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March 25, 2022

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' Responsive Comments to Staff's Proposed Rules.

Please contact this office with any questions.

Sincerely,

Alisha Till
Paralegal

Attachments

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

AR 631

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON, Rulemaking to Address Procedures, Terms, and Conditions Associated with Qualifying Facilities Standard Contracts.	**JOINT UTILITIES' RESPONSIVE COMMENTS TO GROUP 1 RULES**

I. INTRODUCTION

Portland General Electric Company (PGE), PacifiCorp dba Pacific Power (PacifiCorp), and Idaho Power Company (Idaho Power) (together, the Joint Utilities) offer these comments in response to the Joint Comments of the Community Renewable Energy Association, Northwest & Intermountain Power Producers Coalition, and Renewable Energy Coalition (together, the QF Trade Associations).[1] To assist the Public Utility Commission of Oregon (Commission) and stakeholders in reviewing the Joint Utilities' recommendations, the Joint Utilities also provide proposed redlines to the Draft Rules adopted by the Commission,[2] reflecting both the Joint Utilities' substantive revisions and minor wordsmithing and clean-up changes regarding the issues in Group 1.[3]

As explained in these comments, the Joint Utilities oppose the QF Trade Associations' proposals that attempt to absolve qualifying facilities (QF) of risk and responsibility related to their development and instead shift the cost and risk onto utility retail customers. Instead, the

[1] Joint Comments of the Community Renewable Energy Association, Northwest & Intermountain Power Producers Coalition, and Renewable Energy Coalition on Staff's Proposed Rules Group 1 (Mar. 11, 2022) [hereinafter "QF Trade Association Comments"].
[2] Docket AR 631, Order No. 21-353 (Oct. 26, 2021).
[3] Attachment A.

Commission should ensure that the Draft Rules discourage speculative contracting, minimize the harm caused by stale pricing, and adequately protect customers in the event a QF defaults.

II. LEGAL AND POLICY BACKGROUND

The QF Trade Associations frame their comments on the Draft Rules by emphasizing Oregon's aggressive new clean energy standards and Oregon's statutory framework mirroring PURPA—claiming that both of these mandates require the Commission to promote QF development.[4] However, as the Joint Utilities' Initial Comments explained in detail, neither state statute requires retail customers to subsidize sophisticated renewable developers and above-market resource costs, or trumps the state and federal mandates that customers be held indifferent to QF development.[5] Rather, PURPA's goal is to encourage development of QFs to the extent they can be developed at a cost that is no more than customers would otherwise pay. On this point, the Federal Energy Regulatory Commission's (FERC) recent order revising its PURPA regulations emphasized the statutory limitations on the requirement to encourage QFs.[6] And FERC specifically noted that PURPA is intended to promote "financially committed developers seeking to develop commercially viable QFs"—not speculative QFs.[7]

As the Joint Utilities' Initial Comments also noted, circumstances have changed since the enactment of both state and federal PURPA laws in the 1970s and 1980s. And renewable energy development has dramatically evolved in the more than 15 years since the Commission comprehensively examined QF prices, terms, and conditions in docket UM 1129.[8] Both the QF

[4] QF Trade Association Comments at 2.
[5] Joint Utilities' Initial Comments at 4-5, 11-12 (Mar. 11, 2022).
[6] Order No. 872, 172 FERC ¶ 61,041 at PP 7-12, 70-75 (July 16, 2020) [hereinafter, "Order No. 872"] (stating "PURPA was not a directive to [FERC] to encourage QF development without limitation" and describing the statutory requirements limiting the ability to encourage QFs).
[7] Order No. 872 at P 688.
[8] Joint Utilities' Initial Comments at 2; *In re Pub. Util. Comm'n of Or., Staff's Investigation Relating to Elec. Util. Purchases from Qualifying Facilities*, Docket UM 1129 (opened Jan. 20, 2004).

and non-QF renewable markets are well-developed, and the utilities each have hundreds of megawatts (MW) of QFs online or under contract. FERC recently "recognized that renewable resources . . . provide a significant share of the electricity currently generated in the United States, [and] that most renewable resources today are not QFs[.]"[9] Indeed, each of the Joint Utilities has acquired significant portfolios of non-QF, non-emitting generation resources in recent years through market-based transactions that afford customers significant protections. These market changes demonstrate that renewable energy development is possible without forgoing standard market terms and conditions that protect retail customers from taking on business risk that developers bear in renewable market transactions. In this context, it is especially important for the Commission to carefully review its QF terms and conditions and balance the encouragement of QFs with necessary customer protections.

Finally, the existence of aggressive clean-energy standards and the Joint Utilities' need for significant renewable generation do not support encouragement of QFs at any cost. Rather, these dynamics make it even more important to (1) avoid requiring customers to overpay for, or otherwise subsidize, renewable generation from QFs; (2) refrain from distorting competitive renewable markets by giving the same developer more favorable terms in QF PPAs than it would receive for the same or similar projects in the bilateral market; and (3) ensure that when customers contract for renewable QF generation, they can count on the contracted-for product being delivered, or that customers will be made whole in the event of QF default. The Joint Utilities' Initial Comments and these Responsive Comments discuss these dynamics in detail with respect to specific rules.

[9] Order No. 872 at P 52 (internal citations omitted).

III. RESPONSE TO QF COMMENTS ON GROUP 1 RULES

A. New Rule #2(3) – Ownership of Renewable Energy Credits (RECs)

The QF Trade Associations recommend changing New Rule #2 to require that QFs opting to take renewable avoided cost prices retain ownership of the Renewable Energy Credits (RECs) produced after the end of the fixed-price period in the standard contract.[10] The QF Trade Associations argue that requiring QFs to surrender RECs when they are paid a market price provides them with insufficient compensation that is "unfair, likely unconstitutional, and violates a recent Ninth Circuit precedent."[11]

The QF Trade Associations acknowledge that this same issue was litigated in docket UM 1610 and that the Commission rejected their position in Order No. 16-174.[12] The QF Trade Associations have presented no factual, legal, or policy reason for the Commission to modify its now long-standing policy—nor has the passage of time or the Ninth Circuit decision cited by the QF Trade Associations changed the context for the Commission's decision. Moreover, because this issue is an avoided cost issue, it is outside the scope of docket AR 631 and should be properly addressed in docket UM 2000, where the Commission will be holistically examining all elements of avoided cost prices, including renewable and non-renewable avoided cost methodologies.

1. The Commission correctly determined that renewable QFs must cede their RECs once the utility is renewable resource deficient.

The QF Trade Associations' argument largely repeats arguments the Commission has already rejected. In docket UM 1610, QF parties and Staff argued that "QFs would be harmed if they had to cede ownership of RECs during a period when they are not compensated for their

[10] QF Trade Association Comments at 3.
[11] QF Trade Association Comments at 3.
[12] QF Trade Association Comments at 3-4.

value."[13] This identical argument lies at the heart of the QF Trade Associations' recommended change to New Rule #2. But the Commission dismissed this argument in Order No. 16-174, because, under Oregon policy, the transfer of RECs is tied to whether the utility is renewable resource sufficient or deficient, not the avoided cost price paid to the QF.[14]

The Commission approved the use of renewable avoided cost prices in Order No. 11-505, explaining: "Renewable QFs willing to sell their output and cede their RECs to the utility allow the utility to avoid building (or buying) renewable generation to meet their RPS requirements."[15] Importantly, however, the QF cedes its RECs only if the utility is renewable resource deficient, meaning that, from the point in time that the deficiency period starts through the end of the PPA, the renewable QF must cede its RECs.[16] This result is logical. Had the utility constructed a REC-generating renewable resource instead of contracting with the QF, the utility would have received the RECs from the resource for the life of the resource, not just during the first 15 years.

The fact the Commission has established a different pricing structure for the last five years of a PPA's term does not mean the utility's resource sufficiency position, which is established at the time of contracting, has suddenly changed during those years. The five-year market price

[13] *In re Pub. Util. Comm'n of Or., Investigation into Qualifying Facility Contracting and Pricing*, Docket UM 1610, Order No. 16-174 at 4 (May 13, 2016).
[14] Docket UM 1610, Order No. 16-174 at 5 ("We find no conflict between Order Nos. 05-584 and 11-505. In Order No. 05-584, we established a 20-year maximum term for a standard contract to facilitate QF financing, fixing prices for only the first 15 years to minimize forecasting error. In Order No. 11-505, we determined that a utility, once it becomes renewable resource deficient, receives a renewable QF's RECs for the remainder of the standard contract. Thus, Order No. 11-505 ties REC ownership to utilities sufficiency or deficiency position. Order No. 05-584 dictates the maximum term of any standard contract and that market prices replace avoided cost prices during the last five years of a 20-year standard contract. RECs continue to transfer to a utility at the beginning of the utility's resource deficiency period.").
[15] *In re Pub. Util. Comm'n of Or., Investigation into Resource Sufficiency Pursuant to Order No. 06-538,* Docket UM 1396, Order No. 11-505 at 9 (Dec. 13, 2011).
[16] Docket UM 1396, Order No. 11-505 at 1.

available to QFs at the end of a 20-year contract term was adopted by the Commission to help limit the potential inaccuracy of avoided-cost forecasts inherent in such long contracts.[17]

The QF Trade Associations argue that since the Commission rejected the same argument in docket UM 1610, the Ninth Circuit has provided additional guidance in *Californians for Renewable Energy v. California Public Utilities Commission*.[18] In that case, the court noted that "where a state has an RPS and the utility is using a QF's energy to meet the RPS, the utility cannot calculate avoided costs based on energy sources that would not also meet the RPS."[19] However, the court in *Californians for Renewable Energy* was simply reiterating FERC's conclusion from a 2010 order—which is the same FERC order the Commission relied on when adopting renewable avoided cost pricing in Order No. 11-505 and that the Commission considered when it concluded in Order No. 16-174 that QFs must cede their RECs for the entire PPA term once the utility is renewable resource deficient.[20] The Ninth Circuit was not announcing a change in law that would call into question the Commission's conclusion in Order No. 16-174 that the transfer of RECs is governed by the utility's deficiency position.

2. The treatment of RECs in avoided cost pricing is far outside the scope of docket AR 631.

The QF Trade Associations note that the Draft Rules do not conclusively resolve the treatment of REC ownership.[21] This is appropriate because, under Oregon policy, how RECs are treated for purposes of avoided cost pricing is an issue that should be addressed in docket UM 2000—not docket AR 631. The Joint Utilities have long-standing concerns regarding how

[17] Docket UM 1610, Order No. 16-174 at 5 ("In Order No. 05-584, we established a 20-year maximum term for a standard contract to facilitate QF financing, fixing prices for only the first 15 years to minimize forecasting error.").
[18] *Californians for Renewable Energy v. Cal. PUC,* 922 F3d 929 (9th Cir. 2019).
[19] *Californians for Renewable Energy*, 922 F3d at 937; QF Trade Association Comments at 4.
[20] *Californians for Renewable Energy*, 922 F3d at 937 (citing *Cal. Pub. Utils. Comm'n*, 133 FERC P 61,059 (2010)); Docket UM 1396, Order No. 11-505 at 4 (citing the same FERC case to support renewable avoided cost pricing).
[21] QF Trade Association Comments at 4.

renewable avoided cost prices are calculated that are not being addressed in this docket. For example, PacifiCorp's current renewable avoided cost pricing is lower than its non-renewable avoided cost pricing. This means that a renewable QF can elect the higher non-renewable pricing and keep its RECs. This absurd outcome means that RECs effectively have a negative price and instead of being a "valuable commodit[y]"[22] for customers are a cost to customers. While the Joint Utilities look forward to addressing this and other avoided cost issues promptly, they understand that docket AR 631 is not the appropriate docket in which to do so.

B. New Rule #2(4) – Common Developer Exception to the Five-Mile Rule

The QF Trade Associations assert that New Rule #2 does not accurately capture the application of the five-mile rule to circumstances in which a developer has multiple projects, consistent with the partial stipulation adopted in docket UM 1129.[23] However, New Rule #2(4)(d) states "two or more facilities will not be held to be owned or controlled by the same person(s) or affiliates solely because they are developed by a single entity," and this language in the Draft Rules is substantively identical to the language from the partial stipulation quoted in the QF Trade Association Comments.[24] It is therefore unclear how or why the QF Trade Associations contend that the Draft Rules do not accurately reflect the stipulation, and the QF Trade Associations do not offer suggested revisions to the Draft Rules to address their concern.

It appears that the QF Trade Associations may be arguing that the five-mile rule should allow the same person to *own* two adjacent projects during development so long as the common developer/owner intends to sell one of the projects before it becomes operational.[25] If this is the

[22] QF Trade Association Comments at 3.
[23] QF Trade Association Comments at 5.
[24] QF Trade Association Comments at 5 ("The partial stipulation states that 'two facilities will not be held to be owned or controlled by the same person(s) or affiliated person(s) solely because they are developed by a single entity.'").
[25] *See* QF Trade Association Comments at 6.

QF Trade Associations' position, it is not supported by the text of the partial stipulation or by the supporting testimony they quote, which states in part that the exception "allows a developer to have part-ownership in *one* of the two or more projects (s)he is developing."[26] Moreover, the QF Trade Associations' apparent interpretation would result in an exception that swallows the five-mile rule. The Joint Utilities support retaining the current language of the Draft Rules regarding the five-mile rule, which is consistent with the partial stipulation from docket UM 1129.

C. New Rule #3(2) – Information Required to Obtain a Draft PPA

1. New Rule #3(2)(b) – Site Control Requirement

The QF Trade Associations state that the Draft Rules regarding evidence of site control are more onerous than FERC allows.[27] To obtain a draft PPA, the Draft Rules require a QF to provide "Documentary evidence that the [QF] has taken meaningful steps to seek site control of the proposed location of the [QF] including, but not limited to, documentation demonstrating:" (A) ownership, lease, or the right to develop; (B) an option to purchase or lease; or (C) "another document that clearly demonstrates the commitment of the grantor to convey sufficient rights…" The QF Trade Associations state that the Draft Rules *require* a QF to provide the information in (A), (B), or (C) and raise the specific concern that the "commitment" language in Option (C) is inappropriate.

As an initial matter, the Draft Rules do not *require* QFs to provide the information listed in subsections (A), (B), or (C). The phrase "including, but not limited to," indicates that these subsections contain examples of acceptable documentation. The Draft Rules *do* require a QF to provide documentary evidence that it has taken meaningful steps to seek site control, and this

[26] QF Trade Association Comments at 6 (quoting Docket UM 1129, ODOE/8, DeWinkel/3 (Jan. 20, 2006)) (emphasis added).
[27] QF Trade Association Comments at 13.

requirement aligns closely with FERC's statement that a state may reasonably require a QF to demonstrate it has taken "meaningful steps to obtain site control adequate to commence construction of the project at the proposed location."[28] In fact, Staff revised the Draft Rules in the informal phase to mirror the FERC language after the QF Trade Associations raised concerns with Staff's original proposal to require a QF to demonstrate that it had obtained site control. Because the site control requirement in the Draft Rules is consistent with FERC's direction, there is no need to further revise this rule.

The QF Trade Associations argue that the Draft Rules' requirements are more onerous than the site-control requirements for a generator seeking interconnection. However, the Joint Utilities disagree that the site-control requirement for obtaining a draft PPA must be the same as the site-control requirement for interconnection. As FERC explained, the purpose of requiring evidence of site control (and other information) to obtain a draft PPA is to show the QF's commercial viability and financial commitment to ensure that utilities are not obligated to, and required to plan for, QFs that are speculative or "that are not sufficiently advanced in their development."[29] The Draft Rules strike an appropriate balance by requiring a QF to provide meaningful evidence but not requiring a QF to show that it has obtained site control.[30]

Moreover, the site control requirement in the Draft Rules is consistent with market PPAs. Utility RFPs typically require bidders to provide binding evidence of site control. For example, PacifiCorp's last all-source RFP required bidders to provide documentation of site control and to attest that they possessed a legally binding agreement or option for all necessary land rights. And PGE's 2021 all-source RFP requires bidders to possess title, an executed lease agreement, an

[28] Order No. 872 at P 685.
[29] Order No. 872 at P 684.
[30] *See* Order No. 872 at P 685.

executed easement, or an executed option agreement.[31] Market PPAs—and not the FERC interconnection requirements—are the appropriate comparators for the standard PPA site-control requirement.

The QF Trade Associations specifically advocate that the Draft Rules should allow a QF to provide exclusivity agreements to negotiate a lease, which is permissible under FERC's interconnection procedures.[32] Even if it were appropriate to apply FERC's interconnection site control requirements in the PPA process, an exclusivity agreement should not be considered sufficient evidence of site control. The fact that a potential lessor agrees to negotiate exclusively with a specific QF for a period of time says nothing about whether the QF will actually obtain site control or what happens when the period of exclusivity ends.

Finally, the QF Trade Associations argue that PacifiCorp's queue reform process allows a deposit in lieu of site control.[33] The Joint Utilities disagree. First, the deposit option is available only for large QFs that are ineligible for standard contracts. Small QFs are required to provide the same evidence of site control included in OAR 860-082-0025(5), which is more onerous than the Draft Rules because the QF must provide demonstration of actual site control—not just meaningful steps to obtain site control.[34] Second, large QFs can pay a deposit to obtain a cluster study but must demonstrate actual site control to obtain a facilities study, which is a precursor to executing an interconnection agreement. Applying a comparable framework to the PPA process would allow a QF to pay a deposit to obtain a draft PPA but would require actual site control prior to obtaining

[31] PGE's 2021 All-Source RFP at 15, *available at*: https://portlandgeneralrfp2021.com/wp-content/uploads/2021/12/2021-All-Source-RFP-Main-Document_12.16.2021.pdf.
[32] QF Trade Association Comments at 13.
[33] QF Trade Association Comments at 13.
[34] OAR 860-082-0025(5) states, "An applicant must provide documentation of site control with an interconnection application. Site control may be demonstrated through ownership of the site, a leasehold interest in the site, or an option or other right to develop the site for the purpose of constructing the small generator facility. Site control may be documented by a property tax bill, deed, lease agreement, or other legally binding contract."

an executable PPA. Because the time between obtaining a draft PPA and an executable PPA could be a matter of weeks, applying the deposit requirement to the PPA process appears entirely unworkable.

2. New Rule #3(2)(c)(A) – Ability to Obtain QF Status Requirement

New Rule #3(2)(c)(a) includes the requirement that, to receive a draft PPA, a QF must demonstrate its "ability to obtain certified qualifying facility status prior to commercial operation." The Joint Utilities support the principle underlying New Rule #3(2)(c)(a) but recommend that the language expressly require a QF to provide a verification that it has obtained QF status, either by providing a Form 556 or a FERC order certifying the QF.

a) Requiring a Form 556 is not burdensome and is consistent with basic due diligence.

The Commission has long required that QFs demonstrate the ability to obtain QF status before obtaining a draft PPA. And while not specifically required by the Commission, QFs typically demonstrate the ability to obtain QF status by providing a Form 556 showing that the project has been self-certified as a QF with FERC. Indeed, Idaho Power's Commission-approved standard contract QF schedule specifically requires the QF to provide a Form 556.[35] In addition, PGE's current standard PPA includes a representation and warranty that QF "is and shall be" a QF as defined by FERC rules and that "Seller has provided the appropriate QF certification." Thus, any QF that has executed a standard PPA with PGE has presumably provided a Form 556. Idaho, Utah, and Wyoming all require that QFs provide a Form 556 in order to obtain a draft PPA.[36]

[35] Idaho Power Company, Schedule 85, *available at*: https://docs.idahopower.com/pdfs/AboutUs/RatesRegulatory/OregonRates/CogenerationSmallPowerProductionStandardContractRates.pdf.

[36] *See* Rocky Mountain Power's Idaho Schedule 38 at Sheet 38.5, *available at*: https://www.rockymountainpower.net/content/dam/pcorp/documents/en/rockymountainpower/rates-regulation/idaho/rates/038_Qualifying_Facility_Avoided_Cost_Procedures.pdf (requiring "demonstration of ability to obtain QF status (FERC Form 556)" to obtain negotiated PPA); Rocky Mountain Power's Wyoming Schedule 38 at Sheet 38-3, *available at*:

Requiring proof of QF certification is reasonable because a utility's obligations under the Draft Rules, and PURPA generally, extend to only QFs.[37] To become a QF and be able to avail itself of the benefits of PURPA, FERC's regulations specifically require that a project self-certify by filing a Form 556 or apply for certification from FERC.[38] Requiring a Form 556 is not burdensome—the Form 556 is a fill-in-the-blank form available on FERC's website. Requiring a Form 556 is not controversial—numerous QFs in multiple states have provided Form 556s for many years without objection, without controversy, and without slowing down the contracting process.

Requiring a Form 556 to obtain a draft PPA is also consistent with the Commission's direction to perform basic due diligence "as early as possible" and "well before providing a final draft executable contract."[39] Performing due diligence early in the contracting process not only protects the utility and retail customers, but also the QF. The Commission "recognize[d] QFs may invest significant project development resources to refine their project details through the contracting process, and have a legitimate expectation that major barriers will be identified and discussed during the process."[40]

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https://www.rockymountainpower.net/content/dam/pcorp/documents/en/rockymountainpower/rates-regulation/wyoming/rates/038_Avoided_Cost_Purchases_from_Non_Standard_Qualifying_Facilities.pdf (same); Rocky Mountain Power's Utah Schedule 38 at Sheet 38.5, *available at*: https://www.rockymountainpower.net/content/dam/pcorp/documents/en/rockymountainpower/rates-regulation/utah/rates/038_Qualifying_Facility_Procedures.pdf (same). *See also* PacifiCorp's Washington Schedule QF at Sheet 2, *available at*: pacificpower.net/content/dam/pcorp/documents/en/pacificpower/rates-regulation/washington/rates/QF_Avoided_Cost_Purchases_and_Procedures_for_Qualifying_Facilities.pdf (requiring a QF to provide "Demonstration of ability to obtain QF status" to obtain a standard or non-standard PPA and listing "FERC Form 556" as illustrative detail for the requirement).

[37] 16 U.S.C. § 824a-3(a).

[38] 18 C.F.R. § 292.203(a).

[39] *Blue Marmot v. Portland Gen. Elec. Co.*, Docket UM 1829, et al., Order No. 19-322 at 16 (Sept. 30, 2019). In *Blue Marmot*, the due diligence involved the QF's proposed point of delivery, but the general principle applies to all aspects of due diligence.

[40] Docket UM 1829, Order No. 19-322 at 16.

Confirming that a counterparty can actually execute the draft PPA is also consistent with the Joint Utilities' non-PURPA contracting practices. In the non-PURPA context, the Joint Utilities would not provide a draft PPA and begin negotiations with a counterparty before confirming that the counterparty is actually eligible and capable of executing the PPA.

b) The QF Trade Associations' opposition to providing a Form 556 is unpersuasive

The QF Trade Associations object both to the language in the Draft Rules requiring a demonstration of the ability to obtain QF status and to the provision of a Form 556.[41] First, the QF Trade Associations argue that "the utilities do not have the discretion to question the status of a QF at the state level and must raise any disputes regarding a QF's status at FERC."[42] The QF Trade Associations also point out that the "Form 556 is also not technically required until the QF is delivering power."[43] These arguments are beside the point. Requiring a Form 556 is not intended to allow the utility to question the QF's status; rather, the requirement ensures that the proposed project *is* a QF and therefore eligible for the draft PPA. The requirement also ensures that the certified QF is materially the same as the project for which a draft PPA has been requested. The Joint Utilities agree that FERC has exclusive jurisdiction to determine QF status. The Joint Utilities also agree that FERC's newly adopted protest process will allow timely resolution of disputes over a QF's self-certification. But that protest process will work most effectively if the QF self-certifies early in the contracting process so that disputes can be resolved before contract execution and before the expenditure of potentially significant resources finalizing a contract for a project that FERC may conclude is not, in fact, a QF.

[41] QF Trade Association Comments at 6-7.
[42] QF Trade Association Comments at 7.
[43] QF Trade Association Comments at 8.

Second, the QF Trade Associations claim the Commission should not require provision of a Form 556 because the form "is not always going to reflect the final project design when it is filed, as the details typically change over time as the project specifics evolve prior to contract execution and ultimate construction."[44] The QF Trade Associations then list a number of material changes that can occur between requesting a draft PPA and commercial operation, including power production levels, conversion and station service requirements, transmission arrangements for off-system projects, where the QF will interconnect, and whether the project's interconnection will be state- or FERC-jurisdictional. This argument highlights the importance of obtaining greater project certainty on the front end, including verification that the Form 556 matches the project. The Draft Rules include expedited timelines from the provision of a draft PPA to provision of a final executable PPA (potentially less than one month) and the QF Trade Associations recommend making the timelines even shorter. If a project has this degree of uncertainty surrounding its fundamental design and configuration, it is premature to provide a draft PPA and begin the fast-track process to contract execution.

Moreover, in the Joint Utilities' experience, it is difficult, if not impossible, to perform reasonable due diligence on a QF when it is a constantly moving target and project specifics may be unknown until potentially very late in the contracting process or right before contract execution. Rather than creating a process that encourages ongoing revisions to project design and allows more speculative contracting based on less certain QFs, the rules should require developers to complete basic project design work before initiating the contracting process.

Third, the QF Trade Associations claim that each time the "QF is required to re-file the [Form 556] and make changes, the contracting process gets unnecessarily delayed further."[45]

[44] QF Trade Association Comments at 10.
[45] QF Trade Association Comments at 11.

However, to the extent that there is a material change that slows down the contracting process, it is because that change must be reflected in the draft PPA, not because of the need to file a new Form 556. For example, the QF Trade Associations point out that when a QF seeks a draft PPA it may not know its power production level.[46] If the power production changes, however, the draft PPA will need to be amended regardless of whether the QF must file a new Form 556. So, to the extent there is a "delay," that delay results from the QF's material change to its project and the need to modify the draft PPA accordingly, not the requirement that the Form 556 conform to the PPA. Modifying the Form 556 should add no additional time provided the QF timely updates its form.

The QF Trade Associations point to a single example, the Dalreed Solar QF, for their assertion that utilities use QF certification to unreasonably delay the contracting process.[47] On the contrary, Dalreed Solar illustrates why it is important for QFs to demonstrate that they can obtain QF status early in the contracting process. In the Dalreed Solar case, PacifiCorp's Commission-approved Non-Standard Avoided Cost Rates Schedule (Schedule) specifically states that a QF must provide a "demonstration of ability to obtain QF status" in order to receive indicative avoided cost pricing. As noted above, QFs typically provide a Form 556 to satisfy this Commission-approved requirement. Dalreed Solar refused to provide a Form 556 *or any other demonstration of its ability to obtain QF status*, despite the Schedule's clear language and PacifiCorp's specific requests. When Dalreed Solar eventually self-certified its project, it failed to serve the Form 556 on PacifiCorp, in violation of FERC's rules.[48] Dalreed Solar's concealment of its self-certification was particularly concerning because the Form 556 contained material misrepresentations of fact

[46] QF Trade Association Comments at 10.
[47] QF Trade Association Comments at 9.
[48] *See* 18 C.F.R. § 292.207(c)(1).

that if accurately disclosed would have demonstrated that its project could not meet the requirements to obtain QF status, a matter that is currently the subject of a protest at FERC.[49]

Finally, the QF Trade Associations claim that a "developer does not need to identify whether it will sell power as a QF or as non-QF in the interconnection process until the System Impact or Cluster Study stage."[50] Although this claim is not directly relevant to the Form 556 requirement, it is incorrect. A developer must designate whether its project will be a QF selling 100 percent of its output to the interconnecting utility when it submits a request for interconnection because that designation determines whether the interconnection request is processed under a utility's FERC-jurisdictional Open Access Transmission Tariff or the Oregon rules. The QF Trade Associations have not provided a persuasive reason that QFs should not be required to provide a Form 556 prior to receiving a draft PPA.

3. New Rule #3(2)(c)(K) – Changing Point of Interconnection or Point of Delivery

The Draft Rules require a QF to identify its requested Point of Interconnection (POI) and Point of Delivery (POD) in order to obtain a draft PPA. The QF Trade Associations do not oppose this requirement but request that QFs be permitted to identify multiple POIs or PODs and to change the POI/POD identified in the executed PPA in the final as-built supplement,[51] which must be provided within 90 days *after* the QF begins commercial operation.[52] The QF Trade Associations argue that the utility should be indifferent to the specific POI.[53]

The Joint Utilities oppose revising the Draft Rules to permit a QF to unilaterally change its POD/POI after executing a PPA. Contrary to the QF Trade Associations' suggestion, it is

[49] *See Dalreed Solar, LLC*, FERC Docket QF20-1037-002, Motion to Intervene and Protest of Portland General Electric Company (Feb. 14, 2022).
[50] QF Trade Association Comments at 10.
[51] QF Trade Association Comments at 13-14.
[52] Draft Rules OAR 860-029-0120(15)(a).
[53] QF Trade Association Comments at 14.

absolutely critical that the utility understand where the QF plans to deliver its output before the PPA is executed; without doing so the utility cannot perform the basic due diligence required by the Commission.[54]

For off-system QFs, it is essential to know the proposed POD so the utility can arrange for transmission service prior to commercial operation and ensure there is sufficient transmission capacity available to accept the output at that POD in order to avoid the exact type of dispute that arose in the *Blue Marmot* case.[55] In cases where there may be insufficient capacity available, the utility may need to initiate the process outlined in New Rule #1 for identifying costs required for transmission-service-related Network Upgrades, work with the QF to identify an alternate POD, or take other steps—before the utility can make a binding commitment in the PPA to accept delivery at a particular point. The Draft Rules recognize the importance of ensuring the POD is viable for the utility, stating that "[t]he purchasing public utility must agree to the Point of Delivery before it is included in [the] standard power purchase agreement."[56]

For on-system QFs, it is also critical to know the POI because the utility must arrange for transmission service and that service must be in place in order to accept the QF's output once it achieves commercial operation. If the POI changes and transmission service is not in place, the utility cannot accept the QF's generation. The chosen POI may also create issues if the transmission service study identifies constraints that impact the utility's ability to deliver the QF output to load. Due diligence requires that the utility understand these potential constraints as soon as possible and certainly well before the PPA is executed and the QF achieves commercial operation.

[54] *See* Docket UM 1829, Order No. 19-322 at 16.
[55] Docket UM 1829, Order No. 19-322 at 6.
[56] Draft Rules OAR 860-029-0120(10).

The Joint Utilities also note that market PPAs do not contain provisions allowing the seller to unilaterally change the POI/POD. In cases where unexpected delivery issues arise, the utilities work with the counterparty to identify alternative options and any corresponding changes to price, timing, etc. The Joint Utilities are willing to similarly work with QFs that desire to change their POI/POD after entering the PPA but strongly oppose giving QFs a unilateral right to do so up until, and even after, they begin commercial operation.

4. New Rule #3(2)(c)(N) – Other Information Requirement

In the list of information required to obtain a draft PPA, the Draft Rules include "other information specified in the utility's avoided cost rates schedule or standard power purchase agreement approved by the Commission." The QF Trade Associations argue this "catch-all" requirement would allow utilities to impose information requirements that Staff rejected and will be used to "abuse" and "impose contracting burdens on QFs."[57]

The Joint Utilities support retention of this provision, which builds flexibility into the rules. Without this provision, the Commission would need to waive or change the rules to permit a utility to require information beyond what is specifically listed in the rules. As circumstances change and technologies emerge and evolve, new information may become relevant that is not currently listed in the Draft Rules. For example, subsection (M) of the rules requires information regarding battery storage systems, which is a newer technology that was not contemplated when prior versions of the rules were adopted. The catch-all provision allows the information requirements to adapt to changed circumstances.

The Joint Utilities dispute the claim that they will use information requirements to impede contracting. But importantly, any "other information" a utility requires must first be approved by

[57] QF Trade Association Comments at 16-17.

the Commission, as the Draft Rule explicitly requires the information to be "specified in the utility's avoided cost rates schedule or standard power purchase agreement approved by the Commission"—alleviating any concern about unreasonable or burdensome requirements. The QF Trade Associations describe PacifiCorp's history regarding requiring interconnection studies for QFs seeking negotiated PPAs as an example of a utility requiring information to impose hurdles in the contracting process.[58] PacifiCorp implemented this policy to avoid speculative contracting and ensure QFs had conducted adequate due diligence, and as the QF Trade Associations acknowledge, PacifiCorp has since changed this policy following Order No. 872, consistent with Order No. 872's direction that commercial viability and QF financial commitment be demonstrated in other ways. This example does not support eliminating the "other information" requirement from the Draft Rules.

D. New Rule #3 – Contracting Timelines

1. New Rule #3(3) – Timeline for Draft PPA

The QF Trade Associations propose shortening the timeline for a utility to provide a draft PPA from 15 business days to 10 business days.[59] Despite recognizing that that the utility may require 15 business days to respond "due to the press of other business,"[60] the QF Trade Associations assert that "it should not take 15 business days" to review the QF's information and provide a draft PPA.[61] While Staff proposed to shorten other aspects of the contracting process, Staff's Draft Rules retain the current 15-business-day timeline for providing an initial draft PPA. Staff's retention of the 15-business-day timeline recognizes that the utilities need adequate time to review all of the information submitted by the QF to ensure the information is complete and that

[58] QF Trade Association Comments at 16.
[59] QF Trade Association Comments at 18.
[60] QF Trade Association Comments at 19.
[61] QF Trade Association Comments at 18-19.

the QF is eligible for the form of standard PPA requested, that utilities frequently receive multiple PPA requests around the same time (e.g., when an avoided cost update is imminent), and that utility employees have important responsibilities other than QF contracting.

The QF Trade Associations also claim, without support, that a longer contracting timeline results in fewer renewable energy facilities being successfully developed.[62] It is unclear why allowing a utility an additional five business days to prepare a draft PPA would prevent QFs from developing. If anything, allowing the utility sufficient time to ensure that the QF is eligible and that the initial draft PPA is correct will result in a smoother contracting process.

2. New Rule #3(5) – Timeline for Non-Substantive Changes

The QF Trade Associations also propose that the turnaround time for non-substantive changes or correction of typographical or utility-drafting errors should be five business days.[63] The Joint Utilities oppose this change, which is unnecessary and will likely lead to disputes. This change is unnecessary because the Joint Utilities act reasonably by responding to changes sooner when they are able and correcting utility errors promptly. The QF Trade Associations' reliance on a few, isolated examples that occurred several years ago—despite acknowledging that PGE's practices have changed—is not persuasive. In addition, the QF Trade Associations' proposed change may lead to more disputes because parties may disagree about whether a change is non-substantive or who is responsible for an error. The Commission should retain consistent timelines applicable under all circumstances in the Draft Rules.

3. New Rule #3 – Timelines for QF Response

The Draft Rules prescribe the timelines for utility action at each step of the contracting process but do not contain similar timelines for QFs to respond. The Joint Utilities propose

[62] QF Trade Association Comments at 18.
[63] QF Trade Association Comments at 17.

including such timelines so that the length of the overall contracting process is consistent and predictable and to prevent QFs from lingering in the contracting queue without clarity about whether or when they may proceed.[64] PGE, for example, has had more than 100 QFs that entered the contracting queue but did not finish the process—and several of these lingered for extended periods of time without responding to status inquiries. Having clear timelines for QFs to respond would allow the utility to remove a QF from the contracting queue if it is not proceeding through the contracting process or responding to inquiries. The QF response timelines should be similar to the utility turnaround times at each step of the contracting process.

4. New Rule #3 – Good Faith Requirement

The QF Trade Associations propose adding the requirement that "[i]n all cases, the utility should use good faith and reasonable efforts to promptly respond sooner than the deadlines established herein."[65] It appears that the QF Trade Associations interpret this proposed requirement as mandating that a utility expedite responses after a utility-caused delay or when an avoided cost update is imminent.[66]

As an initial matter, the Joint Utilities have, and will continue to, contract with QFs in good faith—including by remediating any utility-caused delay when there is a pending avoided cost update. However, the Joint Utilities oppose the proposed addition to the Draft Rules. Because it is inherently subjective, the proposed language would likely lead to disputes about what constitutes "good faith," "reasonable efforts," and "promptly." For example, if the utility employee responsible for drafting or reviewing QF PPAs is on vacation or sick for a week, would the utility satisfy "reasonable efforts" if it responded when that employee returns? If a utility has 15 QFs

[64] PacifiCorp's Schedule 38 for Utah QFs includes response timelines for the QF actions: https://www.rockymountainpower.net/content/dam/pcorp/documents/en/rockymountainpower/rates-regulation/utah/rates/038_Qualifying_Facility_Procedures.pdf.
[65] QF Trade Association Comments at 19.
[66] QF Trade Association Comments at 19.

rushing to obtain PPAs prior to an avoided cost change, are utility personnel required to work after hours or over the weekend to exceed the deadlines in the rules for all of the QFs?

This language is also problematic because it may lead QFs to expect that PPA requests will be processed more quickly than is possible or reasonable. QFs can and should rely on the timelines provided in the rules and time their PPA requests to ensure that contracting can be completed prior to an avoided cost change. If a QF believes that the utility has failed to process its PPA request appropriately and in good faith and that the QF has been harmed as a result, it can bring the issue to the Commission for resolution. Specific rule language is not necessary to provide a remedy but is likely to create additional disputes.

E. New Rule #3 – QF Completing PPA

The QF Trade Associations recommend that QFs be allowed to complete the standard PPA.[67] The Joint Utilities do not oppose providing QFs with Microsoft Word versions of the standard PPA so that the QF and the utility can exchange revisions in redline. However, the Joint Utilities do not support allowing a QF to simply fill in the PPA and provide it to the utility for several reasons. First, permitting QFs to complete the draft standard PPA will upend the orderly contracting process set forth in New Rule #3, which would need to be revisited and wholly revised. Second, this approach may result in errors or introduce confusion, because drafting the PPA requires more than simply adding the QF's name and address. Utilities complete many provisions of the standard PPA after reviewing the QF-provided information and ensuring that the information is correctly translated into the PPA in compliance with the Commission's rules and policies. Finally, providing this option to QFs would likely increase disputes. In the past, QFs have sought to establish a legally enforceable obligation (LEO) instantly by simply signing the form standard

[67] QF Trade Association Comments at 19.

PPA, which circumvents the established process for obtaining a LEO and results in disputes. It is likely that these situations would increase if QFs were permitted to fill out the PPA.

F. OAR 860-029-0120(2) – Fixed Price Term

The QF Trade Associations claim that ORS 758.525(1) and (2) require a 20-year fixed-price term for QF contracts and recommend that the rules reflect this legal requirement.[68] The QF Trade Associations admit, however, that this "issue was fully briefed by CREA in Docket Nos. UM 1725 and UM 1734" and that the "Commission concluded that the statute did not require 20-year fixed-price contracts."[69] The QF Trade Associations provide no argument that compels a different result here; indeed, they simply reiterate the arguments the Commission twice rejected. The briefing in dockets UM 1725 and 1734 was extensive, and the Joint Utilities will not restate it all here. Rather, the Joint Utilities provide the following summary demonstrating that the QF Trade Associations' legal arguments are still wrong.

First, the plain meaning of ORS 758.525 does not mandate a particular contract term.[70] ORS 758.525(1) requires that every two years a utility must file its "forecasted incremental cost of electric resources over at least the next 20 years." ORS 758.525(2) provides a QF the option to select avoided cost prices based on either "the avoided costs calculated at the time of delivery" or the "projected avoided costs calculated at the time the legal obligation to purchase the energy and capacity is incurred." What the statute *does not* dictate is the term over which either of these sets of prices may be locked in.

[68] QF Trade Associations' Comment at 20.
[69] QF Trade Associations' Comment at 22.
[70] *State v. Gaines*, 346 Or 160, 171–172 (2009) (when interpreting a statute, the Commission must look first and foremost to the text and context of the statute itself); ORS 174.010 (Commission cannot "insert what has been omitted, or . . . omit what has been inserted"); *State v. Vasquez-Rubio*, 323 Or 275, 282–283 (1996) (courts will not rewrite a clear statute based solely on conjecture that legislature intended a particular result).

Second, the legislative history of ORS 758.525 is not as clear-cut as the QF Trade Associations claim. Like CREA's argument in dockets UM 1725 and 1734, here the QF Trade Associations rely on committee testimony from a single legislator and one nonlegislator witness, the Oregon Department of Energy. "Cherry-picked quotations from single legislators or of nonlegislator witnesses, are likely to be given little weight, as the likelihood that such scraps of legislative history represent the views of the institution as a whole is slim."[71] Moreover, "isolated statements made in committee are not necessarily indicative of the intent of the entire legislature."[72] Statements made by nonlegislators are particularly suspect; the Supreme Court is "hesitant to ascribe to the Legislative Assembly as a whole the single remark of a single nonlegislator at a committee hearing."[73]

Indeed, when the Commission rejected the same argument in dockets UM 1725 and 1734, it specifically found the "legislative history to be inconclusive and conclude[d] that we are not constrained in setting policy in the matter of contract duration by either the language of ORS 758.525 itself or by the legislative history that gave rise to it."[74] The QF Trade Associations' repetition of the same inconclusive legislative history here does not support a different result.

Moreover, when a statue is unambiguous, as it is here, "no weight can be given to legislative history that suggests—or even confirms—that legislators intended something

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[71] *State v. Kelly*, 229 Or App 461, 466-67 (2009*); Errand v. Cascade Steel Rolling Mills, Inc.*, 320 Or 509, 539 n. 4 (1995) (Graber, J., dissenting), *quoted in Gaines,* 346 Or at 172–73 n. 9 (reliance on "the beliefs of a single legislator or witness" is "fraught with the potential for misconstruction"); *State v. Stamper,* 197 Or App 413, 424–25, *rev. den.,* 339 Or. 230 (2005); *Linn–Benton–Lincoln Ed. v. Linn–Benton–Lincoln ESD,* 163 Or App 558, 569 (1999) ("we are reluctant to draw decisive inferences concerning legislative intent [because] * * * the statements were made by witnesses and are not direct expressions of legislative intent").

[72] *Davis by & Through Davis-Toepfer v. O'Brien*, 320 Or 729, 745 (1995); *Matter of Marriage of Denton*, 145 Or App 381, 399 (1996) *aff'd in part, rev'd in part*, 326 Or 236 (1998) ("Drawing conclusions as to legislative intent largely from colloquies in committee hearings always is risky business.").

[73] *Stamper,* 197 Or App at 424–425.

[74] *In re Idaho Power Co., Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Change, and for Change in Resource Sufficiency Determination*, Docket UM 1725, Order No. 16-129 at 7 (Mar. 29, 2016).

different."[75] Legislative history "cannot create an ambiguity in a statute that is not ambiguous on its face"[76] and a "party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it."[77] As discussed above, ORS 758.525 is not ambiguous—it contains no entitlement to 20-year fixed-price contracts. Thus, even if the legislature intended to mandate 20-year fixed-price contracts, a conclusion unsupported by the legislative history, this fact would not overcome the plain meaning of the statute. The Commission should retain the current policy of 15-year fixed-price terms reflected in the Draft Rules.

G. OAR 860-029-0120(5)-(6) – Time to Scheduled Commercial Operation Date and Beginning of Fixed Price Term

The Draft Rules allow a QF to select a Scheduled Commercial Operation Date (COD) up to four years after executing a Standard PPA (the Effective Date) if, pursuant to subsection (6)(b)(A), the QF has received an interconnection study indicating that it will take longer than three years to interconnect, or if, pursuant to subsection (6)(b)(B), the QF demonstrates that it cannot reasonably be expected to achieve commercial operation within three years and the utility consents, which consent shall not be unreasonably withheld. When the Scheduled COD is more than three years from the Effective Date, the fixed-price term of the PPA is reduced commensurately, pursuant to subsection (6)(c). Consistent with this requirement, subsection (5) provides that the fixed-price term begins on the Scheduled COD. Finally, pursuant to subsection

[75] *Gaines*, 346 Or at 172-73; *Doe 1 v. State,* 164 Or App 543, 559 (1999). While it is true that courts will consider the legislative history even in if the statute is not ambiguous, the court determines the weight, if any, to give the history. ORS 174.020.
[76] *Doe 1,* 164 Or App at 559; *Jones v. GMC*, 139 Or App 244, 269 (1996) (Landau, J., concurring) (legislative history cannot "*create* meaning; it can only *clarify* the meaning of words actually enacted by the legislature"); *Eslamizar v. American States Ins. Co.,* 134 Or App 138, 146 n. 3 (1995) (court cannot ignore statutory language and if the statutory language was "not what the legislature intended, then the legislature has made a mistake, and only the legislature may remedy it.").
[77] *Gaines*, 346 Or at 172-73.

(6)(d), the Scheduled COD may not be more than four years after the Effective Date under any circumstances.

The QF Trade Associations oppose the four-year cap in the Draft Rules and the policy of reducing the fixed-price term when the Scheduled COD is more than three years after the Effective Date.[78] While acknowledging concerns about stale prices, they argue that long development periods result from lengthy interconnection processes and are "a problem that is beyond the control of the QF."[79] They claim that the utility should not be allowed to decrease the QF's fixed-price period by delaying construction of interconnection upgrades.[80] The QF Trade Associations also argue that the fixed-price term should begin on the COD, not the Scheduled COD, so that the QF receives the full fixed-price term if its Scheduled COD is delayed.[81]

The Joint Utilities' Initial Comments explained in detail why the Draft Rules should not allow a more-than-three-year period between PPA execution and Scheduled COD, even if the fixed-price period is reduced, and the Joint Utilities will not repeat those arguments here.[82] However, the Joint Utilities specifically respond to the QF Trade Associations' claim that interconnection delays are outside the QF's control and necessitate a longer development period, while retaining the QF's entitlement to the full fixed-price term.

First, the Joint Utilities disagree with the unsupported suggestion that interconnection delays prevent all or most QFs from coming online within three years. QFs signing PPAs with PGE, for instance, average approximately 2.5 years from execution to commercial operation. While some areas of PGE's system with numerous interconnection requests experience longer

[78] QF Trade Association Comments at 22-25.
[79] QF Trade Association Comments at 24.
[80] QF Trade Association Comments at 24.
[81] QF Trade Association Comments at 27-28.
[82] Joint Utilities' Initial Comments at 19-23.

interconnection timelines due to the volume of requests and the need for re-studies when a generator withdraws, many other areas continue to experience shorter and more predictable timelines. PacifiCorp's queue reform and cluster study process, which took effect in 2020, has resulted in a more streamlined and predictable interconnection study process for generators interconnecting to PacifiCorp.[83] And Idaho Power believes it processes interconnection requests in a timely manner and the time from executing the PPA to COD is generally within a three-year period.

To the extent that the interconnection process *does* prevent a QF from achieving commercial operation within three years of executing a PPA, it is neither consistent with the customer-indifference standard nor commercially reasonable to place all of the risk of stale pricing on utility customers and absolve the QF of any responsibility. QFs decide where to site their projects and when to initiate the interconnection process, and because utilities must provide open access to their systems, a utility cannot reject an interconnection request because the QF has chosen an unreasonable location to interconnect. The utility also does not control the congestion or upgrades that arise when multiple generators seek to site in the same general area. Notably, QF generators experience the same length of interconnection process as non-QF generators. Yet the QF Trade Associations seem to believe that QFs have an inherent right to site anywhere they choose and interconnect promptly and cheaply, that the utility has unfettered ability to interconnect any QF in less than three years, and that the utility and its customers must bear all the consequences if the QF cannot timely achieve COD. No non-QF generator participating in the market receives such preferential treatment and neither should QFs.

[83] *See In re PacifiCorp, dba Pac. Power, Application for an Order Approving Queue Reform Proposal,* Docket UM 2108, Order No. 20-268 (Aug. 19, 2020).

Finally, the Joint Utilities note that the purchasing and interconnecting utility may not be the same. For example, nearly one-third of the QFs that executed PPAs with PGE are off-system QFs that sought to interconnect to another utility.[84] In these circumstances, interconnection issues are driven by conditions on a third-party's system, meaning that the purchasing utility's customers are even further removed from any interconnection issues and should not bear the risk of these issues.

In sum, the Draft Rules already shift substantial risk to customers and should be revised, as explained in the Joint Utilities' Initial Comments. But the Commission certainly should not adopt the QF Trade Associations' recommendation to remove the customer-protections that Staff incorporated into the Draft Rules.

H. OAR 860-029-0120(7)(d) – Delays to Scheduled COD

The QF Trade Associations argue that the standard PPA "should include a carve-out that holds the QF harmless for delays caused by the purchasing utility."[85] They claim that the Draft Rules are insufficient because they cover only those delays caused by an event of Force Majeure or the utility's contractual default.[86] The Joint Utilities have two significant concerns with this proposal.

First, this proposal would unjustifiably shift significant risk to customers, as discussed above in Section II.G. Second, the "utility-caused delay" concept is overly broad and vague and will likely lead to disputes. As examples of "utility-caused delay," the QF Trade Associations explain that a utility may delay providing an interconnection study in a way that does not violate

[84] *See In re Portland Gen. Elec. Co., Application to Update Schedule 201 Qualifying Facility Information,* Docket UM 1728, IRP Roundtable Presentation 22-3, Slide 13 (Feb. 23, 2022) (showing 105 QFs interconnected to PGE and 50 QFs interconnected to PacifiCorp or BPA).
[85] QF Trade Association Comments at 25.
[86] QF Trade Association Comments at 25.

the study agreement or provide an inadequate or erroneous study.[87] These examples do not help clarify the scope of the QF Trade Associations' proposed exception. It is not clear whether the proposed provision would cover delays that result from a busy interconnection queue or the need to conduct re-studies when a higher-queued generator drops out, for example. It appears, however, that the QF would be able to claim the utility caused a delay any time the utility takes an action the QF disagrees with. If a project is delayed in these circumstances, it is unfair and does not reflect market terms and conditions for the QF to be held harmless for such delays and for utility customers to bear the risk of paying stale fixed prices.

The QF Trade Associations also assert that "general contract law" provides protections beyond what is included in the Draft Rules.[88] If this is correct, then QFs already have the protections the QF Trade Associations seek and there is no need to revise the Draft Rules.

I. OAR 860-029-0120(16)-(17) – Project Development and Default Security

The Draft Rules require QFs that do not meet the utility's creditworthiness requirements to provide Project Development Security in the form of cash escrow or a letter of credit. Project Development Security must be posted within 30 days after PPA execution and must be maintained until the QF is operational. The Draft Rules also require QFs that do not meet the utility's creditworthiness requirements to provide Default Security upon commencing commercial operation in the form of cash escrow or a letter of credit. The QF Trade Associations raise several arguments against these requirements, which they characterize as burdensome for small QFs.[89]

[87] QF Trade Association Comments at 26.
[88] QF Trade Association Comments at 25-26
[89] QF Trade Association Comments at 34-35.

They recommend that the Commission retain its current policy of allowing step-in rights and senior liens as acceptable forms of security.[90]

As background, security and creditworthiness requirements ensure that utility customers are protected in the event a QF defaults under its obligations in a standard PPA. This is important because standard PPAs are long-term contracts for up to 10 MW with a nominal value in the range of $5-15 million, meaning that utility customers can be exposed to substantial financial damages if the QF defaults. Financial damage occurs if market prices are higher than the contract price and the QF fails to deliver energy promised under the PPA. As discussed above, many QFs execute PPAs and then default; in 2019, for example, PGE customers suffered damages of over $1 million dollars over a short period of time when QFs failed to deliver promised energy. To protect customers from defaults, the Draft Rules must require (1) meaningful creditworthiness standards, and (2) a sufficient amount and appropriate type of security.

1. Meaningful creditworthiness requirements provide essential customer protections.

The Draft Rules allow a utility to include its creditworthiness requirements in its standard PPA. The Joint Utilities propose a minor change to the Draft Rules to clarify that the utilities can include creditworthiness requirements in the standard PPA that are consistent with those credit requirements used in wholesale (market) transactions.

It is critical for a standard PPA to include a meaningful creditworthiness requirement because only those QFs that are not creditworthy must provide security. In the past, QFs structured as single-purpose LLCs without assets could meet the creditworthiness requirements and avoid

[90] QF Trade Association Comments at 37 ("Specifically, the Commission should maintain its policies of: 1) exempting creditworthy QFs from any security requirements; and 2) allowing QFs unable to demonstrate creditworthiness to post security through step-in rights or senior liens."). The Joint Utilities note that the Draft Rules already exempt creditworthy QFs from the Project Development and Default Security requirements.

posting security. But such QFs lacked significant assets and were judgment-proof, meaning that all risk of QF default shifted to utility customers. This has no parallel in the wholesale power market—for example, PGE's current RFP requires *all* bidders to post security regardless of creditworthiness. Meaningful creditworthiness requirements are necessary to avoid shifting substantial risk from QF projects to utility customers.

2. Step-in rights and senior liens security do not provide meaningful protection for customers in the event of QF default.

By requiring cash escrow or letter of credit security for QFs that do not meet the utility's creditworthiness requirements, the Draft Rules appropriately ensure that the type of security QFs must post provides meaningful protection for utility customers. However, the QF Trade Associations advocate for retaining the option for a QF to provide step-in rights or a senior lien as Project Development (applicable before the QF achieves COD) or Default Security (applicable after the QF is operational).[91] They contend step-in rights and senior liens are valuable forms of Default Security because the QF is already operational.[92] For Project Development Security, they do not discuss senior liens at all but concede that step-in rights might be less valuable and that the value "may be difficult to quantify and may vary across QFs."[93]

The Joint Utilities disagree that senior liens or step-in rights provide meaningful security. First, the value of both options will vary depending on the development status, type, and quality of the project. Both forms of security will likely have minimal value if the project is in the early stages of development—as the QFs concede.[94] Even for an operational project, the value of a

[91] QF Trade Association Comments at 40-42.
[92] QF Trade Association Comments at 40-41.
[93] QF Trade Association Comments at 41-42.
[94] QF Trade Association Comments at 41-42.

senior lien or step-in rights is uncertain because the cause of the project's default would likely become the utility's problem if the utility exercised step-in rights.

Second, both options impose potentially significant costs on the utility to obtain any value that is present. To collect on a senior lien, the utility must go through a foreclosure process, which involves tracing assets, and undertake a notice and sale process—all of which requires many months of process and significant expense. Step-in rights would typically be subordinated to lenders' rights, and therefore obtaining value from step-in rights would likely involve extensive time and legal costs as well.

The QF Trade Associations point to PacifiCorp's development of the Pryor Mountain project as evidence that step-in rights are valuable.[95] However, the Pryor Mountain wind project did not arise out of a QF PPA with step-in rights, nor any other PPA for that matter. It was a unique, circumstance-specific situation under which a developer attempted to complete a QF PPA, failed to do so, sold its development rights to another entity, and PacifiCorp—under the specific context and economic analysis relevant to the project—subsequently purchased the development rights. Nothing about the project demonstrates that step-in rights are reasonable or an appropriate form of security for a QF PPA.

In contrast to step-in rights and senior liens, cash escrow or a letter of credit provide a consistent and predictable amount of security that the utility can access without significant process, time, and expense. The Joint Utilities request that the Commission adopt the Draft Rules requiring cash escrow or letter of credit for Project Development and Default Security.

[95] QF Trade Association Comments at 42.

3. Requiring meaningful security will not impede QF development.

The QF Trade Associations appear to contend that the Commission must retain its existing security policies because they were adopted to address a lack of QF development.[96] The QF Trade Associations review the history from docket UM 1129 in 2005 when the Commission considered and adopted the existing security requirements.[97] As they explain, the Commission found that the risk of QF defaults was unknown but likely relatively low, and the Commission allowed QFs to provide four forms of security: senior lien, step-in rights, cash escrow, or letter of credit.[98] The Commission sought to balance the default risk with the concern that requiring security would impede small QFs.[99]

The Joint Utilities disagree that the policy adopted in docket UM 1129 should be maintained. As explained above and in the Joint Utilities' Initial Comments, the renewable development landscape has changed significantly over the last two decades, and the Joint Utilities have hundreds of megawatts of QFs under contract.[100] With respect to security specifically, the risk of QF defaults is now well-known and is very high, as the QF Trade Associations acknowledge.[101] For example, between 2010 and 2020, the percentage of QFs executing contracts with PGE that reached commercial operation averaged just 50 percent.[102] Moreover, the vast majority of QF developers are sophisticated and have the financial wherewithal to post liquid security.[103] Thus, the QF Trade Associations' unsupported statement that "a certain category of

[96] QF Trade Association Comments at 35-36.
[97] QF Trade Association Comments at 35-37.
[98] QF Trade Association Comments at 35-36 (citing docket UM 1129, Order No. 05-584 at 44-45).
[99] Docket UM 1129, Order No. 05-584 at 45 (May 13, 2005).
[100] Joint Utilities' Initial Comments at 2.
[101] QF Trade Association Comments at 43 ("[T]he current very high failure rates for small QFs, may be a historical anomaly.").
[102] *See* Docket UM 1728, IRP Roundtable Presentation 22-3, Slide 12.
[103] Joint Utilities' Initial Comments at 7-8. The Joint Utilities' Initial Comments demonstrate the inaccuracy of the QF Trade Associations' statement that "many…QFs less than 10 MW are smaller business entities, private individuals, and governments…" QF Trade Association Comments at 43.

small PURPA developers" will be unable to afford to comply with the Draft Rules is unpersuasive. The QF Trade Associations do not provide detail regarding the developers that it contends will be excluded; they simply claim that no standard PPAs should require liquid security.[104]

4. QF investments in development do not replace the need for meaningful security.

The QF Trade Associations also argue that meaningful security is not necessary because QFs already make significant investments in developing a project that are at risk if the project fails.[105] They specifically describe the "expenditures and time investment related to obtaining land and site control, permits, governmental approvals, and numerous studies, generally including interconnection studies," and note that the QF also must pay for interconnection costs.[106] While the QF Trade Associations' argument might have merit if QFs were required to have reached an advanced stage of project development before entering a PPA, there is no such requirement in the Draft Rules. Instead, under the Draft Rules, QFs need not have obtained site control, permits, approvals, or an interconnection study to execute a PPA. And QFs typically enter PPAs very early in the development process before they have completed these steps. Thus, QF investment in developing a project does not protect utility customers or replace the role of a meaningful security requirement in mitigating the risk to utility customers. A defaulting QF may face substantial liability to the purchasing utility. If the QF has no balance sheet and has posted no security, utility customers run the risk of not collecting for this claim against the QF. In such scenarios, utility customers are not protected, much less made whole, if they are told that the QF invested in the project that defaulted and has caused substantial financial harm.

[104] QF Trade Association Comments at 37-39.
[105] QF Trade Association Comments at 38.
[106] QF Trade Association Comments at 38-39.

5. Neither PGE's actions nor the Commission's decisions bear the blame for the rate of QF failures.

The QF Trade Associations acknowledge that the recent failure rate for small QFs has been "very high" but attempt to place the blame on PGE and the Commission. While the Joint Utilities question the value in this docket of rehashing past litigation and Commission decisions with which the QFs disagree, the Joint Utilities will briefly respond to the QFs' claims.

First, the QF Trade Associations assert that "[t]he main reason that QFs . . . have failed is because of the challenges associated with interconnecting to PGE."[107] But for PGE's errors, they claim, "numerous projects would likely have come on line and done so on time."[108] In support of these statements, the QF Trade Associations point to just three cases—two of which were settled without any admission or finding of wrongdoing by PGE and the third of which is currently pending Commission resolution.[109] It is axiomatic that allegations in complaints are simply allegations—nothing more—and PGE strenuously disputes the claim that its interconnection process is solely responsible for numerous QF failures. Moreover, objective evidence demonstrates that QFs interconnecting directly to PGE have a lower termination rate and achieve COD more quickly on average than off-system QFs selling to PGE, which undermines the QF Trade Associations' claim that PGE's interconnection process is responsible for the rate of QF failures.[110]

Second, the QF Trade Associations argue that the Commission's decisions regarding interconnection and standard-contract interpretation have increased the QF failure rate.[111] They

[107] QF Trade Association Comments at 43.
[108] QF Trade Association Comments at 44.
[109] QF Trade Association Comments at 44 n.98.
[110] Excluding QFs that have signed PPAs but not yet achieved COD, 46 percent of QFs interconnecting to PGE have terminated their PPAs, while 60 percent of off-system QFs selling to PGE have terminated their PPAs. *See* Docket UM 1728, IRP Roundtable Presentation 22-3, Slide 13; *see also id.* Slide 17.
[111] QF Trade Association Comments at 44.

discuss four specific cases:

1. The QF Trade Associations claim that the *Sandy River Solar* decision removed a tool (the option to hire third-party contractors to perform interconnection upgrades) that could have aided QF interconnection. As discussed in greater depth below, the Commission's decision in *Sandy River* simply interpreted the plain language of the Commission's existing rules—it did not establish a new or unexpected policy.[112]
2. The QF Trade Associations claim that the Commission's decision in docket UM 1931 (that the fixed-price period in PGE's standard contract began at contract execution) upset the settled expectation of the QF community. However, the claim that QFs were unaware of how PGE interpreted its standard contract is not credible given that the same QF Trade Associations filed a complaint against PGE on this very issue in 2016.[113] While QFs may have been surprised by the Commission's decision, they were already on notice regarding PGE's interpretation of its contract and should have been aware that the Commission could agree with PGE.
3. The QF Trade Associations next discuss docket UM 1894 in which the Commission determined that PGE's standard PPA did not allow QFs to revise their nameplate capacities after contract execution but before coming online. Given the narrow scope of this decision, it is unclear how it could have substantially impacted QF development in Oregon. But if numerous QFs executed PPAs knowing that the only way they could be successful was if they were allowed to revise their size later, then such QFs were not making prudent development decisions.

[112] *Sandy River Solar, LLC v. Portland Gen. Elec. Co.*, Docket UM 1967, Order No. 19-218 at 23 (June 24, 2019).
[113] *See Nw. and Intermountain Power Producers Coalition, Community Renewable Energy Ass'n, and Renewable Energy Coalition against Portland Gen. Elec. Co.,* Docket UM 1805.

4. Finally, the QF Trade Associations claim that the Commission's decision in docket UM 2051 regarding when PGE could terminate a QF's PPA surprised QFs. Because that case involved a termination provision that has not been used in PGE's standard PPAs since 2015, the Commission's decision had no impact on the vast majority of QFs that have signed PPAs with PGE.

In sum, the QF Trade Associations have not demonstrated that either PGE's actions or the Commission's decisions are responsible for the high failure rate of QFs that executed standard PPAs.

6. The Washington Standard QF PPAs are not dispositive.

The QF Trade Associations argue that the Commission should disregard PacifiCorp's Washington Standard QF PPA, which requires liquid security, and should instead look to the Avista and Puget Sound Energy Washington Standard QF PPAs, which exempt small QFs from security requirements.[114] Given that the utilities in Washington have different security provisions in their standard PPAs and that the Washington Commission does not have one standard policy on this issue, the Joint Utilities agree that the relevance of any Washington Standard PPA on this issue is limited.[115] However, the Joint Utilities note that other states require or permit security in QF PPAs.

J. OAR 860-029-0120(20) – Jurisdiction Language

The QF Trade Associations support removing the jurisdiction language in the Draft Rules, claiming that the language has been interpreted by the Commission in a way that illegally expands the Commission's jurisdiction.[116] The order they cite for this proposition is currently on appeal,

[114] QF Trade Association Comments at 51.
[115] *See* QF Trade Association Comments at 49.
[116] QF Trade Association Comments at 28.

and if the Commission is ultimately determined to have overstepped its jurisdiction, then the rules can be revised if necessary. However, the Commission has consistently ruled that it has jurisdiction to interpret provisions in QF PPAs,[117] and the U.S. District Court for the District of Oregon has also found that the Commission has statutory authority and expertise to interpret QF PPAs.[118] That the QF Trade Associations disagree with the Commission's orders does not provide a basis for removing the jurisdiction portion of the Draft Rules. The Joint Utilities support updating the language of the Draft Rules to implement the Commission's rulings regarding jurisdiction, as explained in the Joint Utilities' Initial Comments.[119]

K. Reasonableness Requirements

The QF Trade Associations request that the Commission add a requirement, covering the entire division of rules, that, in implementing the rules, "the utilities must act reasonably at all times."[120] They assert that "omitting this requirement from the rules could undermine the Commission's authority to hold utilities accountable for unreasonable behavior."[121] The QF Trade Associations' concern apparently arose from the *Sandy River Solar* case.[122] The Joint Utilities object to the QF Trade Associations' recommendation to include an overarching reasonableness requirement for utility actions because it would inject uncertainty into the contracting process and encourage litigation. In addition, the QFs' proposal is one-sided, allowing room for the QFs to dispute every choice the utilities make, while allowing QFs to exercise their discretion free of

[117] *See, e.g.*, *Portland Gen. Elec. Co. v. Dayton Solar I LLC, et al.*, Docket UM 2151, Order No. 21-210 (June 25, 2021); *Portland Gen. Elec. Co. v. Alfalfa Solar I LLC et al.*, Docket UM 1931, Order No. 18-174 at 3-5 (May 23, 2018); *Portland Gen. Elec. Co. v. Pacific Northwest Solar LLC*, Docket UM 1894, Order No. 18-025 at 4-7 (Jan. 25, 2018).
[118] *See Alfalfa Solar I, LLC v. Portland Gen. Elec. Co.*, 2018 U.S. Dist. LEXIS 92771 at *13-26 (May 31, 2018).
[119] Joint Utilities' Initial Comments at 26.
[120] QF Trade Association Comments at 29.
[121] QF Trade Association Comments at 29.
[122] QF Trade Association Comments at 29-31.

question. The Joint Utilities also disagree with the QFs' characterization of the utility position and interpretation of the Commission decision from the *Sandy River* case.

As an initial matter, *Sandy River* involved interpretation of an interconnection rule that stated that the utility and an interconnection applicant "*may* agree . . . to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades."[123] The Commission found that the word "may" was permissive and, combined with the lack of reasonableness language in the rule, led to the conclusion that the rule should be interpreted as giving the utility discretion as to whether to agree to hiring a third-party contractor.[124] The Joint Utilities believe that the Commission's decision in the *Sandy River* case was reasonable and appropriate.

In contrast, the QFs' proposal to inject a reasonableness requirement into every rule, and possibly every contract provision, is not appropriate. The purpose of a contract is to lay out the rights and responsibilities of each of the parties, and as such, contracts will always grant to one party or the other decision-making authority as to certain rights and obligations. For instance, Draft Rule OAR 860-029-0120(2) grants the QF the right to select a purchase term for the PPA of up to 20 years. The utility must accept the QF's decision on this point, regardless of whether the utility believes that term is reasonable under the circumstances. Similarly, OAR 860-029-0120(12) allows the utility to issue a Notice of Default, and subsequently terminate a standard PPA for failure to meet the mechanical availability guarantee (MAG) if the QF does not meet the MAG for two consecutive years—regardless of how close to meeting the MAG the QF might have been. In this instance, the QF must live with the utility decision, even if the QF disagrees.

[123] OAR 860-082-0060(8)(f) (emphasis added).
[124] Docket UM 1967, Order No. 19-218 at 23.

Importantly, the goal of such clear allocation of rights is not to free parties to act unreasonably, but rather to anticipate that the parties may have different views of what is reasonable, and given that fact, eliminate uncertainty and avoid litigation. On this point, if the parties and the Commission have learned anything over the many years of PURPA implementation, it is that the utilities and QFs do not agree on what is reasonable in a host of situations. Therefore, requiring "reasonableness" in the implementation of every provision of these rules is sure to result in a whole new generation of PURPA complaints as soon as the final rules in this docket are adopted.

Moreover, it is important to note that there are circumstances where the Commission may find a reasonableness standard should be applied; in such instances, the Commission can insert a reasonableness standard on a case-by-case basis. For instance, Draft Rule OAR 860-029-0120(10) provides the utility with the right to withhold consent to an off-system QF's point of delivery—but expressly states that "[t]he purchasing utility may not unreasonably withhold agreement." And there are a host of rule provisions that incorporate a reasonableness standard (e.g., references to assessing "reasonable costs,"[125] or damages "reasonably incurred"[126]).[127] The QFs' proposal, however, would upset the intended allocation of rights and responsibilities presented in the Draft Rules by failing to distinguish when discretion is appropriate.

[125] Draft Rules OAR 860-029-0120(11).
[126] Draft Rules OAR 860-029-0120(8)
[127] S*ee also* Draft Rules OAR 860-029-0120(15)(b) ("without the purchasing utility's prior written approval (which approval may not unreasonably be withheld, conditioned or delayed), provided that…"); Draft Rules OAR 860-029-0120(19) ("the qualifying facility will provide documentation and information reasonably requested by the public utility…"); Draft Rules New Rule #7(1) ("The qualifying facility's delivery of electricity…must be at a voltage, phase, power factor, and frequency as reasonably specified by the purchasing utility"); Draft Rules New Rule #7(3) ("If the qualifying facility reasonably determines that it is necessary to schedule a Maintenance Outage…"); Draft Rules New Rule #7(3)(a) ("The qualifying facility must take all reasonable measures consistent with Prudent Electrical Practices to not schedule any Maintenance Outage during the High Demand Months…"); Draft Rules New Rule #7(3)(b) ("The qualifying facility must use all reasonable efforts to comply with any request to modify the schedule for a Maintenance Outage…").

Finally, the Joint Utilities note that if the Commission were inclined to adopt an overarching reasonableness requirement, it should apply to the actions of QFs and not just to utilities, as the QFs propose. For example, the Draft Rules grant the QF sole discretion to select whether to sell RECs and obtain renewable avoided cost prices, or whether to retain RECs and obtain non-renewable avoided cost prices.[128] In situations where the renewable prices are—illogically—lower than the non-renewable prices, a utility could argue it is unreasonable for a QF to select the renewable prices. If the utility did so, it is almost certain that litigation would ensue. Similarly, the Draft Rules do not presently allow utilities to question the reasonableness of a QF's chosen COD, even when facts and circumstances demonstrate that the QF's timeline is objectively unreasonable. If a reasonableness requirement were applied, the utility would be free to object to the selected COD, and again, litigation would almost certainly be the result.

In the end, the Joint Utilities' objection to the QFs' proposed reasonableness requirement is not because the utilities want to do things that are unreasonable. Rather, the concern is that contracts and the rules give parties certain rights and obligations. Some may be subject to a reasonableness requirement, but others give either party a clear obligation or a clear right. Indeed, providing certainty and clarity is one of the benefits of entering into contracts and having rules. It allows stakeholders to plan and reduces the risk of disputes and litigation. The QFs' ill-considered blanket reasonableness proposal will have the exact opposite impact, as under this proposal, parties will not only have to comply with the clear terms of Commission rules but also with a nebulous, undefined additional standard that is open to competing definitions and interpretations depending on the perspective taken and the interests prioritized. The Joint Utilities are open to considering any particular request to add or qualify rights or obligations by a reasonableness standard. Indeed,

[128] *See* Draft Rules New Rule #2(3).

as noted above, several of the rules and contractual terms already include such a standard. The way to address concerns about reasonableness is on a case-by-case basis and not through a general presumption that will create confusion and increase the likelihood of disputes between the parties. The Commission should reject the QF Trade Associations' proposal to significantly change the meaning of the Draft Rules—to the detriment of both utilities and QFs.

L. Applicability and Retroactivity

The QF Trade Associations recommend clarifying which of the Draft Rules apply on a prospective basis, "while not inadvertently purporting to override provisions of existing PPAs."[129] The Joint Utilities agree that changes or new provisions in the Draft Rules should apply prospectively.

The QF Trade Associations also note that some of the Draft Rules express a policy but do not make clear whether "such rule provisions are intended to be included as a provision within PPAs."[130] The Joint Utilities understand that the Draft Rules generally express requirements that the utilities' standard PPAs and QF schedules must implement, but that the Draft Rules mandate specific PPA language only where they specifically say so. For example, OAR 860-029-0120(20) says the PPA "must include language that substantially conforms to the following…" In the informal phase, Staff and stakeholders considered attempting to develop PPA language and adopt a form PPA but ultimately determined not to pursue that approach. In light of this decision, the Joint Utilities generally do not support adopting specific PPA language that must be included in every standard PPA. Except in certain limited circumstances (such as jurisdiction), the Joint Utilities believe the rules should set forth requirements or concepts to be incorporated through express contractual language in utility compliance filings at the conclusion of the rulemaking.

[129] QF Trade Association Comments at 31.
[130] QF Trade Association Comments at 33.

M. Applicability to Standard and Negotiated PPAs

The Joint Utilities agree with the QF Trade Associations that the Draft Rules should make clear to which types of QF PPAs they apply.[131] The Joint Utilities understand this rulemaking to be addressing *standard* PPA process, terms, and conditions only.[132]

IV. CONCLUSION

The Joint Utilities urge the Commission to adopt the Draft Rules with the redlines shown in Attachment A and to reject terms and conditions for standard PPAs proposed by the QF Trade Associations that will increase the risk to utility customers.

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[131] QF Trade Association Comments at 33-34.
[132] Attachment A.

ATTACHMENT A

to

Joint Utilities' Responsive Comments

OAR 860-029-0010 – Definitions for Division 029 Rules

Commented [JU1]: The Joint Utilities included all definitions but commented only on those implicated by the Group 1 rules.

(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 operational and reliable, the Facility is fully interconnected, fully integrated, and synchronized with the System, and the qualifying facility has satisfied the criteria required by the power purchase agreement to commence operation and begin operating.

(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 ~~power purchase agreement~~ Effective Date and ending at 24:00 PPT the day before the scheduled commercial operation date.

(15) “Effective Date” means the date on which a power purchase agreement is executed by both the qualifying facility and the public utility.

(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" means a QF that is or has been operational before the effective date of a power purchase agreement.

(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 is contracted to pay 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-XXXX [New Rule #].

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

(26) "Forced Outage" means NERC Event Types U1, U2 and U3, and specifically excludes any Maintenance Outage or Planned Outage.

Commented [JU2]: A portion of Eastern Oregon is on Mountain Time. Need to discuss how this rule would impact any QFs in that area and consider revisions.

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

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

(30) "Maintenance Outage" means NERC Event Type MO and includes any outage involving ten percent (10%) of the Facility's Net Output that is not a Forced Outage or a Planned Outage.

(31) "MW" means megawatt.

(32) "MWh" means megawatt-hour.

(33) "Nameplate Capacity Rating" means the 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) "NERC" means the North American Electric Reliability Corporation.

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

(36) "Network Upgrade~~s~~" 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) "New qualifying facility" means a qualifying facility that is not an existing qualifying facility.

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

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

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

(43) "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 on which it is located.

(44) "Planned Outage" means NERC Event Type PO and specifically excludes any Maintenance Outage or Forced Outage. A "Planned Outage" is also known as a "Scheduled Outage".

(45) "Point of Delivery" means for agreements with 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 Interconnection.

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

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

~~4~~(48~~24~~) "Purchase" means the purchase of electric energy or capacity or both from a qualifying facility by an electric utility.

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

(49) "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.

~~(50) "Purchase term" means the period of a power purchase agreement during which the qualifying facility is selling its output to the public utility.~~

(51) "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).

Commented [JU3]: The numbering from this point on needs to be updated, because the Draft Rules inadvertently combined two definitions.

Commented [JU4]: Deleted "purchase term" because it appears to have the same meaning as "purchase period"

(52) "Qualifying facility's cost to cover" means the positive difference, if any, between (a) the contract price per MWh, and (b) the net proceeds per MWh actually realized by a qualifying facility for the output not purchased by the public utility as required by a power purchase agreement.

(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.

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

(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.

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

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

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

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

(60) "Scheduled commercial operation date" means the date selected by the qualifying facility on which the qualifying facility intends to be fully operational and reliable, ~~and~~ able to commence the sale of energy or energy and capacity to the purchasing public utility, and otherwise able to satisfy the definition of Commercial Operation Date.

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

(62) "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.

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

Commented [JU5]: "and"?

(64) "System" means the electric transmission and distribution system owned or operated by the purchasing public utility.

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

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

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

(68) "Time of delivery" means:

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

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

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

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

(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.

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

(71) "T~~otal t~~erm" is the total duration of a power purchase agreement starting on the Effective Date and ending the final day of the purchase period.

OAR 860-029-0005 – Applicability of Rules

(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

Commented [JU6]: This existing rule is not included in the Draft Rules but seems to be implicated by the "Applicability" discussion.

While the Joint Utilities have not provided comprehensive redlines intended to address the applicability issues, we look forward to discussion of these issues and refinement of this rule.

conditions that would otherwise be provided by these rules, provided such rate, terms, or conditions do not burden the public utility's customers.

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

~~The public utility's internal procedural requirements and information needs;~~

~~Any contract offered by the public utility is subject to negotiation;~~

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

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

(34) 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.

OAR 860-029-XXXX New Rule #2 Eligibility for Standard Power Purchase Agreements (PPAs)

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

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

(3) Renewable qualifying facilities that satisfy the criteria of subsection (1) are eligible to select the purchasing public utility's standard renewable avoided cost prices. A renewable qualifying facility choosing the standard renewable avoided cost prices must cede all RECs generated by the Facility to the purchasing public utility while the qualifying facility is receiving deficiency-period pricing from the purchasing public utility and during any other period of the power purchase agreement ordered by the Commission.

(4) The determination of nameplate capacity rating for purposes of determining whether a qualifying facility meets the size criteria in subsections (1) and (2) is based on the cumulative nameplate capacity 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) Facilities are located on the same site as a qualifying facility if the Facilities are located within a five-mile radius of the qualifying facility and use the same source of energy or motive force to generate electricity as the qualifying facility or, are otherwise associated with, the qualifying facility.

Commented [JU7]: This section addresses the contracting process, which is now covered by New Rule #3.

(b) For purposes of this section:

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

(B) Affiliate(s) are persons sharing common ownership or management, acting jointly or in concert with, or exercising influence over, the policies of another person or entity, or wholly owned subsidiaries that do not have common ownership.

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

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

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

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

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

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

(d) Notwithstanding subsections (4)(a) and (b), two or more qualifying facilities that otherwise are not owned or operated by the same person(s) or affiliate~~s~~(s) or are not otherwise associated will not be determined to be a single qualifying facility solely because they~~or~~ have a shared interest or agreement regarding interconnection facilities, interconnection-related system

upgrades, or any other infrastructure not providing motive force or fuel. ~~For the purposes of this subsection, t~~Two or more 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.

(5) Disputes regarding eligibility for a standard power purchase agreement under this rule will be resolved by the Commission.

OAR 860-029-XXXX New Rule #3 Process for Obtaining Standard Power Purchase Agreement ~~(PPAs)~~

(l) 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.

~~Note:~~ The provision of a letter of intent or other non-binding documentation of site control, such as an indication of interest to lease, or a qualitative description of the state of site control development, in and of themselves or together, are not sufficient to satisfy this required site control evidence.

Commented [JU8]: The Joint Utilities recommend styling this as a continuation of (b) because the nature of a "note" is unclear.

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

(A) demonstration of ability to obtain certified qualifying facility status prior to commercial operation; for 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-XXXX [New Rule# 2],

(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,

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

(F) estimate of 12 x 24 delivery schedule and 8760 generation profile,

(G) motive force or fuel plan,

(H) proposed commercial operation date,

(I) proposed contract term,

(J) proposed pricing provisions,

(K) Point of Delivery ~~or~~ and Interconnection,

(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, whether it is DC/AC coupled, description of technology used by the 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.

(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 [insert cross-reference], an 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 commercially reasonable revisions based upon the expected performance of the qualifying facility until the date the qualifying facility commences commercial operation, ~~.~~ provided that any such revision must be consistent with OAR 860-029-0120(15).

(3) Once a qualifying facility has asked for a draft standard power purchase agreement and provided the information required under subsection (2), the public utility has fifteen (15) business days to provide the qualifying facility a draft 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.

Commented [JU9]: The Joint Utilities require information about the POI for off-system QFs to understand and review their third-party transmission-service arrangements.

Commented [JU10]: If the QF Trade Association recommendation to remove (N) were adopted, the Joint Utilities might have additional standard information requirements that they would seek to include in the rules.

Commented [JU11]: This section should be removed if the Commission adopts the Joint Utilities' recommendation to not allow QFs to select a Scheduled COD more than three years after the Effective Date.

(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 ~~ten~~ fifteen (~~10~~15) business days to (i) notify the qualifying facility it cannot make the requested changes, (ii) notify the qualifying facility it does not understand the requested changes or requires additional information, or (iii) provide a revised draft power purchase agreement. ~~However, the public utility will have fifteen (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 subsections (4) and (5) will continue until both the qualifying facility and the purchasing public utility agree to the terms of the draft standard power purchase agreement, i.e., neither the qualifying facility not the purchasing public utility have outstanding issues, corrections, or comments regarding the draft power purchase agreement.

(7) After the parties concur on the terms of the draft standard power purchase agreement, the qualifying facility can submit a written request to the public utility for a final executable version of the power purchase agreement. The public utility has fifteen~~ten~~ (15~~0~~) business days from the receipt of the written request to provide a final executable form of the power purchase agreement to the qualifying facility.

(8) Upon receipt of the final executable form of the standard power purchase agreement signed ~~executed~~ by the qualifying facility, the purchasing public utility has fifteen~~ve~~ (15) business days in which to sign the final executable agreement.

OAR 860-029-0120(1)

(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.

OAR 860-029-0120(2)

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

OAR 860-029-0120(3)

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

OAR 860-029-0120(4)

Commented [JU12]: This sentence should remain if the Commission elects to retain the 10-business-day timeline. If this sentence remains, the Joint Utilities propose expanding it to apply in the event material changes to a draft PPA are required, such as:

- A change in electrical generating equipment that increases power production capacity by the greater of 1 MW or five percent of the previously certified capacity of the QF;
- A change in ownership in which an owner increases its equity interest by at least 10 percent from the equity interest previously reported;
- An addition or change in the battery system of a project;
- Any change that triggers a legal requirement for the developer to amend the FERC Form 556 on which the QF relies for QF eligibility, provided that in this scenario, the utility should not be required to issue a revised draft PPA until the later of the expiration of the fifteen business day period following the developer's request for an executable PPA and the fifteenth business day following the date on which the QF delivers to the utility an amended FERC Form 556 that corrects the applicable non-conformities; or
- Any change to avoided cost pricing or any other circumstances outside the utility's control that require a substantive modification be made to the PPA.

Commented [JU13]: This subsection should be removed and condensed with the definition of "Term."

(4) The development period of a standard power purchase agreement begins on the Effective Date~~, which is date the power purchase agreement is executed by both parties, unless the start of the development period is delayed by the initiation of the Network Upgrade cost allocation process in OAR 860-029-XXXX [Rule #1]~~. The development period ends at 24:00 P.T. the day before the scheduled commercial operation date specified in the standard power purchase agreement.

OAR 860-029-0120(5)

(5) The purchase ~~term~~ period of a standard power purchase agreement begins on the scheduled commercial operation date.

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

OAR 860-029-0120(6)

(6) A qualifying facility may specify ~~a~~ the scheduled commercial operation date for a standard power purchase agreement to be a date no later than three years from the Effective Date of the 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 than three years from the Effective Date of the standard power purchase agreement; or~~

~~(B) The qualifying facility demonstrates to the public utility it cannot reasonably be expected to achieve commercial operation 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.~~

~~(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 construction period after three-year anniversary of the Effective date, with the reduction taken from the end of the fixed-price term.~~

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

Commented [JU14]: As noted above, a portion of Eastern Oregon is on Mountain Time. Need to discuss how this rule would impact any QFs in that area and consider revisions. Also, the definitions above use "PPT" rather than "P.T."

Commented [JU15]: If the Joint Utilities' proposed deletion regarding the New Rule #1 process is accepted, then this entire subsection can be deleted as it does not contain any information beyond what is already provided in the definitions of "Effective Date" and "Development Period."

Commented [JU16]: The "note" should be deleted as the substantive issues are addressed below in Subsection 7, and it may cause confusion or introduce inconsistencies to address the same issues here in a "note."

Assuming the "note" is deleted, this subsection can be removed and combined with the definition of "purchase period."

~~(d) 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.~~

OAR 860-029-0120(7)

(7) Modification of Scheduled Commercial Operation Date or Termination

~~(a) Anytime within six (6) 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 longer than 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 (7)(a) may not select a new scheduled commercial operation date more than four years from the date the standard power purchase agreement was executed.~~

~~(c) If a qualifying facility terminates the standard power purchase agreement under subsection (7)(a), 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~~To the extent the qualifying facility is delayed in reaching commercial operation because of an event of Force Majeure or the purchasing public utility's default of an obligation to the qualifying facility under the standard power purchase agreement or under ~~any agreement related to the interconnection of the qualifying facility to the purchasing utility's system, including~~ an interconnection study agreement~~s and~~ or interconnection agreement~~s~~, the qualifying facility~~scheduled commercial operation date in the standard power purchase agreement~~ will be entitled to an extended scheduled commercial operation date or cure period for achieving commercial operation, whichever is applicable, that is commensurate~~ly~~ 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.

(a) Under no circumstances may the scheduled commercial operation date or cure period for achieving commercial operation, whichever is applicable, be extended for more than 180 days because of an event of Force Majeure. An event of Force Majeure shall only operate to extend the scheduled commercial operation date or the cure period for achieving commercial operation, whichever is applicable, but shall not otherwise require an amendment to the standard power purchase agreement or any adjustment to the purchase period or the term as specified in the executed power purchase agreement.

Commented [JU17]: The Joint Utilities propose separating the discussions of Force Majeure delay and utility-default delay, because the balance of equities differ in these situations, and they should be treated differently. The Joint Utilities' Initial Comments discuss their proposal regarding Force Majeure delay.

(b) For any extension permitted by this section that is caused by the purchasing public utility's default, the public utility and qualifying facility shall amend the standard power purchase agreement to extend the scheduled commercial operation date or the cure period for achieving commercial operation, whichever is applicable, one day for every day of delay caused by the purchasing public utility's default and shall permit the qualifying facility to select a purchase period of up to 20 years, including a fixed price term of up to 15 years, following the scheduled commercial operation date as amended. ~~An extension of the scheduled commercial operation date under this subsection is not subject to the fixed-price term reduction in subsection (6)(c) or the four-year limitation in subsection (6)(d).~~

OAR 860-029-0120(8)

(8) 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~~180 days in which to cure the default for failure to meet the scheduled commercial operation date, during which time the public utility may collect damages for failure to deliver.

(a) Unless excused under the standard power purchase agreement, ~~D~~damages for failure to meet the scheduled commercial operation date in a standard power purchase agreement are equal to the positive difference between the utility's replacement power costs less the prices in the standard power purchase agreement during the period of default, determined on a daily basis with positive differences aggregated and invoiced as a monthly sum, plus costs reasonably incurred by the utility to purchase replacement power and additional transmission charges, if any, incurred by the utility to deliver replacement power to the point of delivery.

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

OAR 860-029-0120(9)

(9) Subject to the ~~one-year~~180-day cure period in section (8~~5~~) above, a utility may terminate a standard power purchase agreement for failure to meet the scheduled commercial operation~~on-line~~ date in the power purchase agreement, if such failure is not otherwise excused under the agreement.

OAR 860-029-0120(10)

(10) 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 ~~the~~ power purchase agreement. The purchasing public utility may not unreasonably withhold agreement.

OAR 860-029-0120 (16)

(16) (a) Project Development Security. A qualifying facility that has executed a standard power purchase agreement that does not meet the purchasing public utility's creditworthiness requirements must post Project Development Security for the purchasing public utility's benefit within 30 days of the Effective Date of the standard power purchase agreement. The purchasing public utility's credit requirements, consistent with those used in wholesale transactions, will be set forth in the purchasing public utility's form of standard power purchase agreement approved by the Commission. ~~The amount of required Project Development Security will be set forth in the purchasing 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:

Commented [JU18]: This sentence is in (17) below and should also be included here.

(A~~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~~b~~) Letter of Credit Security. The qualifying facility shall post and maintain in an amount equal to the Project Development Security: (a) a guaranty from a party that satisfies the purchasing public utility's ~~C~~creditworthiness ~~R~~requirements, in a form acceptable to the public utility in its discretion, or (b) a Letter of Credit in favor of the purchasing public utility. To the extent the public utility receives payment from the Project Development 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) The amount of Project Development Security that a purchasing public utility requires under this rule may be up to $150 per kilowatt-hour.

OAR 860-029-0120(17)

(17) (a) Default Security. A qualifying facility that has executed a standard power purchase agreement that does not meet the purchasing public utility's credit-worthiness requirements must post Default Security for the purchasing public utility's benefit upon commencing commercial operation. The purchasing public utility's credit requirements, consistent with those used in wholesale transactions, ~~and the amount of required Default Security~~ will be set forth in the purchasing 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~~a~~) Cash Escrow Security. The qualifying facility shall deposit in an escrow account established by the purchasing utility in a banking institution acceptable to both the qualifying

facility and purchasing utility, Default Security. Such sum shall earn interest at the rate applicable to money market deposits at such banking institutions from time to time. To the extent the purchasing utility receives payment from the Default Security for damages in the event of default, the qualifying facility will, within 15 days, restore the Default Security as if no such deduction had occurred.

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

(b) The amount of Default Security that a purchasing public utility requires under this rule may be up to $50 per kilowatt-hour.

OAR 860-029-0120(18)

(18) 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) gFor a qualifying facility with a Nameplate Capacity Rating greater than 200 kW, 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, for a qualifying facility with a Nameplate Capacity Rating greater than 200 kW, or $2,000,000 for a qualifying facility with a Nameplate Capacity Rating of 200 kW or less, or greater if desired by the qualifying facility.

OAR 860-029-0120(19)

(19) 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.

OAR 860-029-0120(20)

(20) All standard power purchase agreements between a qualifying facility and a public utility for energy, or energy and capacity, must include language that substantially conforms to the following: The Commission shall have jurisdiction to resolve any action or claim relating to this Agreement. The Commission may elect to decline to hear an action or claim relating to this Agreement. The Commission's jurisdiction to resolve actions or claims relating to this Agreement shall not be exclusive.~~This agreement is subject to the jurisdiction of those governmental agencies and courts having control over either party or this agreement. The public utility's compliance with the terms of this contract is conditioned on the qualifying facility submitting to the public utility and to the Public Utility Commission of Oregon, before the date of initial operation, certified copies of all local, state, and federal licenses, permits, and other approvals required by law.~~