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 DRAFT PROPOSED RULES

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 draft of proposed administrative rules related to contracting process and power purchase agreement ("PPA") terms circulated August 3, 2021 ("Staff's Draft Rules") for implementation of the Public Utility Regulatory Policies Act of 1978 ("PURPA") by the Public Utility Commission of Oregon ("OPUC" or the "Commission").

Staff requested that parties submit written comments on Staff's Draft Rules by August 12, 2021, so that Staff may make revisions before the proposed rules are finalized by the Commission at commencement of the formal rulemaking, which is scheduled to occur at the public meeting on August 24, 2021.

The QF Trade Associations appreciate Staff's collaborative efforts in this informal rulemaking process, but the QF Trade Associations continue to have several outstanding concerns and recommendations for improvement of Staff's Draft Rules. The Commission

should ensure that its rules adopted under PURPA are compliant with the policy direction from the applicable legislation, which include directives to "encourage" development of QFs,[1] to promote development of such "permanently sustainable energy resources" to "the highest degree possible,"[2] to ensure rates paid to QFs are "just and reasonable,"[3] to "increase the marketability" of energy from QFs,[4] and to "create a uniform and settled institutional climate" for QFs.[5] Unlike most states, Oregon has specific legislative directives requiring the Commission to go beyond the federal mandates of PURPA, and actions taken by the Commission in this proposed rulemaking must be consistent with that policy direction.

In many cases, however, it appears that Staff's latest draft of the proposed rules has backtracked on the goal of promoting QFs and instead included proposals by PacifiCorp, Portland General Electric Company ("PGE"), and Idaho Power Company (together the "Joint Utilities") made during the informal rulemaking that would create unreasonable obstacles to renewable energy development in Oregon under PURPA. Therefore, the QF Trade Associations recommend that the Commission not publish Staff's Draft Rules as the proposed rules with the Secretary of State until after the issues discussed in these comments are corrected.

In addition to addressing significant substantive issues, we have identified "nits" to the draft proposed rules that are less substantive in nature, but still important to correct for clarity of intent. The "nits" are shown in a mark-up of the draft proposed rules attached to these comments, which also identifies the areas of substantive disagreement for further consideration.

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1 16 USC § 824a-3(a).
2 ORS 758.515(2)(a).
3 ORS 758.515(2)(b).
4 ORS 758.515(3)(a).
5 ORS 758.515(3)(b).

Additionally, the QF Trade Associations reserve the right to revise their position after reviewing comments from other parties.

II. COMMENTS

A. The Applicability of Staff's Draft Rules Should be Clarified

The QF Trade Associations recommend that Staff's Draft Rules be revised to clarify their applicability.

The task of determining the applicability of the rules' various provisions may be more complicated than it might initially seem. On one hand, existing law and regulation is normally incorporated by law into every contract absent express intent to the contrary by the parties, which means the rules could become de facto provisions of PPAs entered into at the time of the rulemaking.[6] On the other hand, PURPA proscribes retroactive modification of long-term PURPA PPAs.[7] The Commission's rules should be careful to require inclusion of certain rule provisions on a prospective basis in new PPAs while not inadvertently purporting to override provisions of existing PPAs. Doing so is complicated by the disparate effective date of the various rule provisions. Specifically, some of the provisions in the rules at issue have existed for many years, and therefore would be expected to be incorporated into existing PPAs executed while such rule provisions were in effect, while other provisions of the rules are being implemented for the first time and should clearly not be intended to override contractual arrangements predating the effectiveness of such provisions.

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6 *E.g.*, *Blizzard v. State Farm Automobile Ins. Co***,** 86 Or App 56, 61, 738 P2d 983, *rev den* 304 Or 149 (1987).

7 *Oregon Trail Electric Consumers Cooperative, Inc. v. Co-Gen Company*, 168 Or App 466, 482, 7 P3d 594 (2000).

The QF Trade Associations do not understand Staff's intent to be that rules implementing a new policy (as opposed to merely codifying a preexisting policy) should apply to existing PPAs executed before finalization of the rules, and the QF Trade Associations would likely oppose any such retroactive modification of existing PPAs. However, the provision in Staff's Draft Rules addressing this point is somewhat unclear because it uses a catch-all application to the entire set of rules without taking into account that some provisions have been in effect for many years while others are entirely new. It also overlooks that some provisions of the rules are not intended for inclusion in PPAs at all. The proposed OAR 860-029-0005(1), which is the same as the existing provision, provides:

> These rules apply to all interconnection, purchase, and sale arrangements between a public utility and qualifying facilities as defined herein. *Provisions of these rules do not supersede contracts existing before the effective date of this rule*. At the expiration of such an existing contract between a public utility and a cogenerator or small power producer, any contract extension or new contract must comply with these rules.

(emphasis added). Staff should consider revising the phrase "effective date of this rule" at the end of the second sentence to better account for various effective dates of the individual provisions of the rules.

Additionally, only isolated sections of the rules, such as proposed OAR 860-029-0120, and New Rule #'s 1, 4, 5, and 6, are clearly intended to mandate certain contractual provisions that must be incorporated into new PPAs. Many other sections of the proposed rules address matters other than required terms and conditions of PPAs, such as rate calculations and filings (e.g., proposed OAR 860-029-0040, -043, -046, -0050, -0080, -0085), the utility's obligation to offer contracts and the negotiation processes (e.g., proposed OAR 860-029-0030, -0100, New Rule #3), and eligibility for standard contacts (e.g., proposed New Rule #2). Other proposed rule

provisions mandate certain outcomes without making it clear whether the rule provision is intended to override or "gap fill" PPAs or whether such rule provisions are intended to be included as a provision within PPAs. For example, the proposed rule provision on "System Emergencies," OAR 860-029-0070, falls into this last category by declaring the utility possesses certain curtailment rights but not necessarily requiring such a corresponding term or condition be expressly included in PPAs offered by the utility.

Further, while this docket title reads "Procedures, Terms, & Conditions Associated with QF *Standard* Contracts" (emphasis added), the scope of Staff's draft rules is far broader than that. Staff adds New Rules #2, #3, and amends OAR 860-029-0120, which all by their titles appear to be limited to standard contracts. Yet, the remainder of the additions and amendments in the rules do not appear to be so limited. This includes revisions to the definitions section (OAR 860-029-0010) and the obligations of all QFs to public utilities (OAR 860-029-0020) the addition of a conditional designated network resource process for all QFs (New Rule #1), delivery and purchase obligations for all QFs (New Rule #4), force majeure provisions applicable to all QFs (New Rule #5), default and termination provisions applicable to all QFs (New Rule #6), and operation and control requirements applicable to all QFs (New Rule #7). Yet, even so, there are some areas in the draft rules where it is ambiguous. For example, New Rule #4 appears to apply to all PPAs, yet in at least subparagraph (2), it appears to be limited to only standard PPAs by explicit mention of the "standard" PPA. Therefore, in addition to clarifying whether each of the rules mandate specific contractual language, the rules should clarify which contractual provisions are mandated only for standard PPAs and which are mandated for all PPAs. Staff could potentially accomplish this with a catch-all provision that

states that such provisions are mandated only for standard PPAs unless otherwise specifically stated that they are also applicable to non-standard PPAs.

To avoid confusion, the QF Trade Associations recommend that Staff clearly identify in the rules which provisions are intended be required for inclusion in standard and/or non-standard PPAs and which, if any, are intended to override or fill in the gaps within existing or future PPAs. As a general matter, the right of the QF to elect to enter into standardized provisions can be desirable because it can minimize transactional costs involved in contract negotiation; however, for non-standard PPAs, there may be reasonable grounds for both parties to agree to different terms and conditions. Once Staff's intent is better understood on the applicability of the various rules to existing and future PPAs, the QF Trade Associations may have additional comments on this point.

B. Reasonableness Requirement

The QF Trade Associations recommend adding a requirement that, in implementing these administrative rules related to contracting process and power purchase agreement terms, the utilities must act reasonably at all times. The Commission has the power to require the utilities to act reasonably.[8] However, omitting this requirement from the rules could undermine the Commission's authority to hold utilities accountable for unreasonable behavior. Even one inadvertent omission of the word "reasonable" in a provision could lead to litigation. Rather than attempt to impose reasonableness in a piecemeal fashion, the QF Trade Associations

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[8] *See, e.g.,* ORS 756.040 (addresses the Commission's general powers and states that in addition to any duties otherwise vested in the Commission, the Commission shall "protect [] customers, and the public generally, from unjust and unreasonable exactions and practices [by the utilities]."); ORS 757.325 (requires utilities to not act unreasonably in giving preference or advantage to any person).

recommend a generic provision that requires the utilities to implement the entire rule chapter reasonably.

The case of *Sandy River Solar, LLC v. PGE* highlights the importance of adding a generic requirement that, in implementing these rules, the utilities must act reasonably. In that proceeding, a QF, Sandy River Solar, LLC, argued that PGE had unreasonably refused the QF's request to hire a third-party consultant to perform the interconnection upgrades in violation of OAR 860-082-0060(8)(f).[9] The rule states, "[a] public utility and an applicant may agree in writing to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades, subject to public utility oversight and approval."[10] Notably, the Commission's interconnection rules lack an explicit reasonableness standard, but the QF argued that such a requirement was implicit.

PGE responded by arguing the term "may" gives the utility total discretion to deny such requests without any reasonableness standard because "may" is permissive, not mandatory.[11] PGE noted several examples elsewhere in the small generator interconnection rules where reasonableness is a requirement.[12] PGE used these examples to contrast against the third-party consultant rule, OAR 860-082-0060(8)(f), that does not expressly contain a reasonableness

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9 *Sandy River Solar, LLC vs. PGE*, Docket No. UM 1967, Complaint at 4 (Aug. 24, 2018).

10 OAR 860-082-0060(8)(f).

11 Docket No. UM 1967, PGE's Motion for Partial Summary Judgment at 12-13, 17 (Feb. 27, 2019).

12 Docket No. UM 1967, PGE's Reply in Support of Motion for Partial Summary Judgment at 11-12 (Apr. 4, 2019). For example, a "public utility may not unreasonably refuse to grant expedited review of an application to renew an existing small generator facility interconnection if there have been no changes" and the "public utility must make reasonable, good-faith efforts to follow the schedule set forth in the feasibility study agreement for completion of the study." OAR 860-082-0025(1)(e)(A), -0060(6)(d); *see, e.g.*, OAR 860-082-0060(6), (8)(a).

requirement.[13] The Commission ultimately agreed with PGE, holding that the utility had discretion to decide whether to hire a third-party consultant and that discretion was not subject to a reasonableness standard.[14] In effect, PGE argued that utilities may act unreasonably whenever the rules do not explicitly proscribe it, and the Commission agreed. Under this precedent, the Commission may not have authority to require utilities to implement rules reasonably unless the rules themselves explicitly require the utilities to do so.

A reasonableness requirement that is applicable to all of these PPA contracting rules would avoid the confusion, ambiguity, and potential litigation demonstrated in *Sandy River Solar*. Without an explicit reasonableness requirement, utilities will likely argue that they have complete discretion and may act unreasonably.[15] Under *Sandy River Solar*, it may be difficult for any QF or even the Commission to hold utilities accountable for unreasonable, potentially illegal behavior. The Commission should mitigate the risk for utility abuse and impose a generically applicable reasonableness requirement.

C. Security

The QF Trade Associations oppose Staff's proposal to subject small[16] QFs under the standard contract size threshold to burdensome security requirements. Under Staff's Draft Rules, all QFs must post security for the utility's benefit in the event of a QF default occurring either

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13 Docket No. UM 1967, PGE's Reply in Support of Motion for Partial Summary Judgment at 12 (Apr. 4, 2019).

14 Docket No. UM 1967, Order No.19-218 at 25 (Jun. 24, 2019).

15 *But see, e.g.,* ORS 757.325.

16 Unless otherwise indicated, the QF Trade Associations use the word "small" here to refer specifically to QFs eligible for standard contracts. This usage is for brevity, as there are some QFs considered "small" in other contexts but who are not eligible for standard contracts.

prior to commercial operations ("Project Development Security") or after commercial operations ("Default Security").[17] Further, Staff's Draft Rules prohibit QFs from posting security through the use of step-in rights or senior liens.[18] Finally, Staff's Draft Rules require QFs to forfeit the security in unreasonable circumstances.[19]

The Commission has previously addressed the question of what security is appropriate under standard PURPA PPAs. In UM 1129, Staff explained that:

> The issue simply involves the level of security requirements that are appropriate for small QFs, given (1) the magnitude of the risk to the utility, (2) the relative risk to ratepayers of large utility-owned resources compared to small QF purchases, and (3) the interest of the Commission in facilitating the development of QFs in Oregon.[20]

The Oregon Department of Energy represented that the "risks arising from potential default by a QF are likely small" but no party (including the utilities) quantified the risk nor provided "any empirical evidence of the risks associated with QF default."[21] Therefore, the Commission concluded that

> it would not be prudent to subject utilities and, in turn, their ratepayers, to an unknown level of unsecured risk. We agree, however, that the risk may be relatively low and that an unreasonably high level of security may create a major impediment to the development of QF projects. Consequently, the question is not whether to require *any* default security, but rather what level of default security requirements should be required?[22]

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17 Staff's Draft Rules at OAR 860-029-0120(13), (14).

18 Staff's Draft Rules at OAR 860-029-0120(13), (14).

19 Staff's Draft Rules at OAR 860-029-0120(8)(c).

20 *Investigation Related to Electric Util. Purchases from QFs,* Docket No. UM 1129, Staff/800, Morgan/4; *see* ORS 758.515 (describing the Commission's obligation to foster QF development in Oregon).

21 Docket No. UM 1129, Order No. 05-584 at 44 (May 13, 2005).

22 Docket No. UM 1129, Order No. 05-584 at 45 (emphasis in original). Note that the Commission used the term "Default Security" in UM 1129 to refer to both pre- and post-operational security, or what Staff's Draft Rules now call "Project Development Security" and "Default Security."

Ultimately, the Commission adopted the current policy for standard contracts that: 1) creditworthy QFs do not need to post security; and 2) QFs unable to demonstrate creditworthiness have the right to choose how to post security through one of four options.[23] Those four options are a senior lien, step-in rights, a cash escrow or a line of credit.[24] Finally, in the case where the QF elects to supply a form of liquid security (i.e., cash escrow or letter of credit), nothing in the Commission's current implementation of PURPA permits the utility to automatically keep the security where no proof exists that the amount of the security is a reasonable approximation of the utility's actual damages caused by the QF's breach of contract.

Further, the Commission determined that the situation for Project Development Security is "effectively no different than" for Default Security and imposed the same requirements, with the caveat that the utility must be in a resource deficient position.[25] If a utility is in a resource sufficient position, the Commission determined that there is no need for any Project Development Security.[26]

It appears that the Joint Utilities, and Staff, wish to revert to the contracting policies and practices in effect prior to the Commission's UM 1129 decisions and which the Commission effectively rejected.[27] It is important to remember that UM 1129 examined QF contracting

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23 Docket No. UM 1129, Order No. 05-584 at 45; Docket No. UM 1129, Order No. 06-538 at 2, 11 (Sept. 20, 2006) (stating that "When entering into a standard contract, QFs must demonstrate creditworthiness, or provide a specified amount of default security" and clarifying the prior order).

24 Docket No. UM 1129, Order No. 05-584 at 45.

25 Docket No. UM 1129, Order No. 05-584 at 47.

26 Docket No. UM 1129, Order No. 05-584 at 47.

27 *See* Docket No. UM 1129, Order No. 05-584 at 42, 46 (describing the utilities' prior requirements for liquid security, which the Commission declined to maintain).

issues specifically because of a concern about "the lack of recent QF development."[28] The Commission has statutory obligations to foster QF development and should not revert to harmful practices.[29]

In essence, the QF Trade Associations recommend adhering to current policy for small QFs and revising Staff's Draft Rules to the extent they conflict with this longstanding Commission policy. Specifically, the Commission should maintain its policies of: 1) exempting creditworthy QFs from any security requirements; and 2) allowing QFs unable to demonstrate creditworthiness to post security through step-in rights or senior liens. Additionally, if the QF elects to submit a liquid form of security, the security amount should not be automatically forfeited to the utility in the event of breach; otherwise, the provision becomes a liquidated damages provision, which is likely going to be an illegal penalty in many or most cases.

As additional support, the QF Trade Associations explain below that: 1) recent QF failure rates are primarily the result of the flawed interconnection process and different understandings of contract provisions, and do not justify additional security requirements that will only reward utilities for hindering QF development; and 2) the Washington Utilities and Transportation Commission ("WUTC" or the "Washington Commission") recently addressed security for its standard contracts and generally exempted small QFs from security requirements, adopting a more lenient security standard than the Commission's current policy.

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[28] Docket No. UM 1129, Order No. 05-584 at 11.
[29] *See* ORS 758.515.

a. Excuse Small QFs From Posting Any Liquid Security

Staff's Draft Rules do not go far enough in exempting small QFs from security requirements. Staff imposes both a Project Development Security and a Default Security after operations on all QFs, including the smallest QFs, unless the QF can meet the utility's proprietary creditworthiness criteria that are undefined in the rule.[30] The QF Trade Associations recommend exempting all small QFs from any liquid security requirements.

As a preliminary matter, the QF Trade Associations note that their previous comments explained that it may be reasonable to modify the Commission's Project Development Security requirements for large QFs but *not* for small ones.[31] In distinguishing these groups, the Commission should remember its 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. Standard contracts are designed to eliminate negotiations and to thereby remove transaction costs. … In addition to transaction costs, … other market barriers such as asymmetric information and an unlevel playing field … obstruct the negotiation of non-standard QF contracts. Just like transaction costs, these market barriers can render certain QF projects uneconomic to get off the ground if an individual contract must be negotiated.[32]

The QF Trade Associations recommend not imposing new burdens on QF development, particularly not in standard contracts whose existence aims to support those small QFs least able

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30 Staff's Draft Rules at OAR 860-029-0120(13), (14).

31 *See* Joint Comments of the QF Trade Associations on Staff's Updated Proposal; *see also* Joint Comments of the QF Trade Associations on Staff's Initial Proposal at 9 (discussing how, until the Commission resolves the flawed interconnection process, QFs should not need to provide interconnection studies to obtain PPAs; and discussing how it might be reasonable to require *large* QFs to provide Project Development Security as an alternative to requiring interconnection studies).

32 Docket No. UM 1129, Order No. 05-584 at 16.

to afford the transaction costs and other barriers to QF development. The Joint Utilities have argued that security is necessary to show that QFs have some "skin in the game" and incentive to complete the project because they have money at risk in case of failure to construct and/or operate the project. From a factual perspective, this ignores that QF developers and their financiers must invest often significant resources which generally provides them with sufficient economic incentives. Entering into a power purchase agreement requires expenditures and time investment related to obtaining land and site control, permits, governmental approvals, and numerous studies, generally including interconnection studies. Once the interconnection studies are complete and an interconnection agreement is executed, then the QF developer generally must pay significant deposits and is responsible for all "reasonable" interconnection costs.[33] The QF must also contract with suppliers, construction companies and numerous others to build the actual project. All of these amounts are sunk costs that will be lost if they fail to become commercially operational and put huge risk on the QF.

If the Commission adopts a more stringent security policy, then there will be a certain category of small PURPA developers that will be unable to afford, or unwilling to take the risk, of failure. Thus, the Commission should recognize that it will be making an affirmative decision that certain business models and types of small developers will not be able to operate in Oregon.

b. Retain the Option for QFs Unable to Demonstrate Creditworthiness to Post Security through Step-In Rights or Senior Liens

The next concern with that the QF Trade Associations have with Staff's Draft Rules is the removal of step-in rights or senior liens as options for how QFs unable to demonstrate

33 *See* OAR 860-082-0035.

creditworthiness may post security. For clarity, the QF Trade Associations discuss this issue separately for Default Security and Project Development Security.

QFs should not lose the option of providing step-in rights. As background, step-in rights authorize a contractual party to take over the development or operation of a project. Thus, if a small QF developer or owner becomes unable to proceed, for whatever reason,[34] a utility may nevertheless develop or operate the facility as if it were the utility's own. This may mitigate the risks associated with small business management for the QF from the risks associated with resource development for the QF and by extension the utility. Note that the benefit of step-in rights typically increases as the project becomes more developed and achieves operations, which correlates to the utility's increasing expectation that the project will meet its contractual obligations.

i. Retain the Option for QFs Unable to Demonstrate Creditworthiness to Post Default Security through Step-In Rights or Senior Liens

The QF Trade Associations strongly oppose requiring operational QFs to post liquid security and prohibiting the use of senior liens or step-in rights. If a facility is actively operating, failure is unlikely. Once it is operating, the QF owner has every incentive to continue operations because it is only paid for energy delivered and can only recoup its capital investments by continuing to operate. The utilities have identified no specific instances of failure in Oregon of operating QFs that have recently caused harm to the utility. Thus, there is very little risk of

[34] It is important to recognize that smaller QFs are often developed and owned by small businesses, potentially run by a single person with limited assistance. It should be apparent that one person could become incapacitated by, say, COVID-19 and unable to manage the business operations (e.g., scheduling maintenance, communicating with the utility, etc.).

default after operations, and any risk that might exist could be ameliorated through the right of the utility to exercise step-in rights and take over the operations. Therefore, the Commission should retain the option for QFs unable to demonstrate creditworthiness to post Default Security through the use of Step-In Rights or Senior Liens.

If anything, due to the limited risk of default during operations, the Commission should reduce its requirements for Default Security. As a reminder, the Commission only adopted its requirement for Default Security because it felt that the risks of QF defaults after commercial operations were too speculative and unknown.[35] Experience since then shows that is rare that an existing QF will default after they achieve commercial operations. As far as we know, the utilities have not identified any recent instances of harm to a utility by a default by an operating Oregon QF. Therefore, the risk to ratepayers from a small QF defaulting after operations is very small.

In UM 1129 the Oregon Department of Energy commented that Default Security might be warranted but only if payments are levelized.[36] Commission Staff agreed in that docket therefore proposed default security for use *with levelized rates*.[37] Therefore, in addition to the other reasons, the Commission should eliminate the requirement for a liquid security because there are no levelized rates in Oregon.

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[35] Docket No. UM 1129, Order No. 05-584 at 42, 45 (describing circumstances when a QF might default after operations and explaining that the risk, while likely low, was not quantified).

[36] Docket No. UM 1129, Order No. 05-584 at 44.

[37] Docket No. UM 1129, Order No. 05-584 at 43 ("Should a QF receive levelized payments, Staff recommends that the utility allow the QF to select one of the following default security measures: credit rating requirements; a senior lien on the facility; step-in rights; a cash escrow; or a letter of contract.").

ii. Retain the Option for QFs Unable to Demonstrate Creditworthiness to Post Project Development Security through Step-In Rights or Senior Liens

The QF Trade Associations also object to prohibiting the use of step-in rights or senior liens for projects that are not yet operational. Again, in UM 1129, Commission Staff specifically recommended that "utilities should not be allowed to require a letter of credit or escrow deposit as … security for small QFs."[38] While step-in rights *might* provide less value for Project Development Security than Default Security, step-in rights and senior liens are not "effectively meaningless" as Staff alleges.[39] Step-in rights provide value, even if that value may be difficult to quantify and may vary across QFs. The mere fact that a utility declines to exercise step-in rights is not *prima facie* evidence that the step-in rights were not valuable, nor that a project would not have been prudent for the utility to develop.

For example, the Commission recently determined that PacifiCorp's development of Pryor Mountain was prudent.[40] Pryor Mountain was originally a QF that struggled to become operational because of the low avoided cost prices provided by PacifiCorp and the expenses relating to interconnection upgrades.[41] The project failed. PacifiCorp obtained and developed the project because the QF site was valuable, and constructed the QF at a higher cost to ratepayers (and PacifiCorp was able to include in rates the interconnection upgrades).[42] This was a good business decision by PacifiCorp and a prudent investment, and demonstrates that a

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38 Docket No. UM 1129, Staff/800, Morgan/4.

39 Staff's Description of Staff Proposed Rules for AR 631 (July 14 proposal and August 2 Revisions) at 4-5.

40 *PacifiCorp Request for a General Rate Revision*, Docket No. UE 374, Order No. 20-473 at 50 (Dec. 18, 2020).

41 Docket No. UE 374, Order No. 20-473 at 49-50.

42 Docket No. UE 374, Order No. 20-473 at 131.

utility's ability to step in and gain access to a QF's pre-operational development is valuable. Thus, Pryor Mountain is an excellent example of how step-in rights can be highly valuable in some circumstances.

The QF Trade Associations note that QF sites might become increasingly valuable in light of Oregon's more restrictive land use requirements. Thus, step-in rights might provide more value today than they did when the Commission originally decided that step-in rights provided adequate security for QFs unable to demonstrate creditworthiness.

c. Disincentivize Utility Abuse by Limiting the Circumstances for Security Forfeiture

The QF Trade Associations also recommend maintaining current policies in regard to security forfeiture. Staff's Draft Rules require QFs to forfeit their security to the utility, even when the interconnection process is explicitly responsible for the QF choosing to terminate its PPA.[43] Similarly, a QF will forfeit their security if there is a reasonable dispute about a contract provision that contributes to project failure. This will put a bounty on QFs and reward utilities for failing to meet their interconnection obligations. This is already a significant hurdle to QF development, as discussed further in the next section. The Commission should recognize how security forfeiture will exacerbate disputes and provide an incentive for the utilities to more aggressively interpret and enforce contracts.

At minimum, security forfeiture should only occur when the utility demonstrates it has suffered an actual harm, either in court or through another appropriate dispute resolution process if the parties do not agree with respect the amount of the damages. A utility will often not be

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[43] Staff's Draft Rules at OAR 860-029-0120(8)(c).

harmed in the case of a breach of a QF PPA. For instance, the rates in the PPA could be higher than the cost of replacement resources available, or the utility's resource position could have changed such that there was no longer a need for the QF's supply. Thus, the amount of forfeiture should be limited to the actual harm the utility incurs. To do otherwise would violate the same Oregon contract principles barring punitive liquidated damages provisions, which are discussed under the section of these comments on damages.

d. The Recent High Rates of QF Failure in Oregon Stems In Part From Actions by PGE and the Commission

The QF Trade Associations understand that one reason the Joint Utilities and Staff are proposing Project Development Security is to prevent "speculative" projects and because of the recent high rate of failure among Oregon QFs.[44] It is true that many (but not all) QFs less than 10 MWs are less sophisticated business entities, private individuals and governments than those that bid into utility RFPs, and that they should have, all things equal, a higher rate of failure. This higher rate of failure militates in favor of no security because the Commission should encourage these developers and not increase the chance of failure that would come from imposing higher costs in the form of security requirements. The current very high failure rates for small QFs, however, may be a historic anomaly based on PGE's aggressive contract interpretation and interconnection issues, and the Commission's recent decisions that have made it more difficult to construct and finance projects in Oregon.

The main reason that QFs with executed contracts in Oregon have failed is because of the challenges associated with interconnecting to PGE. There has historically been little visibility

[44] Joint Utilities' Initial Comments at 4 (Mar. 30, 2021).

into locations on PGE's system that would allow for easy interconnection, which have made it difficult to choose the optimum project siting. The QF Trade Associations note that there have been improvements in PGE's interconnection processing; however, the delays, inaccurate cost estimates, cost overruns, changing interconnection standards, hostility toward their customers, and overall level of mistakes and errors has been unprecedented, and nothing any reasonable QF developer could have expected or should have been required to experience.[45] The Commission decided that the Oregon rules do not provide QFs a right to hire third party contractors to perform interconnection work, which removed a potential tool to addressing some of the PGE interconnection challenges.[46] In the end, there can be no question that numerous projects would have come on line on time and more projects would have been constructed had they been provided services comparable to those offered to interconnection customers in the rest of the nation.

The Commission's decisions on interconnection matters and interpreting PGE's standard contracts have also increased the failure rate among Oregon QFs. The QF Trade Associations

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45 *See generally, e.g., Zena Solar, LLC v. PGE,* Docket No. UM 2164, Complaint at 1-15 (May 24, 2021) (disputing whether QF required to pay for 3V0 protection even after third party identified substation was already exposed to 3V0 issues without the interconnection); *St. Louis Solar, LLC v. PGE*, Docket No. UM 2057, Second Amended Complaint at 1-7 (Feb. 18, 2021) (disputing harms from PGE's nearly 30 months of delay in the interconnection process); *Madras Solar PV1, LLC v. PGE,* Docket No. UM 2009, Complaint at 1-3 (Apr. 22, 2019) (disputing Point of Delivery, which causes delays to QF's efforts to enter into a PPA with PGE).

46 Docket No. UM 1967, Order No. 19-218 at 1. The Commission also indicated in this June 2019 decision the issue could be revisited stating that: "Although we conclude that OAR 860-082-0060(8)(f) as written does not include a reasonableness standard, we note that requirements regarding the use of third-party consultants in the interconnection process can be further considered in Docket UM 2000." *Id.* at 26. While Commission has taken some efforts to improve the interconnection process for community solar projects, there has been no substantive action for regular QFs.

hope that this future interconnection proceedings will improve the interconnection process and this rulemaking will provide greater clarity and less unexpected litigation that will allow QFs to rely upon a settled institutional climate for their development.[47] The Commission has ruled against QFs and in favor of PGE in at least three major contract interpretation cases which have had a material impact on the success rate for QFs.

In UM 1931, the Commission interpreted PGE's standard contract as the fifteen-year period for fixed prices starting at contract execution rather than commercial operation and power deliveries.[48] The development community understood, and the QFs that entered into these contracts believed, that the Commission had a policy that, and that PGE's contract was consistent with the policy, the fixed price period started at commercial operation and not contract execution. The ultimate Commission decision agreeing with PGE's interpretation of contract execution meant that projects lost up to 4 years of fixed prices or 26% of the total value. The

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47 The QF Trade Associations do not intend and urge the Commission not to interpret this section as attempting to reargue past Commission decisions, or even allege that prior Commission decisions were erroneous. Instead, the intent of this section is to simply point out the practical impact that certain Commission decisions have had on the success rate for QFs, and that hopefully these circumstances will not repeat themselves if there are clearer rules. This has happened in two main ways. First, many QFs would not have entered into contracts if they had known how the Commission would interpret their provisions. For example, most QFs need 15 years of fixed prices to obtain financing. Numerous QFs entered into contracts based on the assumption that they would have 15 years of fixed prices. If those QFs knew that their fixed prices started at execution and were effectively less than 15 years, then they may never have even executed contracts and thus the "failure" rate would be lower. Second, significant changes in expectations that impact the profitability of a project can cause a project that would have otherwise succeeded to fail. If the change in expectations is outside of the control or assumptions of the QF (e.g., a regulatory decision or utility action), then the "failure" should not be ascribed to the QF, assuming their original expectations were reasonable.

48 *See PGE v. Alfalfa Solar I, LLC, et al.*, Docket No. UM 1931, Order No. 19-255 at 13-14 (Aug. 2, 2019), *appeal pending*; Docket No. UM 1931, Order No. 19-394 at 1 (Nov. 14, 2019).

mere fact that PGE took a contrary view to developers and then the ultimate Commission decision impacted the success rate for projects. For projects which had not yet invested significant sums of money, it could have been a wise economic decision to seek to deploy their capital somewhere else, or seek to switch their contracts from a standard PUPRA sale to community solar projects, after such an unexpected drop in forecasted revenues.

In UM 1894, the Commission interpreted PGE's standard contract as only allowing immaterial size changes prior to COD.[49] At least some developers understood that they could materially increase or decrease their project size after contract execution. The flexibility to change project size could be a significant benefit to becoming commercially operational when facing the interconnection challenges as occur in PGE's service territory. Regardless of the reasonableness of these developers' expectations, the fact that the Commission concluded that their contracts did not have the flexibility that they expected harmed the project economics and made development more challenging.

In UM 2051, the Commission interpreted PGE's standard contract provisions regarding termination and resource sufficiency and deficiency such that PGE was allowed to terminate Fossil Lake Solar's contract.[50] The PGE standard contract provision was substantially the same as the provision in PacifiCorp's standard contract. In DR 48, the Coalition petitioned for a declaratory ruling that the Commission interpret PacifiCorp's standard contract and its

[49] *PGE v. Pac. Nw. Solar, LLC*, Docket No. UM 1894, Order No. 18-284 at 5-6 (Aug. 2, 2018).

[50] *Fossil Lakes Solar, LLC v. PGE*, Docket No. UM 2051, Order No. 20-340 at 11-14 (Oct. 12, 2020).

termination provisions as it relates to resource sufficiency and deficiency.[51] The developers reasonably relied upon prior Commission precedent and/or their contract to assume that PacifiCorp could not terminate their contracts unless it was actually resource deficient. In DR 48, the Commission Staff informally agreed with the QF parties. Then the Coalition, PacifiCorp and the individual QF projects that were facing contract termination reached a settlement.[52] Now there are a number of small scale hydro-electric facilities are operating and selling power because of that settlement. These projects would not have been able to reach commercial operations under the Commission's order in Fossil Lake Solar, discussed above. Again, regardless of the correctness of the order in UM 2051, the case illustrates that the ability for QFs to reach commercial operation is highly dependent upon the approach that their purchasing utility takes toward disputes (i.e., settlement or litigation) and the resolution of those disputes.

Therefore, the historically low rate of QF survival in Oregon is related, at least in some cases, to PGE's interconnection and contract interpretation policies, and the Commission's

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[51] *See generally the Coalition Petition for Declaratory Ruling*, Docket No. DR 48, Renewable Energy Coalition Petition for Declaratory Ruling at 1.

[52] Docket No. DR 48, the Coalition and PacifiCorp's Motion to Withdraw at 2 ("The Coalition, four of its members, and PacifiCorp have resolved the outstanding issues that gave rise to the need for the Commission's interpretation of the provisions at issue in the Petition…. PacifiCorp avers that it has reached agreement on the interpretive issue raised in the Petition, either as part of the settlement of DR 48 or on a case-by-case basis, with all of the QF projects that are in or near a delayed commercial operation date.") After settlement, the Coalition and PacifiCorp sought expedited withdrawal of the petition because the Coalition explained "that more than one of the Projects are experiencing financing issues directly related to the uncertainty associated with whether PacifiCorp can terminate their Small Firm Contracts due to a delay in commercial operation at this time. Expeditious withdrawal of the Petition will remove this cloud of uncertainty over these Projects." *Id.* at 3.

unexpected decisions on both interconnection and contract interpretation—both of which are ultimately outside of the control of QFs.

***e.* Consider New Standard Contracts for Avista and Puget Sound Energy**

As a general matter, the QF Trade Associations strongly disagree with the Joint Utilities' suggestions that Staff's Draft Rules are consistent with Washington policy.[53] The Washington Commission recently approved new standard contracts for Avista, Puget Sound Energy ("PSE"), and PacifiCorp.[54] PacifiCorp's PPA is the *only* one to require security, and only for projects 2 MWs and above.[55] Mandating security is not a standard operating procedure, and the Commission should carefully review the evidence before abandoning its historic practices.

After a multi-year rulemaking, the Washington Commission adopted new administrative rules in June 2019 that required the utilities to file standard contracts, similar to Oregon.[56] The Washington's rules have significant differences from Oregon's rules, and it is difficult to do direct comparisons in the contract provisions. For example, the Washington Commission requires capacity payments in the sufficiency years based upon a simple cycle turbine rather than Oregon's approach of essentially no capacity payments, Washington has a lower size threshold,

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53 Joint Utilities' Initial Comments at 2 (Mar. 30, 2021).

54 *In Re Amending, Adopting, and Repealing Sections of WAC 480-106 and 480-107*, WUTC Docket No. U-161024, General Order R-597 at 1 (June 12, 2019). These are the three Washington investor-owned utilities that have standard contracts for qualifying facilities 5 MW and lower.

55 WUTC Docket No. U-161024, General Order R-597 at 24. Staff responds to PacifiCorp's request for security as a condition to the QF receiving levelized pricing saying they "are not convinced that the advantages of a security requirement are outweighed by the requirement's potential disadvantages – making tariffs and contracting processes lengthier, more expensive, and less transparent for all participants." *Id.*

56 WUTC Docket No. U-161024, General Order R-597 at 1.

and Washington has effectively shorter contract terms. Overall, the QF Trade Associations believe Washington's rules are less favorable to QFs than Oregon's.

After the Washington Commission adopted new rules, PSE, Avista and PacifiCorp all filed standard contracts.

- The review of PSE's standard contract was pro forma and without litigation because PSE already had a WUTC approved standard contract.[57]
- Avista's standard contract was controversial and litigated with the Washington Commission resolving a number of contested issues. There were multiple rounds of comments, two open meetings (essentially the same as an Oregon PUC public meeting), and multiple Staff recommendations.[58]
- PacifiCorp's standard contract was not litigated, and it was allowed to go into effect after PacifiCorp made material changes to its original filed contract. In the end, NIPPC and the Coalition did not oppose it. It is important to note that there was no Staff Report, and it was not specifically approved by the Washington Commission but instead was simply allowed to go into effect.[59]

The Avista and PSE standard contracts include material differences from each other as well as the PacifiCorp contract, and even more significant differences between the three Washington contracts with the Oregon standard PPAs and Oregon policy. Therefore, the relevance of any of the Washington contracts to Oregon's policies is limited, and the QF Trade Associations caution that it is very difficult to compare them to each other, or to any specific Oregon contract.

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[57] *See generally Utility PURPA Compliance Filings*, WUTC Docket No. UE-190665, Puget Sound Energy Revises Tariff No. WN U-60 (Dec. 5, 2019).

[58] *See Schedule 62 Tariff Revision*, WUTC Docket No. UE-190663, Order No. 02 at 7 (Oct. 30, 2020).

[59] *See* Washington Commission, Minutes and Public Agenda for Open Meeting (Mar. 11, 2021), https://www.utc.wa.gov/event/2021-03/open-meeting-2021-03-11t093000-0800 (click on Minutes for 03-11-2021.pdf and Public Agenda for 03-11-2021.pdf) (showing filing on consent agenda was adopted).

That said, the security provisions discussions are relevant to the Commission's consideration of whether to revise its historical security policies. Importantly, there is no security deposit in either the Avista or PSE standard contract.[60] PSE's contract did not have a security deposit. Avista's original filed contract included a security provision (former Section 9.2); however, upon objection by Staff, the Coalition and NIPPC, Avista removed the security provision.

PacifiCorp's standard contract has a security requirement for projects above 2 MW. The QF Trade Associations believe that if the parties had litigated the issue before the Washington Commission, then PacifiCorp would have been required to remove it because:

- In the administrative rulemaking, PacifiCorp requested that the rules require the QF to post a security deposit. The Commission declined to include security. Note that the discussion was in the context of whether there should be security for levelized prices.[61]
- The first time it was addressed, in the summary in the Washington Commission Notice, there was an explanation in response to PacifiCorp: "The commission disagrees. The avoided cost rate provides sufficient incentives for long-term performance."[62]
- PacifiCorp responded by making its recommendation again in comments and noted that "In the summary of comments the Commission provided with the Notice, it rejected Pacific Power's suggested addition of a provision allowing levelized pricing security."[63]
- The second time the issue was addressed, the Staff explained that "We are not convinced that the advantages of a security requirement are outweighed by the requirement's potential disadvantages – making tariffs and contracting processes lengthier, more expensive, and less transparent for all participants."[64]

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[60] *See generally* WUTC Docket No. UE-190663, Avista Corp. Standard PPA (Oct. 29, 2020); WUTC Docket No. UE-190665, Attachment "A" Agreement: Schedule 91 Purchase from QF of Five MW or Less – New QF (Nov. 22, 2019).

[61] WUTC Docket No. U-161024, General Order R-597 at 24.

[62] WUTC Docket No. U-161024, PURPA SBEIS Comments Summary Matrix at 7 (Feb. 22, 2019).

[63] WUTC Docket No. U-161024, Pacific Power & Light Company's Comments on Proposed Rules at 4 (Apr. 1, 2019).

[64] Docket No. U-161024, General Order R-597 at 24.

- The Washington Commission's order approving the PURPA administrative rules did not specifically address the security deposit issue (the WUTC order did not address most of the contested issues), but the Washington Commission did not make the changes PacifiCorp had repeatedly requested.[65]

The QF Trade Associations object to reliance upon PacifiCorp's WUTC-approved standard contract for many reasons. One reason, particularly relevant to this discussion, is that the Washington Commission approved the opposite approach for two of the three utilities. If the Oregon Commission wishes to follow Washington Commission policy, it should look to Avista and PSE's security policies (which exempt small QFs from posting any security) and not rely on PacifiCorp's outlier position.

f. Conclusion

In summary, the QF Trade Associations recommend for QFs under the standard contract size threshold: 1) exempting creditworthy QFs from any security requirements; 2) allowing QFs unable to demonstrate creditworthiness to post security through step-in rights or senior liens; and 3) prohibiting forfeiture of liquid security (i.e., cash escrow or letter of credit) unless actual damages are proven or agreed as required by bars against punitive liquidated damages provision under Oregon law.

D. Conditional Network Resource Status: Staff's Proposed New Rule #1 Should Be Removed or Significantly Revised Because It Is an Unreasonable Contract Reopener

Staff's proposed New Rule #1 would allow the purchasing utility to reopen any off-system QF's PPA after execution to litigate whether costs related to network transmission should be allocated to the QF through an avoided cost rate reduction or otherwise. The QF Trade Associations oppose this proposed rule and recommend that it be removed from the rules. In the

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[65] *See generally* Docket No. U-161024, General Order R-597.

alternative, if the Commission determines to retain this new rule, the proposal should be significantly revised to limit the harm that would be caused by this contract reopener.

Under Oregon's implementation of PURPA, the Commission must require the utility to offer each QF "projected avoided costs calculated at the time the legal obligation to purchase energy or energy and capacity is incurred."[66] When the QF elects to sell at such forecasted avoided cost rates, PURPA and related state law bar contract reopeners that would recalculate the rates.[67] For example, in *Smith Cogeneration Mgmt. v. Corp. Comm'n & Pub. Serv. Co*., 863 P2d 1227, 1241 (Ok 1993), the state commission promulgated a rule that required all QF PPAs to contain a provision stating the contract terms could be reopened by the state commission.[68] The Oklahoma Supreme Court held that such rule was inconsistent with PURPA's requirement for long-term fixed-price PPAs and thus unlawful. The *Smith* court explained that "[s]uch a requirement makes it impossible to comply with PURPA and FERC regulations requiring established rate certainty for the duration of long term contracts for qualifying facilities that have incurred an obligation to deliver power."[69] "Once avoided costs are set, the Corporation Commission cannot later review the contract to reconsider the avoided costs."[70] The court correctly recognized that such a risk of reopening a fixed-price PPA "prevents cogenerators from

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66 ORS 758.525(2)(b).

67 *Oregon Trail Electric Consumers Cooperative, Inc. v. Co-Gen Company*, 168 Or App 466, 482, 7 P3d 594 (2000).

68 The *Smith* court described the rule as follows: "Rule 58(h) requires utilities and cogenerators to include in each contract a notice provision that allows the Corporation Commission to change the terms and otherwise finalize experimental purchase tariffs of a power sales agreement throughout the duration of the contract." *Smith Cogeneration Mgmt.*, 863 P2d at 1237 n 35.

69 *Smith Cogeneration Mgmt.*, 863 P2d at 1241.

70 *Id.*

obtaining the necessary financing to develop a facility" and thus "stands as an obstacle to the accomplishment of PURPA and FERC regulations."[71]

Staff's proposed New Rule #1 is a classic case of an unlawful contract reopener. It frustrates the QF's right to rely on the forecasted and fixed prices in the PPA from the time that the PPA is executed for purposes of financing. Instead, this new rule would require inclusion in the PPA of a right of the purchasing utility to petition the Commission to examine whether the prices in the contract should change on account of costs of "transmission service-related Network Upgrades" and it expressly allows the utility to file such petition *after* the PPA is executed.[72] Because this proposal is unlawful, it should be removed before issuance of the rulemaking order.

Further, the issue of whether QFs should be obligated to pay for costs related to transmission-level network upgrades is currently being litigated in UM 2032. That docket asks the Commission to decide the cost responsibility for such upgrades in the interconnection process and whether QFs should be required to take Network Resource Interconnection Service.

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71 *Id.*

72 New Rule #1 at (2) provides:

> *Following execution of the standard power purchase agreement*, the purchasing public utility may engage in cost identification process to determine whether receiving electricity from the qualifying facility will require the purchasing utility to incur costs for transmission-service related Network Upgrades. If the purchasing public utility discovers that receiving electricity from the qualifying facility will cause the purchasing public utility to incur costs for transmission service-related Network Upgrades it may request that the Commission issue an order allocating some or all of the costs of the transmission-service related upgrades to the qualifying facility.

(emphasis added).

Although Staff's New Rule #1 regards off-system QFs, it addresses the same type of network upgrade cost allocation issue as in UM 2032. Therefore, approving New Rule #1 could pre-judge the outcome of UM 2032, and it should not be addressed in the rules until resolution of UM 2032.

Even if this type of contract reopener could somehow be lawfully implemented, it would need to be significantly revised and very narrowly limited in its application to prevent it from frustrating financing of QFs. While the QF Trade Associations oppose this provision altogether, we also urge the Commission to require very stringent restrictions on the use of such a provision if the Commission is inclined to adopt such a provision.

First, the currently drafted proposal places no temporal restriction on when the utility must identify network upgrade costs and notify the QF to initiate the contract reopener process. As drafted, the utility could potentially wait until two or three years after the PPA is executed and spring a late-stage development surprise on the QF that completely undermines the financial viability of the project, or the utility could even trigger this provision many years into the contract after operations begin. Most QF developers will be unable to finance a project and commence construction for as long as this provision is in effect and available for use by a utility in a PPA. In effect, there is no final PPA with price certainty during the time the utility can exercise this contract reopener right. A prior version of Staff's proposal contained limitations on the timeframe within which the utility could ask the Commission to reopen the PPA under this provision but, unfortunately, Staff removed those limitations in the current draft. If such a provision is to be included in any QF's PPA, it must require that the purchasing utility immediately submit the request for designated network resource status of the QF to the utility's

transmission arm, and immediately communicate the results and supply all information and studies supporting such results to the QF. If the utility fails to exercise such right to initiate a procedure before the Commission within a limited time after PPA execution, e.g., 60 days, then the right to do so must expire. Otherwise, the provision will prevent financing and successful development.

Second, if the utility exercises the right to reopen the PPA before the Commission under this provision, the QF must be provided with the option to extend the PPA's scheduled commercial operation date on a day-for-day basis for each day until the final order in such proceeding is issued and any amendments to the PPA executed. As with any contested proceeding before the Commission, the proceeding to evaluate the utility's claimed network transmission costs will take months or more than a year before resolution. As noted above, the effect of this provision is to repeal the QF's contractual right to price certainty and to potentially require the QF to enter into a new contract with materially lower rates. In effect, the standard right to a three-year development period should be restarted upon execution of the new PPA that allocates newly identified network upgrade costs to the QF. This would be consistent with this and other commission decisions in prior cases in which the contract length and terms were ultimately revised to account for the time in litigation.[73] Otherwise, the QF will lose the price

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[73] *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995) (declining to disturb state Commission findings that certain milestones of a QFs contract could be modified for litigation delay); *see Blue Marmot V LLC et al. v. PGE*, Docket No. UM 1829, Order No. 19-322 (Sept. 30, 2019) (the Commission allowed QFs an opportunity to demonstrate that a later COD should be allowed); *compare Kootenai Elec. Coop., Inc. v. Idaho Power*, Docket No. UM 1572, Complaint Exhibit 103 at 55 ("Seller has selected May 1, 2012 as the estimated Schedule Operation Date") (Jan. 3, 2012) (emphasis added), *with Idaho Power Co. – QF Contracts*, Docket No. RE 141, OAR Compliance Filing Kootenai Elec. Coop., Inc. Oregon Standard Energy Sales Agreement at Appendix B, P. 36 ("Seller has selected

certainty needed during the three-year development period to successfully complete development and bring the facility online.

Third, if adopted, the applicability of this provision must be much more narrowly limited than it is in Staff's current proposal. We understand that this rule is intended to address the situation outlined in the case of *Blue Marmot V LLC et al. v. PGE* (hereafter "*Blue Marmots*").[74] There, the Commission determined that a utility may decline to accept an off-system QF's chosen point of delivery if the utility timely communicates prior to execution of the PPA that the point of delivery is a constrained point.[75] Alternatively, the Commission explained that the QF may agree in its PPA to pay for the purchasing utility's network upgrades costs associated with receipt of energy at the constrained point of delivery chosen by the QF.[76]

Based on Staff's explanations in workshops, its proposed New Rule #1 is intended to give such off-system QFs the option to enter into the PPA, subject to further transmission study after execution, as an alternative to the utility exercising the right identified in *Blue Marmots* to refuse to execute a PPA with the QF's proposed point of delivery due to perceived transmission congestion. The theory appears to be that the execution of the PPA would enable the additional network resource designation request to the utility's transmission arm to identify the precise cost of network upgrades that would enable such designation.

April 1, 2014 as the estimated Schedule Operation date") (Mar. 11, 2014) (emphasis added).

74 Docket No. UM 1829, Order No. 19-322 (Sept. 30, 2019).

75 *Id.* at 14-15.

76 *Id.* at 19 ("If a QF wishes to deliver to a point at which PGE is not otherwise accepting delivery from off-system QFs, PGE and the QF have the option to negotiate a mutually acceptable non-standard contract that adjusts avoided cost values to incorporate additional transmission system costs that PGE cannot reasonably avoid or allows the QF to fund upgrades to generate the necessary incremental transmission system capacity.").

However, the newly proposed framework in Staff's proposed Rule #1 makes the new provision applicable to *every* off-system QF's PPA, not just those that fall into the rare category of QFs described by the Commission in *Blue Marmots*. Staff's proposed Rule #1 also fails to include a requirement that the purchasing utility investigate and disclose to the QF during the contracting process whether transmission constraints will exist. As currently drafted, Staff's proposal could therefore be interpreted to allow the utility to withhold information regarding transmission constraints during the contracting process and then later raise the network transmission issue only after execution of the PPA, which the Commission expressly admonished utilities not to do in the *Blue Marmots* order.[77] Thus, if such an administrative rule will be adopted, it must be narrowly limited to situations where the utility timely notifies the QF in advance of PPA execution that transmission constraints may require network upgrades at the QF's chosen point of delivery and provides supporting evidence for such a conclusion, but the QF elects to move forward with PPA execution instead of identifying another point of delivery.

Fourth, if adopted, the rule should provide that the QF should be allowed to terminate the PPA without forfeiting any security or owing any damages in the event that the QF elects to terminate the PPA after the Commission reopens it and assigns network upgrade costs to the QF. As noted above, this entire process is, in effect, an action by the utility to terminate the initial PPA and force the QF to execute a whole new commercial arrangement. Before executing the initial PPA, the QF is unlikely to have any reasonable way to estimate the likely network upgrade costs it would be agreeing to accept after conclusion of the Commission proceeding.

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[77] *Id.* at 16 ("A utility should review significant proposed QF delivery terms as early as possible, and ideally well before providing a final draft executable contract.").

The QF should not be penalized or owe damages if it elects not to move forward with executing such a newly revised PPA.

E. REC Ownership (New Rule #2 at (3), p. 26)

The QF Trade Associations recommend changing Staff Draft Proposed New Rule #2 at section (3) to require that renewable QFs retain ownership of the Renewable Energy Credits ("RECs") they produce after the end of the fixed-price period in the standard contract. Requiring renewable QFs to surrender their RECs without adequate compensation is unfair, likely unconstitutional, and violates a recent Ninth Circuit precedent regarding utilities' PURPA obligations.

RECs are valuable commodities that are different and distinct from the power generated and sold to the utility, and QFs may sell RECs outside of their PURPA PPA.[78] Renewable QFs have the option of contracting to sell their RECs to the utility along with their energy and capacity. If a QF chooses to sell its RECs, then its fixed period avoided costs are based on a renewable resource (i.e., one that would have otherwise provided the utility with RECs). However, after the fixed price period ends, renewable QFs only receive a variable market price. Market prices represent the costs the utility would incur for energy and capacity, but not for RECs. Thus, renewable QFs are forced to surrender their RECs to the utility during the market-price period without being paid for them. This is unfair and should be changed.

In UM 1610, Staff agreed with the Coalition that the QF should retain the RECs during the last five years of the contract because QFs would be harmed if they had to give the RECs to

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78 *See, e.g.*, *Investigation into QF Contracting and Pricing*, Docket No. UM 1610, Coalition Post-Hearing Brief at 16-17 (June 17, 2013) (internal quotes omitted).

the utility when they were not compensated for the RECs' value.[79] In that proceeding, CREA also explained that refusing to compensate QFs for their RECs during the last five years of the contract would be an unconstitutional taking without just compensation.[80] The Commission ultimately disagreed and held that RECs would continue to transfer to the utility once a utility became resource deficient, regardless of the price being paid to the QF.[81] Staff's Draft Rules uphold this decision, even though it is unfair and likely unconstitutional.

After the Commission issued its decision in UM 1610, additional guidance has become available. In *Californians for Renewable Energy v. California Public Utilities Commission*, the Ninth Circuit recognized that, when a state has a renewable portfolio standard ("RPS") and the utility is using RECs from the QF to meet the RPS, "the utility cannot calculate avoided costs based on energy sources that would not also meet the RPS."[82] As a result, either the utilities need to increase the market prices they pay to include the value of RECs, or QFs need to retain their RECs after the fixed-price period because the utilities cannot use them.

In summary, the Commission should allow QFs to retain their RECs unless the utilities are providing just compensation for them. Under current policy and Staff's Draft Rules, the utilities are not paying the just compensation to QFs that PURPA requires.

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79 Docket No. UM 1610, Staff Post-Hearing Brief at 2-3 (Oct. 13, 2015).

80 *See, e.g.*, Docket No. UM 1610, Post-Hearing Legal Brief of CREA at 11-13 (June 17, 2013).

81 Docket No. UM 1610, Order No. 16-174 at 5 (May 13, 2016).

82 *Californians for Renewable Energy v. CA Pub. Utils. Comm'n*, No. 17-55297 at 18 (9th Cir. 2019).

F. **Five Mile Rule** (New Rule # 2 at (4), pp. 26-27)

The QF Trade Associations recommend correcting Staff's Draft New Rule #2 to mirror the partial stipulation from UM 1129 on the Commission's Five-Mile Rule, which governs entitlement to standard rates and standard contracts.[83] The partial stipulation states that "two facilities will not be held to be owned or controlled by the same person(s) or affiliated person(s) solely because they are developed by a single entity."[84] Proposed New Rule #2 attempts to codify the stipulation but does not include this language. This is a significant concern to the QF Trade Associations. As with the ability to use common interconnection, the common developer exception is an important element of the existing five-mile rule, and it should be retained just as with the other components of the rule.

It is important to recognize that the common developer exception is more of a clarification than an "exception." The common developer exception does not excuse other violations of the Five-Mile Rule, like common ownership of two operating facilities. In adopting the common developer exception, the testimony supporting the Partial Stipulation stated as follows: "This addition makes it clear that a developer can develop two adjacent projects as long as two different persons or entities will own the projects. It also allows a developer to have part-ownership in one of the two or more projects (s)he is developing."[85] As this testimony demonstrates, this clarification was a material part of the Partial Stipulation for the renewable energy development community. It has now been relied upon by the renewable energy

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83 *See, e.g.*, Docket No. UM 1129, Order No. 06-586 (Oct. 19, 2006).

84 Docket No. UM 1129, Oregon Department of Energy's Motion to Admit Partial Stipulation, Exhibit "A" at 1 (Feb. 6, 2006).

85 Docket No. UM 1129, ODOE/8, DeWinkel/3 (Jan 20, 2006).

development community for almost 15 years, and if the proposed rules intend to retain the Five-Mile Rule, this clarification must be included in the rules.

Notably, no party has asked for this exception to be removed, nor provided any compelling justification for the removal. The QF Trade Associations raised the omission during the July 26, 2021 workshop, but Staff has not addressed it. It appears Staff may have misunderstood the workshop comment as regarding the passive-investor exception.[86] However, that is not the concern presented here. The QF Trade Associations hope that the omission of stipulated language was a simple oversight and will be rapidly corrected. Otherwise, the Commission should acknowledge transparently that it is re-opening the UM 1129 partial stipulation for further proceedings. The QF Trade Associations recommend that the Commission instead simply correct Staff Draft Proposed New Rule #2 at section (4) to include the common developer exception.

G. PPA Request Materials

The QF Trade Associations recommend deleting the catch-all provision added in Staff's proposed New Rule #3 section 2 regarding information required to obtain a draft standard PPA. Stakeholders have discussed the list at length and were close to a compromise on a list without any catch-all.[87] Staff now proposes to require that small QFs additionally provide "[o]ther information specified in the utility's avoided cost rates schedule or standard power purchase

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[86] Description of Staff Proposed Rules for AR 631 (July 14 proposal and August 2 Revisions) at 4.

[87] The current language is not perfect. For instance, the QF Trade Associations continue to have concerns with the proposed requirement regarding demonstration of QF status. *See* Joint Comments of the QF Trade Associations on Staff's Updated Proposal at 4-10. However, resolving this concern could be wasted effort if Staff retains the new catch-all.

agreement approved by the Commission."[88] The QF Trade Associations had understood the purpose of codifying a single, generically applicable set of requirements was to eliminate the confusion and discrepancies that occur with different utility filings that might change over time. Achieving this purpose will be impossible with a catch-all that allows future changes to occur and evolve in utility-specific filings. As a result, the catch-all undermines stakeholders' progress towards a compromise. For every requirement that Staff agreed was unnecessary to include in Staff's Draft Rules, stakeholders may need to re-litigate the issue every time a utility files an updated avoided cost schedule or standard PPA.

Additionally, the catch-all invites confusion and utility abuse on those small QFs eligible for standard PPAs and those least able to overcome hurdles in the contracting process. The history of PacifiCorp's Schedule 38 is illustrative on this point. Schedule 38 is applicable to large QFs, but the same concerns could arise with revisions to any schedule applicable to small QFs.

PacifiCorp first filed its Schedule 38 in UM 1129, and PacifiCorp proposed language requiring interconnection studies before PacifiCorp would even provide the PPA.[89] Staff opposed the insertion, stating that "PacifiCorp should not require that interconnection studies be completed prior to providing the QF with the draft power purchase agreement," and the Commission agreed that "the requirement of a completed interconnection study should be removed" from that schedule.[90] Subsequently, in PacifiCorp's compliance filing, the final filing included the provision that a QF may be asked for "evidence that any necessary interconnection

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[88] Staff's Draft Proposed Rules at New Rule #3, Section (2)(c)(M).
[89] Docket No. UM 1129, Order No. 07-360 at 6-7 (Aug. 20, 2007).
[90] Docket No. UM 1129, Order No. 07-360 at 6-8.

studies have been completed and assurance that the necessary interconnection arrangements are being made…."[91] The Commission approved the language at issue in this proceeding under the express condition that PacifiCorp cannot require the completion of an interconnection study before it provides a QF with a draft PPA. Nonetheless, PacifiCorp implemented its Schedule 38 to "require[] that a QF provide an interconnection study before receiving a draft PPA."[92] PacifiCorp only recently changed this position during a complaint with a 20 MW QF, Dalreed Solar, LLC, that alleged PacifiCorp's requirement violated PURPA.[93]

The Commission should carefully consider every decision point where a utility might impose contracting burdens on QFs, particularly those small enough to qualify for standard PPAs. The Commission should also keep in mind its obligation to uphold Oregon state policy to "[c]reate a settled and uniform institutional climate for the qualifying facilities in Oregon."[94] The QF Trade Associations believe a single, generically applicable list codified in rules is the best way to avoid confusion, abuse, and ultimately litigation. The proposed catch-all undermines this approach and should therefore be deleted.

H. Damages Issues

The QF Trade Associations have several concerns with the treatment of contractual damages in Staff's Draft Rules. First, the QF Trade Associations recommend correcting what damages are owed to a QF should the purchasing utility default. Currently, Staff Draft Proposed

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[91] *Pacific Power & Light*, Advice No. 07-021, Initial Utility Filing at Attach. Schedule 38 at 4 (Nov. 2, 2007).

[92] *Dalreed Solar, LLC v. PacifiCorp*, Docket No. UM 2125, Defendant's Letter Revising its Position at 1 (Feb. 3, 2021).

[93] Docket No. UM 2125, Defendant's Letter Revising its Position at 1 (Feb. 3, 2021).

[94] ORS 758.515(3)(b).

New Rule #6 at (4)(c) states that "[d]amages are an amount equal to the qualifying facility's cost to cover multiplied by the amount of Net Output not purchased."[95] This computation of damages is incomplete and fails to account for the total economic harm a QF could face in the event the purchasing utility defaults. For example, some QFs could suffer additional harm from lost tax credits and lost Renewable Energy Credit sales. These types of economic losses should be added to the computation, but it should not be limited to only these examples. The QF Trade Associations recommend revising the rules to state that damages owed to a QF shall be an amount equal to the actual economic harm suffered by the QF.

Second, the QF Trade Associations recommend that the damages owed to the utility by a QF in the event of a default should be capped at the contract price of the energy the QF failed to deliver. A cap of the contract price will provide upfront certainty for a QF to secure financing, while posing minimal risk to the utility's ratepayers. In UM 1129, the Commission held an identical cap on damages owed by QFs to utilities in the event of a default was reasonable.[96] The Commission directed the utilities to revise their standard contracts to insert a cap on damages at "100% of the QF contract price multiplied by the amount of energy the QF failed to deliver."[97] The Commission reasoned that this cap on damages would "facilitate the development of QFs of all sizes, while keeping ratepayers indifferent to the development of QF power, versus other power sources."[98] Thus, the QF Trade Associations recommend changing Staff Draft Proposed

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95 Staff's Draft Rule at New Rule # 6, Section (4)(c).
96 Docket No. UM 1129, Order No. 06-538 at 66-67 (Sept. 20, 2006).
97 *Id.* at 5-6.
98 *Id.* at 66.

New Rule #6 at (4)(a) to account for a cap at the contract price, consistent with the Commission's prior decision.

Third, the QF Trade Associations recommend that the termination damages owed to the utility by the QF in the event of termination also be capped at the contract price of the energy. Currently, the Staff Draft Proposed New Rule #6 at subsection (8) calculates termination damages by the positive difference between market replacement price and the contract price. In previous comments in this docket, the QF Trade Associations were concerned about the liquidated damages as termination damages because of the uncertain rule language and potential for unlawful penalties.[99] While the QF Trade Associations appreciate Staff's effort to provide clarity regarding liquidated damages, the QF Trade Associations are still apprehensive that the current termination damages could result in an unlawful penalty.

Generally, liquidated damages are only lawful when actual damages are difficult to estimate and the liquidated damages are "a reasonable forecast of just compensation for the harm that is caused by the breach."[100] Further, the provision cannot be a penalty designed to deter non-performance.[101] The QF Trade Associations do not agree that an uncapped market replacement price would necessarily be an accurate estimate of harm to the utility. However, termination damages at the capped contract price would be a better estimate of harm while providing certainty and clarity to the QFs. Thus, the QF Trade Associations recommend changing Staff

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99 Joint Comments of the Community Renewable Energy Association, Northwest & Intermountain Power Producers Coalition, and Renewable Energy Coalition on Staff's Initial Proposal at 26 (Mar. 30, 2021).

100 *State Highway Comm'n v. De Long Corp.*, 9 Or App 550, 574, 495 P2d 1215 (1972) (internal quotes omitted).

101 *Id.*

Draft Proposed New Rule #6 at (8) related to termination damages to account for a cap at the contract price.

I. Termination Provisions

The QF Trade Associations have concerns with two aspects of Staff's Draft Rules regarding PPA termination. First, Staff has deleted New Rule #8, which specified certain events that specifically do not justify PPA termination. The QF Trade Associations support Staff's deletion of financial penalties for these items, because any penalty would have the effect of changing the QF's avoided cost prices in violation of PURPA.[102] However, the list of items that specifically do not justify termination is clarifying, and the QF Trade Associations recommend that it be re-inserted.[103] The QF Trade Associations also recommend that Staff clarify that the list is non-exhaustive, as there may be many other events that do not justify PPA termination.

Second, the QF Trade Associations ask Staff to clarify its comments regarding proposed revisions to OAR 860-029-0120 on termination. Staff wrote that the "[o]nly reason QF can terminate PPA is if utility will take more than three years to construct IX facilities."[104] The QF Trade Associations ask Staff to clarify that this is the only reason *under this specific rule*, as other draft rules provide other instances in which QFs may terminate.[105] Similarly, Staff indicated that the purpose of this same rule provision is intended to "[l]imit when a QF can terminate PPA within 6 months of PPA execution in order to prevent the QF from terminating

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102 Staff's Draft Rules at New Rule # 8, Section 2 (deleted text).

103 Staff's Draft Rules at New Rule # 8, Section 1 (deleted text).

104 Staff's Description of Staff Proposed Rules for AR 631 (July 14 proposal and August 2 Revisions) at 5.

105 Staff's Draft Rules at OAR 860-029-0120(8)(a). *But see, e.g.,* Staff's Draft Rules at New Rule #1, Section 5 (authorizing QFs to terminate in different circumstances).

PPA in order to obtain better prices."[106] However, the suggestion that QFs may seek to upgrade their contracted-for prices is not persuasive grounds for prohibiting QFs from terminating PPAs as a general matter. There are many reasons a QF may wish and need to terminate its PPA. For instance, the QF may be unable to construct its facility on time or at all. The QF Trade Associations urge the Commission not to foreclose a QF's ability to terminate its contract.

J. Staff's Proposed Definition of "Nameplate Capacity" Should Be Further Clarified

The QF Trade Associations understand Staff's proposal for measurement of a QF's capacity – and thus whether it is below the threshold to receive standard rates and/or a standard contract – is to measure the overall power production capacity of the facility, as measured at the point of interconnection, which is equivalent to FERC's "send-out" test most recently articulated in *Broadview Solar, LLC*, 174 FERC ¶ 61,199 (March 19, 2021). The QF Trade Associations support use of FERC's "send-out" test, which is more compatible with solar facilities and storage facilities than traditional measurements of generation of individual generation units within a facility. However, Staff's Draft Rule's definition of "Nameplate Capacity" could be misinterpreted to adopt something other than FERC's send-out test, and the Joint Utilities have not yet acknowledged they agree with use of FERC's send-out test.[107] Therefore, the QF Trade Associations recommend further clarification to the definition of "Nameplate Capacity."

To be clear, FERC's send-out test measures the capacity as the alternating current ("AC") "send-out" at the point of interconnection and therefore allows for individual components of the

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[106] Staff's Description of Staff Proposed Rules for AR 631 (July 14 proposal and August 2 Revisions) at 5.

[107] *See* Staff's Draft Rules at OAR 860-029-0010(x)(defining "Facility"); -029-0010(20) (defining "Nameplate Capacity").

facility to potentially generate in excess of the overall facility's capacity. Under FERC's test, the "power production capacity" – the critical term used the Federal Power Act's 80-MW size cap for small power production QFs – is measured as the maximum amount of useful electric energy the facility as a whole can inject to the grid, i.e., the facility's AC "send out."[108] FERC rejected the argument that the facility's individual components, such as its solar panels that generate in direct current ("DC"), should be determinative of the facilities power production capacity, and FERC instead determined that QFs should be allowed to use "DC overbuilt" and storage to increase the capacity factor of the plant without increasing its overall power production capacity. To illustrate, the Broadview facility consisted of a 160-MW DC solar array and a 200-MWh battery energy storage system, but FERC concluded its power production capacity was 80 MW under the "send-out" test due to the configuration of its inverters and battery storage devices that precluded more than 80 MW AC from being injected at the point of interconnection.[109]

This measurement is consistent with the policy of encouraging QFs and incentivizing intermittent generators to increase their capacity factor to deliver a superior product to the purchasing utility. There is no reason to discourage small Oregon QFs by adopting a different rule. 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. Staff's prior description of its proposal in the informal phase was that the facility's capacity would be measured as the "power production

108 *Broadview Solar, LLC*, 174 FERC ¶ 61,199, PP. 21-33 (March 19, 2021).
109 *Id.*

capacity of the facility as a whole, rather than just a component."[110] While this was a fairly clear articulation of the send-out test, the Joint Utilities' position has been somewhat difficult to fully understand in this proceeding, and the QF Trade Associations are concerned about the ambiguity.

Additionally, at the recommendation of the Joint Utilities, Staff's Draft Rule now adopts the somewhat imprecisely worded language of PacifiCorp's Washington PPA. The QF Trade Associations believe that Staff's Draft Rules' definition of "Nameplate Capacity Rating," when read in conjunction with the definition of "Facility," would be best interpreted to measure the output of the whole facility at the point of interconnection and thus use FERC's send-out test. But we continue to maintain that the language should be more clearly expressed to avoid disputes. Thus, the QF Trade Associations propose the following edit to Staff's Draft Rule:

> (20) "Nameplate Capacity Rating" means the maximum installed instantaneous ~~generation~~ power production capacity of the completed Facility, expressed in MW (AC) and measured at the point of interconnection, 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, inverters, energy storage devices, or other equipment within the Facility affecting the Facility's capability to deliver useful electric energy to the grid at the point of interconnection.[111]

If the Commission does not adopt this type of clarifying language, it will likely be called upon to

[110] *See* Staff's Initial Proposal (Jan. 15, 2021) ("Eligibility for Standard PPA – Nameplate Capacity").

[111] For reference, the word "Facility" is defined as follows in Staff's Draft Rule:

> (x) "Facility" means all equipment, devices, associated appurtenances, owned, controlled, operated and managed by a qualifying facility in connection with, or to facilitate, the production, generation, transmission, delivery, or furnishing of electric energy by the qualifying facility to the purchasing public utility and required to interconnect with the System.

resolve disputes as to the intended meaning of the definition after promulgation of the rules.

K. Staff's Proposed Monthly Netting, Price Paid for Excess Energy, and Imbalance Rules Require Clarifying Edits

Staff's proposed New Rule #4 addresses imbalance and scheduling provisions for off-system QFs. 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 Commission-approved standard contract, with two clarifications.

First, the Addendum W provisions should be modified to include a requirement that the utility must pay the QF for any surplus energy in excess of the QF's monthly net output that the utility receives over the course of the month. Modest amounts of such overscheduled surplus energy (referred to by Staff's Draft Rule as "Excess Energy") should be the expected result of the QF's efforts to ensure delivery of all of its net output (measured in kWh) through the transmission provider's scheduling protocols that utilize whole MW increments.

Second, 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. In Order No. 764, FERC required transmission providers to offer 15-minute scheduling after finding that hourly block scheduling imposes unjust and unreasonable imbalance charges on intermittent generators.[112] It would be unreasonable to deny use of that option to small Oregon QFs. The QF Trade Associations previously attached a

[112] *Integration of Variable Energy Resources*, Order No. 764, FERC Stats. & Regs. ¶ 31,331, at PP. 20-22, 77 Fed. Reg. 41,482 (July 13, 2012) (stating that the "hourly scheduling protocols can expose transmission customers to excessive or unduly discriminatory generator imbalance charges").

proposed mark-up of the existing Addendum W along with our comments filed on June 9, 2021, which we continue to support.

Staff's Draft Rules (at New Rule #4) suggests an intent to adopt this basic framework proposed by the QF Trade Associations, but the wording of the proposed rule needs clarification. Thus, we have proposed nits on the attached rules with these comments.

Staff also requested comment, under New Rule #4, on whether the price for "Excess Energy" (i.e., the amount delivered in a month that exceeds the net output of the facility) should be specified in the rule and whether there should be a limit on the amount of Excess Energy purchased by the utility.[113] The QF Trade Associations submit that the market index price is a reasonable price for such Excess Energy, and that the rule should require use of market index price reasonably reflective of index pricing used by transmission providers' generator imbalance services.[114] Additionally, the QF Trade Associations do not believe it is necessary to limit the amount of Excess Energy purchased by the utility because the QF should have no incentive to deliver more Excess Energy than necessary to ensure delivery of all of its net output if it is only

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113 Relatedly, the QF Trade Associations recommend deletion of the definition in Staff's Draft Rules for "Excess output" because that term is not used elsewhere in the rules and could result in confusion because it measures such excess output on an *hourly* basis. Measuring excess output on an hourly basis and penalizing off-system QFs with a lower price for hourly deliveries in excess of net output undermines the purpose of a monthly settlement provision. Deletion is necessary to prevent that unintended result.

114 For example, the Bonneville Power Administration ("BPA") uses the Powerdex Mid-Columbia Hourly Index as the price for settlement of imbalance energy. *See Generation Imbalance Service: BPA Transmission Business Practice,* Bonneville Power Administration, https://www.bpa.gov/transmission/Doing%20Business/bp/tbp/Generation-Imbalance-Service-BP.pdf (Oct. 25, 2019).

paid the market index price for such energy supplied by the transmission provider as imbalance energy.

L. Staff's Proposed Definition of "Net Output" Should Be Revised to Ensure Off-System QFs Are Paid Full Avoided Costs for All Net Output

Staff's proposed definition of "Net Output" should be revised because, as drafted, it would preclude off-system QFs from receiving payment at avoided cost rates for a significant amount of energy that the QF generates and that the purchasing utility receives from the QF's transmission provider. The definition of "Net Output" is important because a QF's net output is the measure of generation that the QF may compel the utility to purchase at full avoided cost rates, as opposed to some increments of surplus energy or "Excess Energy," such as energy associated with imbalance service, that is typically assigned a lesser index price or in some cases, accepted by the utility without any payment.[115] This Commission has previously explained, "'Net output' of a QF facility is defined by FERC as a facility's 'send out after subtraction of the power used to operate auxiliary equipment in the facility necessary for power generation (such as pumps, blowers, fuel preparation machinery, exciters) and for other essential electricity uses in the facility from the gross generator output.'"[116] That is the measurement method for both the facility's power production capacity qualifying it to be a small power production facility under

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115 *See Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 31,203, at P 101, 114 FERC ¶ 61,102, *clarified*, 114 FERC ¶ 61,128 (2006), *order on reh'g*, Order No. 671-A, FERC Stats. & Regs. ¶ 31,219, 115 FERC ¶ 61,225 (2006) (stating PURPA allows QFs to compel the purchase at avoided cost rates of "electric energy produced by the QF and not non-QF electric energy which the QF has purchased or has produced itself through a process that does not satisfy the technical requirements for QF status").

116 Docket No. UM 1129, Order No. 05-584 at 53 (quoting *Occidental Geothermal, Inc.*, 17 FERC ¶ 61, 444 (1981)).

80 MW, as discussed above, and the amount of "net output" that it can compel utilities to purchase. For the reasons explained below, the QF Trade Associations propose that the definition of "Net Output" in Staff's Draft Rules should be consistent with FERC's precedent by measuring net output at the *point of interconnection* and should not deduct transmission losses between the point of interconnection and the point of delivery to the purchasing utility.

Specifically, the QF Trade Associations recommend the following edit to Staff's proposed definition:

> (x) "Net Output" means all energy and capacity produced by the qualifying facility, less station use and ~~transformation and transmission~~ ~~interconnection~~ losses, ~~and other adjustments (e.g., the qualifying facility's load other than station use)~~ flowing through the Point of Interconnection ~~Delivery~~.

The two elements deleted from Staff's definition are the deduction for a "qualifying facilities load other than station use" and transmission losses. First, load other than station use should not be deducted because, as noted above, FERC defines net output as deducting only station use critical for power production functions. Deducting other unspecified loads from the measure of net output could be erroneously used to deduct loads used for purposes other than power production purposes, such as the load of a QF's industrial processes unrelated to power production.

Second, eliminating transmission losses from the definition is important for off-system QFs. We understand the Joint Utilities to dispute this second point and to insist that transmission losses should be deducted from the measure of net output. As explained below, however, the Joint Utilities' position is without merit.

Under the monthly imbalance settlement procedures that Staff appears to support, an off-system QF will produce net output, the interconnecting utility will transmit an amount of energy

equal to that amount of net output to the purchasing utility, and the purchasing utility will receive the energy equal to that amount of net output. The purchasing utility is obligated to pay for the QF's net output just as if it were directly connected to the QF, regardless of whether the energy physically delivered to the purchasing utility could be traceable to the electrons energized by the QF at the point of interconnection.[117]

As a matter of physics, the energized electrons (i.e., the physical energy) at the point of interconnection follows the path of least resistance and it does not necessarily (or likely) flow to the purchasing utility. Instead, the transaction is a legal transaction that is fulfilled so long as the purchasing utility receives an amount of energy equivalent to the QF's net output injected into the grid for delivery. As is the case with all transmission transactions, the transmission provider delivers the equivalent amount of energy scheduled by the QF to the purchasing utility. On a monthly basis, the QF would aim to have the scheduled and delivered energy equal the metered amount of net output at the point of interconnection. If the QF does so, it should be paid the full avoided costs for such net output that it pays the transmission provider to deliver to the purchasing utility, just as an on-system QF is paid the full avoided cost rates for all net output as measured at the point of interconnection.

Thus, the definition of "Net Output" should measure the "Net Output" at the point of interconnection to provide the off-system QF with opportunity to be paid the full avoided cost rates for all of its net output if it successfully delivers that amount of electric energy to the

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[117] *See* 18 CFR § 292.303(d) (addressing off-system sales and stating: "Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility.").

purchasing utility. If the QF fails to pay for loss replacement service or otherwise schedules and delivers less energy than was injected at the point of interconnection, then the QF would not be paid for such undelivered energy under the monthly netting provisions proposed, and the purchasing utility would be held harmless for such failure. Notably, the QF Trade Association's proposal is consistent with PacifiCorp's Oregon standard off-system contract currently approved by this Commission, which clarifies: "For purposes of calculating payment under this Agreement, Net Output of energy shall be the amount of energy flowing through the Point of Interconnection, less any station use not provided by the Facility."[118]

However, the definition of "Net Output" contained in Staff's Draft Rule, and supported by the Joint Utilities, will always deduct from the measurement of "Net Output" an amount of energy that is assumed to be physically lost in transmission from the point of interconnection to the point of delivery. That is unfair because the amount of "transmission losses" contemplated is not necessarily undelivered energy. Instead, the "transmission losses" will be derived from an assumed loss factor (e.g., 3%) in the transmission provider's tariffs, and the QF will normally pay the transmission provider to make up for such assumed losses and deliver the amount of net output measured at the point of interconnection and scheduled for delivery.[119] Thus, to avoid an

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[118] PacifiCorp's Off-System Standard Contract at § 1.30, available at https://www.pacificpower.net/content/dam/pcorp/documents/en/pacificpower/rates-regulation/oregon/tariffs/purpa/Power_Purchase_Agreement_for_Firm_Off_System_QF.pdf.

[119] *See, e.g.,* Order No. 888, 61 Fed. Reg. 21,540 at 21,593 (May 10, 1996) (discussing "Real Power Loss" service under which the transmission customer may compensate the transmission provider for replacing and delivering to the receiving system the "energy consumed in transmission, much of it by resistance heating of the lines and transformers").

unfair result, the Commission should require "Net Output" to be measured at the point of interconnection.

M. Staff's Draft Rule Should Be Revised in Its Treatment of the Contract Term and the Permissible Scheduled Commercial Operation Date

Several aspects of Staff's Draft Rule regarding the scheduled commercial operation date should be revised to allow a reasonable opportunity for QFs to successfully develop and finance renewable energy facilities in Oregon. Failing to provide QFs with sufficient flexibility in the implementation of the issues related to the scheduled commercial operation date will make it much more difficult to successfully bring renewable energy facilities online, and therefore several revisions to the proposed draft rules are necessary to adequately encourage QFs in Oregon.

1. Staff's Three-Year Development Period Limitations Are Unreasonable

Staff's current proposal on the permissible development period for the QF to establish through its choice of scheduled commercial operation date in the PPA is unreasonably restrictive. In essence, Staff proposes providing QFs the option of a three-year development period, after which Staff's proposed 15-year fixed-price period diminishes, with no real exceptions, even in the case of an "Excused Delay" or an interconnection study stating the purchasing utility will take more than three years to complete interconnection construction.[120] Additionally, Staff's proposal provides only a very limited exception for a scheduled commercial operation date up to four years after execution if agreed to by the utility or supported by an interconnection study; but, it subjects the QF to diminishment of the 15-year period for each day of the three-year

[120] Staff's Draft Rules at OAR 860-029-0120(3)-(6).

cutoff. Further, Staff's proposal strictly proscribes any development period in excess of four years under any circumstances – even in a case of utility malfeasance.[121] The QF Trade Associations oppose these strict cutoffs, which provide reluctant utilities with the ability to impose unreasonable obstacles to QF development.

Instead of Staff's proposal, the QF Trade Associations propose that the new rule should build off of the general three-year framework of existing rules, but there are exceptions that should be recognized and reflected in the rule. While the QF Trade Associations are sympathetic to the concern with the prices becoming stale when the fixed-price period begins after a longer development period than three years, this is often a problem that is beyond the control of the QF and is a result of a lengthy interconnection process.

Therefore, given the flaws with the current interconnection processes which are controlled by the utility, Oregon energy policy should not give the utility the right to diminish the critical fixed-price period of a developer's PPA by delaying the utility's own construction schedule in excess of three years. A longer lead time than three years is appropriate where it is needed for the interconnecting utility to complete the interconnection. In addition to extension for utility-caused delays, there should be an exception that allows for a development period of over three years in the PPA without penalty of loss of fixed-price period if the QF reasonably justifies the need for a longer development period. For example, a geothermal resource cannot typically be developed within three years of signing the PPA.

The problem with the Commission's current rule, which in theory allows development periods in excess of three years, is that the utilities have interpreted it as giving the utility

121 Staff's Draft Rules at OAR 860-029-0120(6).

complete discretion as to whether it will agree to a development period in excess of three years, and the QF Trade Associations are only aware of one instance where a utility agreed to a longer period than three years under the current policy.[122] Thus, the existing administrative rule should be changed to state that the utility shall not unreasonably withhold consent to a longer development period when justified by the QF, and it should not include an arbitrary four-year cutoff. It should also not diminish the 15-year fixed-price and 20-year purchase periods when a delay beyond three years occurs due to circumstances beyond the QF's control.

2. The Definition of "Excused Delay" Should Include All Utility-Caused Delays

Next, distinct from establishment of the scheduled commercial operation date in the PPA, Staff's Draft Rule has included a definition of "Excused Delay" which is ostensibly intended to provide relief to the QF in the case of utility-caused delays but is drafted too narrowly to provide necessary scheduling relief to the QF.

The Commission-approved PPAs should include a carve-out that holds the QF harmless for delays caused by the purchasing utility. It is a basic principle of contract law that one party's prevention of the other party's performance excuses the harmed party's obligation. The Oregon Supreme Court has held that "where the conduct of the defendant has prevented the performance of a contract provision by the plaintiff, he cannot avail himself of any such failure to perform."[123] "[O]r, viewed another way, the condition is considered waived or fulfilled."[124] Thus, if the

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122 The one instance is PGE's contract with OM Power. *PGE Information Filing of QF Contracts or Summaries*, Docket No. RE 143, OM Power 1 LLC PPA. The QF Trade Associations have not conducted a comprehensive analysis and there may be other examples.

123 *Anderson v. Allison*, 256 Or 116, 121, 471 P2d 772, 774 (1970).

124 Richard A. Lord, 13 *Williston on Contracts* § 39.4 (4th ed., 2012).

utility is the cause of a delay, such as through a failure to timely complete the interconnection construction, the QF's obligation to achieve commercial operation by the scheduled commercial operation date should be excused, and the QF should not lose any time from its fixed-price sale period or its overall power sales term. This issue was recently litigated in Washington after Avista refused to include an exception in its proposed standard PPA for utility-caused delays, and the WUTC concluded that its standard PPA must provide such an exception to the delay default provision.[125]

There are at least two problems with Staff's currently proposed definition of Excused Delay. First, Staff's definition of "Excused Delay" only excuses the QF from delay default in the case where the utility's actions rise to the level of a contractual default of the PPA or the interconnection agreement, or a violation of the applicable interconnection procedures.[126] That is inadequate because defaults and tariff violations are not the only actions or inactions by a utility that could cause the QF to be unable to timely achieve commercial operation. For example, the utility may delay furnishing an interconnection study in a manner that does not rise to the level of a clear violation of the applicable interconnection rules. Or the utility might furnish an inadequate or erroneous interconnection study that necessitates further discussions and studies. Such delays are common in Oregon's interconnection processes. Under basic contract law, if any such delays are caused by the utility, the QF should be held harmless. By limiting the scope of utility-caused delays that apply, Staff's proposal provides less protection than general contract law provisions. Given that the Commission is supposed to be encouraging QFs with these rules,

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[125] WUTC Docket No. UE-190663, Order No. 01 at 5-6 (Oct. 30, 2020).
[126] Staff's Draft Rules at OAR 860-029-0010(x)) ("Excused Delay").

there is no basis to afford less protection than general contract law would provide without addressing the issue in the PPA.

Second, Staff's definition also fails to guarantee that the 15-year fixed-price period will be preserved in all cases where the Excused Delay causes a delay beyond three years after the PPA's Effective Date. Instead, Staff's proposed rule appears to work only as a bar against termination of the PPA for failure to achieve the scheduled commercial operation date. The problem therein is that if the utility causes a lengthy delay (e.g., one or two years) the 15-year fixed-price period will diminish and potentially compromise the financial viability of the project.

Instead of Staff's proposal, the PPA should simply excuse a QF's delayed commercial operation for all "utility-caused delays" without trying to exclude types of utility-caused delays, and it should result in automatic amendment of the PPA's scheduled commercial operation date and commencement of the 15-year fixed-price and 20-year purchase periods.

3. The 15-Year Fixed Price Period and 20-Year Purchase Periods Should Commence on the Commercial Operation Date, Not the Scheduled Commercial Operation Date

Additionally, the QF Trade Associations recommend changes to the mechanics of Staff's proposal on measurement of the term length. We recommend that the 15-year fixed-price and 20-year purchase period run from the commercial operation date, not the scheduled commercial operation date to ensure the QF can receive the benefit of the full 15-year and 20-year periods previously deemed necessary by the Commission to adequately encourage QFs.

As noted above, Staff proposes to begin the 15-year period from the scheduled commercial operation date instead of the commercial operation date.[127] However, doing so

[127] *See* Staff's Draft Rules at OAR 860-029-0010(x) ("contract price").

subjects the QF to the risk that a utility-caused delay will eat away at the critical fixed price period without any relief to the QF under Staff's narrow use of the "Excused Delay" concept discussed above. An even easier fix to this problem than properly defining "Excused Delay" and related provisions is to simply begin the fixed-price and purchase periods from the actual commercial operation date. That is how PPAs are ordinarily structured. Under that framework, as long as the QF's delay does justify termination of the PPA by the utility, the QF's 15-year and 20-year rights will be preserved after commercial operation is achieved. Conversely, unlike what would appear to occur under Staff's Draft Rule, the QF will not receive additional fixed-price or purchase period in the case where its actual commercial operation date is before the scheduled commercial operation date. This common-sense solution eliminates the need to debate definitions of "Excused Delay" and encourages renewable energy development by preserving the necessary fixed-price period.

4. The 90-day Limit On Early Commercial Operation Is Unreasonable

Staff's Draft Rule also contains an unreasonable 90-day limitation on achieving commercial operation earlier than forecasted absent utility agreement.[128] Staff's Draft Rule would allow the utility to refuse to allow commercial operation more than 90 days early in its sole discretion, even if withholding such consent is not reasonable or based on any impediment to allowing such early operation. The QF Trade Associations recommend that the rules allow for more flexibility to the QF.

It is difficult to precisely time the date on which the facility will achieve commercial operation, and in cases where the utility is not harmed by the QF achieving commercial operation

[128] *See* Staff's Draft Rules at New Rule #4, Section (5).

early, the QF should be allowed to do so without arbitrary limits. We propose that QFs be permitted to achieve commercial operation and commence receiving payment at the full contract prices up to six months in advance of the scheduled commercial operation date, with notice to the utility, and at an earlier time if the utility consents with such consent not to be unreasonably withheld.

Additionally, it is inconsistent with PURPA's must-purchase obligation to refuse to purchase a QF's power regardless of when the QF provides that power. If the Commission is concerned about stale prices at the end of fixed-price term, there is no reason to make it unreasonably difficult for a QF to come online sooner and commence its fixed-price term earlier. The QF Trade Associations also note that, generally speaking, QFs are more likely to be late than early. As noted above, the interconnection process and its delays have been a consistent and continuing factor in delaying commercial operations that makes it difficult to pin down a precise date.

Accordingly, the QF Trade Associations propose that a QF may come online up to 180 days before the PPA's scheduled commercial operation date without consent of utility by providing advance notice to the utility, and the QF may come online earlier than 180 days early with the utility's consent, and such consent may not be unreasonably withheld. At a minimum, if Staff's 90-day limit will be retained for early operation as a matter of right, the rule should state that the utility's consent to earlier commercial operation should not be unreasonably withheld.

5. QFs Should Be Permitted to Commence Deliveries on the Effective Date

Staff has requested comment on whether both existing and new QFs should be allowed to commence deliveries and commercial operation on the same day as execution of the PPA.[129] The QF Trade Associations support allowing for this rare circumstance to occur. There may be instances where the QF would like to have the commercial operation date coincide with the PPA's execution date, such as the case of an existing QF renewing its PPA or a QF that needs a bridge PPA between two more long-term arrangements. While this scenario is unlikely for a new QF, we see no reason to completely foreclose the possibility in the administrative rules.

6. The QF Should Not Forfeit Its Security Deposit When It Elects to Terminate the PPA Within Six Months of PPA Execution

The QF Trade Associations appreciate Staff's proposal to allow the QF to unilaterally terminate the PPA within six months of execution, but do not support the last-minute addition to this proposal which requires the QF to automatically forfeit a large security deposit if it exercises such termination right.[130] The right to terminate is necessary due to the significant delays that are often experienced in supplying interconnection studies and the drastic changes that can occur from one interconnection study to the next. If the QF is surprised by a utility's change in forecasted costs or timelines it should be offered the right to terminate the PPA. Additionally, this right to terminate addresses the concern raised by the utilities that they must rely on QF PPAs until they are formally terminated four years after execution. However, it is not necessarily reasonable to include an automatic forfeiture of a substantial security amount in the case of such termination, and such a forfeiture will deter QFs from utilizing this right.

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129 Staff's Draft Rules at 30.
130 Staff's Draft Rules at OAR 860-029-0120(8).

In most cases, a provision automatically forfeiting a security deposit would amount to an unlawful liquidated damages provision. In general, liquidated damages are only lawful if actual damages are difficult to estimate and the liquidated damages amount is "a reasonable forecast of just compensation for the harm that is caused by the breach."[131] The provision cannot be a penalty designed to deter non-performance; it must be based on likely actual damage to the non-breaching party.[132] The arbitrarily established amount of the proposed security deposit (e.g., $50/kW) is not in any way tied to the estimated damages accruing to the utility in the case of a QF terminating its PPA within six months of execution. Indeed, the utility should typically have no actual damages if the PPA is terminated within six months of execution. Thus, the automatic forfeiture provision should be deleted.

N. Test energy

The QF Trade Associations appreciate Staff removing draft language limiting a utility's obligation to purchase test energy to a period of "up to ninety (90) days."[133] Staff has indicated issues regarding test energy will instead be addressed in developing standard contracts.[134] The QF Trade Associations previously expressed concerns with the deleted language.[135] While we support the deletion, we remain concerned that a similar approach may be pursued for the standard contracts. PURPA requires utilities to "purchase all energy made available … [and] the

131 *De Long Corp*., 9 Or App at 574 (internal quotation omitted).
132 *Id.*
133 Staff's Draft Rules at New Rule #4, Section 3 (deleted text).
134 Staff's Description of Staff Proposed Rules for AR 631 (July 14 proposal and August 2 Revisions) at 3.
135 Joint Comments of the QF Trade Associations at 43 (June 9, 2021).

price paid must not be less than the utility's avoided costs."[136] As discussion of test energy turns to standard PPA language, the QF Trade Associations urge the Commission to retain the current standard PPA language without an end date for a utility's obligation to purchase test energy.[137]

O. Fixed Price Term

The QF Trade Associations recommend revising the contract term indicated in Staff's Draft Rules at OAR 860-029-0120(5) and 860-029-0130(2) to incorporate the 20-year fixed price term required by Oregon law. ORS 758.525(1) requires utilities to provide a schedule of avoided costs "over at least the next 20 years," and ORS 758.525(2) entitles QFs to sell energy and capacity at the utility's "projected avoided costs."[138] Thus, the statutory text provides that the utility must provide price schedules setting forth forecasted prices for at least 20 years, and the QF then has the option to select those projected avoided costs to be included in its contract. The relevant legislative history confirms this interpretation.[139] The Commission's rules should uphold Oregon law and offer QFs the option to sell energy and capacity at prices fixed for at least 20 years.

P. Jurisdiction Over Disputes

The QF Trade Associations recommend removing Section 860-029-0120(15) of Staff's Draft Rules, which requires contracts to include language referencing "the jurisdiction of those

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136 *Snow Mt. Pine Co. v. Mauldin*, 84 Or App 590, 595 (1987) (internal citations omitted) (internal quotations omitted); *see also* ORS 758.525; 18 CFR 292.304.

137 *E.g.,* PacifiCorp PPA for New Firm QF Not An Intermittent Resource at Section 5.4 (indicating payment for all output prior to the QF achieving commercial operations).

138 ORS 758.525.

139 *See 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, Pre-hearing Brief of CREA at 13-15 (explaining the legislative history).

governmental agencies and courts having control over either party or [the contract]."[140] Historically, this provision was intended to clarify that "if a governmental agency or a court orders the QF to halt generation, the utility is no longer obligated to purchase power under the contract."[141] Recent litigation, however, has raised the question of whether this language is seeking to expand the Commission's jurisdiction to cover QF contracts.[142] Oregon law prohibits such an expansion.[143] The Commission should eliminate rule language that is inconsistent with Oregon law, specifically Section 860-029-0120(15) of Staff's Draft Rules.

Q. Staff's Proposed Insurance Requirements

Staff requested comment on whether the proposed insurance requirements in proposed OAR 860-029-0120(14) are reasonable. The provision requires $1 million in coverage with an insurance company with a B+ rating for QFs over 200 kW. While the Joint Utilities have advocated for more stringent requirements, they have not identified any harm with Staff's proposal, and the Joint Utilities' more stringent insurance proposals would increase costs and deter otherwise viable renewable energy development. Staff's current proposal appears to be reasonable to the QF Trade Associations, but we reserve the right to adjust our position after reviewing other parties' comments.

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140 Staff's Draft Rules at 860-029-0120(15).

141 *In Re Utility Purchases from QFs,* Docket No. AR 114, Order No. 85-099, 1985 Or PUC LEXIS 2, at *4 (Feb. 12, 1985).

142 *E.g.,* Docket No. UM 1931, Order No. 18-174 at 4 n7 (May 23, 2018).

143 *Diack v. City of Portland*, 306 Or 287, 293, 759 P2d 1070 (1988) (explaining an agency cannot expand its jurisdiction through an administrative rulemaking).

R. Numerous Nits and Edits to Staff's Draft Rule

Finally, there are a number of edits the QF Trade Associations offer for clarity, but which do not necessarily change Staff's intended meaning for the draft rules. For additional nits that are less substantive in nature than the issues identified above, we are providing a mark-up of Staff's Draft Rule, on which we have also flagged the rules with which we have made substantive comments for further discussion and future revision.

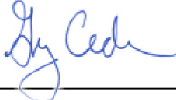
II. CONCLUSION

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

Dated this 12th day of August 2021.

Respectfully submitted,

Richardson Adams, PLLC



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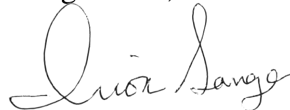

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Of Attorneys for the Renewable Energy Coalition and the Northwest & Intermountain Power Producers Coalition

Attachment No. 1

QF Trade Associations' Mark-Up of Staff's Draft Proposed Rules

Color Key:

Purple Edits = Staff's Edits to Staff's Draft Rules Circulated July 14, 2021

Blue Edits = QF Trade Associations' Edits/Comments to Staff's Draft Rules
Circulated August 3, 2021

Division 29
REGULATIONS RELATED TO AGREEMENTS BETWEEN ELECTRIC UTILITIES AND ELECTRIC COGENERATION AND SMALL POWER PRODUCTION FACILITIES

860-029-0001
Purpose

The purpose of this Division is to implement ORS 758.505 through 758.555 and to implement regulations relating to electric utilities and qualifying cogeneration and small power production facilities as provided under Section 210 of the federal Public Utility Regulatory Policies Act of 1978 (PURPA), Public Law 95-617 (16 USC 824a-3).

860-029-0005
Applicability of Rules

(1) These rules apply to all interconnection, purchase, and sale arrangements between a public utility and qualifying facilities as defined herein. Provisions of these rules do not supersede contracts existing before the effective date of this rule. At the expiration of such an existing contract between a public utility and a cogenerator or small power producer, any contract extension or new contract must comply with these rules.

(2) Nothing in these rules limits the authority of a public utility or a qualifying facility to agree to a rate, terms, or conditions relating to any purchase, which differ from the rate or terms or conditions that would otherwise be provided by these rules, provided such rate, terms, or conditions do not burden the public utility's customers.

(3) Within 30 days following the initial contact between a prospective qualifying facility and a public utility, the public utility must submit informational documents, approved by the Commission, to the qualifying facility which state:

(a) The public utility's internal procedural requirements and information needs;

(b) Any contract offered by the public utility is subject to negotiation;

(c) Avoided costs are subject to change pursuant to OAR 860-029-0080(3); and

(d) Avoided costs actually paid to a qualifying facility depend on the quality and quantity of power to be delivered to the public utility. The avoided costs may be recalculated to reflect stream flows, generating unit availability, loads, seasons, or other conditions.

(4) Upon request or its own motion, the Commission may waive any of the Division 29 rules for good cause shown. A request for waiver must be made in writing, unless otherwise allowed by the Commission.

860-029-0010
Definitions for Division 029 Rules

(x) “AC” means alternating current.

~~(x) “Affiliate” means, with respect to the qualifying facility, any person that directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with qualifying facility or that shares management or that acts jointly or in concert with or exercises influence over the policies or actions of the qualifying facility. For this purpose, “control” means the direct or indirect ownership of fifty percent (50%) or more of the outstanding capital stock or other equity interests having ordinary voting power.~~

~~(x) “Annual Degradation Factor” means . . .~~

~~(x) “As built supplement” means a document provided by the qualifying facility that is the final “as built” description of the Facility including the Point of Delivery, and that identifies changes in equipment of Facility configuration or other modifications to the Facility that vary from the description of the Facility included in the power purchase agreement.~~

(1) "Avoided costs" means the electric utility’s incremental costs of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, the electric utility would generate itself or purchase from another source, including any costs of interconnection of such resource to the system.

(2) "Back-up power" and "stand-by power" mean electric energy or capacity supplied by a public utility to replace energy ordinarily generated by a qualifying facility’s own generation equipment during an unscheduled outage of the facility.

~~(x) “Balancing Authority” means an entity responsible for maintaining the load-interchange-generation balance within the balancing authority area applicable to the Facility.~~

Commented [QFs1]: Balancing Authority is still used elsewhere in the rules, so it is not clear why this definition is being deleted.

~~(x) “Base hours” means the total number of hours in each contract year (8,760 or 8,764 for leap years).~~

~~(x) “Billing period” means one calendar month.~~

~~(x) “Business day” means any day on which banks in Portland Oregon are not authorized or required by law to be closed.~~

(3) "Capacity" means the average output in kilowatts (kW) committed by a qualifying facility to an electric utility during a specific period.

(4) "Capacity costs" mean the costs associated with supplying capacity; they are an allocated component of the fixed costs associated with providing the capability to deliver energy.

(x) "Certified qualifying facility" means a qualifying facility that is certified as such under 18 C.F.R. ~~§ 292.207, in effect as of xxxx, 2021~~Part 292.

(5) "Cogeneration" means the sequential generation of electric energy and useful heat from the same primary energy source or fuel for industrial, commercial, heating, or cooling purposes.

(6) "Cogeneration facility" means a facility which produces electric energy and steam or other forms of useful energy (such as heat) by cogeneration that are used for industrial, commercial, heating, or cooling purposes.

(7) "Commercial operation date" means the date after start-up testing is complete~~,~~ and the qualifying facility has satisfied the criteria ~~in OAR 860-029-00~~ necessary to commence operation and ~~on which the qualifying facility~~ begins to deliver its Net Output. ~~Is fully operational and capable of delivering output.~~

(8) "Commission" means the Public Utility Commission of Oregon.

~~(x) "Conditional DNR Notice" is defined in OAR 860-029-XXXX [New Rule #1].~~

(x) "~~Construction~~ Development period" means the time period commencing on the power purchase agreement effective date and ending 24:00 PPT the day before ~~on the day before~~ the scheduled commercial on-line date.

~~(x) "Contract Interest Rate" means the lesser of (a) the highest rate permitted under Requirements of Law or (b) 200 basis points per annum plus the rate per annum equal to the publicly announced prime rate or reference rate for commercial loans to large businesses in effect from time to time quoted by Citibank, N.A. as its "prime rate." If a Citibank, N.A. prime rate is not available, the applicable prime rate will be the announced prime rate or reference rate for commercial loans in effect from time to time quoted by a bank with $10 billion or more in assets in New York City, N.Y., selected by the Party to whom interest is being paid~~

(x) "Contract price" means for the ~~during the~~ 15-year fixed price term commencing on the scheduled commercial operation date, the applicable fixed price for On-Peak Hours and Off-peak Hours specified in the purchasing utility's avoided cost price schedule, and during the subsequent non-fixed price term, the purchasing utility's applicable Index Price in effect when the energy is generated.

(x) "Contract year" means each twelve (12) month period commencing at 00:00 hours Pacific Prevailing Time ("PPT") on January 1 and ending at 24:00 hours PPT on December 31; provided, however, that the first Contract Year shall commence on the effective date of the power purchase agreement and the last Contract Year shall end on the last day of the Total Term.

~~(9) "Costs of interconnection" means the reasonable costs of connection, switching, dispatching, metering, transmission, distribution, equipment necessary for system protection, safety provisions, and administrative costs incurred by an electric utility directly related to~~

Commented [QFs2]: We recommend keeping the definition of certified QF more generic so it does not have to be amended every time FERC might change its rules, which it does do from time to time, especially related to the format of the certification forms, etc.

Commented [QFs3]: Use of the word "Construction" here suggests the developer must have very advanced development and financing in place to basically begin construction before PPA execution. We recommend the better term to use, which is used in PPAs typically, is the "Development Period" or maybe "Pre-operation Period". We changed all in this draft.

Commented [QFs4]: As we noted in our substantive comments, it is our position that the 15 year purchase terms should run from the actual COD date, not scheduled COD, which is how non-PURPA PPAs and PPAs in other states, including Idaho and Montana, have traditionally been structured. If our recommendation is adopted, an edit will be needed to this subsection.

Commented [QFs5]: Two points here-

(1) Recommend deleting this definition from Div. 29 because the use of this term in these rules only occurs in the definition of "avoided cost" and -080 regarding utility system cost data, both of which refer to the interconnection costs of the avoided utility resource, not the QF as this definition does.

(2) This definition could create confusion and lead to disputes because it is different than FERC's definition for "interconnection costs" in reference to a QF at 18 CFR 292.101(7).

~~installing and maintaining the physical facilities necessary to permit purchases from a qualifying facility.~~

~~(x) "Default security" means an amount equal to fifty dollars ($50) per kW of the final Nameplate Capacity Rating of the qualifying facility.~~

(10) "Demand" means the average rate in kilowatts at which electric energy is delivered during a set period, to be determined by mutual agreement between the electric utility and the customer.

(11) "Effective date" means the date on which a power purchase agreement is executed by both the qualifying facility and the public utility.

(12) "Electric utility" means a nonregulated utility or a public utility as defined in ORS 758.505.

~~(x) "Electric System Authority" means each of NERC, WECC, WREGIS, an RTO, a regional or sub-regional council or authority, and any other similar council, corporation, organization or body of recognized standing with respect to the operations of the electric system in the WECC region, as such are applicable to the Seller or Purchaser.~~

(13) "Energy" means electric energy, measured in kilowatt hours (kWh).

(14) "Energy costs" means:

(a) For nonfirm energy, the incremental costs associated with the production or purchase of electric energy by the electric utility, which include the cost of fuel and variable operation and maintenance expenses, or the cost of purchased energy;

(b) For firm energy, the combined allocated fixed costs and associated variable costs applicable to a displaced generating unit or to a purchase.

~~(x) "Excess output" means any increment of Net Output delivered at a rate, on an hourly basis, exceeding the Facility Capacity Rating.~~

Commented [QFs6]: We recommend deleting this definition because the term "excess output" is not used elsewhere in the rules.

(x) "Excused Delay" means the failure of the qualifying facility 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 is caused by an action or inaction of the purchasing utility. ~~an Event of Default by the purchasing public utility, a default by the purchasing public utility under the Generation Interconnection Agreement or related interconnection study agreement(s) for the Facility, including a default resulting from any breach by the purchasing public utility of any obligation to meet a material deadline included in such agreement(s), or the purchasing public utility's violation of applicable tariff provisions governing the interconnection of the Facility; provided that the duration of any Excused Delay shall not extend to any period of delay that could have been prevented had the qualifying facility taken mitigating actions using commercially reasonable efforts.means the failure of the~~

Commented [QFs7]: As noted in our substantive comments, the definition of "Excused Delay" should be revised to provide relief from all utility-caused delays. We made a proposed edit.

~~qualifying facility to meet the commercial readiness requirements on or before the scheduled commercial on-line date, but only to the extent such failure is caused by an event of Force Majeure or a failure of purchasing public utility to meet a material deadline or obligation included in the power purchase agreement or in any agreement related to the interconnection of the qualifying facility to the purchasing utility's system, including interconnection study agreements and interconnection agreements; provided that the duration of any Excused Delay shall not extent to any period of delay that could have been prevented had seller taken mitigating actions using commercially reasonable efforts.~~

(x) "Existing QF" means a QF that ~~(1)~~ is or has been operational before the effective date of a power purchase agreement ~~or (2) has ever sold energy or capacity to the purchasing utility or a third party~~.

~~(x) "Expected Net Output" means the number of MWh Net Output in the first full Contract Year reduced, as applicable, by an annual degradation factor per Contract year, measured at the Point of Delivery.~~

(x) "Facility" means all equipment, devices, associated appurtenances, owned, controlled, operated and managed by a qualifying facility in connection with, or to facilitate, the production, storage, generation, transmission, delivery, or furnishing of electric energy by the qualifying facility to the purchasing public utility and required to interconnect with the System.

(x) "FERC" means the Federal Regulatory Commission.

(15) "Firm energy" means a specified quantity of energy committed by a qualifying facility to an electric utility.

(16) "Fixed ~~rate~~ price term" means for qualifying facilities electing to sell firm energy or firm capacity or both, the ~~term~~ period of a power purchase agreement after operations commence and during which the public utility pays the qualifying facility avoided cost rates determined either at the time of contracting or at the time of delivery.

(x) "Force Majeure" is defined at OAR 860-029-XXXX [New Rule #6].

(x) "Generator Interconnection Agreement" means the generator interconnection agreement between the qualifying facility and qualifying facility's interconnection provider.

~~(x) Generation unit" means a complete electrical generation system within the Facility that is able to generate and deliver energy to the Point of Interconnection independent of other Generation Units within the same Facility. For example, for a solar facility, a Generation Unit is an inverter and associated panels.~~

(x) "Governmental Authority" means federal, national, state, municipal, local, tribal, territorial, or other governmental department, commission, board, bureau, agency, regulatory authority, instrumentality, judicial, legislative or administrative body, domestic or foreign, including, without limitation, FERC and the Commission.

Commented [QFs8]: Subpart (1) of this definition of "existing QF" includes all circumstances where subpart (2) would apply. Perhaps Staff intended that the "or" should be an "and", but otherwise subpart (2) should be deleted.

Also, because the term "existing QF" is not used elsewhere in the rules, it could just be deleted entirely.

Commented [QFs9]: We recommend including "storage" in the definition of "Facility".

Commented [QFs10]: "Fixed price term" is the term used in the rules, not fixed rate. Also, we recommend a clarifying edit that the fixed price term starts after operations (or Scheduled COD under Staff's current proposal), because PGE argued to the court of appeals in the UM 1805 appeal that the current definition could be read to mean that the fixed-price period begins on the effective date.

(x) “Imbalance energy” means the portion of Firm Energy, measured in kWh, scheduled and delivered to the Delivery Point that was not Net Output.

(17) "Index rate" means the lowest avoided cost approved by the Commission for a generating utility for the purchase of energy or energy and capacity of similar characteristics including on-line date, duration of obligation, and quality and degree of reliability.

Commented [QFs11]: Definition of “index rate” does not match up to the apparent intent of use of the term in the newly proposed rules, which appear to suggest it is a short-term/day-ahead wholesale market price rate, e.g. Mid-C Day-ahead ICE firm rate. A further edit appears to be necessary here.

(18) "Interruptible power" means electric energy or capacity supplied by a public utility to a qualifying facility subject to interruption by the electric utility under certain specified conditions.

~~(x) “Lost Energy” means (in kWh):~~

~~A. In connection with a Facility after the Commercial Operation Date, if the Mechanical Availability Percentage falls below the Minimum Availability Guarantee for a Contract Year, ((the Minimum Availability Guarantee as determined pursuant to Section 3.4 / the actual Mechanical Availability Percentage for the applicable Contract Year) X actual Net Output for the applicable Contract Year) – actual Net Output for the applicable Contract Year; or~~

~~B. In connection with a Facility that does not establish the Commercial Operation Date on or before the Scheduled Commercial Operation Date, the Estimated Monthly Average Net Output (by On-Peak Hours and Off-Peak Hours – see Exhibit C) for each month during the period from the Scheduled Commercial Operation Date until the earlier of the actual Commercial Operation Date or contract termination pursuant to Section 10. The Estimated Monthly Average Net Output shall be pro-rated for any partial months; or~~

~~C. In connection with a Facility whose Agreement has been terminated by PGE pursuant to Section 10 of this Agreement because of Seller’s default, the lesser of the sum of the Estimated Monthly Average Net Output (by On-Peak and Off-Peak Hours – see Exhibit C) for each month during the 24 months following termination, or the sum of the Estimated Monthly Average Net Output (by On-Peak and Off-Peak Hours – see Exhibit C) for each month from the date of termination through the end of the Term. The Estimated Monthly Average Net Output shall be pro-rated for any partial months.~~

~~**[Note to AR 631 Parties: The draft rules do not close the loop with respect to damages for lost energy. This is something Staff needs to correct.]**~~

(19) "Maintenance power" means electric energy or capacity supplied by a public utility during scheduled outages of a qualifying facility.

(x) “MW” means megawatt.

(x) “MWh” means megawatt-hour.

(20) "Nameplate Capacity Rating" means the maximum installed instantaneous ~~generation~~ power production capacity of the completed Facility, expressed in MW (AC) and measured at

Commented [QFs12]: See our substantive comments for explanation for this recommended edit.

the point of interconnection, 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, inverters, energy storage devices, or other equipment within the Facility affecting the Facility's capability to deliver useful electric energy to the grid at the point of interconnection ~~full-load electrical quantities assigned by the designer to a generator and its prime mover or other piece of electrical equipment, such as transformers and circuit breakers, under standardized conditions, expressed in amperes, kilovoltamperes, kilowatts, volts, or other appropriate units. Nameplate capacity is usually indicated on a nameplate attached to the individual machine or device~~.

~~(x) "NERC" means the North American Electric Reliability Corporation.~~

~~(x) "Net available capacity" means the full (maximum) net energy output a Facility is capable of delivering to the electric grid at the point of interconnection continuously for at least sixty (60) minutes.~~

(x) "Net Output" means all energy and capacity produced by the qualifying facility, less station use and ~~transformation and transmission~~ losses, ~~and other adjustments (e.g., the qualifying facility's load other than station use)~~ flowing through the Point of ~~Delivery~~Interconnection.

(x) "New qualifying facility" means a qualifying facility that is not an existing qualifying facility.

(21) "Nonfirm energy" means energy to be delivered by a qualifying facility to an electric utility on an "as available" basis; or energy delivered by a qualifying facility in excess of its firm energy commitment. The rate for nonfirm energy may contain an element representing the value of aggregate capacity of nonfirm sources.

(x) "Non-fixed price term" means the portion of the purchase period of a power purchase agreement that begins after the fixed-price term has ended, during which the qualifying facility receives pricing equal to the purchasing public utility's index rate for comparable deliveries of energy. The length of the non-fixed price term is selected by the qualifying facility and specified in the power purchase agreement.

(22) "Nonregulated utility" means an entity providing retail electric utility service to Oregon customers that is a people's utility district organized under ORS Chapter 261, a municipal utility operating under ORS Chapter 225, or an electric cooperative organized under ORS Chapter 62.

(x) "Off-peak hours" means all hours other than On-peak hours.

(x) "On-peak hours" means the hours designated as such in the purchasing public utility's avoided cost price schedule.

Commented [QFs13]: "Net available capacity" is not used anywhere else in the rules, so we recommend deleting it to avoid confusion as to intent of it in the rules

Commented [QFs14]: See our substantive comments for the explanation for this edit.

(x) “Permits” mean the permits, licenses, approvals, certificates, entitlements and other authorizations issued by Governmental Authorities required for the construction, ownership or operation of the Facility or occupancy of the site it is located.

(x) “Point of Delivery” means for agreements with off-system qualifying facilities, the point on the purchasing public utility’s distribution or transmission system ~~side of the interface with the applicable Balancing Authority~~ where the qualifying facility and purchasing public utility have agreed the qualifying facility will deliver energy to the purchasing public utility. For on-system qualifying facilities, the Point of Delivery is the point of interconnection.

(x) “Point of interconnection” means the point where the qualifying facility is electrically connected to a public utility’s transmission or distribution system.

(23) "Primary energy source" means the fuel or fuels used for the generation of electric energy. The term does not include minimum amounts of fuel required for ignition, start-up, testing, flame stabilization, and control uses; the term does not include minimum amounts of fuel required to alleviate or prevent unanticipated equipment outages and emergencies which directly affect the public health, safety, or welfare.4

~~(x) “Prime Rate” means the publicly announced prime rate or reference rate for commercial loans to large businesses with the highest credit rating in the United States in effect from time to time quoted by Citibank, N.A. If a Citibank, N.A. prime rate is not available, the applicable Prime Rate shall be the announced prime rate or reference rate for commercial loans in effect from time to time quoted by a bank with $10 billion or more in assets in New York City, N.Y., selected by the Party to whom interest based on the prime rate is being paid.~~

~~(x) “Prudent Electrical Practices” means those practices, methods and acts engaged in or approved by a significant portion of the independent electric power generation industry for facilities of similar size and characteristics or any of the practices, methods or acts, which, in the exercise of reasonable judgment in the light of facts known at the time a decision is made, could have been expected to accomplish the desired result at the lowest reasonable costs consistent with reliability, safety, and expedition.~~

(24) "Purchase" means the purchase of electric energy or capacity or both from a qualifying facility by an electric utility.

(25) "Public utility" means a utility regulated by the Commission under ORS Chapter 757, that provides electric power to customers.

(x) "Purchase period" means the period of a power purchase agreement during which the qualifying facility is required to sell power to the public utility and the public utility is required to purchase power offered for sale.

(27) "Qualifying facility" means a cogeneration facility or a small power production facility as defined in 18 C.F.R. Part 292 ~~292.203 .205, in effect as of xxx, 2021~~. Unless otherwise specified, “qualifying facility” includes ~~potential~~ proposed qualifying facilities, (e.g., entities

Commented [QFs15]: “Point of Delivery” - The POD is not always going to be within the purchasing utility’s balancing authority. There are a number of cases we can point to where that is not the case if necessary. Staff’s proposed definition is also inconsistent with FERC precedent on the point, including the Kootenai Elec. Cooperative decision, which held that the BA boundary is not necessarily the point of delivery. 45 FERC P 61,229 at PP 14-19.

Commented [QFs16]: Note that our substantive recommendation is that this and related provisions be amended to run the 20-year purchase period from the actual commercial operation date, not scheduled COD. If our recommendation is adopted, an edit will be needed to this subsection.

Commented [QFs17]: Nits to the definition of “Qualifying Facility” - “proposed” is the term of art used in the FERC regulations. 18 CFR 292.207

that intend to obtain certification as a qualifying facility but that have not yet done so). ~~by these rules~~.

(x) "Qualifying facility's cost to cover" means the positive difference, if any, between (a) the contract price per MWh and other lost revenue to the qualifying facility, such as revenue from sale of renewable energy certificates and production or investment tax credits, and (b) the net proceeds per MWh actually realized by qualifying facility for the output not purchased by the public utility as required by a power purchase agreement.

Commented [QFs18]: Per our substantive recommendations on damages issues, "QF's cost to cover" should include all reasonably anticipated revenue streams, not just payments for energy and capacity. We proposed an edit implementing our proposal here.

(28) "Rate" means any price, charge, or classification made, demanded, observed, or received with respect to the sale or purchase of electric energy or capacity or any rule, regulation, or practice respecting any such price, charge, or classification.

(x) "Renewable energy certificate" has the meaning given that term in OAR 330-160-0015(8) (effective September 3, 2008).

(29) "Renewable Portfolio Standard" or "RPS" is the standard for large electric utilities in ORS 469A.052(1) or the standard for small electric utilities in ORS 469A.055 in effect as of October 23, 2018.

(x) "Renewable qualifying facility" means a qualifying facility that generates electricity that may be used for compliance with the RPS.

(30) "RPS attributes" means all attributes related to the net output generated by the qualifying facility that are required to provide the public utility with "qualifying electricity" as that term is defined in Oregon's Renewable Portfolio Standard Act, ORS 469A.010, in effect as of October 23, 2018. RPS attributes do not include environmental attributes that are greenhouse gas offsets from methane capture not associated with the generation of electricity.

(31) "Sale" means the sale of electric energy or capacity or both by a public utility to a qualifying facility.

(x) "Schedule" means the purchasing public utility's schedule filed with the Commission setting forth terms and prices for standard power purchase agreements and prices.

(32) "Scheduled commercial operation date" means the date selected by the qualifying facility on which the qualifying facility intends to be fully operational and reliable and able to commence the sale of energy or energy and capacity to the public utility.

(33) "Small power production facility" means a facility ~~which~~ that produces electric energy using as a primary energy source biomass, waste, solar energy, wind power, water power, geothermal energy, or any combination thereof. Only small power production facilities which, with any other facilities located at the same site, have power production capacities of 80 megawatts or less, are covered by these rules.

(x) “Start-Up Testing” means the start-up testing required by the manufacturer or interconnection provider that establish that the Facility is reliably producing electric energy. ~~“Start-up testing” means the applicable required factory and start-up tests that must be completed by a qualifying facility prior to commercial operation.~~

(34) "Supplementary power" means electric energy or capacity supplied by a public utility, regularly used by a qualifying facility in addition to that which the facility generates itself.

(x) “System” means the electric transmission and distribution system owned or operated by the purchasing public utility.

(35) "System emergency" means a condition on a public utility’s system which is likely to result in imminent, significant disruption of service to customers, in imminent danger of life or property, or both.

(x) “Test energy” means electric energy generated by the Facility during the Test Period, and RECs and capacity rights associated with such electric energy.

(x) “Test period” means a period ~~of no more than sixty (60) calendar days,~~ during which Start-Up Testing is conducted~~to be concluded~~.

(36) "Time of delivery" means:

(a) In the case of capacity, when the generation is first on-line and capable of meeting the capacity commitment of the qualifying facility to the electric utility under the terms of its contract or other legally enforceable obligation.

(b) In the case of firm energy and depending upon the contract between the parties, either:

(A) When the first kilowatt-hour of energy is able to be delivered under the commitment of the qualifying facility; or

(B) When each kilowatt-hour is delivered under the commitment of the qualifying facility.

(37) "Time the obligation to purchase the energy capacity or energy and capacity is incurred" means the earlier of:

(a) The date on which a binding, written obligation is entered into between a qualifying facility and a public utility to deliver energy, capacity, or energy and capacity; or

(b) The date determined by the Commission.

(x) “Total output” means all energy produced by the Facility.

(x) “Total term” is the total duration of a power purchase agreement starting on the Effective Date and ending the final day of the purchase period.

860-0290-0020

Obligations of Qualifying Facilities to the Electric Utility

The conditions listed in this rule apply to all qualifying facilities that sell or intend to sell electricity to a public utility under this Division:

(1) The owner or operator of a qualifying facility purchasing or selling electricity pursuant to these rules must execute a written power purchase agreement with the public utility.

(2) Contracts:

(a) All contracts between a qualifying facility and a public utility for energy, or energy and capacity must include language that which substantially conforms to the following: This agreement is subject to the jurisdiction of those governmental agencies and courts having control over either party or this agreement. The public utility's compliance with the terms of this contract is conditioned on the qualifying facility submitting to the public utility and to the Public Utility Commission of Oregon, before the date of initial operation, certified copies of all local, state, and federal licenses, permits, and other approvals required by law.

(b) Under subsection (2)(a) of this rule, the public utility shall bear no obligation to identify which approvals are required by law, or to verify the approvals were properly obtained, or that the project is maintained pursuant to the terms of the approvals.

(3) To ensure system safety and reliability of interconnected operations, all interconnected qualifying facilities must be constructed and operated in accordance with all applicable federal, state, and local laws and regulations.

(42) Any qualifying facility entering into a power purchase agreement with a public utility under PURPA will construct and operate the Facility in a manner that ensures its continuing status as a qualifying facility and in a manner consistent with its FERC Qualifying Facility certification.

(53) Any qualifying facility that has entered into a power purchase agreement with a public utility under PURPA will not make any changes in its ownership, control or management that would cause the qualifying facility to fail to satisfy the eligibility requirements for entering into the power purchase agreement and the pricing reflected in this agreement. No more than once every 24 months, , at the request of the purchasing utility, the qualifying facility will shall provide documentation and information reasonably requested by the purchasing utility PGE to establish the qualifying facility's continued compliance with eligibility requirements for the power purchase agreement executed by the qualifying facility and public utility. The public utility shall take reasonable steps to maintain the confidentiality of any such documentation and information that public utility identifies as confidential, provided that the purchasing utility PGE may provide all such information to the Commission upon the Commission's request.

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Commented [QFs19]: As noted in our substantive comments, we continue to object to the requirement that this clause be included in PPAs because it has been cited as a forum selection clause in favor of the Commission's jurisdiction over disputes. If our recommendation is adopted, an edit will be needed to this subsection.

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Commented [QFs20]: This should only be upon request of the utility to avoid the risk of a default or violation of the rules where the utility did not request and did not plan to use or review such information.

(6~~4~~) The qualifying facility must furnish, install, operate, and maintain in good order and repair, and without cost to the public utility, switching equipment, relays, locks and seals, breakers, automatic synchronizers, and other control and protective apparatus as shown by the public utility to be reasonably necessary to operate the qualifying facility in parallel with the public utility's system, or may contract for the public utility to do so at the expense of the qualifying facility. Delivery must be at a voltage, phase, power factor, and frequency as specified by the public utility.

(7~~5~~) The qualifying facility must make ~~S~~switching equipment capable of isolating the qualifying facility from the public utility's system ~~must be~~ accessible to the public utility at all times.

(8~~6~~) The qualifying facility must allow the public utility the option of operating the switching equipment, described in section (4) of this rule if, in the sole opinion of the public utility, continued operation of the qualifying facility in connection with the public utility's system may create or contribute to a system emergency. Such a decision by the public utility is subject to the Commission's verification pursuant to OAR 860-029-0070. The public utility must endeavor to minimize any adverse effects on the qualifying facility of the operation of the switching equipment.

(9~~7~~) Any agreement between a qualifying facility and a public utility must provide for the degree to which the qualifying facility must assume responsibility for the safe operation of the interconnection facilities.

(10~~8~~) At its option, the public utility may require a qualifying facility to report periodically the amount of deliveries and scheduled deliveries to the public utility, as shown to be reasonably necessary for the public utility's system operations and reporting.

~~(9) During the total term of the power purchase agreement, the qualifying facility will not sell any net output from the Facility to any party other than purchasing public utility.~~

(11~~10~~) The qualifying facility must deliver net output to purchasing utility to the Point of Delivery free and clear of all liens, claims and encumbrances.

860-029-0030
Obligations of the Public Utility to Qualifying Facilities

(1) Obligations to purchase from qualifying facilities: Each public utility must purchase, in accordance with the requirements in these rules ~~OAR 860-029-0040~~, ~~any energy and capacity in excess of station service (power necessary to produce generation)~~ Net Output ~~and amounts attributable to conversion losses that are made available~~: ~~from a qualifying facility:~~

(a) Directly from a qualifying facility in ~~it's~~ the purchasing public utility's service territory; or

(b) Indirectly from a qualifying facility in accordance with section (4) of this rule.

Commented [QFs21]: The relevant "conversion losses" would be deducted from the "Net Output" under the definition of "Net Output", so re-stating such deduction for losses here is redundant and potentially confusing.

(2) Obligation to sell to qualifying facilities: Each public utility must sell to any qualifying facility, in accordance with OAR 860-029-0050, any energy and capacity requested by the qualifying facility on the same basis as available to other customers of the public utility in the same class who do not generate electricity.

(3) Obligation to interconnect: Each public utility must interconnect with any qualifying facility as may be necessary to accomplish purchases or sales under this division. The obligation to pay for any interconnection costs shall be determined under OAR 860-029-0060.

(4) Obligation to accept energy and capacity at Point of Delivery from off-system qualifying facilities: Each public utility must accept energy and capacity from an off-system qualifying facility at a Point of Delivery as may be necessary to accomplish purchases under this division. The obligation to pay for costs incurred by public utility to accept energy and capacity at the Point of Delivery and transmit to load may be determined under OAR 860-029-00XX [New Rule #1].

(~~4~~) (5) Option to wheel power to other electric utilities or to the Bonneville Power Administration: At the request of a qualifying facility, a public utility (which would otherwise be obliged to purchase energy or capacity from such qualifying facility) may transmit (wheel) energy or capacity to any other electric utility or to the Bonneville Power Administration, at the expense of the qualifying facility. Use of a public utility's transmission facilities shall be on a cost-related basis.

(~~5~~)(6) Parallel operation: Each public utility must offer to operate in parallel with a qualifying facility, provided that the qualifying facility complies with the standards established in accordance with OAR 860-029-0020.

(~~6~~) (7) When the generating portion of the qualifying facility consumes more electric energy than it produces, the public utility shall cease purchases.

~~(7)~~ (8) Within 30 days of the execution of any purchase agreement with a qualifying facility, the public utility must file with the Commission a true copy or summary of the terms of the executed agreement. If a summary is filed, the summary must identify the quantity and quality of the power and the price being paid. A true copy of the executed contract must be made available upon request for Commission staff review.

860-029-0040
Rates for Purchases

(1) Rates for purchases by public utilities must:

(a) Be just and reasonable to the public utility's customers and in the public interest; and

(b) Be in accordance with this rule, regardless of whether the public utility making such purchases is simultaneously making sales to the qualifying facility.

(2) Establishing rates:

(a) Except for qualifying facilities in existence before November 8, 1978, and except when a public utility fails to make a good faith effort to comply with the request from a qualifying facility to wheel, a purchase rate satisfies the requirements of section (1) of this rule if the rate equals the avoided costs after consideration of the factors set forth in section (5) of this rule.

(b) If a public utility fails to make a good faith effort to comply with the request from a qualifying facility to wheel, the public utility must purchase at a rate which is the public utility's avoided cost or the index rate, whichever is higher. A good faith effort will be demonstrated by the public utility's publication of a generally applicable reasonable policy of the public utility to use the public utility's transmission facilities on a cost-related basis.

(c) When the purchase rates are based upon estimates of avoided costs over a specific term of the contract or other legally enforceable obligation, the rates do not violate these rules if any payment under the obligation differs from avoided costs.

(d) Nothing in these rules will be construed as requiring payment of avoided-cost prices to qualifying facilities in existence before November 1978, provided, however, that prices for such purchases shall be sufficient to encourage continued power production.

(3) Rates for purchases — time of calculation: Each qualifying facility has the option to:

(a) Provide nonfirm energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases must be based on the purchasing public utility's nonfirm energy avoided cost or if subsection (2)(b) of this rule is applicable, in effect when the energy is delivered; or

(b) Provide firm energy and/or capacity pursuant to a legally enforceable obligation for the delivery of energy and/or capacity over a specified term, in which case the rates for purchases must be based on:

(A) The avoided costs calculated at the time of delivery, or, if subsection (2)(b) of this rule is applicable, the index rate in effect at the time of delivery; or

(B) At the election of the qualifying facility, exercised at the time the obligation is incurred, the avoided costs, or the index rate then in effect if subsection (2)(b) of this rule is applicable, projected over the life of the obligation and calculated at the time the obligation is incurred.

(4) Standard rates for purchases shall be implemented as follows:

(a) In the same manner as rates are published for electricity sales, each public utility shall file with the Commission, within 30 days of Commission acknowledgement of its integrated resource plan, standard rates for purchases from eligible qualifying facilities to

become effective 30 days after filing. The publication shall contain all the terms and conditions of the purchase.

(b) If a public utility fails to make a good faith effort to comply with the request from a qualifying facility to wheel, the public utility shall purchase at a rate which is the public utility's standard rate or the index standard rate, whichever is higher. A good faith effort shall be demonstrated by the public utility's publication of its generally accepted reasonable policy to use the public utility's transmission facilities on a cost-related basis.

(c) The public utility's standard rates may differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.

(5) Factors affecting rates for purchases: In determining avoided costs and for determining the index rate the following factors will, to the extent practicable, be taken into account:

(a) The data provided pursuant to OAR 860-029-0080(3) and the Commission's evaluation of the data; and

(b) The availability of energy or capacity from a qualifying facility during the system daily and seasonal peak periods, including:

(A) The ability of the public utility to dispatch output of the qualifying facility;

(B) The expected or demonstrated reliability of the qualifying facility;

(C) The terms of any contract or other legally enforceable obligation;

(D) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the public utility's facilities;

(E) The usefulness of energy and/or capacity supplied from a qualifying facility during system emergencies, including its ability to separate its load from its generation;

(F) The individual and aggregate value of energy and capacity from qualifying facilities on the public utility's system; and

(G) The smaller capacity increments and the shorter lead times available, if any, with additions of capacity from qualifying facilities.

(c) The relationship of the availability of energy and/or capacity from the qualifying facility as derived in subsection (5)(b) of this rule, to the ability of the public utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use; and

(d) The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility if the purchasing public utility generated an equivalent amount of energy itself or purchased an equivalent amount of energy and/or capacity.

(6) Each public utility that is currently complying with Oregon's renewable portfolio standard must offer renewable and non-renewable avoided cost rates to eligible qualifying facilities.

860-029-0043
Standard Rates for Purchase

(1) Each public utility must offer standard non-renewable avoided cost rates to eligible qualifying facilities.

(2) Each public utility that acts to comply with Oregon's renewable portfolio standard must offer standard renewable avoided cost rates to eligible qualifying facilities.

~~(3) Qualifying facilities with a nameplate capacity of 100 kW and less are eligible for standard avoided cost rates.~~

(4) Each public utility must file standard avoided cost rates that differentiate between qualifying facilities of different resource types by taking into account the contributions to meeting the utility's peak capacity of the different resource types.

(5) Each public utility must update its standard avoided costs in accordance with OAR 860-029-0085.

860-029-0046

Integration Charges

(1) Each public utility may assess Commission-approved integration charges on wind and solar qualifying facilities that are located within the public utility's Balancing Authority Area.

(2) The public utility bears the burden to establish the proposed integration charge or charges reflecting the costs of integrating the type of resource that will be subject to the charges.

(3) To the extent they are to be imposed by the public utility, any integration charges must be included in the public utility's avoided cost schedules.

860-029-0050
Rates for Sales

(1) Rates for sales by public utilities must:

(a) Be just and reasonable and in the public interest; and

(b) Not discriminate against qualifying facilities.

(2) Rates for sales that are based on accurate data and consistent, system-wide costing principles will be considered not to discriminate against any qualifying facility to the extent that such rates apply to the public utility's other customers with similar load or other cost-related characteristics.

(3) The following additional services must be provided by a public utility to a qualifying facility at its request:

(a) Supplementary power;

(b) Back-up power;

(c) Maintenance power; and

(d) Interruptible power.

(4) When a waiver request is filed under OAR 860-029-0005(4), the Commission may waive any requirement of section (3) of this rule if, after notice in the area served by the public utility and after opportunity for public comment, the public utility demonstrates and the Commission finds that compliance with such requirement will:

(a) Impair the public utility's ability to render adequate service to its other customers; or

(b) Place an undue burden on the public utility.

(5) The rate for sale of back-up power or maintenance power:

(a) May not be based upon an assumption (unless supported by factual data) that forced outages or other reductions in electric output by all qualifying facilities on a public utility's system will occur simultaneously, during the system peak, or both; and

(b) Must take into account the extent to which scheduled outages of the qualifying facilities can be coordinated usefully with the scheduled outages of the public utility's facilities.

860-029-0060
Obligation to Pay and Reimbursement of Interconnection Costs

(1) Interconnection costs are the responsibility of the owner or operator of the qualifying facility. Interconnection costs that may reasonably be incurred by the public utility will be assessed against a qualifying facility on a nondiscriminatory basis with respect to other customers with similar load or other cost-related characteristics.

(2) The public utility will be reimbursed by the qualifying facility for any reasonable interconnection costs including costs of financing at an interest rate no greater than the

effective rate of the public utility's last senior securities issuance at the time of the contract with the qualifying facility. Such reimbursement may be over any agreed period not greater than one-half the length of any contract between the public utility and the qualifying facility when the contract is for a period greater than two years; otherwise, reimbursement will be made over a one-year period. At the public utility's option and with the Commission's approval, a public utility may guarantee a loan to a qualifying facility for interconnection costs rather than finance such costs from the public utility's own funds.

860-029-00070

System Emergencies

(1) Qualifying facility's obligation to provide power during system emergencies: A qualifying facility is required to provide energy and capacity to a public utility during a system emergency only to the extent:

(a) Provided by agreement between such qualifying facility and public utility; or

(b) Ordered under section 202(c) of the Federal Power Act.

(2) During any system emergency, a public utility may curtail:

(a) Purchases from a qualifying facility if such purchases would contribute to such emergency (including net output requirement); and

(b) Sales to a qualifying facility, as qualified by section (3) of this rule, provided that such curtailment is on a nondiscriminatory basis.

(3) Except in cases of practical impossibility, sales to a qualifying facility that is generating 50 percent or more of its load, may not be curtailed during a system emergency, or under mandatory curtailments established by Order No. 78-823, until all other customers in its class have been fully curtailed.

(4) A qualifying facility that is unable to deliver power to a public utility owing to curtailment by the public utility will be relieved of any obligation to sell to the public utility during the curtailment).

860-029-0080
Electric Utility System Cost Data

(1) Each public utility must provide sufficient data concerning its avoided costs and costs of interconnection to allow the owner or operator of a qualifying facility to estimate, with reasonable accuracy, the payment it could receive from the utility if the qualifying facility went into operation under any of the purchase agreements provided for in these rules.

(2) By January 1 of each odd-numbered year, each nonregulated utility must prepare and file with the Commission a schedule of avoided costs equaling the nonregulated utility's forecasted incremental cost of resources over at least the next 20 years.

(3) Each public utility must file with the Commission draft avoided-cost information at the time it files its integrated resource plan and file final avoided-cost information within 30 days of a Commission decision of acknowledgement of the integrated resource plan to be effective 30 days after filing. The information submitted will be maintained for public inspection and include the following data for calculating avoided costs:

(a) The estimated avoided costs on its system, solely with respect to the energy component, for expected levels of purchases from qualifying facilities. The levels of purchases will be stated in blocks of not more than 100 megawatts for systems with peak demand of 1,000 megawatts or more and in blocks equivalent to not more than 10 percent of the system peak demand for systems of less than 1,000 megawatts. The avoided costs will be stated on a cents-per-kWh basis, during peak and off-peak periods, by year, for the current calendar year and each of the next five years; and

(b) The public utility's estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kW, and the associated energy costs of each addition or purchase, expressed in cents per kWh. These costs will be expressed in terms of individual generating resources and of individual, planned firm purchases.

(4) Each public utility contracting to purchase nonfirm energy from a qualifying facility under OAR 860-029-0040(3)(a) must file with the Commission each quarter its nonfirm energy avoided cost.

(5) Nothing in these rules shall preclude the determination of avoided costs:

(a) As the average avoided costs over an appropriate period of time; or

(b) To reflect variations in avoided costs due to changes in stream flows, generating unit availability, loads, seasons, or other conditions.

(6) State review: Any data submitted by a public utility under this rule shall be subject to review and approval by the Commission. In any such review, the public utility has the burden of supporting and justifying its data.

(7)(a) On May 1 of each year, a public utility must file with the Commission updates to the avoided cost information filed under section (2) of this rule to be effective within 60 days of filing to reflect:

(A) Updated natural gas prices;

(B) On- and off-peak forward-looking electricity market prices;

(C) Changes to the status of Production Tax Credit; and

(D) Any other action or change including changes to the capital costs of a proxy resource in an acknowledged IRP update that is relevant to the calculation of avoided costs.

(b) In the event a utility's integrated resource plan is acknowledged within 60 days of May 1 in a particular year, the utility may seek a waiver of either the May 1 update or the post IRP-acknowledgement filing.

(8) A public utility may propose or the Commission may require a public utility to file the data described in OAR 860-029-0080(3) anytime during the two-year period between filing integrated resource plans to reflect significant changes in circumstances, including, but not limited to, the acquisition of a major block of resources or the completion of a competitive bid. Such a revision will become effective 90 days after filing.

(9) At least every two years, the public utility must file with the Commission the data described in OAR 860-029-0040(4) and 860-029-0080(3).

869-029-0085
Requirements for Standard Avoided Cost Rates

(1) Each public utility must file with the Commission standard avoided cost rates within 30 days of a Commission decision regarding acknowledgement of the public utility's integrated resource plan.

(2) Each public utility currently complying with Oregon's renewable portfolio standard must file both "renewable" and "non-renewable" standard avoided cost rates.

(3) The standard avoided cost rates filed by a public utility under sections (1) and (2) of this rule are subject to review and approval as well as modification by the Commission. The Commission may suspend the standard avoided cost rates during review. In any such review, the public utility has the burden of supporting and justifying its standard avoided cost rates. The standard avoided cost rates will be effective 30 days after filing unless otherwise determined by the Commission.

(4)(a) On May 1 of each year, a public utility must file with the Commission updates to its standard avoided cost rates under sections (1) and (2) of this rule to reflect:

(A) Updated natural gas prices;

(B) On- and off-peak forward-looking electricity market prices;

(C) Changes to the status of Production Tax Credit; and

(D) Any other actions or changes that are acknowledged by the Commission upon review of an IRP Update and that are relevant to the calculation of avoided costs.

(b) In the event a utility's integrated resource plan is acknowledged within 60 days of May 1 in a particular year, the utility may seek a waiver of either the May 1 update or the post IRP-acknowledgement filing.

(c) Updates filed under this section are subject to review and approval as well as modification by the Commission. The Commission may set the effective date of the standard avoided cost rates during review. In any such review, the public utility has the burden of supporting and justifying its standard avoided cost rates Standard avoided cost rates filed under this section will be effective within 60 days of filing.

(5)(a) Upon request or its own motion, the Commission may consider updates to avoided cost rates to reflect significant changes in circumstances including, but not limited to, the acquisition of a major block of resources or the completion of a competitive bid process.

(b) An update under this section may be considered at any time.

(c) Updates to avoided cost rates under this section are subject to review and approval by the Commission and will become effective within 90 days after filing.

860-029-0100
Resolution of Disputes for Proposed Negotiated Power Purchase Agreements

(1) This rule applies to a complaint, filed pursuant to ORS 756.500, regarding the negotiation of a Qualifying Facility power purchase agreement for facilities with a capacity greater than the eligibility threshold for a standard contract for the Qualifying Facility's resource group. These provisions supplement the generally applicable filing and contested case procedures contained in OAR chapter 860, division 001.

(2) Before a complaint is filed with the Commission, the Qualifying Facility must have followed the procedures set forth in the applicable public utility's tariff regarding negotiated power purchase agreements.

(3) At any time after 60 calendar days from the date a Qualifying Facility has provided written comments to the public utility regarding the public utility's draft power purchase agreement, the Qualifying Facility may file a complaint with the Commission asking for adjudication of any unresolved terms and conditions of its proposed agreement with the public utility.

(4) A Qualifying Facility filing a complaint under this rule is the "complainant." The public utility against whom the complaint is filed is the "respondent."

(5) The complaint must contain each of the following, as described by the complainant:

(a) A statement that the Qualifying Facility provided written comments to the utility on the draft power purchase agreement at least 60 calendar days before the filing of the complaint.

(b) A statement of the attempts at negotiation or other methods of informal dispute resolution undertaken by the negotiating parties.

(c) A statement of the specific unresolved terms and conditions.

(d) A description of each party's position on the unresolved provisions.

(e) A proposed agreement encompassing all matters, including those on which the parties have reached agreement and those that are in dispute.

(6) Along with the complaint, the Qualifying Facility must submit written direct testimony that includes all information upon which the complainant bases its claims.

(7) The Commission will serve a copy of the complaint upon the respondent. Service may be made by electronic mail if the Commission verifies the respondent's electronic mail address to service of the complaint and a delivery receipt is maintained in the official file. Within 10 calendar days of service of the complaint, the respondent must file its response with the Commission, addressing in detail each claim raised in the complaint and a description of the respondent's position on the unresolved provisions. The respondent may also identify and present any additional issues for which the respondent seeks resolution.

(8) Along with its response the respondent must submit written direct testimony that includes all information upon which the respondent relies to support its position.

(9) An assigned Administrative Law Judge (ALJ) will conduct a conference with the parties to identify disputed issues, to establish a procedural schedule and to adopt procedures for the complaint proceeding. To accommodate the need for flexibility and to implement the intent of this streamlined complaint process, the ALJ retains the discretion to adopt appropriate procedures provided such procedures are fair, treat the parties equitably, and substantially comply with this rule. Such procedures may include, but are not limited to, hosting a technical workshop, holding a hearing, or submitting written comments.

(10) Only the counterparties to the agreement will have full party status. The ALJ may confer with members of the Commission Staff for technical assistance.

(11) After the hearing, or other procedures set forth in section (9), if the Commission determines that a term or provision of the proposed agreement is not just, fair, and reasonable, it may reject the proposed term or provision and may prescribe a just and reasonable term or provision. The Commission's review is limited to the open issues identified in the complaint and in the response.

(12) Within 15 business days after the Commission issues its final order, the public utility must prepare a final version of the power purchase agreement complying with the Commission

decision and serve it upon the Qualifying Facility. Within 10 days of service of the final power purchase agreement, the Qualifying Facility and the public utility may sign and file the agreement with the Commission, may request clarification whether the agreement terms comply with the Commission order, or may apply for rehearing or reconsideration of the order. The terms and conditions in the power purchase agreement will not be final and binding until the agreement is executed by both parties.

(13) The provisions of any power purchase agreement approved pursuant to this rule apply only to the parties to the agreement and are not to be considered as precedent for any other power purchase agreement negotiation or adjudication.

860-029-00XX [New Rule #1]

Obligation for ~~to Pay~~ Costs to Accept Deliveries from Off-System Qualifying Facilities

(1) ~~(1)~~ The ~~For any off-system qualifying facility~~ standard power purchase agreement for off-system ~~delivering Net Output to the purchasing public utility's system at a Point of Delivery,~~ qualifying facilities must include a provision under which parties are required to amend the executed agreement if the Commission issues an order allocating costs to construct transmission-service related Network Upgrade costs to the qualifying facility after the process described in this rule.~~the power purchase agreement~~

(2) Following execution of the standard power purchase agreement, the purchasing public utility may engage in cost identification process to determine whether receiving electricity from the qualifying facility will require the purchasing utility to incur costs for transmission-service related Network Upgrades. ~~will include a provision allowing for possible amendment to the executed standard power purchase agreement after the cost review process included in this section.~~If the purchasing public utility discovers that receiving electricity from the qualifying facility will cause the purchasing public utility to incur costs for transmission service-related Network Upgrades, it may request that the Commission issue an order allocating some or all of the costs of the transmission-service related upgrades to the qualifying facility.

~~(2) Within five (5) business days following the date the power purchase agreement is signed by both the qualifying facility and purchasing public utility, the purchasing public utility's Merchant Function may submit an application to the Transmission Provider requesting designation of the qualifying facility as a Network Resource.~~

~~(a) If the purchasing public utility is notified in writing by the Transmission Provider that designation of the qualifying facility as a Network Resource requires the construction of transmission system network upgrades or otherwise requires potential redispatch of other Network Resources of the public utility (the "Conditional DNR Notice"), the public utility has fifteen (15) business days in which to submit an application to the Commission seeking an amendment to the power purchase agreement to address the~~

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Commented [QFs22]: New Rule #1 - As noted in substantive comments, we recommended deleting this provision regarding Conditional DNR, or alternatively significantly revising it. If our recommendation is adopted, edits will be needed to this subsection.

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~~impact to the public utility associated with accepting Net Output from the off-system qualifying facility.~~

~~(b) If the purchasing utility is notified in writing by the Transmission Provider that the designation of the qualifying facility as a Network Resource does not require construction of transmission system network upgrades or otherwise require potential redispatch of other Network Resources of the public utility, the purchasing utility will notify the qualifying facility in writing that no amendment to the power purchase agreement will be sought.~~

~~(C) If the purchasing public utility receives no response to its application to the Transmission Provider requesting designation of the qualifying facility as a Network Resource within twenty (20) business days after the application was submitted, the purchasing public utility will not have opportunity to seek amendment to the power purchase agreement under this section and will notify the qualifying facility in writing that no amendment to the power purchase agreement will be sought.~~

(3~~3~~) If the purchasing public utility submits an application to the Commission under subsection (2)~~(a)~~, the purchasing public utility and qualifying facility will each have opportunity to present their respective positions to the Commission as to the proper allocation of the costs of transmission service Network Upgrades.~~whether and how the prices in the power purchase agreement and other terms and conditions of the power purchase agreement should be amended or whether the qualifying facility should be allowed to change the Point of Delivery, in light of the Conditional DNR Notice.~~

(4~~4~~) After providing notice and opportunity to comment regarding an application filed under subsection (2)(a), the Commission will issue an order regarding the appropriate allocation of costs related to accepting the qualifying facility's net output at the Point of Delivery. ~~or whether the Point of Delivery should be changed.~~

(5~~5~~) Notwithstanding subsection (1), ~~In the event of a Conditional DNR Notice or any subsequent Commission order allocating costs or ordering a new Point of Delivery,~~ the qualifying facility may terminate the power purchase agreement upon written notice to the public utility if the notice is provided within 14 days of the Commission order allocating transmission service related Network Upgrades to the qualifying facility. The qualifying facility's timely termination of the standard power purchase agreement will not be an event

~~(6) Neither a qualifying facility's notice of termination or termination, of a power purchase agreement will be an event~~ of default, and no damages or other liabilities under the power purchase agreement will be owed by or to either party.~~, if the qualifying facility issues its notice of termination under subsection (5) to the purchasing public utility within 180 days of the Commission order.~~

~~(7) If a purchasing utility does not submit an application to designate a Qualifying Facility as a Network Resource within five (5) business days of executing a power purchase agreement, the public utility may not allocate or seek to allocate to the qualifying facility any costs associated~~

~~with accepting the Net Output of the qualifying facility at a Point of Delivery, and may not file an application with the Commission under subsection (2)(a).~~

(6~~8~~) Notwithstanding the other subsections in this rule, nothing prevents the purchasing public utility and qualifying facility from agreeing to amend a power purchase agreement to address transmission-related Network Upgrade costs or to substitute a new Point of Delivery.

860-029-XXXX [New Rule #2]

Eligibility for Standard Avoided Cost Prices and Purchase Agreements

(1) Solar qualifying facilities with a nameplate capacity of three (3) MW and less, and all other qualifying facilities with a nameplate capacity of ten (10) MW and less, are eligible for standard avoided cost prices.

(2) Unless otherwise ordered by the Commission, a~~A~~ll qualifying facilities with a nameplate capacity of ten (10) MW and less are eligible to enter into a standard power purchase agreement.

(3) Unless otherwise ordered by the Commission, r~~R~~enewable qualifying facilities that satisfy the criteria of subsection (1) are eligible to select the purchasing public utility's standard renewable avoided cost prices. A renewable qualifying facility choosing the standard renewable avoided cost prices must cede all RECs generated by the Facility to the purchasing public utility while the qualifying facility is receiving deficiency-period pricing from the purchasing public utility and the qualifying facility will own the RECs during the while it is receiving the sufficiency period pricing and during non-fixed price term of the power purchase agreement.

Commented [QFs23]: REC Ownership - As argued in our substantive comments, it is illegal to require the QF to give the utility the RECs when it is paid a market price rate under the recent 9th Circuit decision. So we have proposed an edit.

(4) The determination of nameplate capacity for purposes of determining whether a qualifying facility meets the size criteria in subsections (1) and (2) is based on the cumulative nameplate capacity of the qualifying facility seeking the standard avoided cost prices or power purchase agreement and any other Facilities owned by the same person(s) or affiliates(s) located on the same site.

(a) Facilities are located on the same site as a qualifying facility if the Facilities are located within a five-mile radius of the qualifying facility and use the same source of energy or motive force to generate electricity as the qualifying facility~~ or, are otherwise associated with, the qualifying facility~~.

Commented [QFs24]: Five-Mile Rule - The phrase "or are otherwise associated with" is very vague and not a part of the existing Partial Stipulation on the five-mile rule, so we recommend deleting it.

(b) For purposes of this section:

(A) Person(s) are natural persons or any legal entities.

(B) Affiliate(s) are persons sharing common ownership or management, acting jointly or in concert with, or exercising influence over, the policies of another person or entity.

(C) To the extent a person or affiliate is a closely held entity, a "look through" rule applies so that project equity held by LLCs, trusts, estates, corporations, partnerships, and other similar entities is considered to be held by the owners of the look through entity.

(c) Notwithstanding subsections (4)(a) and (b), the qualifying facility seeking standard prices or a standard power purchase agreement, and other Facilities within the same five-mile radius, will not be considered owned or controlled by the same person(s) or affiliate(s) if the person(s) or affiliate(s) in common are passive investors whose ownership interest is primarily for obtaining value related to production tax credits, green tag values, or MACRS depreciation, and the qualifying facility and other Facilities at issue are "family-owned" or "community-based" project(s).

(A) **Family-owned.** A project will be considered "family owned" if, after excluding the ownership interest of those who qualify as passive investor(s) under (4)(c), five or fewer individuals hold at least 50 percent of the project entity, or fifteen or fewer individual entities hold at least 90 percent of the project entity. For purposes of counting the number of individuals holding the remaining share (i.e., determining whether there are five or fewer individuals or 15 or fewer individuals) an individual is a natural person. Notwithstanding the foregoing, an individual, his or her spouse, and his or her dependent children, will be aggregated and counted as a single individual even if the spouse and/or dependent children also hold equity in the project.

(B) **Community Based.** A community-based (or community-sponsored) project must include participation by an established organization that is located either in the county in which the qualifying facility is located or within 50 miles of the qualifying facility and that either:

(i) has a genuine role in developing, or helping to develop, the qualifying facility and intends to have a significant continuing role with, or interest in, the qualifying facility after it is completed and placed in service, or

(ii) is a unit of local government that will not have an equity ownership interest in or exercise any control over the management of the qualifying facility and whose only interest is a share of the cash flow from the qualifying facility, that may not exceed 20 percent without prior approval of the Commission for good cause.

(d) Notwithstanding subsections (4)(a) and (b), two or more qualifying facilities that otherwise are not owned or operated by the same person(s) or affiliates(s) or are not otherwise associated will not be determined to be a single qualifying facility because of a shared interest or agreement regarding interconnection facilities, interconnection-related system upgrades, or any other infrastructure not providing motive force or fuel.

(e) Notwithstanding subsections (4)(a) and (b), the qualifying facility seeking standard prices or a standard power purchase agreement, and other Facilities within the same five-mile radius, will not be considered owned or controlled by the same person(s) or affiliate(s) solely because they are developed by a single entity.

Commented [QFs25]: Five Mile Rule - The common developer exception is an important part of the existing five-mile rule in the Partial Stipulation and needs to be included in the rules.

860-029-XXXX [New Rule #3]

Process for Procuring Standard Power Purchase Agreement

(1) Each public utility must file with the Commission a schedule outlining the process for acquiring a standard power purchase agreement that is consistent with the provisions of OAR 860 division 029 and Commission policy and that satisfies the requirements of this section. **[Note: Subsection (1) was moved from OAR 860-029-0120].**

(2) Upon request, each public utility must provide a draft standard power purchase agreement to an eligible qualifying facility after the qualifying facility has provided the public utility, in written form:

(a) An executed standard form of interconnection study agreement and evidence that all related interconnection study application fees have been paid, or evidence that no study is required;

(b) Evidence that the qualifying facility has taken meaningful steps to seek site control of the proposed location of the qualifying facility. Without limiting the types of evidence that satisfy this requirement, a qualifying facility may satisfy this requirement by presenting ~~, 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.

(c) The following information regarding the proposed qualifying facility:

(A) demonstration of ability to obtain certified qualifying facility status prior to commercial operation,
(B) design capacity (MW),
(C) station service requirements and net amount of power to be delivered to public utility's electric system,
(D) generation technology and other related technology applicable to the site,
(E) schedule of monthly power deliveries,
(F) motive force or fuel plan,
(G) proposed on-line date,
(H) proposed contract term,
(I) proposed pricing provisions,
(J) Point of delivery or interconnection,
(K) latitude and longitude of proposed facility and site layout, ~~and~~
(L) for a qualifying facility with battery storage system, description of the storage design capacity, description of technology used by battery storage system, storage system duration, and net power output, and~~.~~

Commented [QFs26]: Site Control – We propose this clarifying nit to avoid confusion.

~~(L.) (M) Other information specified in the utility's avoided cost rates schedule or standard power purchase agreement approved by the Commission.~~

(3) Once a qualifying facility has asked for a draft power purchase agreement and provided the information required under subsection (2), the public utility has fifteen (15) business days to provide the qualifying facility a draft power purchase agreement including current standard avoided cost prices and/or other optional pricing mechanisms as approved by the Commission.

(4) After receipt of a draft power purchase agreement, the qualifying facility may submit comments to the public utility regarding the draft agreement or request that the public utility prepare a final executable power purchase agreement.

(5) If the qualifying facility submits comments to the public utility or asks for revisions to the draft purchase agreement the public utility has ten (10) business days to (i) notify the qualifying facility it cannot make the requested changes, (ii) notify the qualifying facility it does not understand the requested changes or requires additional information, or (iii) provide a revised draft power purchase agreement.

(6) The process outlined in subsections (4) and (5) will continue until both the qualifying facility and public utility agree as to the terms of the draft standard power purchase agreement, i.e., neither the qualifying facility not the purchasing public utility have outstanding issues, corrections, or comments regarding the draft power purchase agreement.

(7) After the parties concur on the terms of the draft standard power purchase agreement, the qualifying facility can submit a written request to the public utility for a final executable version of the purchase agreement. The public utility has ten (10) business days from the receipt of the written request to provide a final executable form of the purchase agreement to the qualifying facility.

(8) Upon receipt of the final executable form of the purchase agreement signed ~~executed~~ by the qualifying facility, the purchasing public utility has five (5) business days in which to sign the final executable agreement.

860-029-0120
Standard Power Purchase Agreements

(1) Each public utility must offer standard power purchase agreements to eligible qualifying facilities. Each public utility must submit all forms of standard power purchase agreements to the Commission for approval. ~~s that include the terms included in this section and are consistent with the other sections in this division.~~

~~(1) Each public utility must file with the Commission a schedule outlining the process for acquiring a standard power purchase agreement that is consistent with the provisions of OAR 860 division 029 and Commission policies and that satisfies the requirements of this rule.~~

Commented [QFs27]: As discussed in substantive comments, we oppose this catch-all expander of the materials the utility may require to be supplied with a PPA request. We've proposed the edit on the point here.

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(2) The total term of a standard power purchase agreement -is any the construction development period followed by the purchase period. The total term starts on the date the power purchase agreement is executed by both parties and ends the last day of the purchase term.

(3) The construction development period of a standard power purchase agreement of a standard power purchase agreement begins on the date the power purchase agreement is executed by both parties and ends at 24:00 P.T. on the day before the scheduled commercial on-line date specified in the standard power purchase agreement.

(4) The purchase period begins on the scheduled commercial on-line date specified in the power purchase agreement unless modified due to an UneExcused Delay or by agreement of the public utility and qualifying facility. or as modified if modified under other rules in this division. The purchase period of a standard power purchase agreement includes a fixed-price term and may also include a non-fixed price term that begins after the fixed-price term.

Note: Note: The scheduled commercial on-line date may be delayed by Unexcused Delay, Force Majeure, or extended by agreement of the purchasing public utility and the qualifying facility or under subsection (7) of this section. In these cases, the purchase period commences on the delayed or extended scheduled commercial on-line date. In any event, Tthe purchase period of a standard power purchase agreement will start on the scheduled commercial operation date even if the qualifying facility does not begin deliveries on the scheduled commercial operation date.

[**Comment from Staff:** The rule is drafted so that an existing qualifying facility need not have a constructiondevelopment period in the standard power purchase agreement. However, this current draft is broad enough that a new QF would also not need to have a constructiondevelopment period and could come on-line immediately. If the public utilities believe it is necessary to have a minimum time period after PPA execution before a QF can commence commercial operation, they should make this clear in any comments. QFs should provide their position on this issue as well.]

(5) A qualifying facility electing to sell output at fixed prices may select a fixed-price term of up to 15 years, subject to the reduction specified in subsection (6) for a construction development period that exceeds three years and may select a non-fixed price term of up to five years.

(4)(6) A qualifying facility may specify a scheduled commercial on-line date for a standard power purchase agreement subject to the following limitations: consistent with the following:

(a) Anytime within three years from the date of agreement execution; or

(b) Anytime between three years and four years after the Eeffective Ddate of the standard power purchase agreement if:

Commented [QFs29]: As noted in comments, we recommend the development/construction period end on the actual commercial operation date, not the scheduled commercial operation date, so an edit would be needed here if our proposal is adopted.

Commented [QFs30]: As noted in comments, we recommend that the purchase period and fixed-price period should begin on the actual commercial operation date, not the scheduled commercial operation date.

Additionally, if the scheduled COD will be used, this provision should be clarified to clearly require that any Excused Delay requires the utility to agree to amend the Scheduled COD on a day-for-day basis and preserve the 15-year fixed price period, as we stated in substantive comments. Staff's position is not very clear on this point.

If either of our recommendations are adopted, an edit will be needed to this subsection.

Commented [QFs31]: As noted above, we oppose starting the purchase period on the scheduled COD, and an edit will be needed here if our recommendation is adopted. If our recommendation is adopted, an edit will be needed to this subsection.

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(A)The qualifying facility has received an interconnection-related system impact study report, cluster study report, or facilities study report indicating interconnection will take longer than three years from the Effective Date of the standard power purchase agreement, or

(B) The qualifying facility demonstrates to the public utility it cannot reasonably be expected to achieve commercial operation in three years or less from the Effective Date and the utility consents to a scheduled commercial operation date more than three years from the Effective Date

(c) In any standard power purchase agreement with a scheduled commercial~~,~~ operation date more than three years after the Effective Date, ~~provided that~~ the fixed-price term will be~~is~~ reduced one day for every day of the ~~construction~~ development period after ~~that extends the~~ three-year anniversary of the Effective~~execution~~ date, with the reduction taken from the end of the fixed-price term.

~~(b)Anytime later than three years after the date of agreement execution if the qualifying facility establishes that a later scheduled commercial on-line date is reasonable and the utility agrees.~~

Example: A standard power purchase agreement with a ~~construction~~ development period of three years and six months will have a fixed-price term of fourteen years and six months The fixed-price term will begin on the scheduled commercial on-line date and will end after 14 years and 6 months.

(d~~c~~) A qualifying facility entering into a standard power purchase agreement may not select a scheduled commercial on-line date more than four years from the E~~e~~ffective D~~d~~ate.

(7~~5~~) Unless otherwise excused under the power purchase agreement, the utility is authorized to issue a Notice of Default if the qualifying facility does not meet the scheduled commercial on-line date in the standard power purchase agreement. If a Notice of Default is issued for failure to meet the scheduled commercial on-line date in the power purchase agreement, the qualifying facility has one year in which to cure the default for failure to meet the scheduled commercial on-line date, during which the public utility may collect damages for failure to deliver.

(a)Damages for failure to meet the scheduled commercial on-line date are equal to the positive differencce~~t~~ between the utility's replacement power costs less the prices in the standard power purchase agreement during the period of default, netted over a monthly period, plus costs reasonably incurred by the utility to purchase replacement power and additional transmission charges, if any, incurred by the utility to deliver replacement power to the point of delivery.

(b) If the qualifying facility would have been required by the standard power purchase to transfer Renewable Energy Credits to the public utility during the period when the qualifying facility is in default under this subsection, damages owed to the public utility will include the public utility's cost to acquire replacement Renewable Energy Credits.

Commented [QFs32]: We oppose the strict cutoffs in these subsections (-029-120(6)) related to the scheduled COD and the 15-year term. These subsections will need to be revised if our substantive positions are adopted with respect to exceptions to the standard 3-year development period and tolling of the 15-year period for an actual COD beyond the 3-year cutoff due to excused reasons.

If our recommendation is adopted, an edit will be needed to this subsection.

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(86) (a) Modification of Scheduled Commercial On-line Date. Anytime within six (6) months after the Eeffective Ddate of a standard power purchase agreement, the qualifying facility may terminate the standard power purchase agreement or modify the scheduled commercial on-line date in the standard power purchase agreement if , subject to the limitations in subsection (4) above, and subject to any damages incurred by the purchasing public utility related to the modification.the qualifying facility receives an interconnection study report that is completed after the Effective Date that indicates interconnection will likely not occur prior to the Scheduled Commercial On-line Date in the executed standard power purchase agreement or if the costs identified in the interconnection study are in excess prior cost estimates supplied to the qualifying facility.

(b) A qualifying facility that chooses to modify the scheduled commercial on-line date under subsection (1)(a) may not select a new scheduled commercial on-line date more than four years from the date the standard power purchase agreement was executed.

(c) A qualifying facility that chooses to terminate the standard power purchase agreement under subsection (8)(a) must forfeit the Development Security posted under subsection (13). The qualifying facility must also pay the purchasing public utility additional damages to cover any costs the purchasing public utility incurs that exceed the amount of forfeited Development Security, provided the costs are incurred after the Effective Date of the standard power purchase agreement.

(7) Extension of Scheduled Commercial On-line Date:

(a) The scheduled commercial on-line date in a standard power purchase agreement may be extended at any point during the construction period for Excused Delay or Force Majeure. An extension of the scheduled commercial on-line date under this subsection is not subject to the four-year limitation or reduced purchase term for a construction period over three years specified in subsection (4).

(b) With the consent of the purchasing public utility, the scheduled commercial on-line date in a power purchase agreement may be extended at any point during the construction period, subject to the four-year limitation and reduction to purchase term for construction periods over 36 months specified in subsection (4).

(98) Point of Delivery. The qualifying facility may propose the Point of Delivery. The purchasing public utility must agree to the Point of Delivery before it is included in the power purchase agreement. The purchasing public utility may not unreasonably withhold agreement.

(7) (109) The standard power purchase agreement must include a mechanical availability guarantee (MAG) for wind, solar, and run-of-river hydropower intermittent qualifying facilities as follows:

(118) An X percent -overall guarantee starting three years after the commercial operation date for qualifying facilities with new contracts or one year after the commercial operation date for qualifying facilities that renew contract or enter into a superseding contract, subject to an

Commented [QFs33]: Modification of Scheduled Commercial Operation Date – See our substantive comments for explanation of these edits.

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Commented [QFs34]: As explained in our substantive comments, we recommend deleting the four-year cutoff on scheduled CODs, and we oppose automatic forfeiture of the security deposit.

Commented [QFs35]: Excused Delay - It is not clear why Staff deleted this important aspect of the Excused Delay concept. As explained in our substantive comments, we recommend preserving the fixed price and purchase terms in cases of excused delay.

Commented [QFs36]: "Intermittent Qualifying Facility" is not defined. We recommend this clarification for the MAG.

allowance for 200 hours of planned maintenance per turbine per year that does not count toward the calculation of the overall guarantee.

(b) A qualifying facility may be subject to damages for failure to meet the MAG calculated by:

(A) Determining the amount of the "shortfall" for the year, which is the difference between the projected average on- and off-peak net output from the project that would have been delivered had the project been available at the guaranteed availability for the contract year and the actual net output provided by the qualifying facility for the contract year;

(B) Multiplying the shortfall by the positive difference, if any, obtained by subtracting the Contract Price from the price at which the utility purchased replacement power and additional transmission costs to deliver replacement power to the point of delivery, if any; and

(C) Adding any reasonable costs incurred by the utility to purchase replacement power and additional transmission costs to deliver replacement power to the point of delivery, if any.

Commented [QFs37]: As discussed in substantive comments, we recommend continued use of the cap on damages at the Contract Price, and if that outcome is adopted an edit will be needed here.

~~(8)~~ (120) A public utility may issue a Notice of Default, and subsequently terminate a standard power purchase agreement pursuant to its terms and limitations, for failure to meet the MAG if the qualifying facility does not meet the MAG for two consecutive years if such failure is not otherwise excused by the power purchase agreement.

(131) Project Development Security. A qualifying facility entering into a standard power purchase agreement must post Project Development Security for ~~need not post security for~~ the public utility's benefit in the event of default by the qualifying facility prior to the scheduled commercial online date or termination under subsection (8). The amount of required Project Development Security will set forth in the purchasing public utility's form of standard power purchase agreement approved by the Commission and the obligation to maintain the Project Development Security will expire once the qualifying facility commences commercial operation. The qualifying facility may use either of the following options to post Project Development Security:~~, provided that the qualifying facility states in writing and warrants in the power purchase agreement:~~

Commented [QFs38]: As noted in substantive comments, we oppose the requirement that all QFs post a liquid security, elimination of step-in rights as security, and the failure to include a reasonable carve out for small QFs as in prior versions of Staff's draft rules. Edits to this section will need to be made if our proposal is adopted.

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~~(a) Neither the qualifying facility nor any of its principal equity owners is or has within the past two (2) years been the debtor in any bankruptcy proceeding, is unable to pay its bills in the ordinary course of its business, or is the subject of any legal or regulatory action, the result of which could reasonably be expected to impair the qualifying facility's ability to own and operate the Facility in accordance with the terms of the standard power purchase agreement.~~

~~(b)The qualifying facility has not at any time defaulted in any of its payment obligations for electricity purchases from the purchasing public utility.~~

~~(c)The qualifying facility is not in default under any of its agreements and is current on all of its financial obligations, including construction related financial obligations.~~

~~(d) The qualifying facility owns and will continue to own for the term of the power purchase agreement, all right, title and interest in and to the Facility, free and clear of all liens and encumbrances related to third-party financing of the Facility.~~

~~(12) If a qualifying facility is unable to satisfy the criteria in subsection (11), the qualifying facility must provide security, upon request of the purchasing public utility, using the qualifying facility's choice of the following methods.~~

(a) Cash Escrow Security. The qualifying facility shall deposit in an escrow account established by the purchasing utility in a banking institution acceptable to both the qualifying facility and purchasing utility, Project Developmen ~~Defaul~~t Security. Such sum shall earn interest at the rate applicable to money market deposits at such banking institutions from time to time. To the extent the purchasing utility receives payment from the Project Development ~~Default~~ Security for damages in the event of default, the qualifying facility will, within 15 days, restore the Project Development ~~Default~~ Security as if no such deduction had occurred.

(b) Letter of Credit Security. The qualifying facility shall post and maintain in an amount equal to the Project Development ~~Default~~ Security: (a) a guaranty from a party that satisfies the Credit Requirements, in a form acceptable to the public utility in its discretion, or (b) a Letter of Credit in favor of the purchasing public utility. To the extent the public utility receives payment from the Project Development ~~Default~~ Security for damages in the event of default, the qualifying facility will, within 15 days, restore the Project Development ~~Default~~ Security as if no such deduction had occurred.

(14) Default Security. A qualifying facility that does not meet the public utility's credit requirements must post Default Security prior to commencing commercial operation. The utility's credit requirements and the amount of required Default Security will be set forth in the public utility's form of standard power purchase agreement approved by the Commission. The qualifying facility may use one of the following options to post Default Security:

Commented [QFs39]: Same comment as above related Project Development Security.

(a) Cash Escrow Security. The qualifying facility shall deposit in an escrow account established by the purchasing utility in a banking institution acceptable to both the qualifying facility and purchasing utility, Default Security. Such sum shall earn interest at the rate applicable to money market deposits at such banking institutions from time to time. To the extent the purchasing utility receives payment from the Default Security for damages in the event of default, the qualifying facility will, within 15 days, restore the Default Security as if no such deduction had occurred.

(b) Letter of Credit Security. The qualifying facility shall post and maintain in an amount equal to the Default Security: (a) a guaranty from a party that satisfies the Credit Requirements, in a form acceptable to the public utility in its discretion, or (b) a Letter of Credit in favor of the purchasing public utility. To the extent the public utility receives payment from the Default Security for damages in the event of default, the qualifying facility will, within 15 days, restore the Default Security as if no such deduction had occurred.

~~(c) Senior Lien. Before the scheduled commercial operation date, the qualifying facility will grant the purchasing public utility a senior, unsubordinated lien on the Facility and its assets as security for the performance under the power purchase agreement by executing, acknowledging, and delivering a security agreement and a deed of trust or mortgage, in a recordable form (each in a form satisfactory to the purchasing utility in the reasonable exercise of its discretion). Pending delivery of the senior lien to the purchasing public utility, the qualifying facility shall not cause or permit the Facility or its assets to be burdened by liens or other encumbrances that would be superior to the purchasing public utility's, other than workers', mechanics', suppliers' or similar liens, or tax liens in each case arising in the ordinary course of business that are either not yet due and payable or that have been released by means of a performance bond posted within eight (8) calendar days of the commencement of any proceeding to foreclose the lien.~~

~~(d) Step-in rights. The qualifying facility shall agree in writing that the purchasing utility has step-in rights the event of a default by the qualifying facility, subject to the following:~~

~~(A) Prior to any termination of the power purchase agreement due to an event of default of the qualifying facility, the purchasing utility shall have the right, but not the obligation, to possess, assume control of, and operate the Facility as agent for Seller (in accordance with Seller's rights, obligations, and interest under the power purchase agreement). The qualifying facility shall not grant any person, other than the lending institution providing financing to the qualifying facility for construction of the Facility ("Facility Lender"), a right to possess, assume control of, and operate the Facility that is equal to or superior to PacifiCorp's right under this subsection.~~

~~(B) The purchasing public utility shall give the qualifying facility ten calendar days' notice in advance of contemplated exercise of the purchasing utility's step-in rights. Upon such notice, the qualifying facility shall collect and have available at a convenient central location at the Facility all documents, contracts, book, manuals, reports, and records required to construct, operate, and maintain the Facility in accordance with Prudent Electrical Practices.~~

~~(C) Upon such notice, the purchasing utility, its employees, contractors, or designated third parties will have the unrestricted right to enter the Facility for the purpose of constructing and/or operating the Facility. Upon its receipt of the purchasing utility's notice, the qualifying facility will appoint the purchasing public utility as the qualifying facility's attorney-in-fact for the exclusive purpose of executing such documents and taking such other actions the purchasing utility may reasonably deem necessary or appropriate in the exercise of its step-in rights. During any period that the purchasing utility is in possession of and constructing or operating the Facility, no proceeds other than other monies attributed to operation of the Facility shall be remitted to or otherwise provided to the qualifying facility the qualifying facility has cured any event of default.~~

~~(D) During any period that the purchasing public utility is in possession of or operating the Facility, the qualifying facility shall retain legal title to and ownership of the~~

~~Facility and the purchasing public utility shall assume possession, operation, and control solely as agent for the qualifying facility.~~

~~(E) In the event the purchasing public utility is in possession and control of the Facility for an interim period, the qualifying facility shall resume operation and the purchasing utility will relinquish its right to operate when the qualifying facility demonstrates to the public utility's satisfaction that the qualifying facility will remove the grounds that original gave rise to the public utility's right to operate the Facility.~~

~~(F) In the event the purchasing public utility is in possession and control of the Facility for an interim period, the Facility Lender, or any nominee or transferee thereof, may foreclose and take possession of and operate the Facility and the purchasing utility shall relinquish its right to operate when the Facility Lender or any nominee or transferee thereof, requests such relinquishment.~~

~~(G) The purchasing public utility's exercise of its step-in rights shall not be deemed an assumption by the purchasing utility of any liability attributable to the qualifying facility. If at any time after exercising its step-in rights the public utility elects to return possession and operation to the qualifying facility, the purchasing utility shall provide the qualifying facility at least 15 calendar days' notice of the date the purchasing utility intends to return possession and operation. Upon receipt of such notice, the qualifying facility shall take all measures necessary to resume possession and operation of the Facility on the date indicated in the notice..~~

(14~~3~~) Insurance requirements. A qualifying facility with a nameplate capacity rating greater than 200 kW must secure and maintain general liability insurance coverage that complies with the following:

(a) The insurance provider must have a rating no lower than "B+" by A.M. Best Company.

(b) The coverage will be for both bodily injury and property damage in the amount of $1,000,000 each occurrence combined single limit, or greater if desired by the qualifying facility.

[Comment: Stakeholders should provide suggestions if the language in subsection (b) does not reflect commercial standard practice.]]

~~(a)~~ (15~~4~~) All standard power purchase agreements7~~contracts~~ between a qualifying facility and a public utility for energy, or energy and capacity must include language that ~~which~~ substantially conforms to the following: This agreement is subject to the jurisdiction of those governmental agencies and courts having control over either party or this agreement. The public utility's compliance with the terms of this contract is conditioned on the qualifying facility submitting to the public utility and to the Public Utility Commission of Oregon, before

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the date of initial operation, certified copies of all local, state, and federal licenses, permits, and other approvals required by law.

(b) Under subsection ~~(2)(a)~~ (14) of this rule, the public utility shall bear no obligation to identify which approvals are required by law, or to verify the approvals were properly obtained, or that the project is maintained pursuant to the terms of the approvals.

~~(15) To ensure system safety and reliability of interconnected operations, all interconnected qualifying facilities must be constructed and operated in accordance with all applicable federal, state, and local laws and regulations.~~

~~***[Note: Subsections 14 and 15 are moved from OAR 860-029-0020/Obligations of Qualifying Facilities because they were out of place in that rule.]***~~

~~**860-029-XXXX [New Rule #4]**~~
~~**Commercial Readiness Requirements**~~

~~(1) A qualifying facility may not commence commercial operation any sooner than 90 days before the scheduled commercial on-line date unless the public utility consents to early operation.~~

~~(2) Prior to commencing commercial operation, new qualifying facilities must conduct start-up testing under subsection (3) and both new and existing qualifying facilities must complete the commercial readiness review process as described under subsection (4).~~

~~(3) Start-Up Testing.~~

~~(a) The qualifying facility must provide no less than one (1) business day's written notice when commencing start-up testing and must provide ten (10) business days' written notice to the purchasing public utility prior to selling test energy to the purchasing public utility.~~

~~(b)The qualifying facility shall use best efforts to schedule and deliver test energy to the purchasing public utility. The qualifying facility shall be entitled to compensation received for test energy at the purchasing utility's Index Rate for similar types of energy deliveries.~~

~~(c)The qualifying facility may schedule and deliver test energy to the purchasing public utility pursuant to the scheduling procedures set forth in OAR 860-029-XXXX. The qualifying facility shall pay any costs or additional expenses that are required for the purchasing utility to receive Test Energy, including procurement of any necessary capacity costs or reserves.~~

~~(d)Prior to the commercial operation date, for a period of up to ninety (90) days, the purchasing public utility will pay the qualifying facility for test energy delivered under subsections (1)-(3) at the public utility's Index Price for off-peak hours.~~

Commented [QFs40]: As noted above, and in substantive comments, we oppose this clause on the ground that it has been misused as a forum selection clause in favor of the PUC. If our recommendation is adopted, an edit will be needed to this subsection.

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(e)The required start-up testing depends on the nature of the qualifying facility. The start-up testing requirements must be included in the power purchase agreement. The following requirements may be used as a template for start-up testing requirements.

(A) Required factory testing includes such checks and tests necessary to determine that the Facility equipment systems and subsystems have been properly manufactured and installed, function properly, and are in a condition to permit safe and efficient start-up of the Facility. which may include but are not limited to (as applicable):

(i) pressure tests of all steam system equipment,
(ii) calibration of all pressure, level, flow, temperature and monitoring instruments,
(iii) operating tests of all valves, operators, motor starters and motor,
(iv) alarms, signals, and fail-safe or system shutdown control tests,
(v) insulation resistance and point-to-point continuity tests,
(vi) bench tests of all protective devices,
(vii) tests required by manufacturer of equipment, and
(viii) complete pre-parallel checks with PGE.

(B) Required start-up tests are those checks and tests necessary to determine that all features and equipment, systems, and subsystems have been properly designed, manufactured, installed and adjusted, function properly, and are capable of operating simultaneously in such condition that the Facility is capable of continuous delivery into PGE's electrical system, which may include but are not limited to (as applicable):

(i) turbine/generator mechanical runs including shaft, vibration, and bearing temperature measurements,
(ii) running tests to establish tolerances and inspections for final adjustment of bearings, shaft run-outs,
(iii) brake tests,
(iv) energization of transformers,
(v) synchronizing tests (manual and auto),
(vi) stator windings dielectric test,
(vii) armature and field windings resistance tests,
(viii) load rejection tests in incremental stages from 5, 25, 50, 75 and 100 percent load,
(ix) heat runs,
(x) tests required by manufacturer of equipment,
(xi) excitation and voltage regulation operation tests,
(xii) open circuit and short circuit,
(xiii) saturation tests,
(xiv) governor system steady state stability test,
(xv) phase angle and magnitude of all PT and CT secondary voltages and currents to protective relays, indicating instruments and metering,
(xvi) auto stop/start sequence,

~~(xvii) level control system tests, and~~
~~(xviii) completion of all state and federal environmental testing requirements.~~

~~(4) Commercial Readiness Process. A qualifying facility must complete the following commercial readiness process before the qualifying facility begins commercial operation.~~

~~(a) The qualifying facility must provide a Notice of Commercial Readiness to the purchasing public utility, accompanied by the following:~~

~~(A) documentation showing that the qualifying facility has retail electric service for the Facility,~~
~~(B) manufacturer's and engineering documentation that establishes the Nameplate Capacity of the Facility,~~
~~(C) a certificate executed by an authorized agent of the qualifying facility attesting that all mechanical and electrical equipment of the Facility has been completed to enable the Facility to deliver energy in a safe manner,~~
~~(D) a certificate of insurance evidencing that qualifying facility has met the insurance requirements of 860-029-0120(x),~~
~~(E) verification from the Transmission Provider that the Facility maintains its Network Resource designation,~~
~~(F) a certificate executed by an authorized agent of the qualifying facility attesting that all licenses, permits, determinations and approvals necessary for the qualifying facility's operations have been obtained from applicable federal, state or local authorities, including, but not limited to, evidence of the Required Facility Documents and qualifying facility's status as a certified Qualifying Facility,~~
~~(G) a certificate from an officer of qualifying facility stating that the qualifying facility is not in violation of or subject to any liability under any Requirements of Law,~~
~~(H) a fully executed and effective Generation Interconnection Agreement and a certificate executed by an authorized agent of the qualifying facility attesting that any and all interconnection upgrades and testing requirements necessary to enable the Facility to be safely connected to the purchasing utility's electrical system have been completed as required under the Generation Interconnection Agreement (as terms are defined in the Generation Interconnection Agreement).~~
~~(I) evidence that the qualifying facility is a certified qualifying facility.~~

~~**[*Note to stakeholders: Staff does not intend to eliminate any exceptions to the commercial readiness requirements that are currently available for very small QFs. These exceptions still need to be inserted. Staff would like input on whether additional exceptions are appropriate for very small QFs.***~~

~~(b) The purchasing public utility has ten (10) business days from receipt of the qualifying facility's Notice of Commercial Readiness and accompanying documentation to respond with a written acceptance of or rejection of the Notice of Commercial Readiness. A rejection must have a reasonable basis and be accompanied by written description of the requirements for commercial operation that the public utility reasonably believes have not been achieved.~~

~~(c) If the purchasing utility rejects the Notice of Commercial Readiness under subsection (4)(b), the qualifying facility must take action necessary to satisfy the deficiencies identified by the public utility. When the qualifying facility has completed the necessary actions, it must submit another Notice of Commercial Operation to the public utility for review.~~

~~(d)The notice and review process described in subsections (2)-(4) above will continue until the public utility has accepted the Notice of Commercial Operation in writing.~~

~~(e)The commercial readiness requirements will be achieved on the date the matters identified in the public utility's deficiency notice have been addressed to the public utility's reasonable satisfaction.~~

~~(f) If the public utility does not provide a written response to the qualifying facility's Notice of Commercial Operation within ten (10) business days, the commercial readiness requirements will be deemed as achieved ten (10) business days after the purchasing utility's receipt of the Notice of Commercial Readiness.~~

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~~***[Note to AR 631 Stakeholders: Staff to insert rule related to ability to change size after commercial operation].***~~

860-029-XXXX [New Rule #4~~5~~]
Delivery and Purchase

(1) Commencing on the scheduled commercial on-line date and continuing until the end of the total term (the "purchase period"), the qualifying facility will be obligated to deliver and sell, and the purchasing public utility will be obligated to receive and purchase, the Net Output delivered to the Point of Delivery or Point of Interconnection, subject to other relevant requirements in this division.

(2) The purchasing public utility is not obligated to pay the fixed price in the standard power purchase agreement for Test Energy and ~~non-firm~~monthly deliveries from an off-system qualifying facility in amounts that exceed the monthly ~~of~~ Net Output ~~netted over a monthly period,~~.

[Comment: Subsections (1) and (2) of this rule are intended to require the public utility to pay a QF for net output that exceeds the scheduled Firm Energy (Excess Energy) or Test Energy, but not at the fixed rate in the power purchase agreement. Stakeholders should comment as to whether this rule should specify that the price for Excess Energy and Test Energy should be the index rate or price for non-firm energy or whether the price for this energy should not be specified in rule. Stakeholders should also comment whether there should be limits on the amount of Excess Energy a utility has to purchase.]

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(3~~2~~) Scheduled Deliveries from Off-System Qualifying Facilities: An off-system qualifying facility shall coordinate with the transmission provider(s) to provide the purchasing public

utility with a schedule of scheduled Net Output deliveries in accordance with Federal Energy Regulatory Commission requirements and WECC scheduling practices, including, at the option of the qualifying facility, making use of sub-hourly scheduling increments offered by the transmission provider.

(4) Monthly Netting of Imbalance Energy. ~~The~~ An off-system qualifying facility may also deliver, and the purchasing public utility shall receive and purchase, imbalance energy delivered at the Point of Delivery, ~~subject to subsection~~pursuant to the requirements in subsection (4~~3~~)~~, when~~:

(a) T~~t~~he delivery of imbalance energy results from the qualifying facility's purchase of energy imbalance ancillary service required by the transmission provider(s) to ensure there is no mismatch between energy scheduled by the Facility and the real-time production of the Facility when netted over a monthly basis,

(b) T~~t~~he transmission provider(s) require(s) the qualifying facility to schedule deliveries of Net Output in one (1) megawatt hour increments, and

(c)The qualifying facility is not attempting to sell the purchasing public utility energy less than, or in excess of, its Net Output over the course of a monthly basis.

(d) If the monthly accumulated difference between qualifying facility's Net Output subtracted from the amount of energy actually delivered at the Point of Delivery is a positive number, the purchasing public utility will purchase such excess energy at the market price index price approved for such sales. If such resulting difference is a negative number, meaning the qualifying facility did not deliver all of its Net Output, the purchasing public utility has no obligation to purchase such undelivered net output.

Commented [QFs41]: See our substantive comments for explanation of the edits to the off-system scheduling requirements we propose here.

~~***[Note the AR 631 Parties: Staff will insert rules related to purchase of excess energy (energy that exceeds scheduled amounts). Utilities will be required to purchase excess energy at index rate.]***~~

(4~~3~~) Title and risk of loss related to the energy shall transfer from the qualifying facility to the purchasing public utility at the Point of Delivery, except that title to RECs transferred under a power purchase agreement shall transfer to the purchasing utility when generated.

(5) A qualifying facility may not commence commercial operation any sooner than ~~90 days before~~ the scheduled commercial ~~on-line~~operation date unless: (a) the qualifying facility provides advance notice to the public utility if commercial operation will occur up to 90 days prior to the scheduled commercial operation date; or (b) the public utility consents~~-~~, with such consent not be unreasonably withheld, if commercial operation is proposed to occur more than 90 days prior to scheduled commercial operation~~to early operation~~.

Commented [QFs42]: Early COD – See our substantive comments for explanation on this proposed edit.

[Comment: Subsection 4 was in the New Rule # 4 – Commercial Readiness Requirements, included in the July 14 draft proposed rules. The remaining sections of that rule have been omitted from this revised draft of proposed rules.

860-029-XXXX [New Rule #56]
Force Majeure

(1) Every power purchase agreement shall include a Force Majeure provision that complies with the requirements of this section.

(2) "Force Majeure" means an event that prevents a party to the power purchase agreement (hereinafter referred to as "party") from performing an obligation under a power purchase agreement and that:

(a) is not reasonably anticipated as of the effective date of the power purchase agreement,

(b) is not within the reasonable control of the party affected by the event,

(c) is not the result of such party's negligence of failure to act, and

(d) could not be overcome by the affected party's use of due diligence in the circumstances.

(3) Force majeure includes events of the following types (but only to the extent that such an event, in consideration of the circumstances, satisfies the requirements in subsection (2)); environmental disasters, civil disturbance, sabotage, strikes, lock-outs, work stoppages, and action or restraint by court order or Governmental Authority.

(4) Notwithstanding subsections (2)-(3), none of the following constitute Force Majeure:

(a) the qualifying facility's ability to sell, or the public utility's ability to purchase energy or capacity at a more advantageous price than is provided under the power purchase agreement,

(b) the cost or availability of fuel or motive force to operate the Facility unless the lack of availability of fuel or motive force is caused by an event of Force Majeure.

(c) economic hardship, including lack of money or increased cost of electricity, steel, labor, or transportation,, unless the lack of availability of such materials is caused by an event of Force Majeure,

(d) any breakdown or malfunction of the Facility's equipment (including any serial defect) that is not caused by an independent event of Force Majeure,

(e)The imposition upon either qualifying facility or purchasing public utility of costs or taxes,

Commented [QFs43]: Force Majeure - This carve out is necessary. Imagine for example and earthquake that makes fuel delivery to the site impossible even though it does not directly impact the facility itself. That should be an excusable event of force majeure, but as initially drafted in this rule, it would arguably not be an excusable event of force majeure.

Commented [QFs44]: Force Majeure - Same comment as above

(f) delay or failure of qualifying facility to obtain or perform any required facility document unless due to a Force Majeure event;

(g) any delay, alleged breach of contract, or failure by the transmission provider or interconnection provider unless due to a Force Majeure event as defined in any agreement with the transmission provider or interconnection provider,

(h) maintenance upgrade(s) or repair(s) of any facilities or right of way corridors constituting part of or involving the interconnection facilities, whether performed by or for the qualifying facility, or other third parties (except for repairs made necessary as a result of an event of Force Majeure;

(i) the qualifying facility's failure to obtain, or perform under, the Generation Interconnection Agreements, or its other contracts and obligations to transmission owner, transmission provider or interconnection provider, unless due to a Force Majeure event; or

(j) any event attributable to the use of interconnection facilities for deliveries of Net Output to any party other than the purchasing public utility.

(5) If either qualifying facility or purchasing public utility is rendered wholly or in part unable to perform its obligation under the power purchase agreement because of a Force Majeure, the affected party shall be excused from whatever performance is affected by the Force Majeure to the extent and for the duration of the event of Force Majeure, after which such party will recommence performance of such obligation, provided that the non-performing party:

(a) provides the other party written notice describing the Force Majeure, no later than two weeks after its occurrence,

(b) ensures its failure to perform is of no greater scope and of no longer duration than what is required by the Force Majeure, and

(c) uses its best efforts to remedy its inability to perform.

(6) No obligation of either the qualifying facility or public utility that arose before the Force Majeure causing suspension of performance will be excused as a result of Force Majeure.

860-029-XXX/Default, Damages and Termination [New Rule #67]

(1) The following events may constitute a Default under a power purchase agreement:

(a) failure to begin power deliveries by scheduled commercial on-line date,
(b) failure to provide Project Development or Default Security, to the extent such Project Development Security is required by the power purchase agreement,
(c) failure to maintain status as a certified qualifying facility once power deliveries have commenced,

Commented [QFs45]: We recommend this nit because security is not always required, for example if the QF meets the creditworthiness requirements.

(d) failure of the qualifying facility to sell entire net output to the purchasing public utility, unless the power purchase agreement requires the qualifying facility to sell less than its entire net output to the purchasing public utility,
(e) failure to make a payment when due under the power purchase agreement, if amount of payment is not the subject of good faith dispute,
(f) abandonment of the Facility,
(g) failure to satisfy applicable Minimum Availability Guarantee for two (2) consecutive years,
(h) failure to satisfy applicable Minimum Delivery Guarantee for three (3) consecutive years,
(i) failure by the purchasing public utility to receive or purchase all or part of Net Output made available by the qualifying facility, or
(j) failure to timely provide a timely notice of early termination under OAR 860-029-XXX [New Rule #1].

Commented [QFs46]: This nit is needed because some QFs may contract to sell less than all of their net output, which is allowed by PURPA.

Commented [QFs47]: (j) does not seem to fit as a default. There could be circumstances where such notice is not issued simply because the QF plans to accept the new costs and thus it would not be a default not to send such notice or early termination

(2) Unless otherwise excused under the power purchase agreement by Excused Delay, Force Majeure, or otherwise, the non-defaulting party is authorized to issue a Notice of Default upon any of the events described in subsection (1).

(3) Cure periods

(a) If a Notice of Default is issued under subsection (1)(a), the qualifying facility has one year in which to cure the default for failure to meet the scheduled commercial on-line date.

(b) If a Notice of Default is issued under subsection (1)(b), (1)(c), (1)(d), 1(e), 1(f), or 1(i), the non-defaulting party has ninety (90) days in which to cure the event of default.

(c) There is no cure period for a Notice of Default issued under subsection (1)(g) or (1)(h).

(4) Imposition of damages.

(a) The public utility may collect damages after issuing a Notice of Default under subsection (1)(a),(1) (d), or (1)(f). Damages are equal to the positive difference between the utility's replacement power costs less the prices in the standard power purchase agreement during the period of default, plus costs reasonably incurred by the utility to purchase replacement power and Renewable Energy CreditsRECs, and any incremental transmission charges incurred by the utility to deliver replacement energy; but in no case will such damages exceed the applicable prices in the standard power purchase agreement. The invoice for such amount must include a written statement explaining in reasonable detail the calculation of such amount.

Commented [QFs48]: As noted in our substantive comments, there should be a cap on the QF's damages at the contract price, which is consistent with PGE's existing QF PPA.

(b) The public utility may collect damages after issuing a Notice of Default under subsections (1)(g) or (1)(h) as specified in OAR 860-029-01209(x) and (x).

(c) A qualifying facility may collect damages if the purchasing public utility fails to receive or purchase all or part of the Net Output required to be purchased and such failure is not excused by the qualifying facility's failure to perform under or comply with its obligations under the power purchase agreement. Damages are an amount equal to the qualifying facility's cost to cover multiplied by the amount of Net Output not purchased.

(d) If damages are imposed, they must be remitted to the non-breaching party no later than 30 days after the breaching party received an invoice for damages. The invoice for damages must include a written statement explaining in reasonable detail the calculation of the damages amount.

(5) Subject to the cure periods in subsection (3), the non-defaulting party may issue a Notice of Termination to terminate a standard power purchase agreement for a default under subsection (1).

(6) The non-defaulting party must provide the defaulting party a Notice of Termination at least 30 days prior to date of Termination. The notice period for termination may run concurrently with the default period.

(7) Termination of Duty to Buy. If the power purchase agreement is terminated because of an Event of Default by the qualifying facility and the qualifying facility wishes to sell Net Output to the purchasing public utility following such termination, the public utility may require the qualifying facility do so subject to the terms of the terminated agreement, including but not limited to the contract price, until the termination date. The qualifying facility may not take any action or permit any action to occur the result of which avoids or seeks to avoid the restrictions in subsection through use or establishment of a special purpose entity or other Affiliate.

(8) Termination Damages. If the power purchase agreement is terminated by the public utility as a result of an event of default by the qualifying facility, termination damages owed by the qualifying facility to the public utility will be the positive difference, if any, between (a) the public utility's estimated costs to secure replacement power for a period of twenty four (24) months following the date of termination, including any associated transmission necessary to deliver such replacement power; and (b) the contract price for such twenty four (24) month period ("Termination Damages"). The public utility must calculate the Termination Damages in a commercially reasonable manner and provide to the qualifying facility a written statement explaining in reasonable detail the calculation of Termination Damages. Termination damages are due by qualifying facility within twenty (20) Business Days after receipt of the written statement of Termination Damages from the public utility.

(9) Duty/Right to Mitigate. Both the public utility and qualifying facility have a duty to mitigate damages and will use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance.

(10) Security. If the power purchase agreement is terminated because of the qualifying facility's default, the public utility may, in addition to pursuing any and all other remedies

available at law or in equity, proceed against any security held by the public utility in whatever form to reduce the amounts that the qualifying facility owes the public utility arising from such default.

(11) Cumulative Remedies. Except in circumstances in which a remedy provided for in the power purchase agreement is described as a sole or exclusive remedy, the rights and remedies provided to the parties in the standard power purchase agreement are cumulative and not exclusive of any other rights or remedies of the parties.

~~860-029-XXXX [New Rule #8]~~

~~Violations~~

~~The following events may constitute a Violation of the power purchase agreement:~~

- ~~(a) Failure to provide timely notice of planned outages.~~
- ~~(b) Failure to provide timely notice of scheduled maintenance.~~
- ~~(c) Failure to provide timely notice of Forced Outage.~~
- ~~(d) Failure to adhere to Scheduling Requirement~~
- ~~(e) Failure to provide timely notice of material adverse event.~~
- ~~(f) Failure to grant purchasing utility access rights upon reasonable prior notice.~~

~~(2) Remedies for violations [Making certain failures “violations” as opposed to “defaults” is intended to address QFs’ concerns that PPAs may be terminated for issues that do not substantially impact the generation and sale of energy. Potential remedies are financial penalties or possibly, the opportunity for the purchasing utility to issue a notice of default if a QF has x number of violations in a certain time period. Staff would like to hear input on this idea.].~~

860-029-XXXX [New Rule #7~~9~~]

Operation and Control

~~(1) General. The qualifying facility will operate the Facility within its control in accordance with all applicable federal, state, and local laws and regulations to ensure system safety and reliability of interconnected operations. Qualifying Facility must operate, maintain and repair the Facility in accordance with:~~

~~(a) applicable and mandatory standards, criteria and formal guidelines of FERC, NERC, any RTO, and any other Electric System Authority and any successors to the functions thereof;~~

~~(b) permits and Required Facility Documents,~~

~~(c) any applicable Generation Interconnection Agreement;~~

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~~(d) all Requirements of Law; and~~

~~(e) requirements of the power purchase agreement.~~

(1~~3~~) Coordination with System. The qualifying facility's delivery of electricity to purchasing public utility under power purchase agreement must be at a voltage, phase, power factor, and frequency as reasonably specified by purchasing public utility. The qualifying facility will furnish, install, operate, and maintain in good order and repair, and without cost to the purchasing public utility, such switching equipment, relays, locks and seals, breakers, automatic synchronizers, and other control and protective apparatus determined by the public utility to be reasonably necessary for the safe and reliable operation of the Facility in parallel with the System, or the qualifying facility may contract with the purchasing public utility to do so at the qualifying facility's expense. The purchasing public utility must at all times have access to all switching equipment capable of isolating the Facility from the System.

(2~~4~~) Planned Outages.

(a) The qualifying facility must provide the purchasing public utility with an annual forecast of Planned Outages for each Contract Year of the purchase period at least one month, but no more than three months, before the first day of that Contract Year, and may update such Planned Outage forecast as necessary to comply with Prudent Electrical Practices. Any such update to the Planned Outage forecast must be promptly submitted to the public utility.

(b) The public utility may specify in the power purchase agreement two (2) calendar months in each Contract Year in which the qualifying facility may not schedule planned outages during on-peak hours ("High Demand ~~Months~~Periods") except to the extent reasonably required to enable a vendor to satisfy a guarantee requirement. The public utility may change either or both High Demand Months with no less than twelve (12) months advance notice to the qualifying facility.

(3~~5~~) Maintenance Outages.

(a) If the qualifying facility reasonably determines that it is necessary to schedule a Maintenance Outage, the qualifying facility must notify the purchasing public utility of the proposed Maintenance Outage as soon as practicable but in any event at least five (5) days before the outage begins. The qualifying facility must take all reasonable measures consistent with Prudent Electrical Practices to not schedule any Maintenance Outage during the High Demand Months identified by the public utility.

(b) Notice of a proposed Maintenance Outage by the qualifying facility must include the expected start date and time of the outage, the amount of generation capacity of the Facility that will not be available, and the expected completion date and time of the outage. The purchasing utility will promptly respond to such notice and may request reasonable modifications in the schedule for the outage. The qualifying facility must use all reasonable efforts to comply with any request to modify the schedule for a Maintenance Outage provided that such change has no substantial impact on the qualifying facility.

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Commented [QFs49]: The difference between Planned Outages, Maintenance Outages, and Forced Outages should be better defined or else it will not be clear when the QF is excused from following the notice deadlines for Planned and Maintenance Outages, or excused from it minimum delivery or MAG requirements. This is an area in need to significant revision if it will be included in the proposed rules.

Commented [QFs50]: Solar QFs should be allowed to conduct maintenance in Off-Peak/nighttime hours during these months because they would not generate at night anyway.

(c) Once the Maintenance Outage has commenced, the qualifying facility must keep the public utility apprised of any changes in the generation capacity available from the Facility during the Maintenance Outage and any changes in the expected Maintenance Outage completion date and time. As soon as practicable, any notifications given orally must be confirmed in writing. The qualifying facility may must take all reasonable measures consistent with Prudent Electrical Practices to minimize the frequency and duration of Maintenance Outages.

(4~~6~~) Forced Outages. The qualifying facility must promptly notify the purchasing public utility orally, via telephone to a number specified by the public utility (or other method approved by the public utility), of any Forced Outage resulting in more than ten percent (10%) of the Nameplate Capacity Rating of the Facility being unavailable. This report from qualifying facility must include the amount of the generation capacity of the Facility that will not be available because of the Forced Outage and the expected return date of such generation capacity. The qualifying facility must promptly update the report as necessary to advise the public utility of changed circumstances. As soon as practicable, any oral report of a Forced Outage must be confirmed in writing to the public utility.

(5~~7~~) Notice of Emergency Deratings and Outages. Notwithstanding the requirements of subsections (4)-(6), the qualifying facility will inform the purchasing public utility, via telephone to a number specified by public utility (or other method approved by public utility), of any limitations, restrictions, deratings or outages reasonably predicted by qualifying facility to affect more than five percent (5%) of the Nameplate Capacity rating of the Facility for the following day and will promptly update such notice to the extent of any material changes in this information.

~~(8) Scheduling Cooperation and Standards.~~

~~***[Comment to AR 631 stakeholders: Need comment/input on the rules related to scheduling, forecasting.]***~~

~~(a) With respect to any and all scheduling requirements, the qualifying facility must cooperate with the public utility with respect to scheduling Net Output, and both the qualifying facility and public utility will designate authorized representatives to communicate with regard to scheduling and related matters arising under a power purchase agreement. Each Party must comply with the applicable variable resource standards and criteria of any applicable Electric System Authority, as applicable.~~

~~(b) If a purchasing public utility is deemed by an RTO to be financially responsible for a qualifying facility's performance under the Generation Interconnection Agreement due to the qualifying facility's lack of standing as a "scheduling coordinator" or other RTO-recognized designation, qualification or otherwise, then the qualifying facility must promptly take all actions necessary to acquire such RTO-recognized standing (or must contract with a third party who has such RTO-recognized standing) so that the public utility is no longer responsible for the qualifying facility's performance under the Generation Interconnection Agreement or RTO requirement.~~

(9) Forecasting. The following requirements apply for intermittent qualifying facilities.

(a) Long-Range Forecasts. The qualifying facility must, by December 1st of each year during the Total Tern (except for the last year), provide an annual update to the expected long-term monthly/diurnal mean net energy and net capacity factor estimates (12 X 24 profile) for the Total Term. Seller must prepare such forecasts utilizing a renewable energy resource prediction model or service that is satisfactory to the public utility in the exercise of its reasonable discretion and comparable in accuracy to models or services commonly used in the industry. The forecasts provided by the qualifying facility must comply with all applicable Electric System Authority tariff procedures, protocols, rules and testing as necessary and as may be modified from time to time.

(b) Day-Ahead Forecasts and Updates. At the qualifying facility's expense, the purchasing public utility will solicit and obtain from a qualified renewable energy production forecasting vendor forecast data and information with respect to the Facility, including day-ahead and real-time forecasting services and provision of real-time meteorological data necessary for compliance with applicable Electric System Authority procedures, protocols, rules and testing. Upon request by the public utility the qualifying facility must provide a 24-hour telephone number that the public utility may contact to determine the then-current status of the Facility. The public utility will present the qualifying facility with an invoice and documentation supporting the costs of obtaining such forecasting data. The qualifying facility must pay the amount stated on the invoice within fifteen (15) days of receipt. The public utility reserves the right to change the forecasting vendor in its sole discretion during the Term.

860-029-0XXX [New Rule #10]
Billings, Computations, and Payments

(1) On or before the tenth (10th) day following the end of each calendar month, the qualifying facility must deliver to the purchasing public utility an invoice showing the qualifying facility's computation of Net Output delivered to the Point of Delivery during such month. When calculating the invoice, the qualifying facility must provide computations showing the portion of Net Output that was delivered during On-Peak Hours and the portion of Net Output that was delivered during Off-Peak Hours.

(2) Upon the purchasing public utility's receipt of an invoice under subsection (1), the purchasing public utility must send to the qualifying facility, on or before the later of the twentieth (20th) day following receipt of such invoice or the thirtieth (30th) day following the end of each month, payment for the qualifying facility's deliveries of Net Output.

(3) Either the qualifying facility or purchasing public utility may offset any payment due under this Agreement against amounts owed by the other Party pursuant under the power purchase agreement. Either the qualifying facility's or purchasing utility's exercise of recoupment and set off rights will not limit the other remedies available to such Party under the power purchase agreement.

~~(4) Any amounts not paid when due under the power purchase agreement will bear interest at the Contract Interest Rate from the date due until paid.~~

~~(5) Either the qualifying facility or purchasing utility, in good faith, disputes any amount due under an invoice provided under the power purchase agreement, such Party must notify the other Party of the specific basis for the dispute and, if the invoice shows an amount due, must pay that portion of the invoice that is undisputed on or before the due date. Any such notice of dispute must be provided within two (2) years of the date of the invoice in which the error first occurred. If any amount disputed by such Party is determined to be due the other Party, or if the Parties resolve the payment dispute, the amount due must be paid within five (5) Business Days after such determination or resolution, along with interest at the Contract Interest Rate from the date due until the date paid.~~

~~(6) Each Party to a power purchase agreement, through its authorized representatives, has the right, at its expense upon reasonable notice and during normal business hours, to examine and copy the records of the other Party to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made under the power purchase agreement or to verify the other Party's performance of its obligations under same.~~

~~(7) Upon request, each Party must provide to the other Party statements evidencing the quantities of Net Output delivered at the Point of Delivery or Point of Interconnection. If any statement is found to be inaccurate, a corrected statement will be issued and, subject to subsection (5), any amount due one Party to the other Party as a result of the corrected statement will be promptly paid including the payment of interest at the Contract Interest Rate from the date of the overpayment or underpayment to the date of receipt of the reconciling payment.~~

860-029-0130
Nonstandard Power Purchase Agreements

(1) Each public utility must offer nonstandard avoided cost rates and nonstandard power purchase agreements to all qualifying facilities directly or indirectly interconnected with the public utility.

(2) Qualifying facilities have the unilateral right to select a purchase term of up to 20 years for a power purchase agreement. Qualifying facilities electing to sell firm output at fixed prices have the unilateral right to a fixed-price term of up to 15 years.

(3) A qualifying facility may specify a scheduled commercial on-line date consistent with the following:

(a) Anytime within three years from the date of agreement execution;

(b) Anytime later than three years after the date of agreement execution if the qualifying facility establishes to the utility that a later scheduled commercial on-line date is reasonable and necessary and the utility agrees.

(4) The qualifying facility will be determined to be providing firm energy or capacity if the contract requires delivery of a specified amount of energy or capacity over a specified term and includes sanctions for noncompliance under a legally enforceable obligation. For a qualifying facility providing firm energy or capacity:

(a) The utility and the qualifying facility should negotiate the time periods when the qualifying facility may schedule outages and the advance notification requirement for such outages, using provisions in the utility's partial requirements tariffs as guidance.

(b) The qualifying facility should be required to make best efforts to meet its capacity obligations during the utility system emergencies.

(c) The utility and the qualifying facility should negotiate security, default, damage and termination provisions that keep the utility and its ratepayers whole in the event the qualifying facility fails to meet its obligations under the contract.

(d) Delay of commercial operation should not be a cause of termination if the utility determines at the time of contract execution that it will be resource sufficient as of the qualifying facility scheduled commercial operation date specified in the power purchase agreement. The utility may impose damages.

(e) Lack of notice force testing to prove commercial operation should not be the cause of termination.

(5) An "as-available" obligation for delivery of energy, including deliveries in excess of nameplate rating or the amount committed in the power purchase agreement should be treated as a non-firm commitment. Non-firm commitment should not be subject to minimum delivery requirements, default damages for construction delay or under-delivery, default damages for the qualifying facility choosing to terminate the power purchase agreement early, or default security for these purposes.

(6) For qualifying facilities unable to establish creditworthiness, the utility must at a minimum allow the qualifying facility to choose either a letter of credit or cash escrow for providing default security. When determining security requirements, the utility should take into account the risk associated with the qualifying facility based on such factors such as its size and type of supply commitments. Default security methodologies specified in the utility's standard power purchase agreements are a useful starting point for negotiations for nonstandard power purchase agreements.

(7) Qualifying facilities may either contract with the purchasing utility for a "surplus sale" or for a "simultaneous purchase and sale" provided, however, that the qualifying facility's selection of either contractual arrangement is not inconsistent with any retail tariff provision of the purchasing utility then in effect or any agreement between the qualifying facility and the purchasing utility.

(a) Contracts for surplus sale and for simultaneous purchase and sale will be available to qualifying facilities regardless of whether they qualify for standard power purchase agreements and rates or non-standard power purchase agreements and rates. However, the "simultaneous purchase and sale" is not available to qualifying facilities not directly connected to the purchasing utility's electrical system.

(b) The negotiation parameters and guidelines should be the same for both surplus sale and simultaneous purchase and sale contracts.

(c) The avoided cost calculations by utilities do not require adjustment solely as a result of the selection of either surplus sale or simultaneous purchase and sale arrangements.