and contracts.

In sum, the QF Trade Associations prefer Staff's proposed language because it unambiguously uses the terminology of the power production capacity of the facility as a whole and does not require confusing cross reference to other definitions, but we recommend it be clarified as intended to follow the FERC send-out test with the critical measurement point being the point of interconnection.

10. Eligibility for Standard PPA—Same Site Rule

Staff's Updated Proposed Terms:

Deleted proposal to use Order No. 872 method and proposed as follows:

- **Keep Commission's current 5-mile rule.**

QF Trade Associations' Comments:

The QF Trade Associations support Staff's Updated Proposal on this point for the reasons

stated in our March 30th Comments.

11. Modifications to QF Facility prior to COD and after COD

Staff's Updated Proposed Terms:

- **For generation attributable to the original power production capacity (as defined above), the QF should continue to receive the contracted-for standard prices. For incremental generation attributable to incremental power production capacity up to the standard contract threshold, the QF should also continue to receive the standard prices in the original contract. For incremental generation beyond the standard contract threshold, the QF should negotiate a supplemental PPA with negotiated pricing.**

QF Trade Associations' Comments:

The QF Trade Associations support Staff's Updated Proposal for the reasons stated in our March 30th Comments.

12. Requirement for Minimum Availability Guarantee (MAG) for intermittent resources

Staff's Updated Proposed Terms:

No change to current Commission requirements.

QF Trade Associations' Comments:

We continue to support Staff's proposal.

13. Penalties for failure to meet MAG

Staff's Updated Proposed Terms:

No change to current Commission requirements.

QF Trade Associations' Comments:

We continue to support Staff's proposal.

14. Scheduled Outages

Staff's Updated Proposed Terms:

- **QF must provide annual written proposed maintenance schedule no later than Jan. 31 of each calendar year.**

QF Trade Associations' Comments:

We support Staff's proposal.

15. Requirements for minimum delivery for intermittent resource (w/no battery)

Staff's Updated Proposed Terms:

Utility may not impose minimum delivery requirement for intermittent resource that has no associated battery.

QF Trade Associations' Comments:

We continue to support Staff's proposal.

16. Default Security

Staff's Updated Proposed Terms:

- ~~No change to current options for security.~~

- **Staff withdraws initial proposal re: security pending discussion of terms in PAC PPA**.

QF Trade Associations' Comments:

The QF Trade Associations stand by their March 30th Comments, which proposed a security requirement may be reasonable for large QFs, but we support retention of the existing requirements for security for small QFs, including the option of step-in rights. As discussed below, the QF Trade Associations do not support use of the security provisions of PacifiCorp's Washington PPA for small QFs in Oregon. 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.

17. Other breaches of PPA/default/ termination

Staff's Updated Proposed Terms:

- No changes from Staff's Initial Proposal

QF Trade Associations' Comments:

We support Staff's proposal, with the clarification that utility-caused delays should not allow for default, damages, or termination, which Staff appears to agree with.

18. Insurance

Staff's Updated Proposed Terms:

- No changes from Staff's Initial Proposal

QF Trade Associations' Comments:

We continue to support Staff's proposal.

19. Notices

Staff's Updated Proposed Terms:

- No changes from Staff's Initial Proposal

QF Trade Associations' Comments:

We continue to support Staff's proposal.

B. PacifiCorp's Washington PPA Has Many Flaws that Preclude Its Use

The QF Trade Associations have serious concerns with the use of PacifiCorp's Washington PPA as the template upon which the OPUC develops its own renewable energy policies. As we recommend in our prior comments, we recommend that the Commission retain an independent expert to assist and work under the supervision of the Commission Staff and the Commission's legal counsel to develop the Commission's standard contract. An independently

developed standard contract would better ensure unbiased consistency with Oregon's implementation of PURPA, and reduce the possibility for disputed contract provisions and associated workload on all interested parties and the Commission.

Alternatively, the QF Trade Associations suggest that the current OPUC-approved PacifiCorp standard PPA be used as the starting point for making the changes necessary to implement the final rules as well as limited modernization updates. In contrast to PGE's current PPA, the PacifiCorp OPUC-approved PPA is shorter, simpler, has been subject to few contractual disputes, and includes provisions that are generally reasonable and clear.

Critically important, the PacifiCorp OPUC-approved PPA has a proven track record of being successfully financed, and has provisions with well-known history that are generally consistent with Oregon policy. There is no need to create new litigation and financing risk with a new contract form that there is insufficient time to vet, especially prior to the Commission or the stakeholders resolving key policy issues. In addition, the PacifiCorp form was not drafted to be consistent with Oregon's policies, while the current OPUC-approved PacifiCorp PPA reflects years of Oregon policy decisions.

In any event, this section of the comments will address a preliminary list of issues the QF Trade Associations identified in PacifiCorp's Washington PPA. It is very difficult to fully explain all concerns with PacifiCorp's Washington PPA because it contains so many biases in favor of the utility. That is to be expected with a document that was drafted by the utility; the party drafting any contract will understandably ensure that it protects its own interests in the contract's structure, complexity, and specific content. The contract is also vague and will likely engender years of litigation over its meaning. Thus, the following list is not intended to be

exhaustive, but instead is intended to highlight a beginning list of issues the parties will have to work through if the Commission decides to use the PacifiCorp-drafted form as the basis of its own OPUC standard contract.

In addition, the QF Trade Associations generally agree with many of Staff's comments on PacifiCorp Washington PPA that are not included on this list, and agree those are also issues the parties would need to work through with PacifiCorp's Washington PPA.

1. Overall Length and Complexity of PPA

At a high level, the PacifiCorp's Washington PPA is far longer and contains much more detail than the previously used PacifiCorp PURPA contract forms in Oregon. PacifiCorp's Washington PPA is over 23,000 words in length whereas the Oregon contract is roughly 13,000 (depending on version of the form). In many cases, the additional complexity adds additional limitations on the rights of the QF. The volume and length of the document alone will likely deter some small developers from pursuing development. That is one of the main reasons the QF Trade Associations oppose use of this form because it is a problem that cannot be easily solved without using an entirely different template.

2. Termination and Cure Problems (§§ 2.3, 3.2.3, & 11)

PacifiCorp's Washington PPA contains at least four problems with the termination and cure provisions.

First, the PPA provides inadequate carve outs for the "Excused Delay" provision that could result in penalizing a QF for a PacifiCorp-caused delay. The Excused Delay is intended to provide excuses for the QF's inability to achieve the Scheduled Commercial Operation Date on time. Therefore, consistent with Staff's recommendations set forth above, the Excused Delay

definition should provide excuse for *any* "PacifiCorp-caused" delay. Instead of doing so, PacifiCorp's Washington PPA only excuses the QF from delay default in the case where PacifiCorp's actions rise to the level of a default or tariff violation under the interconnection rules and contract.[40] Defaults and tariff violations are not the only actions or inactions by PacifiCorp that could cause the QF to be unable to timely achieve commercial operation.

Second, the PPA's cure provision is also inconsistent with the OPUC's policy of providing one year to cure a delay default even in the absence of an Excused Delay because it provides a much shorter cure period for a delay default.

Third, the PPA contains problematic cross-default provisions under which a QF could automatically default under the PPA for an unrelated issue with a totally separate contract or permitting requirement. Sections 3.2.3 and 11.1.2(e) contain an express cross-default provision making any failure to maintain the expansively defined "Required Facility Documents" a default under the PPA if not capable of cure within 90 days.

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[40] PacifiCorp's Washington PPA provides:

> "Excused Delay" means the failure of Seller to achieve Commercial Operation on or before the Scheduled Commercial Operation Date, but only to the extent such failure is caused by an event of Force Majeure or *an Event of Default by PacifiCorp, a default by PacifiCorp under the Generation Interconnection Agreement or related interconnection study agreement(s) for Seller's Facility, including a default resulting from any breach by PacifiCorp of any obligation to meet a material deadline included in such agreement(s), or PacifiCorp's violation of applicable tariff provisions governing the interconnection of Seller's Facility*; provided that the duration of any Excused Delay shall not extend to any period of delay that could have been prevented had Seller taken mitigating actions using commercially reasonable efforts.
>
> (emphasis added).

Additionally, we agree with Staff's proposal for Section 11.3 that at least a 30-day notice should be provided before a termination occurs.

Fourth, as Staff's comments on the PPA note, Section 11.1.1(d) too broadly defines the events that can lead to a default and potential termination of the PPA. Such events should be narrowly defined and limited.

3. **Changes to Design, Capacity, and Net Output During Development Period** (Recitals, Exhibits, Definitions, §§ 6.1, 6.8)

The PPA has significant ambiguities and problems that could prevent reasonable upgrades or changes to the facility before and after the achievement of Commercial Operation.

First, Sections 6.1 and 6.8 could be interpreted to bar any increase in Nameplate Capacity Rating during the development period, no matter how minor, which is not reasonable. While these provisions appear to allow an As-Built Supplement that specifies a Nameplate Capacity less than the capacity amount supplied in Exhibit B at the time of PPA execution, suggesting that lesser nameplate capacities are acceptable, it is not unambiguously clear. This is a good example of a provision where the utility drafter left the aspect of the agreement beneficial to the QF (potential reductions in capacity during development) vague, presumably to allow for the utility to claim it means something else later.

Relatedly, Section 6.1 bars an As-Built Supplement that specifies an Annual Net Output that is in *excess* by 10% of the amount in Exhibit A, suggesting that output increases of up to 10%, or any decreases in output forecasts, are acceptable in development designs after PPA execution. The PPA should be unambiguous by affirmatively stating that such increases up to 10% are allowed, and any decreases are allowed. Additionally, the precise level of allowed increase or decrease before and after the development period is a significant policy question that

should be resolved before any PPA provision is drafted. The QF Trade Associations do not necessarily support the framework contained in PacifiCorp's Washington PPA on this point for use in Oregon. As noted above, Staff has a different proposal under discussion already.

4. **Credit Requirements and Security** (Definitions & § 8)

For any QF over 2 MW in capacity, PacifiCorp's Washington PPA has eliminated the option for Step-In Rights as an adequate security and now will require a Project Development Security of $25/kW of Facility Nameplate Capacity posted within 30 days of execution and in effect up to COD, and an ongoing Default Security of $50/kW after COD, unless the Seller satisfies PacifiCorp's proprietary credit scoring criteria which it will evaluate every three months during the PPA term. The requirement for liquid security is not appropriate for any small Oregon QFs eligible for the standard contract, and the QF Trade Associations oppose such a requirement.

5. **Waiver of Protections Against PacifiCorp Transmission** (§§ 1.2.4(c), 4.6, 6.2.1)

Throughout the PPA, PacifiCorp has tried in various ways to limit its potential responsibility for its actions, inactions, and misconduct that it may be attributable to its transmission function. These provisions are simply not reasonable. PacifiCorp Transmission group's performance is critical to the QF in the interconnection and network resource designation process, and if PacifiCorp's transmission employees harm the QF's rights under the PPA, no claims against PacifiCorp should be waived. The PPA's approach to this issue ignores that PacifiCorp Transmission is just another business unit of the larger PacifiCorp Corporation. The QF Trade Associations disagree as a matter of fact that the utility merchant and transmission functions truly operate independently when it comes to the implementation of PURPA. In the

end, there is no basis to bar a QF from bringing a claim under the PPA against PacifiCorp for misconduct related to its transmission function.

6. **Designated Network Resource Provisions** (§§ 4.2, 5.2, 6.3)

Under normal FERC interconnection rules, a generator (IPP or utility-owned) must fund the costs of network upgrades initially but will receive a refund of those costs over time after it successfully becomes operational. However, Oregon utilities generally attempt to require 100 percent of these network upgrade costs be paid by QFs with no refund, and PacifiCorp's proposed PPA here reflects an intent to do so. This is a matter the Commission is currently addressing in Docket No. UM 2032. PacifiCorp's Washington PPA is adverse to the QF on this point in at least the three following ways.

First, Section 4.2 requires the QF to engage in a process whereby if any Network Upgrade costs are identified after PPA execution, PacifiCorp can seek to adjust the PPA price or otherwise ask the Commission to require the QF to pay those costs. The QF Trade Associations oppose this process. It provides no right to scheduling adjustments to the Scheduled Commercial Operation Date that will be needed for stalled development during the proposed adjudication of network upgrade costs. Notably, Staff also flagged this as a problematic process in the PPA but suggests it might be appropriate for off-system QFs. The QF Trade Associations do not support this process for any QFs, and if it were to be adopted it must also include corresponding adjustments to the Scheduled Commercial Operation Date.

Second, the same provision also ignores the possibility of using BPA Network Transmission to the extent that PacifiCorp Network Transmission cannot be used. The Commission's standard contract should not foreclose that option.

Third, the PPA's Section 6.3 also unreasonably requires use of Network Resource Interconnection Service, as opposed to Energy Resource Interconnection Service, which forecloses another potentially cost-effective solution for renewable energy developers and is also an issue currently under discussion in UM 2032.

7. **Commercial Operation Approval Process** (Definitions and Exhibits)

The definitions of "Commercial Operation" and related phrases referenced therein contain objectionable requirements, including the following problems.

First, as Staff's comments note, PacifiCorp's Washington PPA requires the Seller to supply certification by a Licensed Professional Engineer ("LPE") of Required Facility Documents and capability of the Facility to comply with the PPA, but an LPE may lack skills to make such legal determinations. Relatedly, the definition of "Required Facility Documents" is too broad because it includes not only major permits, but also "other authorizations, rights, and agreements necessary for the construction, ownership, and maintenance of the Facility . . . ." Staff appears to also have concern with the vague nature of the scope of Required Facility Documents from its comment on Exhibit D.

Second, the definition of LPE could be too restrictive in some applications because it bars use of an LPE who is involved in development of the Facility or "a representative of a manufacturer or supplier of any equipment installed in the Facility." In some cases, the representative of the manufacturer may be the only qualified engineer to warrant the operability of the equipment.

Third, the PPA also requires an overbroad warranty "from an officer of Seller stating that neither Seller nor the Facility are in violation of or subject to any liability under any

Requirements of Law." Issues the Seller might have with laws unrelated to the PPA should be irrelevant. Are PacifiCorp, PGE, and Idaho Power willing to make the same warranty to the Seller under this PPA?

Fourth, PacifiCorp's Washington PPA's definition of Commercial Operation further requires that the Seller have paid for all network upgrades under the interconnection agreement – a matter that should be controlled solely by the interconnection agreement and may not even be a requirement before energization under such agreement.

Finally, the provision appears to provide PacifiCorp with sole discretion to accept or reject the submittal by stating "Seller *must address* the concerns stated in PacifiCorp's deficiency notice to the reasonable satisfaction of PacifiCorp . . . ." (emphasis added). The utility should not have sole discretion to accept or deny the Seller's submittal, and the PPA should not suggest such discretion exists.

8. **Limitations on Timing of Permissible COD** (Definitions and § 5.1.1)

The PPA's COD process and definition of Scheduled Commercial Operation Date contain confusing and unreasonable timing requirements, including the following issues.

First, it bars the Seller from achieving Commercial Operation more than 90 days before the Scheduled Commercial Operation Date, through the definition of "Commercial Operation Date." We agree with Staff that this limitation should be deleted.

Second, in Section 5.1.1, the PPA appears to bar the payment for test energy (paid at 85% of the market price) to any time prior to 90 days before the Scheduled Commercial Operation Date.

Third, the PPA bars the QF from selecting a Scheduled Commercial Operation Date that is less than three months after the Effective date, which is contrary to what Oregon policy should allow.

Fourth, as Staff's comments note, the PPA is inconsistent with the policies under discussion that would allow selection of Scheduled Commercial Operation Date more than three years after the PPA execution date.

9. Damages Provisions (§§ 2.3, 2.5, 11, 12.2, 24.4)

The PPA contains the following problems with its damages provisions, which are unfair to the QF and in some cases likely unlawfully punitive liquidated damages.

First, PacifiCorp's definition of Delay Damages and Section 2.3 uses a typical replacement pricing provision (market price minus Contract Price), but unlike many PPAs it does not cap the damages the Seller would owe at the Contract Price – exposing the Seller to potentially large damages during market price spikes.

Second, the termination damages provision (§ 11.5) likewise calculates 24 months of such damages without a cap. It additionally contains ambiguity as to when the calculation will occur – at the time of termination based on forecasted market prices or after completion of the 24 months? Additionally, the limitation on such damages in Section 11.6 should also limit the assessment of such damages when PacifiCorp is surplus generation and does not need to procure replacement power; otherwise it would be a punitive liquidated damages provision.

Third, the damages owed by Seller with respect to "Capacity Rights" are uncapped in Section 11.2.3 – identifying PacifiCorp's "actual damages".

Fourth, in contrast to the potentially enormous damages owed by the QF, PacifiCorp's Washington PPA (*See* §11.2.2) limits PacifiCorp damages at the "Seller's Cost to Cover" in the event of PacifiCorp's failure to purchase, which merely includes the revenue owed by PacifiCorp under the PPA for the net output (and any bundled RECs) that PacifiCorp failed to purchase and is thus capped at the PPA price. Other PURPA PPAs in the region have reasonably included other easily identifiable damages, such as the lost value of production tax credits or lost value of renewable energy certificates where the QF would be selling the renewable energy certificates to a third party. The PPA also contains an overly broad waiver of consequential damages in Section 12.2.5, which may be relied upon by the utility to preclude recovery of many of the QF's actual damages.

Fifth, the damages invoicing provision is also one-way and provides too short of a payment/dispute period. Section 2.5 only provides that Seller must pay PacifiCorp within 10 days of receiving a damages invoice. There should be requirements that PacifiCorp supply all data and work papers for such damages invoice and Seller must pay or dispute the invoice within a reasonable time; 10 days is not necessarily enough time to review, evaluate, and wire a potentially large sum to PacifiCorp.

The QF Trade Associations would also like to better understand Staff's proposal to calculate damages monthly rather than daily before taking a position on that point from Staff's comments.

10. Curtailment Provisions (§ 4.5)

PacifiCorp's Washington PPA contains the right to curtail outside of the narrow circumstances allowed by PURPA and FERC rules, which are limited to system emergencies.[41] Section 4.5 defines such events far more broadly than allowed by FERC rules. If PacifiCorp wants broader curtailment rights, the QF Trade Associations may agree to a broader right for *compensated* curtailment, where the utility can curtail if it pays the QF for curtailed output, which is a concept PacifiCorp included in its ongoing RFP's pro forma PPA. But otherwise, these provisions are unlawful and unreasonable. Staff appears to also have concerns with the curtailment provision from its comments, but Staff's edit does not delete enough of this provision to make it reasonable and lawful.

11. Force Majeure (§ 14)

The force majeure provision has at least two problems.

First, it is more narrow than typical, and does not expressly excuse orders and actions by a governmental authority as a force majeure. It also specifically excludes delays, "alleged breach of contract, or failure" by the Transmission Provider or Interconnection Provider unless due to a Force Majeure. Given that PacifiCorp is the most likely Interconnection Provider, this provision is not fair. If PacifiCorp causes the delay, Seller should be kept whole and its rights preserved

41 *Pioneer Wind Park I, LLC* , 145 FERC ¶ 61,215, P 36 (Dec. 16, 2013) ("The Commission's PURPA regulations permit a purchasing utility to curtail a QF's output in two circumstances: (1) in system emergencies, pursuant to section 292.307(b) of the Commission's regulations; or (2) in light load periods, pursuant to section 292.304(f) of the Commission's regulations, but only if the QF is selling its output on an 'as available' basis.") (citations omitted).

under the agreement, whether by Force Majeure or otherwise, which is consistent with Staff's proposal above.

Second, the PPA also allows for termination if the Force Majeure event lasts over 180 days, regardless of the cause. This is too short of a time to overcome the effects of some events of force majeure, especially in areas with seasonal limitations on construction and repairs during the winter.

12. Performance Guarantees (Exhibit F)

The performance guarantees contained in the exhibits have several problems and are inconsistent with policy-level proposals made by Staff thus far in this proceeding. We agree with Staff that they should be deleted, and we provide some additional concerns with them.

First, while the PPA (*see* Exhibit F) implements a superficially reasonable mechanical availability guarantee for wind QFs, with a 90-percent annual availability requirement, closer examination reveals some serious flaws. There is simply a blank space on the form in the definition of "Seller Uncontrollable Minutes" for the number of excused planned maintenance hours, which leaves the developer to individual negotiation to establish this critical number of carve-out hours. Additionally, cross referencing through the PPA's various provisions appears to result in an extremely narrow carve-out for planned maintenance. It appears the PPA collectively only excuses "Planned Outages" for the maintenance carve-out from the availability guarantee, and that type of outage is far more restrictive than normal in this PPA – requiring the Seller to schedule such planned outages at the commencement of the year and limiting it to an outage that "lasts for several weeks and only occurs once or twice a year", as defined in the PPA and Exhibit J. It appears that there is basically no carve out for normal planned maintenance. In

contrast, the OPUC has ruled that 200 hours per year of planned maintenance *per turbine* should be allowed in a 90-percent annual MAG.[42] The PPA contains the terms "Forced Outage" and "Maintenance Outage" (*see* § 6.5), but it is not clear why; those terms are only used to further narrow the meaning of "Planned Outages" and have no independent relevance in the agreement. While Staff proposed some edits to the PPA to correct these problems, the precise corrective language used should be carefully reviewed, and the performance assurance exhibits should be deleted.

Next, the PPA's Exhibit F also includes a minimum delivery guarantee for solar and baseload QFs. The provisions appear to be identical for the two solar and for baseload facilities. The requirement is based on 90-percent of the Expected Net Output (annually). Additionally, the PPA states that the Seller must warrant that its Expected Net Output (annually) accounts for expected planned and unplanned maintenance. As with the MAG, there is no reduction to the obligation to meet the 90-percent target on account of forced outages or planned outages other than those meeting the narrow definition of "Planned Outages." This concept is inconsistent with Staff's current proposal for solar QFs to use a MAG. Additionally, even for baseload or solar-plus storage facilities the 90-percent minimum delivery could be onerous if the utility will require the Seller to use a higher Expected Net Output amount than Seller wishes. The PPA form contains an ominous footnote in Exhibit A stating that Seller must supply information sufficient to satisfy PacifiCorp that the Expected Net Output estimates are reasonable before execution.

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42 Docket No. UM 1610, Order No. 14-058 at 30 (Feb. 24, 2014).

A shortfall under the MAG or minimum delivery guarantee (as applicable) in any year would subject the Seller to replacement pricing damages, which would be subject to the same concerns discussed above related to the damages provisions.

Finally, a 90% output guarantee does not match actual, historical output for seasonal or irrigation district hydro facilities, especially when weather patterns are changing due to climate change. PacifiCorp is likely aware that its PPA would result in some QFs breaching the contract over its life, which arguably demonstrates that PacifiCorp designed the PPA to be harmful to hydro QFs or overlooked this important point to hydro QFs.

13. Capacity Rights (Definitions, §§ 4.3, 4.4., 4.8, 11.1.2, 11.2.3)

PacifiCorp's Washington PPA contains PacifiCorp's right to "Capacity Rights," which is defined very broadly and even includes "ancillary service or attribute thereof". The PPA bars the sale of Capacity Rights to third parties and holds Seller liable for PacifiCorp's actual damages for failure to deliver. (§§ 4.3, 4.4, 4.8, 11.1.2(c), 11.2.3). Additionally, Section 4.8 provides that Seller "must *execute such documents and instruments* as may be reasonably required to effect recognition and transfer of the Net Output or any Capacity Rights to PacifiCorp" (emphasis added). But Oregon's avoided costs are not necessarily designed to compensate QFs for all of these rights. The QF Trade Associations object to inclusion of these new requirements, which do not exist in currently approved Oregon PPAs and have not even been identified as issues in AR 631, much less vetted or approved by the Commission.

14. Forum For Disputes (§§ 19, 24)

The PPA contains contradictory and unreasonable provisions on venue for contract disputes. On the one hand, the PPA's Section 19 contains the "Governmental Jurisdiction and

Authorizations" provision recently argued by PGE to confer jurisdiction in the OPUC. This provision has led to confusion and litigation, and it is not helpful in the PPA.

However, on the other hand, the PPA identifies the state and federal courts in Portland, Oregon as the venue, which is acceptable but should be all the PPA states on this subject. (*See* § 24.3.) Yet, the PPA also contains an unreasonable jury trial waiver in Section 24.4, which should be deleted. If a jury is available for resolution of a dispute or some aspect of it, the QF should not be required to waive that right to a jury to execute enter into the standard contract.

Additionally, the PPA's Section 24.2 allows for either party to trigger non-binding mediation when a dispute arises, which could increase the costs to the QF/Seller. Mediation should only be allowed when mutually agreed to at the time of the dispute.

15. Limitations on Sale of Net Output (§§ 5.1, 6.8)

The PPA contains a potentially arbitrary provision that relieves PacifiCorp of the obligation to purchase output above the "Maximum Delivery Rate," which is equivalent to the Nameplate Capacity Rating averaged over an hour, with only a limited exception for hydropower facilities. (*See* §§ 5.1 & 6.8.) Some facilities will generate in excess of nameplate rating for hours at a time. Therefore, this type of provision could be unfair to the QF Seller.

Additionally, although PacifiCorp did not supply an off-system PPA, off-system QFs will typically need to deliver in excess of Nameplate Capacity under normal scheduling practices using whole MW block scheduling to deliver energy to the utility. Any PPA endorsed by the OPUC should contain express monthly settlement provisions that allow under and over scheduled hourly deliveries to net to zero over the course of the month. Similarly, PacifiCorp's PPA defines "Net Output" as excluding "transmission losses," which is not acceptable for an off-

system QF. The off-system QF should not have transmission losses occurring after the point of interconnection deducted from the Net Output for which it is entitled to payment at avoided cost rates if it arranges, through purchase of transmission loss service, to deliver to the utility its entire net output as measured at the point of interconnection.

For purposes of off-system scheduling, the QF Trade Associations generally support the provisions governing monthly netting contained in PacifiCorp's Addendum W of its currently effective OPUC-approved standard contract, with two clarifications. The Addendum W should be modified to include a requirement that for any surplus energy over the course of the month, the utility will pay the QF the wholesale market index prices for such energy, which is essentially the price the QF would pay to deliver such energy. Additionally, any off-system-specific PPA should expressly allow use of commonly available intra-hour scheduling methods (e.g., FERC-mandated 15-minute scheduling) and not mandate the use of the hourly block scheduling. The QF Trade Associations have attached a proposed mark-up of the existing Addendum W.[43]

16. Use of Vague "Material Adverse Effects" (Definition, §§ 3.2, 3.4, 6.12)

The PPA contains certain vague provisions subjecting the QF to risk under the PPA of "material adverse effect." The PPA here also unreasonably requires the Seller to notify PacifiCorp of "material adverse effects" and any litigation under any related agreements or permits, as well as any potential violations of the PPA. (*See* §§ 3.4, 6.12.6, 6.12.7.) These "material adverse effects" provisions unreasonably create a risk of default under the PPA merely

[43] Attachment A (QF Trade Associations' Revised Addendum W).

by failing to inform PacifiCorp of such events under other agreements. Many other utilities' PPAs in the region do not use this vague, catch-all basis for default and termination of the PPA.

17. Information Requirements (§§ 6.12, 6.13)

The PPA requires far more detailed information reports to PacifiCorp throughout the term in Section 6.12 than are normally required in a small QF PPA. This includes quarterly reports of progress during the development period, copies of any "statement, application, and report" to Governmental Authorities, as well as pretty much anything PacifiCorp asks for during the term and even afterwards. We agree with Staff's deletion of these provisions because they are unreasonable.

18. Construction Against the Drafter (§ 1.2.2)

The PPA unreasonably states that it should not be construed against either party, even though it is a basic tenet of contract law that contracts are construed against the party that drafted them. Obviously, PacifiCorp drafted this PPA, and now the other utilities propose its use, and any ambiguities should be construed against the purchasing utility.

19. Insurance Requirements (Exhibit I)

Exhibit I regarding insurance requirements is overly vague. It does not describe the limits required (e.g., $1 million) and allows PacifiCorp to change the requirements altogether "in its discretion" apparently at any time. In its footnote, it also appears to give PacifiCorp sole discretion to evaluate what it wants on a case-by-case basis, even after the PPA is executed. This provision is not reasonable, and the requirements should be known and approved by the Commission in the standard contract. Staff also appears to have concerns with the insurance requirements.

Dated this 9th day of June 2021.

Respectfully submitted,

Richardson Adams, PLLC

Gregory M. Adams
515 N. 27th Street
Boise, ID 83702
(208) 938-2236 (tel)
(208) 938-7904 (fax)
greg@richardsonadams.com

Counsel for the Community Renewable Energy Association

Sanger Law, PC

Irion A. Sanger
Joni Sliger
1041 SE 58th Place
Portland, OR 97215
503-756-7533 (tel)
503-334-2235 (fax)
irion@sanger-law.com

Counsel for the Renewable Energy Coalition and the Northwest and Intermountain Power Producers Coalition

Attachment A

QF Trade Associations' Revised Addendum W

ADDENDUM W

GENERATION SCHEDULING ADDENDUM

(Applicable only to Facilities scheduling deliveries of Net Output to the Point of Delivery over a Transmitting Entity(ies) system)

WHEREAS, Seller's Facility is not located within the control area of ~~PacifiCorp~~Purchasing Utility;

WHEREAS, Seller's Facility will not interconnect directly to ~~PacifiCorp's~~Purchasing Utility's System; WHEREAS, Seller and ~~PacifiCorp~~Purchasing Utility have not executed, and will not execute, ~~a Generation~~an Interconnection Agreement in conjunction with the Power Purchase Agreement;

WHEREAS, Seller has elected to exercise its right under PURPA to deliver Net Output from it's QF Facility to ~~PacifiCorp~~Purchasing Utility via one (or more) Transmitting Entities.

WHEREAS, ~~PacifiCorp~~Purchasing Utility desires that Seller schedule delivery of Net Output ~~on a firm, hourly basis~~to the Point of Delivery;

WHEREAS, ~~PacifiCorp~~Purchasing Utility does not intend to buy, and Seller does not intend to deliver, more or less than Net Output from the Facility (except as expressly provided, below);

THEREFORE, Seller and ~~PacifiCorp~~Purchasing Utility do hereby agree to the following, which shall become part of their Power Purchase Agreement:

DEFINITIONS

The meaning of the terms defined in the Power Purchase Agreement and this **Addendum W** shall apply to this Generation Scheduling Addendum:

"Day" means midnight to midnight, prevailing local time at the Point of Delivery, or any other mutually agreeable 24-hour period.

"Energy Imbalance Accumulation," or "**EIA,**" means the accumulated difference between Seller's Net Output and the energy actually delivered at the Point of Delivery. A positive accumulated difference indicates Seller's net delivery of ~~Supplemented Output to PacifiCorp~~Surplus Energy to Purchasing Utility.

"Firm Delivery" means uninterruptible transmission service that is reserved and/or scheduled between the Point of Interconnection and the Point of Delivery pursuant to Seller's Transmission Agreement.

"Settlement Period" means one month.

"Supplemented Output" means any increment of scheduled ~~hourly~~ energy or capacity delivered to the Point of Delivery in excess of the Facility's Net Output during that same hour or sub-hourly scheduling increment.

"**Surplus ~~Delivery~~Energy"** means any energy delivered by the Facility in excess of hourly Net Output that is not offset by the delivery of energy in deficit of hourly Net Output during the Settlement Period. ~~PacifiCorp shall accept Surplus Delivery, but shall not pay for it.~~

SELLER'S OBLIGATIONS IN LIEU OF THOSE CONTAINED IN A GENERATION INTERCONNECTION AGREEMENT.

1. **Seller's Responsibility to Arrange for Delivery of Net Output to Point of Delivery**. Seller shall arrange for the Firm Delivery of Net Output to the Point of Delivery. Seller shall comply with the terms and conditions of the Transmission Agreement(s) between the Seller and the Transmitting Entity(s). Whenever Seller fails to provide for Firm Delivery of Net Output, all Net Output delivered via non-firm transmission rights shall be deemed Excess Output, and therefore subject to the payment provision in Section 5.4.

2. **Seller's Responsibility to Schedule Delivery.** Seller shall coordinate with the Transmitting Entity(s) to provide ~~PacifiCorp~~Purchasing Utility with a schedule of ~~the next Day's hourly~~ scheduled Net Output deliveries ~~at least 24 (twenty-four) hours prior to the beginning of the day being scheduled, and otherwise~~ in accordance with ~~the~~ Federal Energy Regulatory Commission requirements and WECC ~~Prescheduling Calendar (which is updated annually and m~~Scheduling practices.

3. **Seller's Responsibility to Maintain Interconnection Facilities**. ~~PacifiCorp~~Purchasing Utility shall have no obligation to install or maintain any interconnection facilities on Seller's side of the Point of Interconnection. ~~PacifiCorp~~Purchasing Utility shall not pay any costs arising from Seller interconnecting its Facility with the Transmitting Entity(s).

4. **Seller's Responsibility to Pay Transmission Costs**. Seller shall make all arrangements for, and pay all costs associated with, transmitting Net Output to ~~PacifiCorp~~Purchasing Utility, scheduling energy into the ~~PacifiCorp~~Purchasing Utility system and any other costs associated with delivering the Seller's Net Output to the Point of Delivery.

5. **Energy Reserve Requirements.** The Transmitting Entity shall provide all generation reserves as required by the WECC and/or as required by any other governing agency or industry standard to deliver the Net Energy to the Point of Delivery, at no cost to ~~PacifiCorp~~Purchasing Utility.

6. **Seller's Responsibility to Report Net Output.** On or before the tenth (10^{th}) day following the end of each ~~Billing Period~~month, Seller shall send a report documenting hourly station service, Excess Output, and Net Output from the Facility during the previous ~~Billing Period~~month, in columnar format substantially similar to the attached **Example 1**. If requested, Seller shall provide an electronic copy of the data used to calculate Net Output, in a standard format specified by ~~PacifiCorp.~~Purchasing Utility. For each day Seller is late delivering the certified report, ~~PacifiCorp~~Purchasing Utility shall be entitled to postpone its payment deadline in ~~Section~~

~~9 of~~ this Power Purchase Agreement by one day. Seller hereby grants ~~PacifiCorp~~Purchasing Utility the right to audit its certified reports of hourly Net Output. In the event of discovery of a billing error resulting in underpayment or overpayment, the Parties agree to limit recovery to a period of three years from the date of discovery.

7. **Seller's Supplemental Representations and Warranties.** In addition to the Seller's representations and warranties contained in Section 3 of this Agreement, Seller warrants that:

(a) Seller's ~~Supplemented Output~~Surplus Energy, if any, results from Seller's purchase of some form of energy imbalance ancillary service;

(b) The Transmitting Entity(s) requires Seller to procure the service, above, as a condition of providing transmission service;

(c) The Transmitting Entity requires Seller to schedule deliveries of Net Output in increments of no less than one (1) megawatt;

(d) Seller is not attempting to sell ~~PacifiCorp~~Purchasing Utility energy or capacity in excess of its Net Output; and

(e) The energy imbalance service, above, is designed to correct a mismatch between energy scheduled by the QF and the actual real-time production by the QF.

8. **Seller's Right to Deliver Supplemented Output**. In reliance upon Seller's warranties in Section 5, above, ~~PacifiCorp~~Purchasing Utility agrees to accept and pay for Supplemented Output; *provided, however, that* Seller agrees to make commercially reasonable efforts to achieve an EIA of zero (0) kilowatt-hours during On- Peak Hours and zero (0) kilowatt-hours during Off-Peak Hours at the end of each Settlement Period.

(a) **Remedy for Seller's Failure to Achieve zero EIA**. In the event Seller does not achieve zero EIA at the end of each Settlement Period, ~~PacifiCorp~~Purchasing Utility will declare any positive balance to be Surplus ~~Delivery~~Energy, and Seller's EIA will be reset to zero. ~~PacifiCorp~~Purchasing Utility will include an accounting of Surplus ~~Delivery~~Energy in each monthly statement provided to Seller pursuant to ~~Section 9.1 of this~~this Agreement and shall pay Seller the applicable index price rate for Surplus Energy in the Agreement.

(b) **Negative Energy Imbalance Accumulations.** Any negative EIA (indicating that the Transmitting Entity has delivered less than Seller's Net Output), will be reset to zero at the end of each Settlement Period without any corresponding compensation by ~~PacifiCorp~~Purchasing Utility.

(c) **~~PacifiCorp's~~Purchasing Utility's Option to Change EIA Settlement Period**. In the event ~~PacifiCorp~~Purchasing Utility reasonably determines that doing so likely will have a *de minimis* net effect upon the cost of Seller's Net Output to ~~PacifiCorp~~Purchasing Utility, it may elect to enlarge the Settlement Period, up to a maximum of one ~~Contract Year.~~year. Conversely, if ~~PacifiCorp~~Purchasing Utility reasonably determines, based on the QF's performance during the current year, that

reducing the Settlement Period likely will significantly lower the net cost of Seller's Net Output to ~~PacifiCorp~~Purchasing Utility, it shall have the right to shorten Seller's EIA settlement period beginning the first day of the following Contract Year. However, in no case shall the Settlement Period be less than one month.

ADDENDUM W—Example 1

Example of Seller's Output Reporting Requirement

Day	Hour ending (HE)	A Meter Reading[ψ] at Point of Interconnection (MWh)	B Meter reading at Station Power Meter* (MWh)	C (=A-B) Net Output (MWh)	D Facility Capacity Rating (MW)	E (=Max (0, C-D)) Excess Output (MWh)
1	7:00	0.50	0.01	0.49	1.50	
1	8:00	0.50	0.02	0.48	1.50	
1	9:00	0.50	0.01	0.49	1.50	
1	10:00	0.50	0.01	0.49	1.50	
1	11:00	0.50	0.01	0.49	1.50	
1	12:00	1.60	0.01	1.59	1.50	0.09
1	13:00	1.70	0.01	1.69	1.50	0.19
1	14:00	1.60	0.01	1.59	1.50	0.09
1	15:00	1.50	0.01	1.49	1.50	
1	16:00	1.50	0.01	1.50	1.50	
1	17:00	1.50	0.00	1.50	1.50	
1	18:00	1.50	0.01	1.49	1.50	
1	19:00	0.50	0.02	0.48	1.50	
1	20:00	0.50	0.01	0.49	1.50	

[ψ] Seller shall show adjustment of Meter Reading for losses, if any, between point of metering and the Point of Interconnection, in accordance with Section 8.1.

[*] Does not apply if Station Service is provided from the gross output of the Facility.