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February 16, 2023

VIA ELECTRONIC FILING

Attention: Filing Center
Public Utility Commission of Oregon
P.O. Box 1088
Salem, Oregon 97308-1088

Re: AR 631 – Rulemaking to Address Procedures, Terms, and Conditions Associated with Qualifying Facilities (QF) Standard Contracts.

Attention Filing Center:

Attached for filing in the above-captioned docket are the Joint Utilities' Redlines of the Rules Filed with the Secretary of State. Many of the changes the Joint Utilities are providing in these redlines are clean-up or clarifying edits that they urge the Administrative Law Judge to carefully consider in order to ensure that the rules are clear and internally consistent. For ease of identifying the Joint Utilities' substantive changes, which reflect revisions the Joint Utilities recommended in prior comments, the Joint Utilities have highlighted substantive changes in yellow.

Please contact this office with any questions.

Sincerely,

Jordan R. Schoonover

Attachment

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

Commented [JU1]: Substantive changes are highlighted in yellow. All other proposed changes reflect clean up edits to make the rules clearer and internally consistent.

AMEND: **860-029-0005**
RULE TITLE: **Applicability of Rules**
RULE TEXT:

(1) These rules apply to all interconnection, purchase, and sale arrangements between a public utility and facilities that are 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 be offered on terms and conditions that 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) 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.

AR 631 –DRAFT STAFF RULES

AMEND: **860-029-0010**
RULE TITLE: **Definitions for Division 029 Rules**
RULE TEXT:

(1) "AC" means alternating current.

(2) "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.

(3) "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.

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

(5) "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.

(6) "Certified qualifying facility" means a qualifying facility that is certified as such under 18 C.F.R Part 292.

(7) "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.

(8) "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.

(9) "Commercial operation date" means the date after start-up testing is complete on which the total Nameplate Capacity Rating of the Facility is fully interconnected, fully integrated, and synchronized with the System, and the ~~qualifying~~qualifying facility has satisfied the criteria required by the power purchase agreement to declare commercial operation.

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

(11) "Contract Price" means for the fixed price term, 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.

(12) "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 installing and maintaining the physical facilities necessary to permit purchases from a qualifying facility.

(13) "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.

(14) "Development period" means the time period commencing on the Effective Date and ending at 24:00 in the prevailing time zone in which the qualifying facility is located on the day before the scheduled commercial operation date or such earlier date on which the qualifying facility achieves the commercial operation date in compliance with these rules.

(15) "Effective Date" means the date specified in the power purchase agreement on which the power purchase agreement between the qualifying facility and the public utility becomes effective.

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

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

(18) "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.

(19) "Existing ~~QF~~qualifying facility" means a ~~QF~~ qualifying facility that is or has been operational before the effective date of a power purchase agreement.

Commented [JU2]: Unclear whether this definition is necessary except for use in "New qualifying facility" definition.

(20) "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.

(21) "FERC" means the Federal Energy Regulatory Commission.

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

(23) "Fixed price term" means for qualifying facilities electing to sell firm energy or firm capacity or both, the period of a power purchase agreement 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.

(24) "Force Majeure" is defined at OAR 860-029-0122.

Commented [JU3]: Note that Force Majeure will need to be defined here if OAR 860-029-0122 is deleted, which the Joint Utilities oppose. At the very least, the definition should: (1) clarify that any delay, alleged breach of contract, or failure by the transmission provider or interconnection provider—i.e., entities that are not the purchasing public utility—does not qualify as an event of Force Majeure; and (2) add a time limit of 180 days to one year for events of Force Majeure after which time the party not claiming Force Majeure may terminate the PPA.

(25) "Forced Outage" means:

(a) An outage that requires immediate removal of a unit from service, another outage state or

a reserve shutdown state;

(b) An outage that does not require immediate removal of a unit from the in-service state but requires removal within six ~~(6)~~ hours; or

(c) An outage that can be postponed beyond six hours but requires that a unit be removed from the in-service state before the end of the next weekend.

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

(27) "Index Rate" means the market index rate approved by the Commission for inclusion in the purchasing public utility's standard power purchase agreement.

(28) "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.

(29) "Maintenance Outage" means ~~s~~ an outage that can be deferred beyond the next weekend, but requires that the unit be removed from service before the next Planned Outage. A Maintenance Outage can occur any time during the year, has a flexible start date, may or may not have a predetermined duration and is usually shorter than a Planned Outage.

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

(31) "Moody's" means Moody's Investors Service.

(~~31~~32) "MW" means megawatt.

(~~32~~33) "MWh" means megawatt-hour.

(~~33~~34) "Nameplate Capacity Rating" means maximum installed instantaneous 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.

(~~34~~35) "NERC" means the North American Electric Reliability Corporation.

(~~35~~36) "Net Output" means all energy and capacity produced by the qualifying facility, less station service, losses, and other adjustments, flowing through the Point of Interconnection.

(~~36~~37) "Network Upgrades" means an addition, modification, or upgrade to the transmission system of a purchasing utility required at or beyond the Point of Delivery to accommodate the transmission provider's receipt of energy from a generation facility to the transmission provider's System.

(~~37~~38) "New qualifying facility" means a qualifying facility that is not an existing qualifying facility.

(~~38~~39) "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.

(~~39~~40) "Non-fixed price term" means the portion of the purchase term of a power purchase agreement that begins after the fixed-price ~~period~~ term has ended, during which the qualifying facility receives pricing equal to the purchasing public utility's Index Rate. The length of the non-fixed price term is selected by the qualifying facility and specified in the power purchase agreement.

Commented [JU4]: This should still be "term", not "period". "Fixed price period" is not defined.

(~~40~~41) "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.

(~~41~~42) "Off-peak hours" means all hours other than On-peak hours.

(~~42~~43) "On-peak hours" means the hours designated as such in the purchasing public utility's avoided cost price schedule.

(~~43~~44) "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.

(~~44~~45) "Planned Outage" means an outage that is scheduled well in advance and is of a predetermined duration. A "Planned Outage" is also known as a "Scheduled Outage".

(~~45~~46) "Point of Delivery" means for off-system qualifying facilities, the point on the purchasing public utility's distribution or transmission system 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.

(~~46~~47) "Point of Interconnection" means the point where the qualifying facility is electrically connected to an electric utility's transmission or distribution system.

(~~47~~48) "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.

(~~48~~49) "Public utility" means a utility regulated by the Commission under ORS Chapter 757, that provides electric power to customers.

(~~49~~50) "Purchase" means the purchase of electric energy or capacity or both from a qualifying

facility by an electric utility.

(~~50~~51) "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.

(~~51~~52) "Qualifying facility" means a cogeneration facility or a small power production facility as defined in 18 C.F.R. Part 292. Unless otherwise specified, "qualifying facility" includes proposed qualifying facilities~~,~~ (e.g., entities that intend to obtain certification as a qualifying facility but that have not yet done so).

(~~52~~53) "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.

(~~53~~54) "Renewable energy certificate" has the meaning given that term in OAR 330-160-0015(17).

(~~54~~55) "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.

(~~55~~56) "Renewable qualifying facility" means a qualifying facility that generates electricity that may be used for compliance with the RPS.

(~~56~~57) "RPS attributes" means all attributes related to the ~~net~~ Net ~~output~~ 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.

(58) "S&P" means S&P Global Ratings.

(~~57~~59) "Sale" means the sale of electric energy or capacity or both by a public utility to a qualifying facility.

(~~58~~60) "Schedule" means the purchasing public utility's schedule filed with the Commission setting forth terms and ~~prices~~ rates for standard power purchase agreements ~~and prices~~.

Commented [JU5]: JUs recommend that this be changed to "rates," which is defined in this section.

(~~59~~61) "Scheduled commercial operation date" means the commercial operation date specified by the qualifying facility and included in the standard power purchase agreement.

(~~60~~62) "Small power production facility" means a facility ~~which~~ 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.

(~~61~~63) "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.

(~~62~~64) "System" means the electric transmission and distribution system owned or operated by the purchasing public utility, or where applicable, another electric utility.

(~~63~~65) "System emergency" means a condition on a public utility's ~~system~~ System which is likely to result in imminent, significant disruption of service to customers, in imminent danger of life or property, or both.

(~~64~~66) "Test energy" means electric energy generated by the Facility during the Test Period, and ~~RECs~~ renewable energy certificates and capacity rights associated with such electric energy.

(~~65~~67) "Test period" means a period during which Start-Up Testing is conducted.

(~~66~~68) "Time of delivery" means:

(a) In the case of capacity, when the generation is first online 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.

(~~67~~69) "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.

(~~68~~70) "Total output" means all energy produced by the Facility.

AR 631 –DRAFT STAFF RULES

AMEND: **860-029-0043**
RULE TITLE: **Standard Rates for Purchase**
RULE TEXT:

(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) 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.

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

AR 631 –DRAFT STAFF RULES

ADOPT: **860-029-0044**
RULE TITLE: **Allocation of Costs ~~to~~ Related to Deliveries from ~~Off-System~~ Qualifying Facilities**
RULE TEXT:

(1) If the merchant function of the public utility has access to information that the proposed Point of Delivery in a~~n off-system~~ qualifying facility's request for a draft standard power purchase agreement may be unavailable due to transmission capacity constraints or competing uses of reserved transmission, the public utility will provide the qualifying facility with written notice of the possible constraint or reserved use and if applicable, the public utility's decision to decline the qualifying facility's proposed Point of Delivery. A public utility must act reasonably and without discrimination in declining the qualifying facility's proposed Point of Delivery. Nothing in this section prevents the public utility from proposing an alternate Point of Delivery or requires the public utility to undertake informational or other studies or to change its standard study processes to seek information not reasonably in its possession during the contracting process.

(2) If the qualifying facility proposes an alternate Point of Delivery in response to a public utility's written notice under section (1), the public utility will have 15 business days to complete its review of proposed alternate Point of Delivery and provide the notification described in section (1), if applicable.

(3) Provided that the public utility and the qualifying facility have agreed upon a Point of Delivery, the standard power purchase agreement for a~~n off-system~~ qualifying facility may, at the public utility's discretion, include a provision specifying that costs to construct transmission -service-related Network Upgrades of the purchasing public utility's ~~system~~ System necessary for transmission service for a qualifying facility's output may be allocated to the qualifying facility by Commission order after the process described in sections (4), (5), and (6) of this rule.

(4) If the public utility chooses to include a transmission -service-related Network Upgrade cost-allocation provision in the standard power purchase agreement for a~~n off-system~~ qualifying facility, the public utility must:

~~(a) Specify in the power purchase agreement that the development period in the standard power purchase agreement does not commence until after the processes in sections (4), (5), and if applicable, section (6), are complete.~~

~~(b)~~(a) No later than 15 business days after the Effective Date of the standard power purchase agreement, provided that if the qualifying facility is off-system, the off-system qualifying facility has obtained firm transmission to the Point of Delivery as of the Effective Date, or no later than 15 business days after the purchasing public utility receives a signed transmission service agreement from the off-system qualifying facility showing that the off-system qualifying facility has obtained firm transmission service to the Point of Delivery, submit an application to the appropriate transmission provider requesting designation of the qualifying facility as a network resource and requesting network transmission service for the purpose of transmitting the power purchased from qualifying facility to the public utility's load.

Commented [JU6]: The Joint Utilities recommend that OAR 860-029-0044 apply to both on- and off-system, and therefore recommend removing all references to "off-system" in this rule where appropriate.

Commented [JU7]: The Joint Utilities suggest using this descriptor throughout this rule for clarity.

Commented [JU8]: The Joint Utilities oppose allowing deferment of the development period.

Commented [JU9]: **[If the Commission decides to retain subsection (4)(a) allowing for deferment of the development period, then the Commission should require repricing after the cost-allocation process is completed to avoid stale pricing and harm to customers. In such case, the Joint Utilities recommend adding the following new subsection (4)(b):**

(b) Specify in the standard power purchase agreement that, if the developer elects to defer commencement of the development period, the development period in the standard power purchase agreement shall resume on the date of receipt of an order from the Commission allocating transmission service-related Network Upgrades costs. On such date, avoided costs in the standard power purchase agreement shall be repriced at the then-effective rates approved under the purchasing public utility's schedule.]

Commented [JU10]: The Joint Utilities understand that a QF must have firm transmission to the purchasing utility's system before the utility can request to designate it as a network resource. The Joint Utilities recommend the following revisions to clarify this point.

~~(e)~~(b) Request an effective date for commencement of network transmission service for the qualifying facility that is

(A) ~~180~~ 90 days prior to the scheduled commercial operation date, or

(B) As soon as practicable after the Effective Date of the ~~executed~~ standard power purchase agreement if the scheduled commercial operation date is less than ~~180~~ 90 days following the Effective Date.

~~(d)~~(c) No later than five business days after the public utility's receipt of a response to the application submitted under subsection (b), inform the qualifying facility of the transmission provider's response.

~~(e)~~(d) No later than 15 business days after the public utility's receipt of a response to the application submitted under subsection (b), notify the qualifying facility in writing whether it is submitting a request for a transmission service-related Network Upgrade cost-allocation determination to the Commission and if applicable, file the request for cost-allocation determination with the Commission.

(5) Upon receipt of a request for a cost-allocation determination under subsection (4)(e), the Commission will conduct a proceeding at which the 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-related Network Upgrades. After providing notice and opportunity to comment regarding a request filed under subsection (4)(e), the Commission will issue an order regarding the appropriate allocation of costs of ~~transmission service~~transmission service-related Network Upgrades. Notwithstanding the notice and opportunity to comment provided under this section, a public utility and qualifying facility both have the right to proceed with a contested case to address transmission service-related Network Upgrade costs.

(6) After receipt of notice under subsection (4)(e) of this section that the public utility is seeking a cost-allocation determination, but no later than ~~14~~ 15 business days after any Commission order allocating costs of transmission service-related Network Upgrades to the qualifying facility, the qualifying facility may terminate the power purchase agreement upon written notice to the public utility. The qualifying facility's timely termination of the standard power purchase agreement under this section will not be an event of default, and no damages or other liabilities under the power purchase agreement will be owed by or to either party.

(7) If a purchasing public utility is unable to meet a deadline in section (4), the public utility shall have 30 days to cure such failure.

(~~7~~8) Notwithstanding the other sections in this rule, nothing prevents the purchasing public utility and qualifying facility from agreeing to amend the standard power purchase agreement to address transmission-related Network Upgrade costs or to substitute a new Point of Delivery.

Commented [JU11]: The Joint Utilities should not plan in advance, at PPA execution when the utility makes the designated network request, that a QF will commence commercial operation sooner than 90 days before the Scheduled COD.

Commented [JU12]: If the Commission removes subsection (4)(a) as recommended by the Joint Utilities, references to subsection (4)(e) in this rule will need to be changed to subsection (4)(d). If the Commission retains subsection(4)(a) and adds the Joint Utilities' recommended new subsection (4)(b) regarding repricing, then references to subsection (4)(e) in this rule will need to be changed to subsection (4)(f).

Commented [JU13]: Same as above.

Commented [JU14]: The Joint Utilities recommend clarifying that each party has a right to proceed with a contested case. This is a concept that is generally agreed to by all stakeholders.

Commented [JU15]: Suggest using 5-day increments and business days (i.e., 15 business days) for consistency with other timelines in this rule.

Commented [JU16]: Because of tight-turnaround deadlines in proposed OAR 860-039-044 (e.g., 5 days), the Joint Utilities recommend specifying a 30-day cure period for failure to meet the deadlines in section (4) of the rule rather than immediate default.

AR 631 –DRAFT STAFF RULES

ADOPT: **860-029-0045**
RULE TITLE: **Eligibility for Standard Avoided Cost Prices and Purchase Agreements**
RULE TEXT:

(1) Solar qualifying facilities with a ~~nameplate~~ Nameplate ~~capacity~~ Capacity ~~rating~~ Rating of 3 MW and less, and all other qualifying facilities with a ~~nameplate~~ Nameplate ~~capacity~~ Capacity ~~rating~~ Rating of 10 MW and less, are eligible for standard avoided cost prices.

(2) All qualifying facilities with a ~~nameplate~~ Nameplate ~~capacity~~ Capacity ~~rating~~ Rating of 10 MW and less are eligible to enter into a standard power purchase agreement.

(3) Renewable qualifying facilities that satisfy the criteria of section (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 ~~Renewable Energy Credits~~renewable energy certificates generated by the Facility to the purchasing public utility while the qualifying facility is receiving deficiency-period pricing from the purchasing public utility and during any other period of the power purchase agreement ordered by the Commission.

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

(a) Two qualifying facilities are located on the same site if the generating facilities or equipment providing fuel or motive force associated with the qualifying facilities are located within a five-mile radius and the qualifying facilities use the same source of energy or motive force to generate electricity.

(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, persons acting jointly or in concert with, or exercising influence over, the policies of another person or persons, or wholly owned subsidiaries.

(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~~limited liability companies (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 modified accelerated cost recovery system (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) will not be determined to be a single qualifying facility based on the fact that they have in place a shared interest or agreement regarding interconnection facilities, interconnection-related system upgrades, or any other infrastructure not providing motive force or fuel. Two or more qualifying facilities will not be held to be owned or controlled by the same person(s) or affiliate(s) solely because they are developed by a single entity so long as they are not owned or operated by the same person(s) or affiliate(s) of the same person(s) at the time each ~~QF~~ qualifying facility seeks to enter into a ~~PPA~~power purchase agreement or thereafter.

Commented [JU17]: The Joint Utilities recommend adding "thereafter" to address potential problem that by specifying that it applies at the time the QF seeks to enter the PPA the rule accidentally suggests they could have common ownership later after the PPA is entered.

AR 631 –DRAFT STAFF RULES

AMEND: **860-029-0046**
RULE TITLE: **Process for Procuring Standard Power Purchase Agreement**
RULE TEXT:

(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.

(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) Documentary evidence that the qualifying facility has taken meaningful steps to seek site control of the proposed location of the qualifying facility including, but not limited to, documentation demonstrating:

(A) An ownership of~~,~~ a leasehold interest in, or a right to develop, a site of sufficient size to construct and operate the qualifying facility;

(B) An option to purchase or acquire a leasehold interest in a site of sufficient size to construct and operate the qualifying facility; or

(C) Another document that clearly demonstrates the commitment of the grantor to convey sufficient rights to the developer to occupy a site of sufficient size to construct and operate the qualifying facility, such as an executed 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~~ execution of the standard power purchase agreement; for qualifying facilities ~~QFs~~ larger than 1 MW, a Form 556 self-certification of the proposed qualifying facility or a FERC order granting an application for certification of the proposed qualifying facility is required.

(B) Demonstration of eligibility for standard power purchase agreement and pricing under OAR 860-029-0045,

(C) Design capacity (MW),

(D) Estimate of station service requirements and net amount of power to be delivered to the purchasing public utility's electric ~~system~~System,

(E) Generation technology and other related technology applicable to the site,

(F) Non-binding estimate of 12 x 24 delivery schedule and 8760 generation profile when practicable, where estimates of the net amount of power to be delivered to the public utility's electric system and the 12 x 24 delivery schedule are subject to revision until the date the qualifying facility commences commercial operation provided that any such revision must be consistent with OAR 860-029-0120(14), and a 12 x 24 delivery schedule may be used by the public utility to calculate damages.

(G) Motive force or fuel plan,

(H) Proposed scheduled commercial operation date,

(I) Proposed contract term,

(J) Proposed pricing provisions,

(K) Point of Delivery as well as Point of Interconnection or multiple Points of Interconnection under consideration,

(L) Latitude and longitude of proposed facility and site layout,

(M) 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~~

(N) Other information specified in the utility's avoided cost rates schedule or standard power purchase agreement approved by the Commission, and

~~(N)~~(O) For a qualifying facility selecting a scheduled commercial operation date between three and four years after the Effective Date of the standard power purchase agreement pursuant to OAR 860-029-0120(5)(b)(A), a copy of the interconnection study supporting the scheduled commercial operation date.

~~Estimates of the net amount of power to be delivered to the public utility's electric system and the 12 x 24 delivery schedule are subject to revision until the date the qualifying facility commences commercial operation.~~

(3) Once a qualifying facility has asked for a draft standard power purchase agreement and provided the information required under section (2), the public utility has 15 business days to provide the qualifying facility a draft standard 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 standard 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 standard power purchase agreement, in writing, the public utility has 10 business days to:

Commented [JU18]: The Joint Utilities recommend moving the qualifying statement describing the 12 x24 delivery schedule to subsection (2)(c)(F) where the 12 x24 delivery schedule is discussed.

Commented [JU19]: AHD did not accept OAR 860-029-0046(2)(c)(O) because the requirement is allegedly "an unnecessary hurdle to interconnection." However, it is unclear how the requirement that the QF provide the public utility ***a copy*** of the interconnection study necessitated under OAR 860-029-0120(5)(b)(A) could affect the interconnection process, and the Joint Utilities are aware of no evidence to indicate that the requirement creates a hurdle. The Joint Utilities believe such a requirement simply allows the utilities to implement OAR 860-029-0120(5)(b)(A). That is, just as utilities need to know a facility's capacity in MW in order to determine if the facility is eligible for a standard PPA, utilities also need to know whether the QF actually has an interconnection study that supports a Scheduled COD within four years from contract execution.

(a) Notify the qualifying facility it cannot make the requested changes,

(b) Notify the qualifying facility it does not understand the requested changes or requires additional information, or

(c) Provide a revised draft power purchase agreement. However, the public utility will have 15 business days to respond or provide a revised draft standard power purchase agreement when the qualifying facility requests a change to the Point of Delivery.

(6) The process outlined in sections (4) and (5) of this rule will continue until both the qualifying facility and public utility agree to the terms of the draft standard power purchase agreement, i.e., neither the qualifying facility ~~not~~ nor 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 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 executed by the qualifying facility, the purchasing public utility has five business days in which to sign the final executable agreement.

(9) A legally enforceable obligation will be considered established on the date on which the qualifying facility executes the final executable form of the power purchase agreement or such earlier date that the Commission may order.

AR 631 –DRAFT STAFF RULES

ADOPT: **860-029-0047**
RULE TITLE: **Integration Charges**
RULE TEXT:

(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.

AR 631 –DRAFT STAFF RULES

AMEND: **860-029-0120**
RULE TITLE: **Standard Power Purchase Agreements**
RULE TEXT:

(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.

(2) Qualifying facilities have the unilateral right to select a purchase period of up to 20 years for a standard 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, subject to the reduction specified in section (6) for a development period that exceeds three years, and may select a non-fixed price term of up to five years.

(3) The development period of a standard power purchase agreement begins on the Effective Date~~, unless the start of the development period is delayed by the initiation of the Network Upgrade cost allocation process in OAR 860-029-0044~~. The development period ends at 24:00 in the time zone in which the qualifying facility is located on the day before the scheduled commercial operation date specified in the standard power purchase agreement or such earlier date on which the qualifying facility achieves the commercial operation date in compliance with these rules.

Commented [JU20]: The Joint Utilities recommended deleting to conform with opposition to deferment of development period in OAR 860-029-044.

(4) The purchase period of a standard power purchase agreement begins on the earlier of the commercial operation date or the scheduled commercial operation date. The scheduled commercial operation date may be delayed by Force Majeure, extended by agreement of the purchasing public utility and the qualifying facility or modified under subsection (5)(d) or section (6) of this rule. In these cases, the purchase period and fixed price term commence on the earlier of the commercial operation date or the delayed or extended scheduled operation date.

(5) A qualifying facility may specify a scheduled commercial operation date for a standard power purchase agreement subject to the following requirements:

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

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

(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~~ can occur more than three years, but no more than four years, after ~~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 within three years from the Effective Date and the utility consents to a scheduled commercial operation date more than three years from the Effective Date, which consent shall not be unreasonably withheld.

Commented [JU21]: As currently drafted, OAR 860-029-0120(5)(b)(A) could be interpreted as requiring utilities to enter PPAs with QFs selecting a Scheduled COD anytime between three and four years after the Effective Date, even if the interconnection study shows that interconnection cannot occur until, for example, seven years from the Effective Date. Such an interpretation would encourage speculative contracting and does not reflect Staff's intention in balancing customer protection and QF development.

(c) In any standard power purchase agreement with a scheduled commercial operation date more than three years after the Effective Date, the fixed-price term will be reduced one day for every day of the development period after three-year anniversary of the Effective date, with the reduction taken from the end of the fixed-price term except as ~~specified~~ specified in subsection (5)(d) below~~otherwise in these rules~~. Example: A standard power purchase agreement with a development period of three years and six months will have a fixed-price term of 14 years and 6 months. The fixed-price term will begin on the scheduled commercial operation date and will end after 14 years and 6 months.

Commented [JU22]: The Joint Utilities recommend using this more specific language in the proposed rules.

(d) If the qualifying facility can provide an interconnection study showing that the time it will take the purchasing utility to process its interconnection queue necessitates a commercial operation date between three and four years from the Effective Date, then the additional time necessitated by the interconnection queue will not be taken off the period of the fixed-price term.

(e) A qualifying facility entering into a standard power purchase agreement may not select a scheduled commercial operation date more than four years from the Effective Date.

(6) Modification of Scheduled Commercial Operation Date or Termination

(a) Anytime within six months after the Effective Date of a standard power purchase agreement, the qualifying facility may terminate the standard power purchase agreement or modify the scheduled commercial operation date in the standard power purchase agreement if the qualifying facility receives an interconnection study report that is completed after the Effective Date that:

(A) Includes an estimate of time to interconnect that is longer than the development period in the executed standard power purchase agreement; or

(B) Includes an estimate of costs to interconnect that render the project uneconomic in the qualifying facility's opinion.

(b) A qualifying facility that chooses to modify the scheduled commercial operation date under subsection (a) of this section (6) may not select a new scheduled commercial operation date more than four years from the date the standard power purchase agreement was executed ~~except as specified otherwise in these rules~~.

Commented [JU23]: The Joint Utilities recommend deleting this language as it is too vague.

(c) If a qualifying facility terminates the standard power purchase agreement under subsection (a) of this section (6), it is liable for damages incurred by the public utility up until the date of termination, which may be taken from the Project Development Security posted by the qualifying facility.

(d) In the event the qualifying facility is delayed in reaching commercial operation because of an event of Force Majeure or the public utility's default under the standard power purchase agreement or any other agreement related to the interconnection of the

qualifying facility to the purchasing utility's system, including interconnection study agreements and interconnection agreements, the scheduled commercial operation date in the standard power purchase agreement will be extended commensurately with the delay caused by the event of Force Majeure or the public utility's default, except for periods of delay that could have been prevented had the qualifying facility taken mitigating actions using commercially reasonable efforts. An extension of the scheduled commercial operation date under this subsection is not subject to the fixed-price term reduction in subsection (65)(c) or the four-year limitation in subsection (6)(b).

~~(7) The purchase period of a standard power purchase agreement begins on the earlier of the commercial operation date or the scheduled commercial operation date. The scheduled commercial operation date may be delayed by Force Majeure, extended by agreement of the purchasing public utility and the qualifying facility or modified under subsection 5(d) or section (6) of this rule. In these cases, the purchase period and fixed price term commence on the earlier of the commercial operation date or the delayed or extended scheduled operation date.~~

Commented [JU24]: The Joint Utilities recommend deleting this section as it is a duplicate of section (4) of this rule.

~~(8) 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.~~

Commented [JU25]: The Joint Utilities recommend deleting this section as it is an old version of section (5) of this rule, which the Joint Utilities believe AHD forgot to delete in error. Importantly, this old version leaves out clarifying language, such as "between three and four years".

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

(a) Delay Damages. Unless otherwise excused under the standard power purchase agreement, damages for failure to meet the scheduled commercial operation date in a standard power purchase agreement are equal to:

(A) ~~the~~ The positive difference between the utility's replacement power costs less the ~~prices~~ Contract Price in the standard power purchase agreement during the period of default, determined on a daily basis with positive differences aggregated and invoiced as a monthly sum~~,~~; plus

(B) Any incremental ancillary services and transmission costs resulting from the qualifying facility's failure to deliver during the applicable period; and~~costs reasonably incurred by the utility to purchase replacement power and additional transmission charges, if any, incurred by the utility to deliver replacement energy to the point of delivery~~

(C) The cost of replacement renewable energy certificates if the qualifying facility would have been required to transfer renewable energy certificates during such monthly period.

~~(b) If the qualifying facility would have been required by the standard power purchase agreement 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.~~

~~(c) Notwithstanding subsections (a) and (b), damages incurred under this section may not exceed an amount equal to what the qualifying facility would have received under the standaard power purchase contract for energy delivered during the default period.~~

(~~10~~8) Subject to the one-year cure period in section (~~9~~7) above, a utility may terminate a standard power purchase agreement for failure to meet the scheduled commercial operation date in the power purchase agreement, if such failure is not otherwise excused under the agreement.

(~~11~~9) Point of Delivery. An off-system qualifying facility may propose the Point of Delivery for a standard power purchase agreement. The purchasing public utility must agree to the Point of Delivery before it is included in the standard power purchase agreement. The purchasing public utility may not unreasonably withhold agreement.

(~~12~~10) The standard power purchase agreement must include a mechanical availability guarantee (MAG) for wind and run-of-river hydroelectric qualifying facilities as follows:

(a) A 90 percent overall guarantee, measured per turbine, 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 allowance for 200 hours of planned maintenance per turbine per year that does not count toward calculation of the overall guarantee. ~~The 90 percent availability guarantee will be reduced on a pro rata basis for any portion of the annual period the qualifying facility was prevented from being available for reasons of Force Majeure, a default by the public utility under the power purchase agreement or interconnection agreement, or any interconnection and transmission curtailment initiated by the purchasing utility or the transmitting utility;~~

(b) A qualifying facility may be subject to damages for its 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~~ Net ~~output~~ 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~~ Net ~~output~~ Output provided by the qualifying facility for the contract year;

(B) Multiplying the "shortfall" by the positive difference, if any, between the utility's replacement power costs less the Contract Price in the standard power purchase

Commented [JU26]: For clarity purposes, the Joint Utilities recommend that all damages provisions in these rules follow the same format.

Commented [JU27]: The Joint Utilities oppose a price cap for damages.

Capping damages at the contract price does not adequately protect customers and violates the customer indifference principle. A cap based on what the utility would have paid the QF does not keep customers financially whole if the QF breaches when market prices are high, which is increasingly the case under current market conditions. When the QF fails to deliver energy under the PPA, customers bear all costs of the QF's default that exceed the cap.

agreement~~obtained by subtracting the Contract Price from the price at which the utility purchased replacement power~~; and

(C) Additional ancillary service and transmission costs to deliver replacement power to the point of delivery and the cost of replacement ~~Renewable Energy Credits~~renewable energy certificates, if any.

(c) The 90 percent MAG will be reduced on a pro rata basis for any portion of the annual period the qualifying facility was prevented from being available for reasons of Force Majeure, or a default by the public utility under the power purchase agreement or interconnection agreement.

~~(c) Notwithstanding subsection (b), the total amount of damages owed to the purchasing public utility by a qualifying facility for failure to meet the MDG will not exceed what the qualifying facility would have paid under the standard power purchase agreement had it delivered sufficient output to meet the MAG.~~

(~~13~~11) 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.

(~~14~~12)

(a) The standard purchase agreement will include an annual minimum delivery guarantee (MDG) for solar, geothermal, biomass, and baseload hydroelectric qualifying facilities equal to 90 percent of the qualifying facility's expected energy for the year.

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

(A) Determining the amount of the "shortfall" for the year, which is the difference between 90 percent of the qualifying facility's expected energy for the year and the actual Net Output delivered by the qualifying facility to the purchasing public utility in the year;

(B) Multiplying the "shortfall" by the positive difference, if any, between the utility's replacement power costs less the Contract Price in the standard power purchase agreement~~obtained by subtracting the Contract Price from the price at which the utility procured replacement power~~, and

(C) Additional ancillary service and transmission costs to deliver replacement power to the point of delivery and the cost of replacement renewable energy certificates~~Renewable Energy Credits~~, if any.

~~(c) Notwithstanding subsection (b), the total amount of damages owed to the purchasing public utility by a qualifying facility for failure to meet the MDG will not exceed what the~~

Commented [JU28]: The Joint Utilities recommend removing "or any interconnection and transmission curtailment initiated by the purchasing utility or the transmitting utility" because curtailment does not impact availability.

Commented [JU29]: Propose moving this section down here so that the MAG and MDG provisions are symmetrical.

Commented [JU30]: The Joint Utilities oppose capping damages at the contract price.

~~qualifying facility would have been paid under the standard power purchase agreement for energy it would have delivered had it me the MDG.~~

Commented [JU31]: The Joint Utilities oppose a cap on damages at the contract price.

~~(d)~~(c) The 90 percent MDG will be reduced on a pro rata basis for any portion of the annual period the qualifying facility was prevented from generating or delivering electricity for reasons of Force Majeure, a default by the public utility under the power purchase agreement or interconnection agreement, or any interconnection and transmission curtailment initiated by the purchasing utility or the transmitting utility.

(~~15~~13) A purchasing 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 MDG if the qualifying facility does not meet the MDG for three consecutive years if such failure is not otherwise excused by the standard power purchase agreement.

(~~16~~14) Incremental Facility Upgrades.

(a) During the development period, the qualifying facility may make reasonable modification to the design and components of its facility from the design and components contained in the power purchase agreement. The qualifying facility is obligated to provide the purchasing public utility an as-built supplement describing the Facility within 90 days after the commercial operation date. Except as expressly permitted under subsection (~~b~~c) of this section, the Facility as reflected in the as-built supplement may not:

(A) Have a ~~nameplate~~ Nameplate ~~capacity~~ Capacity ~~rating~~ Rating that exceeds the ~~nameplate~~ Nameplate ~~capacity~~ Capacity ~~rating~~ Rating in the power purchase agreement at the time it was executed; or

(B) ~~Result in~~Cause the expected annual ~~net~~ Net ~~output~~ Output specified in the power purchase agreement at the time it was executed to increase by more than 10 percent.

(b) In the event that the qualifying facility seeks to upgrade the facility during the term of the power purchase agreement in a manner that does not increase the Nameplate Capacity Rating of the facility in the power purchase agreement, but which is reasonably likely to cause the expected annual Net Output specified in the power purchase agreement at the time it was executed to increase by no more than 10 percent, such upgrades may be made without the utility's prior approval under this subsection (b) so long as~~During the term of the power purchase agreement, except as permitted under subsection (c) of this section, the facility may not be modified in a manner that materially deviates from the as-built supplement without the qualifying facility providing the purchasing utility~~ the purchasing utility receives (i) a detailed description of the proposed upgrades and their impact on expected Net Output and (ii) revised 12 x 24 delivery schedule, at least six months in advance of the scheduled installation date for the proposed~~'s prior written approval~~. The incremental additional Net Output expected to be generated as a result of the upgrades under this subsection (b) will be subject to the Contract Price in the power purchase agreement. ~~That approval may not unreasonably be withheld, conditioned or delayed, , provided that the purchasing utility is not required to approve any modification of the facility that:~~

~~(A) Results in the facility increasing its nameplate capacity rating beyond the nameplate capacity rating specified in the power purchase agreement at the time it was executed; or~~

~~(B) Is reasonably likely to result in the expected annual net output specified in the power purchase agreement at the time it was executed to increase by more than 10 percent.~~

(c) In the event that the qualifying facility seeks to upgrade the facility during the term of the power purchase agreement in a manner that does not increase the ~~nameplate~~ Nameplate ~~capacity~~ Capacity ~~rating~~ Rating of the facility in the power purchase agreement, but which is reasonably likely to cause the expected annual Net Output specified in the power purchase agreement at the time it was executed to increase by more than 10 percent, ~~but which is reasonably expected to exceed 10 percent of expected annual net output in the power purchase agreement,~~ such upgrades may be made without the utility's prior approval under this subsection (c) of this section subject to the following requirements:

(A) The proposed upgrades may not cause the qualifying facility to fail to meet the current eligibility requirements for either the standard power purchase agreement or standard prices, to breach its generation interconnection agreement, or necessitate network upgrades in order to maintain designated network status.

(B) At least six months in advance of the scheduled installation date for the proposed upgrades, the qualifying facility must send written notice to the purchasing utility containing a detailed description of the proposed upgrades and their impact on expected ~~net~~ Net ~~output~~ Output and revised 12 x 24 delivery schedule and requesting indicative pricing for the incremental additional ~~net~~ Net ~~output~~ Output expected to be generated as a result of the upgrades.

(C) Within 30 days after receiving such a request, the purchasing utility must respond with indicative pricing for the expected incremental additional ~~net~~ Net ~~output~~ Output to be generated as a result of the upgrades and which exceeds 10 percent of the expected annual ~~net~~ Net ~~output~~ Output specified in the power purchase agreement.

(D) Within 30 days after receiving indicative pricing, the qualifying facility ~~may~~ must request a draft amendment to the power purchase agreement to reflect revised pricing for the remaining term of the power purchase agreement, effective upon completion of the upgrades. If it is not reasonably feasible to separately meter the incremental additional ~~net~~ Net ~~output~~ Output resulting from the proposed upgrades, the purchasing utility may create a blended rate based on the proportion the expected incremental additional ~~net~~ Net ~~output~~ Output bears to the expected total ~~net~~ Net ~~output~~ Output following the installation of the upgrades.

(d) Within 90 days after the date on which upgrades are installed under subsections (a), (b), or (c) of this section, the qualifying facility is obligated to provide the purchasing utility an as-built supplement describing in detail the upgraded facility.

(e) A qualifying facility that wishes to install upgrades that would cause the Facility to increase its Nameplate Capacity Rating must terminate its existing power purchase

agreement and may choose to enter a new standard or new non-standard power purchase agreement based on the then current avoided cost. In calculating damages resulting from the early termination of the original standard power purchase agreement, if any, the cost to cover will be calculated based on the pricing set forth in the new non-standard pricing agreement notwithstanding any other provision in these rules to the contrary. A qualifying facility that chooses to negotiate a new power purchase agreement under this subsection will not be liable for damages for any default caused by its failure to maintain eligibility for a standard power purchase agreement.

(~~17~~15) Project Development Security. A new qualifying facility that has executed a standard power purchase agreement that does not meet the creditworthiness requirements in this rule must post Project Development Security for the purchasing public utility's benefit within 60 days of the Effective Date of the standard power purchase agreement. 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 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:

(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 Development 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 Security for damages in the event of default, the qualifying facility will, within 15 days, restore the Project Development 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 Security either a guaranty from a party that satisfies the ~~purchasing public utility's~~ creditworthiness requirements under section (17) of this rule, ~~in a form acceptable to the public utility in its reasonably exercised discretion,~~ or a Letter of Credit in favor of the purchasing public utility. To the extent the public utility receives payment from the Project Development Security for damages in the event of default, the qualifying facility will, within 15 days, restore the Project Development Security as if no such deduction had occurred.

Commented [JU32]: Joint Utilities are offering a more specific Parent Guarantee as a third option. The Joint Utilities believe more clarity could be offered on this point in addition to subsection (b).

(~~18~~16) Default Security. A qualifying facility that has executed a standard power purchase agreement that does not meet the public utility's credit worthiness requirements must post Default Security upon commencing commercial operation. 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:

(a) Cash Escrow Security. The qualifying facility shall deposit the Default Security in an escrow account established by the purchasing utility in a banking institution acceptable to both the qualifying facility and purchasing utility. 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 either a guaranty from a party that satisfies the creditworthiness requirements under section (17) of this rule~~the Credit Requirementspurchasing public utility's creditworthiness requirements, in a form acceptable to the public utility in its reasonably exercised discretion~~, or 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) Step-In Rights and Senior Liens. Default security can be satisfied through grant of step-in rights or a senior lien to the purchasing utility in a form acceptable to the purchasing public utility in its reasonable exercised discretion.~~

(17) Creditworthiness requirements under sections (15) and (16) of this rule may be satisfied by:

(a) A senior, unsecured long term debt rating (or corporate rating if such debt rating is unavailable) of (a) 'BBB+' or greater from S&P, or (b) 'Baa1' or greater form Moody's; provided that if such ratings are split, the lower of the two ratings must be at least 'BBB+' or 'Baa1' from S&P or Moody's, respectively.

(b) If a rating from S&P or Moody's is not available, the qualifying facility must provide financial documentation that supports an equivalent rating as determined by the purchasing utility through an internal process review and utilizing a proprietary credit scoring model. In such case, the purchasing utility will request audited financial statements for the most recent two full years (including balance sheet, income statement, statement of cash flows, and accompanying footnotes), which information is evaluated considering (i) the type of generation resource, (ii) the size of the resource, (iii) the expected energy delivery start date, and (iv) the term of the power purchase agreement. The internal review process will evaluate, at minimum, certain profitability, cash flow, liquidity, and financial leverage metrics.

(18) A qualifying facility of 1 MW or less, that is owned, directly or indirectly, by persons or entities who hold no other beneficial interests in any other qualify facility, does not have to meet the requirements in sections (15), (16), or (17) of this rule if the qualifying facility represents and warrants that:

(a) Neither the qualifying facility nor any of its principal equity owners is or has within the past two 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) Neither the qualifying facility nor any of its principal equity owners is or has at any time

Commented [JU33]: Joint Utilities are offering a more specific Parent Guarantee as a third option. The Joint Utilities believe more clarity could be offered on this point in addition to subsection (b).

Commented [JU34]: The Joint Utilities strongly object to allowing the use of step-in rights and senior liens for Default Security and recommend that these options be removed from the Draft Rules as it is highly unlikely that a QF's lender would allow the utilities to have meaningful step-in rights or liens senior in priority to the lender's rights, and even if the utility were to be granted a first-priority security interest in the QF's project assets, these rights present little to no value to the utilities.
At the January 12, 2023 Hearing, the QF developers confirmed that they could not agree to give utilities security rights with priority over lenders, a position that undermines these alternatives previously sponsored by the same QF developer groups. However, if the Commission chooses to allow a QF to elect to provide step-in rights and liens as Default Security, the rule ***must*** require the QF to solve the "lender problem" and ensure that the purchasing utility is permitted to perfect a first-priority security interest in the project through execution of a form of agreement that is either (1) reasonably acceptable to the utility, or (2) approved by the Commission as an attachment to the PPA. Otherwise, the utility will not be entitled to the QF project's assets of value, if any, and customers will be harmed. That is, in the event of a foreclosure, any proceeds from liquidating the project assets following foreclosure proceedings would likely go entirely to making the lender whole, leaving little, if anything, to cover the utility's damages.
Even if the utility were to be granted a first-priority security interest in the QF's project assets, the utility could recover its damages ***only if*** the QF owns project assets of value. If those assets existed, the value of those assets would need to be greater than the aggregate transaction costs (including litigation risk and cost) involved in liquidating those assets, taking into account that these transaction costs could be significant. Alternatively, if the utility were to "foreclose" by exercising step-in rights and taking control of the facility, the cause of the default would then become the utility's problem—i.e., taking over a failed QF is unlikely to bring benefits to customers and more likely to bring burdens. In short, in the case of a defaulting QF, step-in rights and senior liens not only cannot be realistically granted to utilities (as lenders will require these positions), they also do not provide meaningful security and improperly shift the burden of the QF's default onto customers.

Commented [JU35]: Joint Utilities are offering a more specific Parent Guarantee as a third option instead of step-in rights/senior liens. This should provide QFs more flexibility without transferring costs and risks to customers.

defaulted on any of its payment obligations for electricity purchased from the utility.

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

(19) Insurance requirements. The standard power purchase agreement must specify that 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 "A-" by A.M. Best Company.

(b) Insurance coverage will include:

(A) general commercial liability insurance covering 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; and

(B) Umbrella insurance in the amount of $5,000,000, or greater if desired by the qualifying facility.

(20) Except as explicitly provided in these rules, any qualifying facility that has entered into a standard 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 standard power purchase agreement or receipt of standard pricing reflected in the agreement. No more than once every 24 months, at the request of the public utility, the qualifying facility will provide documentation and information reasonably requested by the public utility to establish the qualifying facility's continued compliance with eligibility requirements for the standard 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 the qualifying facility identifies as confidential, provided that the public utility may provide all such information to the Commission in a proceeding before the Commission.

AR 631 –DRAFT STAFF RULES

ADOPT: **860-029-0121**
RULE TITLE: **Delivery and Purchase under Standard Power Purchase Agreement**
RULE TEXT:

(1) Commencing on the earlier of the commercial operation date or the scheduled commercial operation date of the standard power purchase agreement 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. ~~For off-system qualifying facilities, the public utility shall offer to receive deliveries made by any form of scheduling offered to the qualifying facility by its transmission provider, including intra-hour scheduling.~~

(2) An off-system qualifying facility may deliver and the purchasing public utility must accept energy imbalance ancillary services if:

(a) The transmitting entity or entities require the qualifying facility to procure the services;

(b) The transmitting entity or entities require the qualifying facility to schedule deliveries in increments of no less than one megawatt;

(c) The qualifying facility is not attempting to sell the purchasing public utility energy or capacity in excess of its expected hourly Net Output; and

(d) The energy imbalance service is designed to correct a mismatch between energy scheduled by the qualifying facility and the actual real time production by the qualifying facility.

(3) The purchasing public utility must accept but is not obligated to pay for surplus delivery of energy. For purposes of this rule surplus delivery of energy means:

(a) For on-system qualifying facilities, Net Output at the Point of Interconnection that exceeds the qualifying facility's Nameplate Capacity Rating;

(b) For off-system qualifying facilities, any positive difference between the total energy delivered to the purchasing public utility in a given month and the qualifying facility's total Net Output for the month~~energy delivered to the Point of Delivery in excess of the qualifying facility's net output at the Point of Interconnection, netted over a monthly period~~.

(4) 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 ~~Renewable Energy Credits~~renewable energy certificates transferred under a power purchase agreement shall transfer to the purchasing public utility when generated.

(5) A qualifying facility may not commence commercial operation any sooner than ~~180~~ 90 days before the scheduled commercial operation date of the standard power purchase agreement unless the public utility consents to early operation. If a qualifying facility desires to begin transmitting

Commented [JU36]: Attempting to add this highly technical but operationally important issue into the rulemaking at this stage is inappropriate. Intra-hour scheduling was not subject to careful study and vetting during the informal rulemaking process, resulting in its exclusion from the Draft Rules prepared by Staff after a comprehensive informal rulemaking process. Moreover, this topic was not included in the scope of issues to be addressed in the formal rulemaking phase when AHD issued its scoping memorandum. The Joint Utilities are very concerned about adopting a requirement to accept intra-hourly scheduling when the Commission does not have a fully developed record about the implications or a well vetted draft rule that takes into account the operational impacts, avoided cost pricing effects, or the current industry standards and trends for scheduling. Accordingly, the Joint Utilities recommend that the Commission remove the new intra-hourly scheduling requirement from the Draft Rules and that the topic be addressed in docket UM 2000 where pricing implications can be fully considered.

start-up Test Energy to the purchasing public utility at a date earlier than 90 days, but no more than 180 days, prior to the scheduled commercial operation date, the purchasing public utility will be obligated to purchase such Net Output under the standard power purchase agreement only if the purchasing public utility is able to modify its network resource designation for the Facility such that the output could be delivered using network transmission service at no additional cost or other economic impact to the purchasing public utility.~~The purchasing public utility may require a qualifying facility to wait to commence commercial operation until no sooner than 90 days prior to the scheduled commercial operation if the purchasing public utility is unable to accept delivery from the qualifying facility but is obligated to undertake reasonable efforts to obtain transmission service up to 180 days ahead of the scheduled commercial operation date.~~

(6) The purchasing public utility will accept Test Energy delivered to the Point of Delivery as early as 90 days, but no more than 180 days, prior to the scheduled commercial operation date, subject to section (5) of this rule; provided that, in such case, the purchasing public utility's obligation to purchase Test Energy will not exceed a maximum period of 180 days. The purchasing public utility will pay the qualifying facility the lower of 85 percent of Index Rate or 85 percent of Contract Price for Test Energy delivered prior to the scheduled commercial operation date~~The public utility will pay the qualifying facility the index rate for Test Energy delivered prior to the scheduled commercial operation date.~~

Commented [JU37]: The Joint Utilities propose the following changes to OAR 860-029-0121(5), which mirror provisions already approved by the Commission in the utilities' Community Solar Program PPAs.

Commented [JU38]: The Joint Utilities oppose being required to pay the full Index Rate for Test Energy, which is not consistent with currently approved standard PPAs or the Joint Utilities' negotiated QF and non-QF agreements. For example, under PGE's current standard PPA, PGE pays a discounted as-available rate for Test Energy, and in certain bilateral contracts, PGE pays 50 percent of the contract price. Moreover, PGE's current RFP PPA pays $0 for Test Energy. The Index Rate can significantly exceed the contract price at times—market prices have recently spiked to hundreds or even above one thousand dollars in certain instances. Moreover, if the Test Energy is not delivered as firm energy, accepting the Test Energy could impose *additional* cost on the utility because the utility would be required to hold 1:1 reserves against the Test Energy. Neither AHD nor the QF developers have provided reasonable argument why QFs are entitled to the full Index Rate for Test Energy. For these reasons, the Joint Utilities propose that the purchasing public utility pay the QF the lower of 85 percent of Index Rate or 85 percent of contract price for Test Energy delivered prior to the Scheduled COD. This proposal, which is shown below, is more favorable for QFs than the terms of recent non-QF and RFP PPAs executed by the utilities.

AR 631 –DRAFT STAFF RULES

ADOPT: 860-029-0122
RULE TITLE: **Force Majeure for Standard Power Purchase Agreements**

(1) Every standard 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 standard power purchase agreement (hereinafter referred to as "party") from performing an obligation under a standard power purchase agreement and that:

(a) Is not reasonably anticipated as of the effective date of the standard 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 or 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 sections (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 standard power purchase agreement.

(b) The cost or availability of fuel or motive force to operate the Facility that is not caused by an independent event of Force Majeure.

(c) Economic hardship, including lack of money or increased cost of electricity, steel, labor, or transportation.

(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.

(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 standard 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.

(7) If an event of Force Majeure exceeds [180 days/one year], the party not claiming a Force Majeure defense or delay may terminate the standard power purchase agreement without liability or damages to either party by providing written notice to the other party.

Commented [JU39]: While the Joint Utilities are recommending a 180-day limit on Force Majeure, which is market, they do not oppose a limit on Force Majeure of one year.

ALTERNATIVE: 860-029-0122
RULE TITLE: Force Majeure for Standard Power Purchase Agreements

(1) Every standard power purchase agreement shall include a Force Majeure provision that is based on the common legal definition of the term and complies with the requirements of this section.

(2) Any delay, alleged breach of contract, or failure by the transmission provider or interconnection provider will not constitute an event of Force Majeure unless due to a Force Majeure event as defined in any agreement with the transmission provider or interconnection provider.

(3) If an event of Force Majeure exceeds [180 days/one year], the party not claiming a Force Majeure defense or delay may terminate the standard power purchase agreement without liability or damages to either party by providing written notice to

the other party.

Commented [JU40]: Even if the Commission declines to address the parameters of Force Majeure in great detail in these rules, the Joint Utilities recommend that the Commission nevertheless adopt two specific provisions/policies that prevent parties from abusing claims of Force Majeure.
First, the Joint Utilities recommend that the Commission clarify that any delay, alleged breach of contract, or failure by the transmission provider or interconnection provider ***does not*** qualify as an event of Force Majeure unless that delay, breach, or failure is due to a Force Majeure event as defined in any agreement with the transmission provider or interconnection provider. As discussed above, the Commission has significant specialized expertise regarding interconnection issues in the West and is well-positioned to determine whether a delay, alleged breach of contract, or failure by a transmission provider or interconnection provider is truly an "an unforeseeable event of superior or irresistible force" qualifying as Force Majeure or if it is within the reasonable risks anticipated by off-system QF developers when selecting such projects and entering into off-system PPAs. The Joint Utilities believe this type of event is the latter, and to prevent abuse of Force Majeure claims, the Commission should clarify that delays and breaches of the PPA caused by the transmission provider or interconnection provider do not qualify as Force Majeure.
Second, if an event of Force Majeure extends beyond 180 days, the Joint Utilities recommend that the party not claiming Force Majeure should have the right to terminate the PPA. Extraordinary events that are not reasonably foreseeable at the time of contracting, and which cannot be overcome by reasonable diligence, provide a basis for temporarily suspending the parties' obligations and performance. However, with changing avoided cost prices and the long-term nature of these contracts, it is unreasonable to permit *indefinite* extensions of the parties' rights and obligations. Such a provision is market and protects both parties. Moreover, limiting the time during which Force Majeure can be claimed does not prevent the parties from re-entering a PPA if the Force Majeure eventually resolves. In addition, placing a time limit on Force Majeure events does not expose QF developers to damages claims given that the right to terminate after 180 days is without liability or damages for both parties. Finally, while the Joint Utilities are recommending a 180-day Force Majeure time limit, the Joint Utilities would not oppose a time limit between 180 days and one year.

AR 631 –DRAFT STAFF RULES

ADOPT: **860-029-0123**
RULE TITLE: **Default, Damages, and Termination**
RULE SUMMARY: **This rule specifies requirements related to events of default under standard power purchase agreements.**
RULE TEXT:

(1) The following events, if uncured within the applicable cure period, may constitute a default by the qualifying facility under a standard power purchase agreement for which the purchasing utility may terminate the power purchase agreement subject to the provisions of this rule:

(a) Failure to begin power deliveries by scheduled commercial operation date~~;~~.

(b) Failure to provide Project Development or Default Security in the applicable time frame~~;~~.

(c) Failure to maintain ~~-~~qualifying facility status~~;~~.

(d) Failure to sell entire Net Output to the purchasing public utility ~~unless it does not have an obligation to do so~~ under its ~~PPA~~power purchase agreement~~; and~~.

(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~~MAG for two (2) consecutive years~~;~~.

(h) Failure to satisfy applicable ~~Minimum Delivery Guarantee~~MDG for three (3) consecutive years~~; or~~.

(i) Breach of any warranty or representation in the power purchase agreement.

~~(i)~~(j) Failure to comply with any other material obligation under the power purchase agreement.

(2) The following events, if uncured within the applicable cure period, may constitute a default by the purchasing public utility under the standard power purchase agreement for which the Qualifying Facility may terminate the power purchase agreement subject to the provisions of this rule:

(a) Failure to receive or purchase Net Output~~;~~.

(b) Failure to make a payment when due under the power purchase agreement, if amount of payment is not the subject of good faith dispute~~;~~.

(c) Breach of any warranty or representation in the power purchase agreement~~; or~~.

(d) Failure to comply with any material obligation under the power purchase agreement.

(3) ~~(3)~~ Unless otherwise excused under the standard power purchase agreement by ~~Excused~~

Commented [JU41]: Recommend deleting to avoid confusion since standard PPAs require the QF to sell all net output.

Commented [JU42]: The Joint Utilities support this provision as it is not a "cross-default" provision and is in the utilities' current standard contracts.

Commented [JU43]: This should be the same as with the utilities' event of default in section (2)(d).

~~Delay,~~ Force Majeure, or otherwise, the non-defaulting party is authorized to issue a Notice of Default upon any of the events described in sections (1) and (2), as applicable.

(4) Cure periods:

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

(b) Except with respect to a failure to meet the MAG or the MDG, which failures are not capable ~~If a Notice~~ of ~~Default~~ cure, and as otherwise specified in ~~is issued under~~ subsection (4)(a) of this rule, ~~(1)(b), (1)(c), (1)(d), 1(e), 1(f), or 1(g), the non-~~a defaulting party has 30 days following written notice from the non-defaulting party in which to cure any failure to comply with its obligations under the power purchase agreement~~in which to cure the event of default~~. This 30-day period shall be extended by ~~an additional~~no more than 90 days if:

(A) The failure cannot reasonably be cured within the 30-day period ~~despite diligent efforts,~~;

(B) The default is reasonably capable of being cured within the additional 90-day period~~,~~; and

~~(C)~~ The defaulting ~~Party~~ party provides to the non-defaulting party a remediation plan within 15 days following the date of notice of the default by the non-defaulting party, the non-defaulting party approves such remediation plan, and the defaulting party promptly commences and diligently pursues the remediation plan~~ommences the cure within the original 30-day period and is at all times thereafter diligently and continuously proceeding to cure the failure~~.

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

~~(E)~~(C)

(5) Damages. If damages are incurred as a result of a breach under the standard purchase agreement, the breaching party must remit payment in the full amount of the damages to the non-breaching party no later than 30 days after the breaching party receives an invoice for damages from the non-breaching party if the amount of payment is not the subject of good-faith dispute. The invoice for damages must include a written statement explaining in reasonable detail the calculation of the damages amount.

(6) Subject to the cure periods in section (4), the non-defaulting party may issue a Notice of Termination to terminate a standard power purchase agreement for a default under sections (1) or (2), as applicable.

(7) 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~~ applicable cure period.

Commented [JU44]: Term not defined in these rules.

Commented [JU45]: This language is much clearer and resolves the errors in the current language.

(8) Termination of Duty to Buy. If a standard power purchase agreement is terminated because of ~~Default~~ default by the qualifying facility and the qualifying facility wishes to sell Net Output to the purchasing 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~~ Contract ~~price~~Price, until the expiration date, and may require the qualifying facility to post default security~~until the scheduled end date in the terminated agreement~~. 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 this section through use or establishment of a special purpose entity or other Affiliate.

(9) Termination Damages. If the standard 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 positive difference, if any, between ~~The~~ the public ~~utility's~~ utility's estimated ~~costs to secure~~ replacement power costs and the Contract Price ~~and Renewable Energy Credits, if applicable,~~ for a ~~perioud~~period of 24 months following the date of termination; plus, ~~including any associated transmission necessary to deliver such replacement power; and~~

(b) Any resulting incremental ancillary services and transmission costs resulting from the qualifying facility's failure to deliver during the 24 months following the date of termination; and

~~(a)~~(c) The cost of replacement renewable energy certificates if the qualifying facility would have been required to transfer the renewable energy certificates during the 24 months following the date of termination, if any.

~~The contract price for such 24-month period ("Termination Damages"), provided the damages may not exceed the cost the utility would have incurred to purchase the qualifying facility's power and Renewable Energy Credits under the terminated power purchase agreement.~~ The public utility must calculate the Termination Damages on a monthly basis and in a commercially reasonable manner and provide to the qualifying facility a written statement explaining in reasonable detail the calculation of Termination Damages in the Notice of Termination. Termination damages are due by qualifying facility within 30 days of ~~reciptreceipt~~ of the written Notice of Termination from the public utility.

(10) Duty/Right to Mitigate. Both the purchasing public utility and qualifying facility have a duty to mitigate damages and must use commercially reasonable efforts to minimize any damages it may incur as a result of the other party's performance or non-performance under a standard power purchase agreement.

(11) Security. If a standard power purchase agreement is terminated because of the qualifying facility's default, the purchasing 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 purchasing public utility in whatever form to reduce the amounts that the qualifying facility owes the purchasing public utility arising from such default.

Commented [JU46]: Again, for clarity purpose, the Joint Utilities propose that damages provisions follow the same format.

Commented [JU47]: The Joint Utilities oppose a price cap on damages. The 24-month period for calculating damages itself provides an adequate cap on damages.

(12) 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.

STATUTORY/OTHER AUTHORITY: ORS 183, ORS 756, ORS 757, ORS 758
STATUTES/OTHER IMPLEMENTED: ORS 756.040, ORS 758.505-758.555

AR 631 –DRAFT STAFF RULES

ADOPT: **860-029-0124**
RULE TITLE: **Coordination between Qualifying Facility and Public Utility under Standard Power Purchase Agreements**
RULE SUMMARY: **This rule sets forth requirements for purchasing utilities and qualifying facilities related to coordinating operations of a public utility and qualifying facility under a standard power purchase agreement.**
RULE TEXT:

(1) Coordination with System. The qualifying facility's delivery of electricity to the purchasing public utility under a standard power purchase agreement must be at a voltage, phase, power factor, and frequency as reasonably specified by the 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 as required in the interconnection agreement or determined by the purchasing 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) Planned Outages in standard power purchase agreements.

(a) The qualifying facility must provide the purchasing public utility with an annual forecast of Planned Outages for each year of the purchase period at least one month, but no more than three months, before the first day of that 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 purchasing public utility. Although the Planned Outage schedule should include predetermined outage duration, the outage may be extended when the original scope of work requires more time than originally scheduled, subject to notice of at least five days to the purchasing public utility when feasible.

(b) The purchasing public utility may specify in the power purchase agreement two calendar months in each year in which the qualifying facility may not schedule Planned Outages during times when motive force is available to generate and deliver Net Output from the Facility ("High Demand Months") except to the extent reasonably required to enable a vendor to satisfy a guarantee requirement. Failure to identify the High Demand Months in the power purchase agreement shall constitute waiver of the purchasing public utility's right to require Planned Outages to occur in such months. The purchasing public utility may change either or both High Demand Months ~~with~~ no less than 12 months prior to the first contract year for which the purchasing public utility intends to change the High Demand Month(s). Nothing in the power purchase agreement's provisions limiting Planned Outages during High Demand Months may prohibit a qualifying facility from conducting Planned Outages during High Demand Months at times when motive force is unavailable to generate and deliver energy~~, such as during nighttime for a solar qualifying facility~~.

(3) Maintenance Outages in standard power purchase agreements.

(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 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 purchasing public utility in accordance with subsection (2)(b).

(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.

(c) Once the Maintenance Outage has commenced, the qualifying facility must keep the purchasing 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. Although the Notice of Proposed Maintenance Outage must include an expected completion date and time of the outage, the outage may be extended when the original scope of work requires more time than originally scheduled subject to notice of at least five days where feasible. The qualifying facility must take all reasonable measures consistent with Prudent Electrical Practices to minimize the frequency and duration of Maintenance Outages.

(4) Forced Outages in standard power purchase agreements. 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 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 purchasing public utility of changed circumstances. As soon as practicable, any oral report of a Forced Outage must be confirmed in writing to the purchasing public utility.

(5) Notice of Emergency Deratings and Outages in standard power purchase agreements. Notwithstanding the requirements of sections (42)-(~~64~~) of this rule, the qualifying facility will inform the purchasing public utility, via telephone to a number specified by the purchasing public utility (or other method approved by public utility), of any limitations, restrictions, deratings or outages reasonably predicted by the qualifying facility to affect more than five percent 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.

STATUTORY/OTHER AUTHORITY: ORS 183, ORS 756, ORS 757, ORS 758

AR 631 –DRAFT STAFF RULES

STATUTES/OTHER IMPLEMENTED: ORS 756.040, ORS 758.505-758.555