UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Beaver Creek Wind I, LLC	**Docket Nos. EL21-86-000**
Beaver Creek Wind IV, LLC	**QF20-1303-000**
Broadview Solar LLC	**QF20-1304-000**
Meadowlark Solar LLC	
Greenfields Irrigation District	

MOTION TO INTERVENE AND COMMENTS OF THE COMMUNITY RENEWABLE ENERGY ASSOCIATION AND THE RENEWABLE ENERGY COALITION

The Community Renewable Energy Association ("CREA") and Renewable Energy Coalition ("REC") hereby move to intervene and submit joint comments in this proceeding before the Federal Energy Regulatory Commission ("FERC" or the "Commission"). For the reasons explained below, CREA/REC support the petition for enforcement of Beaver Creek Wind I, LLC, Beaver Creek Wind IV, LLC, Broadview Solar LLC, Meadowlark Solar LLC, and Greenfields Irrigation District (hereafter "Petitioners"). As the Petitioners explain, a state commission rule that requires qualifying facilities ("QF") to pay all the costs of network upgrades, without refunds analogous to those offered to non-QF interconnection customers, unlawfully discriminates against QFs, discourages QF development, and violates the Public Utility Regulatory Policies Act of 1978 ("PURPA") and the Commission's PURPA rules. The Commission should therefore initiate an enforcement action or, alternatively, declare such rule to be unlawful and in conflict with PURPA.

I. COMMUNICATIONS

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II. CREA'S MOTION TO INTERVENE

CREA moves to intervene in this proceeding under Rule 214(a)(3).[1] CREA is an intergovernmental association organized under Oregon Revised Statutes Chapter 190, whose membership includes local governments, irrigation districts, and renewable energy developers. CREA's organizational purpose is to support renewable energy development and thereby support an economically and environmentally beneficial electric generation sector within the State of Oregon. Many of CREA's members rely on the mandatory purchase provisions of PURPA to

[1] 18 C.F.R. § 385.214(a)(3).

create a market for the sale of electric energy and capacity from existing and proposed QFs. Thus, CREA regularly participates in proceedings before the Public Utility Commission of Oregon, FERC, and state and federal courts in proceedings regarding implementation of PURPA.

In this proceeding, the Petitioners have raised an important question of cost allocation for network upgrades under PURPA and this Commission's PURPA rules – the outcome of which will materially impact the viability of renewable energy development efforts of CREA's members in Oregon. Thus, CREA has or represents an interest of competitors to traditional public utilities which may be directly affected by the outcome of the proceeding, and granting intervention to CREA is in the public interest under Rule 214(b)(2).[2]

III. REC'S MOTION TO INTERVENE

REC moves to intervene in this proceeding under Rule 214(a)(3).[3] REC is an unincorporated trade association that is comprised of nearly 40 members who own and operate nearly 50 QFs or are attempting to develop new QFs under PURPA in Idaho, Montana, Oregon, Utah, Washington, and Wyoming. REC is open to all technology types, and its members include irrigation districts, water and waste management districts, corporations, small utilities, and individuals with an interest in selling renewable energy to utilities – members who, absent PURPA, may have no viable mechanism to develop and sell the output of renewable energy projects.

In this proceeding, the Petitioners have raised an important question of cost allocation for network upgrades under PURPA and this Commission's PURPA rules – the outcome of which will materially impact the viability of renewable energy development efforts of REC's members

[2] 18 C.F.R. § 385.214(b)(2)(ii) & (iii).
[3] 18 C.F.R. § 385.214(a)(3).

in Oregon. Thus, REC has or represents an interest of competitors to traditional public utilities which may be directly affected by the outcome of the proceeding, and granting intervention to REC is in the public interest under Rule 214(b)(2).[4]

IV. JOINT COMMENTS

The Petitioners present an important issue that necessitates action by this Commission to ensure fulfillment of PURPA's mandate to "encourage" QF development.[5] As Petitioners explain, the Montana Public Service Commission ("Montana PSC") is discriminating against QFs by allocating all the costs of network upgrades to QFs without an opportunity for refunds available to non-QFs. Such discrimination against QFs violates PURPA.

PURPA's non-discrimination provision requires that this Commission's rules ensure comparable treatment for QFs and utilities.[6] The D.C. Circuit has explained that this provision is intended to put QFs "on *an essentially equal competitive footing* with competing suppliers."[7] Unlike the Federal Power Act's antidiscrimination provision which only bars *undue* discrimination, PURPA bars *any* discrimination, and therefore utility and state arguments attempting to justify discrimination against QFs must fail.[8] Additionally, because the Commission's PURPA rules governing state-jurisdictional interconnections arise from PURPA's

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4 18 C.F.R. § 385.214(b)(2)(ii) & (iii).

5 16 U.S.C § 824a-3(a).

6 16 U.S.C. § 824a-3(b)(2) (requiring that "rates . . . shall not discriminate against [QFs]"); *Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1232 (D.C. Cir. 1995) ("Section 210 of the PURPA was enacted, in part, to address discrimination by electric utilities in the availability and price of power that they sell to and buy from cogeneration facilities for resale").

7 *Envtl. Action, Inc. v. FERC*, 939 F.2d 1057, 1061-62 (D.C. Cir. 1991) (vacating FERC order that excluded QFs from open-access tariff because this "would effect an administrative repeal of this congressional choice" to disallow discrimination against QFs).

8 *Compare* 16 U.S.C. § 824d(b) (Federal Power Act prohibition on "undue prejudice or disadvantage") *to* 16 U.S.C. § 824a-3(b)(2) (PURPA's requirement that rates "shall not discriminate").

must purchase provisions, the statutory bar against any discrimination applies to such state-jurisdictional interconnections.[9]

Thus, while this Commission has delegated to states the right to implement interconnection where the QF sells all of its output to the interconnecting utility under PURPA,[10] PURPA requires that states do so in a nondiscriminatory manner. The applicable rules require states to assess interconnection costs "on a nondiscriminatory basis[,]"[11] and to include only "reasonable standards to ensure system safety and reliability of interconnected operations."[12]

Despite the legal proscription against discrimination, states and utilities continue to discriminate against QFs and thereby frustrate development of renewable and cogeneration resources. The discrimination is plain to see by comparing the regimes for allocating network upgrade costs to QFs and non-QFs.

Under FERC-jurisdictional interconnections, this Commission's longstanding policy – affirmed by the courts – entitles the interconnection customer to a full refund of the upfront costs of network upgrades assessed by a non-independent transmission provider.[13] As the D.C. Circuit has explained, "'Network Upgrades, which are defined as all facilities and equipment constructed *at or beyond* the Point of Interconnection for the purpose of accommodating the new

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9 *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978,* Order No. 69, FERC Stats. & Regs. ¶ 30,128, 45 Fed. Reg. 12,214, at 12,220-12,221 (1980), *aff'd, Am. Paper Inst. v. Am. Elec. Power Serv. Corp*., 461 U.S. 402, 418-23, 103 S. Ct. 1921 (1983).

10 *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at PP 813-815 (2003).

11 18 CFR § 292.306(a).

12 18 CFR § 292.308; *Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215, P 37 and n.72 (Dec. 16, 2013) (finding a curtailment provision in a QF contract unlawful because it was discriminatory).

13 Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at PP 21-22.

Generating Facility,' are (ultimately) the responsibility of the Transmission Provider."[14] The D.C. Circuit affirmed "the Commission's long-held understanding that Network Upgrades provide system-wide benefits" and thus justify refunds.[15] This refund policy makes eminent sense.

The Commission's refund policy is absolutely necessary to protect against anticompetitive conduct because non-independent transmission providers are vertically integrated utilities that also develop, own, and profit from their own generation assets. Such vertically integrated monopolies are in direct competition with the interconnection customers to whom such network upgrade costs would be assessed. Without the Commission's refund policy, a non-independent transmission provider, like NorthWestern here as well as other investor-owned utilities in the Pacific Northwest, will engage in discrimination against the interconnection customer that is its direct competitor in the generation market. Additionally, the Commission has long recognized that network upgrades "benefit all transmission customers," and therefore it is not just and reasonable to assign such costs solely to a single customer.[16]

In Order No. 2003, the Commission explained that a non-independent transmission provider, i.e., a vertically integrated monopoly utility, is "an interested party" with respect to the amount of costs for network upgrades that should be allocated to the utility's competing generators.[17] Logically, the Commission was "concerned that, when the Transmission Provider is not independent and has an interest in frustrating rival generators, the implementation of

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14 *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1284 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008) (quoting Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 676).

15 *Id.* at 1285.

16 Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at PP 21-22.

17 *Id.* at P 696.

participant funding, including the 'but for' pricing approach [for network upgrades], creates opportunities for undue discrimination."[18] Discrimination can easily occur because "aspects of the 'but for' approach are subjective, and a Transmission Provider that is not an independent entity has the ability and incentive to exploit this subjectivity to its own advantage."[19] The Commission provided the example of the vertically integrated utility's "incentive to find that a disproportionate share of the costs of expansions needed to serve its own customers is attributable to competing Interconnection Customers."[20] The Commission determined that "*any policy that creates opportunities for such discriminatory behavior to be unacceptable*."[21]

Notably, however, the Commission's refund policy under Order No. 2003 still contains incentives for the interconnection customer to prevent unnecessary construction of network upgrades. The Commission's refund policy requires the interconnection customer to initially fund and finance the upfront costs of network upgrades, which are only refunded over a period of time after the facility is successfully placed in service and operates.[22] Thus, the interconnection customer still has the incentive to site and design its facility to minimize such costs to avoid such financing costs and the risk of not receiving refunds.

Unfortunately, the Commission's fears of discrimination that would result without Order No. 2003's refund policy have now borne true for QFs in state-jurisdictional interconnection procedures lacking that refund policy. The same concerns of discrimination identified in Order No. 2003 for non-independent transmission providers apply, and are even magnified, for state-jurisdictional QF interconnections. QFs are by definition "competition" for the interconnecting

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18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.* (emphasis added).
22 *Id.* at PP 722, 731.

utility. Indeed, QFs should be the utility's most disfavored type of competitor because the QF has the right to compel the interconnecting utility to purchase the QF's output at the utility's full avoided costs of generation. Utilities do not receive a return on investment for QF power purchase agreements, as they do for their own energy resources displaced by purchases from QFs.

Despite this Commission's reasoning in Order No. 2003, certain states, such as Montana, have implemented policies that have resulted in virtually all costs of network upgrades identified by a self-interested utility to be allocated to proposed QFs without any meaningful option for a refund.[23] By adopting a network upgrade cost allocation policy that is so significantly different from the FERC pro forma policy, these states have created a framework in which the monopoly utility has no incentive to identify least-cost, reliable solutions to integrating QF renewable energy resources onto their systems. Given such free reign to discriminate, the utility has no incentive to collaborate with QF resource developers in its plans for efficient use and expansion of the transmission system.

Petitioners have amply demonstrated the results of this discriminatory framework with extreme examples, including Montana PSC's endorsement of NorthWestern's allocation to a QF of the costs of a $237-million transmission line spanning 160 miles and clearly providing benefits to NorthWestern's system beyond just the interconnection of such QF.[24] There have

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[23] The problem is not limited to Montana. *See In the Matter of a Rulemaking to Adopt Rules Related to Small Generator Interconnection,* Oregon Pub. Util. Comm'n Docket No. AR 521, Order No. 09-196 at 4-5 (June 8, 2009) (quoting Or. Admin. R. 860-082-0035(4) & 860-082-0060(2)), available at http://apps.puc.state.or.us/orders/2009ords/09-196.pdf (requiring QFs with capacity of 10 MW or less to fund system upgrades necessitated by the interconnection, with an option for refunds only in the case of systemwide benefits). To the best of the commenters' knowledge, Oregon utilities have never refunded the costs of network upgrades to any QF under this policy.

[24] *Petition* at 19.

been numerous similar examples of unreasonably high cost allocations to proposed QFs in Oregon as well, which have all but ground QF development in PacifiCorp's Oregon service territory to a halt.[25] In one case, PacifiCorp proposed a major network upgrade be assessed to a proposed QF through a state-jurisdictional interconnection process, but stated to a lower-queued QF that it would have to fund the network upgrade if the higher-queued QF converted from a QF to non-QF interconnection customer – further confirming that utilities apparently believe it is acceptable to discriminate against QFs.[26] The interconnection customers in these cases are direct competitors for generation supply with the utility's merchant business unit, which profits from utility-owned generation placed in rate base under the state's vertically integrated monopoly utility regulation. It is not reasonable to assume that such a utility would efficiently minimize network upgrade costs to interconnect QF generators when the utility knows no refunds must be offered.

The regime implemented by Montana and other states is plainly discriminatory. If the same interconnection customers identified by Petitioners were interconnecting under the FERC-

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[25] Studies found on PacifiCorp's former serial interconnection queue on its OASIS website provide ample additional evidence of discriminatory network upgrades costs proposed to be assessed to QFs. These include: Q0758 (proposing a 2-MW solar QF pay $230 million for transmission upgrades connecting PacifiCorp's Southern Oregon generation area to its Willamette and Portland loads if higher queued generators do not fund such costs, *see* System Impact Study at p. 7); Q0779 (2.99-MW solar QF whose System Impact Study, at pp. 6-7, includes a potential $230-million transmission line that would take 10 years to complete); Q0769 (8-MW solar QF with System Impact Study, at pp. 5-6, proposing a new 85 to 95 mile-long 230-kV transmission line with "one or two long-span river crossings" estimated to cost $54 million). *See* https://www.oasis.oati.com/woa/docs/PPW/PPWdocs/pacificorplgiaqw.htm.

[26] *See id.* at Q0747 (6-MW proposed solar QF whose System Impact Study, at pp. 5-6, includes 80 to 90 mile-long 230-kV transmission line estimated to cost $40 million) *and* Q0750 (alternatively proposing the same 230-kV line for a 2-MW hydropower QF, and explaining, at p. 5 of the System Impact Study, "if the Q0747 interconnection customer chooses to convert to a non-qualified facility, or drops out of the queue, the transmission line construction requirement will be required for Q0750").

jurisdictional interconnection process, the utility would provide a full refund to them under Order No. 2003 for the network upgrade costs. Indeed, recent major resource acquisitions by the Northwest's utilities confirms that ratepayers fund the large costs of network upgrades for the utility's non-QF generation acquisition. For example, PacifiCorp recently achieved retail rate recovery for the costs of its $680 million Aeolus to Bridger/Anticline 500 kV transmission project, among other major network upgrades, that were required to develop its latest major non-QF generation resource acquisitions.[27] As with virtually all such network upgrades, PacifiCorp justified the cost recovery on the ground that the transmission project provided other benefits to the system beyond allowing interconnection of its new generation resources.[28] Yet QFs proposing to interconnect and sell their output to the interconnecting utility must pay the full costs identified by the utility with no refund option. There could be no more clear case of discrimination frustrating the purposes of PURPA to encourage development of QFs.

While utilities attempt to blame the QF by asserting that the high cost of QF network upgrades results from the QF's decision as to where to site its proposed facility, that same argument was rejected in Order No. 2003 because it ignores the incentive for discrimination by the non-independent transmission providers.[29] In the absence of refunds offered to QFs, there is no incentive for the utility to proactively identify efficient sites for its QF competitors to interconnect or to otherwise minimize network upgrade costs. Additionally, under the Commission's refund policy in Order No. 2003, the QF would have the same incentives to reduce such network upgrade costs as non-QF interconnection customers because the

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27 *In Re PacifiCorp, dba Pacific Power, Request for General Rate Revision*, Oregon Pub. Util. Comm'n Docket No. UE 374, Order No. 20-473, at pp. 46-48, 50-55 (Dec. 18, 2020), available at https://apps.puc.state.or.us/orders/2020ords/20-473.pdf.

28 *Id.*

29 Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at PP 681, 683, 695-696.

Commission's refund policy still requires upfront payment by the interconnection customer that is refunded only if the facility is placed in service and operates for a period of time.

Further, it is not valid for the Montana PSC or other state commissions to assess network upgrade costs through a reduction to the avoided cost rates offered to the proposed QFs, as Petitioners explain the Montana PSC has done in this case through a $159.91/MWh reduction to the QF's avoided cost rates.[30] That approach just achieves the same discriminatory result through a different means. PURPA's antidiscrimination provision expressly proscribes discriminatory rates and thus makes it equally unlawful to recover the discriminatory network upgrade costs through avoided cost rates.[31] Shifting the focus to recovery of such costs to avoided cost rate calculations does nothing to address the inherent subjectivity and discriminatory motivation identified in Order No. 2003, which incents the self-interested utility to inflate the costs of network upgrades for its competitors. Absent a right to full refund of the network upgrade costs, a state rule assigning such costs to QFs directly or through avoided cost rate calculations is discriminatory, fails to encourage development of QFs, and therefore violates PURPA.

V. CONCLUSION

For the reasons stated herein, the Commission should grant CREA's and REC's motions for intervention and grant the Petitioners' petition for enforcement.

30 *Petition* at 24.

31 16 U.S.C. § 824a-3(b)(2); 18 C.F.R. § 292.304(a)(ii).

Respectfully submitted on July 22, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day, July 22, 2021, served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

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