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September 16, 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' Initial Comments Regarding the Group 2 Rules.

Please contact this office with any questions.

Sincerely,

Alisha Till

Alisha Till
Paralegal

Attachment

**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' INITIAL COMMENTS REGARDING GROUP 2 RULES**

September 16, 2022

I. INTRODUCTION

Portland General Electric Company (PGE), PacifiCorp dba Pacific Power (PacifiCorp), and Idaho Power Company (Idaho Power) (together, the Joint Utilities) welcome this opportunity to comment on the Group 2 draft rules that were proposed by Staff of the Public Utility Commission of Oregon (OPUC or Commission) and adopted by the Commission to serve as the subject of the formal phase of this rulemaking docket (Draft Rules). The Joint Utilities greatly appreciate all stakeholders' participation in the informal phase of this docket and are particularly thankful for the hard work put in by Staff to gain a greater understanding of the parties' concerns, and to develop draft rules that attempt to balance development of qualifying facilities (QFs) with the customer protections that the utilities have requested. While progress has been made during the formal rulemaking phase on the Group 1 Draft Rules, additional effort will be necessary to revise the Group 2 Draft Rules, which were not fully vetted by stakeholders during the informal phase.

As currently proposed by Staff, the Group 2 Draft Rules include key provisions that are protective of customers. For example, New Rule #1 provides a process for identifying and allocating transmission-service-related Network Upgrade costs necessitated by an off-system QF to ensure such costs are not automatically borne by customers. The Draft Rules also require minimum delivery guarantees (MDGs) for solar resources, which help ensure that customers consistently receive the amount of energy for which they contracted. And finally, the Draft Rules add significant clarity regarding what events do and do not qualify as Force Majeure, which will benefit all parties and the Commission by helping avoid disputes.

However, the Draft Rules also include several provisions that are inconsistent with market, or non-QF, power purchase agreements (PPAs) and have the potential to result in significant

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customer harm. For example, New Rule #1 postpones the start of the Development Period until completion of the steps necessary to resolve the allocation of transmission-service-related Network Upgrade costs, which could delay the Scheduled Commercial Operation Date (COD) for years, thus forcing stale prices onto customers. Similarly, the Draft Rules regarding Force Majeure would permit an event of Force Majeure to indefinitely delay the parties' obligations under the PPA, which could result in QFs receiving extremely outdated prices and thereby harm customers. The Joint Utilities urge the Administrative Hearings Division and the Commission to revise these provisions to ensure customer indifference is maintained. The Joint Utilities also offer a number of clarifying revisions to the Draft Rules.

II. COMMENTS ON GROUP 2 DRAFT RULES

A. New Rule #1 − Obligation for Costs to Accept Deliveries from Off-System Qualifying Facilities (QFs)

The Joint Utilities deliver QF output to utility load using firm network transmission service, which requires the designation of the QF as a network resource under the utility's Open Access Transmission Tariff (OATT). Under the OATT, the Joint Utilities cannot request to designate a QF as a network resource and arrange for firm network transmission service until they have committed to purchase the generation.[1] Therefore, the Joint Utilities will not be able to ascertain whether a purchase from a QF will necessitate transmission-service-related Network Upgrades until *after* they have committed to purchase the QF's output. In *Blue Marmot*, a case involving an off-system QF seeking to deliver to a constrained location, the Commission recognized that there was no process in place at that time for identifying and allocating transmission-related costs on the

[1] Utilities signing PPAs with non-QFs can address this issue by making those PPAs conditional upon availability of transmission capacity.

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purchasing public utility's system.[2] The Commission directed that in the future, utilities should endeavor to identify any delivery issues and inform the QF as early as possible, and the Commission noted that QFs should fund necessary transmission-system upgrades, either directly or through an adjustment to avoided cost prices.[3]

New Rule #1 specifically allows the purchasing public utility to include a transmission-service-related Network Upgrade[4] cost-allocation provision in a standard PPA to address costs to the purchasing public utility's customers that are caused by an off-system QF's chosen Point of Delivery (POD), and the rule includes the requirements for such a process if the utility elects to include such a provision. In particular, New Rule #1 provides that if the standard PPA includes such a provision, the utility must request designation of the QF as a network resource within 15 business days of the effective date of the PPA. If designating the QF as a network resource will require Network Upgrades to the purchasing public utility's transmission system, the utility may request that the Commission determine how the Network Upgrade costs should be allocated. The QF may terminate the PPA without liability for damages either while the Commission is considering the cost-allocation request or within 14 days of the Commission order allocating the Network Upgrade costs. The Draft Rules also require that the Development Period in the standard PPA will not commence until after the cost-allocation process is completed—meaning that the Scheduled COD is delayed indefinitely without decreasing the fixed-price term.

The provisions in New Rule #1, which are commonly referred to as "Conditional DNR" provisions, implement the Commission's direction in *Blue Marmot* by detailing the process for

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[2] *In re Complaint of Blue Marmot V LLC v. Portland General Electric Company, Pursuant to ORS 756.500*, Docket No. UM 1829, Order No. 19-322 at 19 (Sept. 30, 2019).
[3] *See* Docket No. UM 1829, Order No. 19-322 at 19.
[4] Under the Draft Rules, "Network Upgrades" means "an addition, modification, or upgrade to the transmission system of a purchasing utility required at or beyond the Point of Delivery to accommodate the transmission provider's receipt of energy from a generation facility to the transmission provider's System." Draft Rules OAR 860-029-0010(36).

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identifying any transmission-service-related Network Upgrade costs incurred to deliver the QF output and providing a "safety valve" that allows the Commission to determine the appropriate allocation of such costs, which could be very significant. A Conditional DNR provision is critical to maintaining customer indifference because the administratively-determined long-term fixed avoided cost price does not take into account the specific Network Upgrades required to facilitate transmission service on the purchasing utility's system. Notably, the Commission has already approved including a similar Conditional DNR provision in all three utilities' Community Solar Program PPAs.[5]

The Joint Utilities generally support the provisions of New Rule #1. However, the Joint Utilities recommend several important revisions. ***First***, the Joint Utilities disagree with Staff's conclusion that the utilities should not have the opportunity to include a Conditional DNR provision for on-system QFs.[6] ***Second***, the Joint Utilities submit that the provision allowing deferral of the Development Period until the Commission issues a cost-allocation order should be removed. ***Third***, the rule should make clear that off-system QFs must have obtained firm transmission service to deliver their output before the purchasing utility is required to designate the QF as a network resource. ***Finally***, a utility should be required to request an effective date for commencement of network transmission service for a QF that is only 90 days—not 180 days—prior to the Scheduled COD.

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[5] *In re Public Utility Commission of Oregon, Community Solar Program Implementation*, Docket No. UM 1930, Order No. 20-122 at 2 (Apr. 9, 2020) ("We approve the Conditional DNR notice provisions as a reasonable method for the Commission to continue to achieve transparency and a balance of costs and risks in the program.").
[6] Staff Report at 8 (Oct. 21, 2021).

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1. <u>New Rule #1 Should Apply to On-System and Off-System QFs.</u>

The Joint Utilities continue to propose that the option to include a Conditional DNR process apply to both on-system and off-system QF PPAs. While Staff acknowledged that "it is possible a purchasing utility will need to construct Network Upgrades to transmit the output of an on-system QF as well as an off-system QF,"[7] Staff appears to believe that the risk that there will be transmission-service-related Network Upgrades for on-system QFs is mitigated by the fact that the Commission currently requires on-system QFs to interconnect with Network Resource Interconnection Service (NRIS), which is a comprehensive type of interconnection service intended to assess deliverability.[8] Accordingly, Staff concluded that the Conditional DNR process is not warranted for on-system QFs.

However, in docket UM 2032 the Commission is currently considering which type of interconnection service is appropriate for on-system QFs, and the QF parties in that docket are advocating to eliminate the NRIS requirement.[9] If the Commission eliminates the NRIS requirement, then it is very likely that on-system QFs will trigger Network Upgrades that will not be addressed through the interconnection process. The Conditional DNR provision will become a critically important safety valve for maintaining customer indifference related to on-system QF purchases, should the Commission's current NRIS policy change.[10] And even if the Commission

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[7] Staff Report at 8.

[8] NRIS is a comprehensive level of interconnection service intended to make an interconnecting generator eligible to deliver its output to load on a firm basis. The alternative, Energy Resource Interconnection Service (ERIS), is a basic interconnection service that does not assess deliverability to load. *See, e.g.*, *In re Staff Investigation Into Treatment of Network Upgrade Costs for QFs*, Docket No. UM 2032, Joint Utilities' Prehearing Brief at 31-32 (June 3, 2022).

[9] *See, e.g.*, Docket No. UM 2032, CREA, NIPPC & REC Post Hearing Response Brief at 2 (Sept. 2, 2022); Docket No. UM 2032, NewSun's Post-Hearing Response Brief at 3 (Sept. 2, 2022); Docket No. UM 2032, OSSIA's Posthearing Brief at 2 (Aug. 5, 2022).

[10] The Joint Utilities note, however, that interconnection "deliverability" costs *should* be the responsibility of the QF. *See, e.g.*, *Pioneer Wind Park I, LLC*, Order Granting Petition for Declaratory Order in Part, 145 FERC ¶ 61,215, at 20 n. 73 (Dec. 19, 2013) (noting that the QF is not "exempt from paying interconnection costs, which may include transmission or distribution costs directly related to installation and maintenance of the physical facilities necessary to permit interconnected operations") (internal citations omitted).

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retains the NRIS requirement in docket UM 2032, as the Joint Utilities and Staff recommend, on-system QFs that interconnect with NRIS may still cause transmission-service-related Network Upgrades because transmission-service studies include different analyses from interconnection studies and because system conditions may have changed between the time of the interconnection study and the transmission-service study. In certain instances, a meaningful amount of time could pass between the time of the completed interconnection study and the time of the completed transmission-service study. During that time, system conditions—and thus study results—could change meaningfully. In other situations, system conditions could change quickly enough to impact results even when the interconnection studies and transmission-service studies are conducted close together in time. In such situations, the Conditional DNR provision ensures that the Commission can appropriately allocate any Network Upgrade costs incurred to deliver an on-system QF's output so that those costs are not simply imposed on customers.

There is substantial precedent for applying the Conditional DNR rule to on-system QFs. In the Community Solar Program, the Commission required all the Joint Utilities to include a Conditional DNR provision in *both* on-system and off-system PPAs.[11] Moreover, PacifiCorp has executed PPAs with on-system QFs that include this provision, both in Oregon and in other jurisdictions,[12] and provisions similar to this have been included in PacifiCorp's non-standard QF and non-QF PPAs, including the form of PPA included in its recent 2020 and 2022 All-Source

[11] Docket No. UM 1930, Order No. 20-122 at 2, App. A at 11-15.

[12] For example, PacifiCorp's PPA with non-standard Oregon QF Skysol, LLC, which was executed in 2020 contains a Conditional DNR provision. *See In re PacifiCorp, dba Pacific Power Information Filing of Qualifying Facility Contracts or Summaries Per OAR 860-029-0020(1)*, Docket RE 142, PacifiCorp's Informational Filing on Qualifying Facility Transactions - Skysol, LLC, Attachment A, Section 4.2 (Apr. 24, 2020), https://edocs.puc.state.or.us/efdocs/HAQ/re142haq13018.pdf. In addition, PacifiCorp recently has entered into a number of PPAs that contain this provision with small QFs in Idaho and with QFs in Washington. These PPAs have been approved by the Idaho Public Utilities Commission.

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Requests for Proposals (RFPs).[13] Accordingly, such a provision reflects market-based terms and conditions that should apply to *all* QF PPAs to ensure customers are no worse off because the PPA counterparty is a QF. The Commission should therefore revise New Rule #1 as reflected below to remove language limiting its application to off-system QFs.

2. New Rule #1 Should Not Allow Deferment of the Development Period.

The Commission should revise the proposed rule so that the cost-allocation process does not delay the Scheduled COD indefinitely—potentially resulting in the QF receiving very stale avoided cost prices. Specifically, the Joint Utilities urge the Commission to delete subsection (4)(a) in its entirety so that the start of the Development Period cannot be postponed. Unless subsection (4)(a) is removed, the Development Period could be deferred indefinitely, which would be inconsistent with Staff's and the Administrative Hearings Division's recommendation elsewhere in the Draft Rules that a QF should not be permitted to select a Scheduled COD more than four years from the PPA Effective Date.[14]

Assuming that the Commission retains the NRIS requirement, it is likely that most QFs will not trigger transmission-service-related Network Upgrades; however, some will. As discussed in depth in Section 3 below, the purchasing utility cannot even begin the process to identify transmission-service-related Network Upgrades necessitated by an off-system QF until the QF has obtained firm transmission to deliver to the purchasing utility. Once the purchasing utility requests to designate the QF as a network resource, if a significant Network Upgrade is required, it is possible that the cost-allocation process could be resolved relatively quickly, but it is also possible

[13] The form PPA for the 2020 RFP (RFP Appendix E-2) is available here: https://www.pacificorp.com/suppliers/rfps/all-source-rfp/2020-all-source-rfp-docs.html. The form PPA for the 2022 RFP (RFP Appendix E-2.1) is available here: https://www.pacificorp.com/suppliers/rfps/2022-all-source-rfp/RFP-documents-appendices.html. The DNR provision is Section 4.2 of both form PPAs.

[14] *See* Draft Rules OAR 860-029-0120(5)(e) ("A qualifying facility entering into a standard power purchase agreement may not select a scheduled commercial operation date more than four years from the Effective Date.").

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that it could require one year or more. For example, the *Blue Marmot* case, which addressed deliverability and cost-allocation issues, took almost two and half years to resolve.[15] If the cost-allocation process under New Rule #1 takes two years and *then* the QF can take an additional four years to achieve Scheduled COD, the avoided cost prices in the PPA would be six years old.

Because a lengthy delay could render the avoided cost prices unacceptably stale, the Commission should not permit indefinite deferral of the Development Period. The removal of subsection 4(a) would ensure that customers remain indifferent when a QF sites at a constrained location that requires Network Upgrades.

3. <u>New Rule #1 Should Clarify that an Off-System QF Must Have Firm Transmission to Deliver its Output to the Purchasing Utility's System Prior to the Utility Designating the QF as a Network Resource.</u>

The Joint Utilities recommend that the Commission revise what is now subsection (4)(b) to clarify that an off-system QF must have obtained firm transmission to the purchasing utility's system before the utility is required to designate the QF as a network resource. Under the OATT, an off-system generator must have firm transmission arrangements to the purchasing utility's system in order to become a designated network resource. Off-system QFs are responsible for securing firm transmission from a third-party to deliver their output to the purchasing public utility's system. However, as currently drafted, New Rule #1 lacks any requirement that the QF have arranged for firm delivery, and the requirement that the purchasing public utility request network transmission service from the "appropriate transmission provider" could be read to suggest that the purchasing public utility is responsible for acquiring transmission service for the

[15] The Blue Marmots filed complaints on April 28, 2017, and the Commission entered a final order on September 30, 2019. Docket No. UM 1829, Order No. 19-322 at 2.

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QF on a third-party's system. Therefore, the Joint Utilities propose the revisions reflected below to what is now subsection (4)(b).

4. New Rule #1 Should Not Require the Purchasing Utility to Obtain Transmission Service for the QF Output Until 90 Days Prior to the Scheduled COD.

The Joint Utilities recommend that the Commission revise New Rule #1 such that the purchasing public utility is required to request an effective date for commencement of network transmission service for a QF 90 days prior to the Scheduled COD—not 180 days as provided in the Draft Rules. This change is consistent with the Joint Utilities' proposal, discussed below in Section C, to revise New Rule #4(4) to provide that a QF may not commence commercial operation sooner than 90 days before the Scheduled COD. Requiring the utilities to obtain transmission service 180 days in advance to account for the *possibility* that a QF may wish to come online early would result in an inefficient use of the transmission system and may interfere with utility planning. Moreover, the Community Solar PPAs for all three Oregon utilities are consistent with the Joint Utilities' position. Specifically, the Community Solar PPAs require that the purchasing utility hold transmission service allowing for in-service dates 90 days—not 180 days—before scheduled COD.[16] Accordingly, the Joint Utilities recommend the revisions to New Rule #1 below.

5. Proposed Changes to New Rule #1.

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

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

(1) If the merchant function of the purchasing public utility has access to information that the proposed Point of Delivery in a~~n~~ ~~off-system~~ qualifying

[16] *See, e.g.*, PacifiCorp Oregon Community Solar Program Power Purchase Agreement, Section 3.1 (June 18, 2021), *available at* https://www.pacificpower.net/content/dam/pcorp/documents/en/pacificpower/rates-regulation/oregon/tariffs/community_solar_program/Community_Solar_Program_Purchase_Agreement.pdf.

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

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

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

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

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

(a) ~~(b)~~ No later than fifteen (15) business d~~D~~ays after the Effective Date of the standard power purchase agreement, provided that if the qualifying facility is off-system, the off-system qualifying facility has obtained firm transmission to the Point of Delivery as of the Effective Date, or not later than fifteen (15) business days after the purchasing public utility receives a signed transmission service agreement from the off-system qualifying facility showing that the off-system qualifying facility has obtained transmission service to the Point of Delivery, submit an application to the ~~appropriate~~ purchasing public utility's transmission provider requesting designation of the qualifying facility as a network resource and requesting

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network transmission service ~~for the purpose of transmitting the power purchased from qualifying facility to the public utility's load~~.

(b) ~~(c)~~ Request an effective date for commencement of network transmission service for the qualifying facility that is (i) 90 ~~180~~ days prior to the scheduled commercial operation date, or (ii) as soon as practicable after the Effective Date of the ~~executed~~ standard power purchase agreement if the scheduled commercial operation date is less than 90 ~~180~~ days following the Effective Date.

(c) ~~(d)~~ No later than five (5) business days after the public utility's receipt of a response to the application submitted under subsection (b), inform the qualifying facility of the transmission provider's response.

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

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

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

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

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

B. OAR 860-029-0120 – Standard Power Purchase Agreements

1. <u>OAR 860-029-0120(11)-(12) – Mechanical Availability Guarantees (MAGs)</u>

A mechanical availability guarantee (MAG) is a contractual provision that ensures the QF is consistently available and prepared to generate the output for which the utility has contracted. The Draft Rules retain the MAG from the Commission's current rules for wind QFs.[17] Specifically, the Draft Rules require that a wind QF's standard PPA include a 90 percent MAG beginning one year after COD for existing QFs and three years after COD for new QFs, with up to 200 hours of planned maintenance per turbine per year excluded from the availability calculation.

As an initial matter, the Joint Utilities oppose the three-year and one-year delays in applying the MAG requirement, which would harm customers by allowing QFs to fail to produce their contracted-for output for one or more years without incurring damages. The Joint Utilities specifically oppose any delay in applying a 90 percent MAG to existing QFs renewing contracts or entering into a superseding contract. An existing QF is, by definition, already operational, so there is no reason such a QF should not be able to reliably produce from the outset of the PPA. Moreover, while new facilities can be expected to experience some minor issues during the first year of operation, it is reasonable for the purchasing public utility to expect that the facility is reliably operational and largely issue-free by the time it achieves COD. Therefore, the Joint Utilities propose that for QFs entering new contracts, the MAG is 85 percent in the first year after

[17] OAR 860-029-0120(7)(a).

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commencing commercial operation, and 90 percent thereafter. Provisions allowing for delays of one or more years in applying MAG requirements are inconsistent with how such guarantees are addressed in non-QF PPAs. For example, PacifiCorp's recently executed non-QF PPAs and RFP PPAs do not allow for a delay in applying the MAG. Similarly, PGE's recent RFP PPA applies the MAG beginning in the first full calendar year after the COD.

The Joint Utilities also oppose the exception in the MAG requirements for planned maintenance as such a provision is unnecessary; the percentage guarantees inherently include the time needed for maintenance, and thus there should not be an additional allowance required for maintenance.

In addition, run-of-the-river hydro QFs, as intermittent resources, should also be subject to the 90 percent MAG requirement. Like wind QFs, run-of-the-river hydro QFs are less predictable than solar and baseload hydro resources, and therefore a MAG requirement could be accepted in lieu of a MDG requirement.

Finally, the Joint Utilities propose minor modifications to the calculation of damages for failure to meet the MAG to clarify that the shortfall in output is multiplied by the Index Rate, which is straightforward to implement and consistent with the Joint Utilities' current practice.[18] In addition, the Draft Rules mention transmission costs for replacement power twice, and the Joint Utilities propose deleting one such reference. Accordingly, the Joint Utilities recommend the following revisions to OAR 860-029-0120(11)-(12):

> (10~~1~~) The standard power purchase agreement must include a mechanical availability guarantee (MAG) for intermittent wind and run-of-the-river hydro qualifying facilities as follows:

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[18] Under the current MAG rule, OAR 860-029-0120(7), PacifiCorp's current practice is to use a 12 x 24 delivery schedule to calculate damages. The Joint Utilities' proposed revisions should not be read to infringe on this practice.

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(a) For new qualifying facilities, ~~A 90 percent~~ an 85 percent overall guarantee for the first year starting ~~three years after~~ on the commercial operation date, with a 90 percent overall guarantee thereafter ~~for qualifying facilities with new contracts or one year after the commercial operation date for qualifying facilities that renew contract or enter into a superseding contract, subject to an allowance for 200 hours of planned maintenance per turbine per year that does not count toward the calculation of the overall guarantee~~.

(b) For existing qualifying facilities renewing contracts or entering into a superseding contract, a 90 percent overall guarantee.

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

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

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

(C) Adding any reasonable costs incurred by the purchasing public utility to purchase replacement power and additional transmission costs to deliver replacement power to the P~~p~~oint of D~~d~~elivery, if any.

(11~~2~~) A purchasing public utility may issue a Notice of Default, and subsequently terminate a standard power purchase agreement pursuant to its terms and limitations, for failure to meet the MAG if the qualifying facility does not meet the MAG for two (2) consecutive years if such failure is not otherwise excused by the power purchase agreement.

2. OAR 860-029-0120(13)-(14) – Minimum Delivery Guarantees (MDGs)

A MDG is a contractual provision that ensures the QF delivers the output for which the utility has contracted. As currently proposed, the Draft Rules include a MDG for solar, geothermal, biomass, and baseload hydro QFs equal to 90 percent of the QF's expected energy for

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the year. MDGs are feasible and reasonable provisions to require for these resources because their output can be reliably estimated based on the characteristics of the project. Importantly, the avoided cost prices paid to QFs include compensation for both capacity and energy. Without a MDG requirement, utility customers pay for an assumed capacity performance that they may or may not receive. If utility customers pay for an assumed capacity performance that they do not receive, the Public Utility Regulatory Policies Act of 1978's (PURPA) customer indifference principle is violated unless there is a MDG and appropriate remedies for such non-performance.

Output guarantees, such as MDGs, and more stringent specified energy provisions are standard in negotiated QF PPAs and in non-QF PPAs. For example, all of PGE's active negotiated PPAs contain a MDG requirement. In addition, PGE's 2021 RFP PPA contains MDG requirements for all renewable resources. Since 2017, PacifiCorp has executed nine non-QF PPAs for solar and wind resources that have included a MDG requirement. If non-QF solar generators are capable of agreeing to and meeting performance guarantees, there is no reason solar QFs should be held to a lower standard to the detriment of utility customers.

For the above reasons, the Joint Utilities generally support the MDG provisions in the Draft Rules but offer the following edits to add detail regarding how damages for failure to meet the MDG are calculated:

> (12~~3~~) The standard purchase agreement will include an annual minimum delivery guarantee (MDG) for solar, geothermal, biomass, and baseload hydro qualifying facilities equal to 90 percent of the qualifying facility's expected energy for the year.
>
> (a) The qualifying facility will owe damages for failure to meet the MDG equal to:
>
> (A) the product of the deficiency for such period, which is the difference between (1) 90 percent of the qualifying facility's expected energy for the year and (2) the actual Net Output delivered by the qualifying facility to the purchasing public utility in the year, and the positive difference, if any, obtained by

subtracting the Contract Price from the Index Rate ~~and the utility's cost to cover~~;

(B) the cost of ~~any replacement energy procured by the utility as a result of the qualifying facility's failure to meet the MDG and~~ any ~~resulting~~ incremental ancillary services and transmission costs resulting from the qualifying facility's failure to meet the MDG; and;

(C) the cost of replacement Renewable Energy Credits.

(b) The 90 percent MDG will be reduced on a pro rata basis for any portion of the annual period the qualifying facility was prevented from generating or delivering electricity for reasons of Force Majeure.

(134) A purchasing public utility may issue a Notice of Default, and subsequently terminate a standard power purchase agreement pursuant to its terms and limitations, for failure to meet the MDG if the qualifying facility does not meet the MDG for three (3) consecutive years if such failure is not otherwise excused by the standard power purchase agreement.

3. OAR 860-029-0120(15) – Incremental Facility Upgrades

The Draft Rules describe in detail how and when a QF is permitted to increase its Nameplate Capacity or expected annual Net Output, and explain when facility modifications require revised pricing or a new PPA. With respect to increases in generation, subsection (a) prevents facility upgrades from (A) resulting in an increase to Nameplate Capacity Rating above that specified in the PPA at the time of execution or (B) causing the expected annual net output specified in the PPA at the time of execution to increase by more than 10 percent, unless permitted by the purchasing public utility under subsection (b). While under subsection (b), the utility may not unreasonably withhold its approval of facility upgrades in most circumstances, the utility *is not required to approve* facility upgrades that would (A) result in an increase to Nameplate Capacity Rating above that specified in the PPA at the time of execution or (B) cause the expected annual net output specified in the PPA at the time of execution to increase by more than 10 percent.

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Confusingly, however, subsection (c) allows a QF to *unilaterally* seek facility upgrades that would likely increase the annual net output more than 10 percent.

The Joint Utilities generally support Staff's Incremental Facility Upgrades provision in the Draft Rules, which incorporated many of the recommendations provided by the Joint Utilities in the informal phase of this rulemaking. In particular, the Joint Utilities support the provisions prohibiting increases in the Nameplate Capacity Rating and requiring updated pricing for incremental Net Output when the QF increases its Net Output by more than 10 percent. This policy appropriately balances the QFs' desire to maintain and upgrade facilities over time to optimize efficiency, with the need to protect utility customers from being required to pay for increased generation at stale prices. Moreover, such provisions protect customers from paying stale avoided cost prices for significant new generation while providing QFs the flexibility to operate and modernize their facilities.

Given the contradictory provisions regarding when a utility's written approval is necessary for facility modifications, Staff's intent is unclear. However, the Joint Utilities believe that *all* modifications to the project should require prior written approval from the purchasing public utility—especially those that would cause the expected annual net output to increase by more than 10 percent. Therefore, the Joint Utilities recommend deleting from subsection (b) "except as permitted under subsection 14(c)" and deleting from subsection (c) "without the utility's prior approval," as reflected below.

Finally, the Joint Utilities propose deleting the language in subsection (e) that exempts a QF from damages for any default caused by its failure to maintain eligibility for a standard PPA.

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A QF should not be excused from its contractual obligations simply because it decided to modify its facility.

The Joint Utilities propose the following revisions:

(14~~5~~) Incremental Facility ~~Utility~~ Upgrades.

(a) The qualifying facility is obligated to provide the purchasing public utility an as-built supplement describing the F~~f~~acility within 90 days after the commercial operation date. Except as expressly permitted under subsection 14(b), the F~~f~~acility reflected in the as-built supplement may not:

(A) have a N~~n~~ameplate C~~c~~apacity R~~r~~ating that exceeds the N~~n~~ameplate C~~c~~apacity R~~r~~ating in the power purchase agreement at the time it was executed; or

(B) ~~result in~~ cause the expected annual N~~n~~et O~~o~~utput specified in the power purchase agreement at the time it was executed to increase by more than ten (10) percent.

(b) During the term of the power purchase agreement, ~~except as permitted under subsection 14(c),~~ the F~~f~~acility may not be modified in a manner that materially deviates from the as-built supplement without the purchasing public utility's prior written approval. That approval may not unreasonably be withheld, conditioned or delayed, provided that the purchasing public utility is not required to approve any modification of the F~~f~~acility that:

results in the F~~f~~acility increasing its N~~n~~ameplate C~~c~~apacity R~~r~~ating beyond the N~~n~~ameplate C~~c~~apacity R~~r~~ating specified in the power purchase agreement at the time it was executed; or

is reasonably likely to result in the expected annual N~~n~~et O~~o~~utput specified in the power purchase agreement at the time it was executed to increase by more than ten (10) percent.

(c) In the event that the qualifying facility seeks to upgrade the F~~f~~acility during the term of the power purchase agreement in a manner that does not increase the N~~n~~ameplate C~~c~~apacity R~~r~~ating of the F~~f~~acility in the power purchase agreement, but which ~~and~~ is reasonably ~~expected~~ likely to cause the expected annual Net Output specified in the power purchase agreement at the time it was executed to ~~exceed~~ increase by more than ten (10) percent ~~of expected annual Nnet Ooutput in the power purchase agreement~~, such upgrades may be made ~~without the utility's prior approval~~ under this subsection 14(c) subject to the following requirements:

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

(B) At least six (6) months in advance of the scheduled installation date for the proposed Facility upgrades, the qualifying facility must send written notice to the purchasing public utility containing a detailed description of the proposed upgrades, their impact on expected N~~n~~et O~~o~~utput and a revised 12 x 24 delivery schedule, and must request~~ing~~ indicative pricing for the incremental additional N~~n~~et O~~o~~utput expected to be generated as a result of the upgrades.

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

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

(d) Within 90 days after the date on which upgrades are installed under subsection~~s~~ 14~~(a) (b) or (c)~~, the qualifying facility is obligated to provide the purchasing public utility an as-built supplement describing in detail the upgraded F~~f~~acility.

(e) A qualifying facility that wishes to install upgrades that would cause the F~~f~~acility to increase its N~~n~~ameplate C~~c~~apacity R~~r~~ating must terminate its existing power purchase agreement and may choose to enter a new standard or new non-standard power purchase agreement based on the then current avoided cost non-standard prices In calculating damages resulting from the early termination of the original standard power purchase agreement, if any, the cost to cover will be calculated based on the pricing set forth in the new non-standard pricing agreement notwithstanding any other provision in these rules to the contrary. ~~A qualifying facility that chooses to negotiate a new power purchase agreement under this subsection will not be liable for damages for failing any default caused by its failure to maintain eligibility for a standard power purchase agreement.~~

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C. New Rule #4 – Delivery and Purchase

New Rule #4 codifies requirements related to the sale and delivery of power under PURPA. The rule is intended to specify the purchasing public utility's obligation to purchase energy—including surplus energy and Test Energy—as well as the QF's obligation to sell energy beginning on the QF's COD. The Joint Utilities recommend that the Commission revise New Rule #4 to (1) distinguish between energy imbalance ancillary services for off-system QFs and surplus delivery of energy for off-system QFs; (2) clarify how surplus delivery is calculated for off-system QFs; (3) limit QFs from coming online more than 90 days prior to the scheduled COD; and (4) limit a utility's obligation to accept Test Energy and decrease the price to be paid for Test Energy. The Joint Utilities provide their proposed revisions below.

1. New Rule #4 Should Address Imbalance Energy from Off-System QFs.

The Draft Rules currently do not address imbalance energy, which is energy that a third-party transmission provider delivers to the purchasing utility when an off-system QF produces less than it schedules for transmission and delivery to the purchasing utility in a given hour. To avoid confusion and the potential for disputes, the Joint Utilities propose language specifying when a QF may deliver imbalance energy.

2. New Rule #4 Should Clarify How Surplus Delivery is Calculated for Off-System QFs.

With respect to on-system QFs, Staff's proposed New Rule #4 requires public utilities to accept but not pay for surplus delivery, which is defined as any Net Output that exceeds the QF's Nameplate Capacity Rating. The Joint Utilities do not object to this provision.

With respect to off-system QFs, the Draft Rules require the purchasing public utility to accept but not pay for energy that the QF scheduled and delivered but did not produce, netted over

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a monthly period. As discussed above, when a QF schedules more than it generates, its third-party transmission provider delivers the full scheduled amount to the purchasing public utility, making up the difference with imbalance energy. When a QF schedules less than it generates, the third-party interconnecting utility delivers only the scheduled amount and absorbs the excess. The over- and under-scheduling for each hour are netted over a monthly period, and only the net amount by which delivered energy exceeded Net Output is deemed "surplus delivery." The Joint Utilities understand that the Draft Rules intend to capture this concept, which is consistent with PacifiCorp's current Commission-approved PPA. However, the Joint Utilities suggest revisions to the provision to more clearly explain how surplus delivery is calculated for off-system QFs.

3. <u>New Rule #4 Should Prevent QFs from coming online more than 90 days prior to the Scheduled COD.</u>

The Draft Rules currently allow a QF to come online up to 180 days prior to the Scheduled COD. The Joint Utilities recommend that this provision be revised such that a QF may come online *only* 90 days prior to the Scheduled COD, because 180 days is far too long for utilities to be expected to reserve capacity. Allowing up to 180 days would generate uncertainty in utilities' system planning; moreover, it raises concerns that would need to be vetted about whether utilities reserving transmission capacity so far in advance would face legal risks related to impermissible hoarding of transmission capacity in contravention of FERC policy.[19]

4. <u>New Rule #4 Should Not Require Utilities to Pay the Full Index Rate for Test Energy.</u>

The Joint Utilities oppose being required to pay the full Index Rate for Test Energy, which is not consistent with currently approved standard PPAs or the Joint Utilities' negotiated QF and

[19] FERC Order No. 888, 75 FERC ¶ 61,080, 61,238, at 172 (Apr. 24, 1996) ("We conclude that public utilities may reserve existing transmission capacity needed for native load growth and network transmission customer load growth

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non-QF agreements. For example, under PGE's current Schedule 201, PGE pays a discounted as-available rate for Test Energy.[20] In addition, PGE's current RFP PPA pays $0 for Test Energy.[21] Furthermore, if the Test Energy is not delivered as firm energy, accepting the Test Energy could impose *additional* cost on the utility because the utility would be required to hold 1:1 reserves against the Test Energy. For these reasons, the Joint Utilities propose that the purchasing public utility pay the QF the lower of 85 percent of Index Rate or 85 percent of Contract Price for Test Energy delivered prior to the Scheduled COD. This proposal is consistent with the terms of recent non-QF and RFP PPAs executed by the utilities.

5. Proposed Changes to New Rule #4.

860-029-XXXX [New Rule #4]

Delivery and Purchase under Standard Power Purchase Agreement

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

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

reasonably forecasted within the utility's current planning horizon. However, any capacity that a public utility reserves for future growth, but is not currently needed, must be posted on the OASIS and made available to others through the capacity reassignment requirements, until such time as it is actually needed and used.").

[20] Under PGE's Schedule 201, PGE purchases "as-available energy" at the "as-available rate". PGE, Schedule 201: Qualifying Facility 10 MW or Less Avoid Cost Power Purchase Information at 201-19 (July 13, 2022), *available at* https://assets.ctfassets.net/416ywc1laqmd/2dXGX4FvW9bUeyimPsm05X/3d338ae86620e4162898734ee9685efc/UM_1728_Compliance_Filing_Update_2022_Sch_201_QF_Info_Sch_201_Eff_07.13.22.pdf [hereinafter, "PGE Schedule 201"]. "As-available energy" includes "all Net Output delivered prior to the Commercial Operation Date", such as Test Energy. *Id.* at 201-23. The "as-available rate" is equal to "avoided energy cost", which is eighty-two and four tenths percent (82.4%) of the monthly arithmetic average of each day's ICE Mid-C Physical Peak (bilateral) and Mid-C Physical Off-Peak (bilateral) average index prices. *Id.* at 201-19, 201-23.

[21] *In re Portland General Electric Company, Application for Approval of an Independent Evaluator for 2021 All-Source Request for Proposal*, Docket No. UM 2166, Portland General Electric Company's ("PGE") 2021 All-Source RFP – Final Draft, App. A at 5 (Oct. 15, 2021), *available at* https://edocs.puc.state.or.us/efdocs/HAC/um2166hac155830.pdf.

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

(b) the transmitting entity or entities require the qualifying facility to schedule deliveries in increments of no less than one (1) megawatt;

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

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

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

(a) for on-system qualifying facilities, N~~n~~et O~~o~~utput at the Point of Delivery that exceeds the qualifying facility's Nameplate Capacity Rating;

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

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

(~~4~~5) A qualifying facility may not commence commercial operation any sooner than 90 ~~180~~ days before the scheduled commercial operation date of the standard power purchase agreement unless the purchasing public utility consents to early operation. ~~A public utility may require a qualifying facility to wait to commence commercial operation until no sooner than 90 days prior to the scheduled commercial operation if the public utility is unable to accept delivery from the qualifying facility.~~

(~~5~~6) The purchasing public utility will accept Test Energy delivered to the Point of Delivery as early as 90 days prior to the scheduled commercial operation date, as long as the purchasing public utility has commenced transmission service for the Facility; provided that, in such case, the purchasing public utility's obligation to purchase Test Energy will not exceed a maximum period of 90 days. The purchasing public utility will pay the qualifying facility the lower of 85 percent of

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Index Rate or 85 percent of Contract Price ~~index rate~~ for Test Energy delivered prior to the scheduled commercial operation date.

D. New Rule #5 – Force Majeure

New Rule #5 is intended to define Force Majeure for the purpose of PURPA PPAs and detail the parties' rights and obligations when a Force Majeure occurs. Defining Force Majeure in these rules will limit the potential for disputes between utilities and QFs, thus leading to more efficient development and conserving Commission, utility, and QF resources. The Joint Utilities generally support the provisions of New Rule #5.

The Joint Utilities recommend that if an event of Force Majeure extends beyond 180 days, the party not claiming Force Majeure should have the right to terminate the PPA. Extraordinary events that are not reasonably foreseeable at the time of contracting, and which cannot be overcome by reasonable diligence, provide a basis for *temporarily* suspending the parties' obligations and performance. However, with changing avoided cost prices and the long-term nature of these contracts, it is unreasonable to permit indefinite extensions of the parties' rights and obligations.

For example, if a QF claims Force Majeure before coming online and its Scheduled COD is extended as a result, a lengthy or indefinite extension could expose utility customers to undue risk of paying stale prices. Similarly, if a utility claims Force Majeure and stops accepting the QF output, the QF may be harmed if it remains under contract with the utility for an extended period of time and is unable to find an alternate buyer. In the Joint Utilities' recent experience, QFs have claimed Force Majeure delays of more than three years.

The Joint Utilities do not dispute that genuine Force Majeure events should relieve parties of the obligation to perform and protect parties from potential damage claims for some reasonably limited amount of time. However, if Force Majeure conditions persist after such time, the parties should have a right to terminate without liability. Such a provision is a standard commercial

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provision that protects both parties, and limiting the time during which Force Majeure can be claimed does not prevent the parties from re-entering a PPA if the Force Majeure eventually resolves. It is important to note that the Joint Utilities' proposal is symmetrical, and thus both parties are granted the unilateral right to terminate the PPA in the event Force Majeure extends beyond 180 days. Accordingly, the Joint Utilities recommend the changes to New Rule #5 reflected below.

1. <u>Proposed Changes to New Rule #5.</u>

860-029-XXXX [New Rule #5]

Force Majeure

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

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

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

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

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

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

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

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

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

(b) the cost or availability of fuel or motive force to operate the Facility.

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

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

(e) ~~T~~the imposition upon either qualifying facility or purchasing public utility of costs or taxes~~,~~.

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

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

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

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

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

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

(a) provides the other party written notice describing the Force Majeure, no later than ~~two weeks~~ fourteen (14) days after its occurrence~~,~~;

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

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

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

(7) If an event of Force Majeure exceeds 180 days, the party not claiming a Force Majeure defense or delay may terminate the power purchase agreement by providing written notice to the other party.

E. New Rule #6 – Default, Damages, and Termination

New Rule #6 describes events that constitute default, the applicable cure periods and damages calculations, and when and how a standard PPA may be terminated. The Joint Utilities generally support the substance of this rule but propose a number of clarifying revisions, most significantly:

i. Separating the utility and QF events of default for clarity;

ii. Clarifying the discussion of what cure periods apply to specific provisions;

iii. Adding a statement to the "Termination of Duty to Buy" section to clarify that a QF may be required to post default security in order to ensure customers are not subject to risk if a QF defaults and then later seeks to re-enter a PPA; and

iv. Revising the provision regarding "Termination Damages" to include a more detailed and precise description of how termination damages are calculated that aligns structurally with the rules describing damage calculations for the MAG and MDG.

The Joint Utilities also propose to substantively revise (1) some of the events of default for QFs and utilities; (2) the cure period for failure to meet the Scheduled COD; and (3) the discussion of damages for failure to timely achieve COD, which the Joint Utilities propose to move from OAR 860-029-0120(7) to New Rule #6.

First, with respect to the events of default for both QFs and utilities, the Joint Utilities recommend adding "breach of any warranty or representation in the power purchase agreement" and "failure to comply with any other material obligation under the power purchase agreement" to clarify that—in addition to the specified events of default in the Draft Rules—any other general breach in warranties and representations or failure to comply with material obligations under the PPA will also qualify as an event of default under the agreement. These additions are necessary to ensure compliance with the entirety of the representations and material obligations in the PPA. Moreover, the Joint Utilities propose to delete "failure to provide a timely notice of early termination under . . . New Rule #1" from the list of QF events of default because it becomes redundant if "failure to comply with any other material obligation" under the PPA is an event of default.

Second, with respect to the cure period for failure to timely achieve Scheduled COD, the Joint Utilities propose decreasing the one-year cure period to 180 days. A one-year cure period is six to nine months longer than most negotiated cure periods in market-based PPAs and significantly longer than the cure periods applicable to QF standard PPAs in other states. For example, the standard PPA for PacifiCorp's Washington QFs provides for a cure period of up to 180 days but not to exceed the third anniversary of the execution date for the PPA and only so long as the QF complies with a detailed schedule recovery plan approved by PacifiCorp; provided, however, if the QF does not comply with the schedule recovery plan, the QF has 30 days to cure

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its default.[22] Also, in Utah, PacifiCorp has entered into standard QF PPAs that provide for a 15-day cure period, and in Wyoming, PacifiCorp has entered into standard QF PPAs that provide for a 90-day cure period.

Third, with respect to damages for failure to timely achieve Scheduled COD—referred to as "delay damages"—the Joint Utilities recommend moving subsections (a) and (b) of OAR 860-029-0120(7) to New Rule #6 and revising so that the provisions align structurally with the rules describing termination damages and damage calculations for the MAG and MDG.

The Joint Utilities offer the following revisions to New Rule #6:

1. Proposed Changes to New Rule #6.

860-029-XXXX [New Rule #6]

Default, Damages and Termination ~~[New Rule #6]~~

(1) The following events, if uncured within the applicable cure period, may constitute a default by the qualifying facility under a standard power purchase agreement for which the purchasing utility may terminate the power purchase agreement subject to the provisions of this OAR 860-029-XXXX:

(a) failure to begin power deliveries by scheduled commercial operation date~~,~~;

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

(c) failure to maintain qualifying facility status ~~as a certified qualifying facility once power deliveries have commenced,~~;

(d) failure ~~of the qualifying facility~~ to sell entire ~~n~~Net ~~o~~Output to the purchasing public utility~~,~~;

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

[22] *See* Washington Utilities and Transportation Commission, Docket UE 190666, Standard Power Purchase Agreement, Attachment A (Mar. 1, 2021), *available at* https://www.utc.wa.gov/casedocket/2019/190666 (see "Schedule Recovery Plan" definition and Section 11).

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(f) abandonment of the Facility~~,~~;

~~(h) failure to receive or purchase all or part of Net Output~~

(g)~~(i)~~ failure to satisfy applicable Minimum Availability Guarantee for two (2) consecutive years~~,~~;

(h)~~(j)~~ failure to satisfy applicable Minimum Delivery Guarantee for three (3) consecutive years~~,~~; ~~or~~

(i) breach of any warranty or representation in the power purchase agreement; or

(j)~~(k)~~ failure to comply with any other material obligation under the power purchase agreement ~~provide a timely notice of early termination under OAR 860-029-XXX [New Rule #1]~~.

(2) The following events, if uncured within the applicable cure period, may constitute a default by the purchasing public utility under a standard power purchase agreement for which the qualifying facility may terminate the power purchase agreement subject to the provisions of this OAR 860-029-XXXX:

(a) failure to receive or purchase Net Output;

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

(c) breach of any warranty or representation in the power purchase agreement; or

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

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

(3) Cure periods.

(a) ~~If a Notice of Default is issued under subsection (1)(a), t~~The qualifying facility has 180 days ~~one year~~ from the date of the scheduled commercial operation date in which to cure ~~the default for~~ a failure to meet the scheduled commercial operation date.

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(b) Except with respect to a failure to meet the Minimum Availability Guarantee or the Minimum Delivery Guarantee, which failures are not capable of cure, and as otherwise specified in subsection (3)(a) ~~If a Notice of Default is issued under subsection (1)(b), (1)(c), (1)(d), 1(e), 1(f), or 1(g)~~, ~~the~~ a non-defaulting party has thirty (30) days following written notice from the other party in which to cure any failure to comply with its obligations under the power purchase agreement ~~the event of default~~.

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

(4) ~~Imposition of damages.~~

~~(a) The public utility may claim impose damages after issuing a Notice of Default under subsection (1)(a) or (1)(d) as specified in OAR 860-029-0120(7).~~

~~(b)~~ If damages are incurred as a result of any breach under the standard purchase agreement ~~imposed~~, the breaching party must remit ~~they must be remitted~~ payment in the full amount of the damages to the non-breaching party no later than 30 days after the breaching party receive~~sd~~ an invoice from the non-breaching party ~~for damages~~. The invoice for damages must include a written statement explaining in reasonable detail the calculation of the damages amount.

(5) Subject to the cure periods in subsection (3), the non-defaulting party may issue a Notice of Termination to terminate a standard power purchase agreement for a default under subsection (1) or (2), as applicable.

(6) The non-defaulting party must provide the defaulting party a Notice of Termination at least 30 days prior to date of Termination. The notice period for termination may run concurrently with the applicable cure ~~default~~ period.

(7) Termination of Duty to Buy. If a standard power purchase agreement is terminated because of ~~an Event of D~~default by the qualifying facility and the qualifying facility wishes to sell Net Output to the purchasing public utility following such termination, the purchasing public utility may require the qualifying facility do so subject to the terms of the terminated agreement, including but not limited to the contract price, until the ~~termination~~ expiration date, and may require the qualifying facility to post default security. The qualifying facility may not take any action or permit any action to occur the result of which avoids or seeks to avoid the restrictions in subsection through use or establishment of a special purpose entity or other Affiliate.

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(8) Termination Damages. If the standard power purchase agreement is terminated by the purchasing public utility as a result of ~~an event of~~ default by the qualifying facility, termination damages owed by the qualifying facility to the purchasing public utility will be calculated as follows:

(a) the product of (1) the deficiency for a period of twenty-four (24) months following the date of termination, which is equal to the expected Net Output for such period, and (2) the positive difference, if any, obtained by subtracting the Contract Price from the Index Rate for such period;

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

(c) the cost of replacement Renewable Energy Credits if the qualifying facility would have been required to transfer RECs during the twenty-four (24) months following the date of termination.

~~be the positive difference, if any, between (a) the public utility's estimated costs to secure replacement power and Renewable Energy Credits, if applicable, for a period of twenty four (24) months following the date of termination, including any associated transmission necessary to deliver such replacement power; and (b) the contract price for such twenty four (24) month period ("Termination Damages").~~ The purchasing public utility must calculate the Termination Damages on a monthly basis and in a commercially reasonable manner and provide to the qualifying facility a written statement explaining in reasonable detail the calculation of Termination Damages in the Notice of Termination. Termination damages are due by qualifying facility within thirty (30) days of receipt of the written Notice of Termination from the purchasing public utility.

[[Original language moved from Draft Rules OAR 860-029-0120(7)]] (9) Delay Damages. ~~(a)~~ Unless excused under the standard power purchase agreement, damages for failure to meet the scheduled commercial operation date in a standard power purchase agreement are equal to the following:

(a) the positive difference between the Index Price ~~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

(b) any incremental ancillary services and transmission costs resulting from the qualifying facility's failure to deliver during the applicable period ~~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.~~; and

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(c~~b~~) ~~If the qualifying facility would have been required by the standard power purchase agreement to transfer~~ the cost of replacement Renewable Energy Credits if the qualifying facility would have been required to transfer RECs during such monthly period ~~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~~.

(~~9~~10) Duty/Right to Mitigate. Both the purchasing public utility and qualifying facility have a duty to mitigate damages and ~~will~~ must use commercially reasonable efforts to minimize any damages it may incur as a result of the other ~~P~~party's performance or non-performance under a standard power purchase agreement.

(~~10~~11) Security. If a standard power purchase agreement is terminated because of the qualifying facility's default, the purchasing public utility may, in addition to pursuing any and all other remedies available at law or in equity, proceed against any security held by the purchasing public utility in whatever form to reduce the amounts that the qualifying facility owes the purchasing public utility arising from such default.

(~~11~~12) Cumulative Remedies. Except in circumstances in which a remedy provided for in the power purchase agreement is described as a sole or exclusive remedy, the rights and remedies provided to the parties in the standard power purchase agreement are cumulative and not exclusive of any other rights or remedies of the parties.

F. New Rule #7 – Coordination Between Qualifying Facilities (QFs) and Utilities

New Rule #7 describes some technical specifications regarding how the QF output is delivered and the QF's obligations to operate and maintain the facilities necessary to operate in parallel to the bulk electric system. Because many of these requirements are likely to be addressed in the QF's interconnection agreement, the Joint Utilities propose adding language to this provision clarifying that the requirements may be required in the interconnection agreement *or* determined by the purchasing public utility.

New Rule #7 also describes the obligations of the QF and the purchasing public utility to coordinate Planned and Maintenance Outages, as well as the QF's obligations to notify the public

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utility in the event of a Forced Outage or other emergency, thus protecting system reliability. The Joint Utilities generally support these provisions, but offer clarifying edits where applicable.

1. Proposed Changes to New Rule #7.

860-029-XXXX [New Rule #7]

Coordination between qualifying facility and public utility under standard power purchase agreements.

(1) Coordination with System. The qualifying facility's delivery of electricity to the purchasing public utility under a standard power purchase agreement must be at a voltage, phase, power factor, and frequency as reasonably specified by the purchasing public utility. The qualifying facility will furnish, install, operate, and maintain in good order and repair, and without cost to the purchasing public utility, such switching equipment, relays, locks and seals, breakers, automatic synchronizers, and other control and protective apparatus as required in the interconnection agreement or determined by the purchasing public utility to be reasonably necessary for the safe and reliable operation of the Facility in parallel with the System, or the qualifying facility may contract with the purchasing public utility to do so at the qualifying facility's expense. The purchasing public utility must at all times have access to all switching equipment capable of isolating the Facility from the System.

(2) Planned Outages in standard power purchase agreements.

(a) The qualifying facility must provide the purchasing public utility with an annual forecast of Planned Outages for each year of the purchase period at least one (1) month, but no more than three (3) months, before the first day of that year, and may update such Planned Outage forecast as necessary to comply with Prudent Electrical Practices. Any such update to the Planned Outage forecast must be promptly submitted to the purchasing public utility.

(b) The purchasing public utility may specify in the power purchase agreement two (2) calendar months in each year in which the qualifying facility may not schedule planned outages ("High Demand Months") except to the extent reasonably required to enable a vendor to satisfy a guarantee requirement. The purchasing public utility may change either or both High Demand Months with no less than twelve (12) months advance notice to the qualifying facility.

(3) Maintenance Outages in standard power purchase agreements.

(a) If the qualifying facility reasonably determines that it is necessary to schedule a Maintenance Outage, the qualifying facility must notify the

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purchasing public utility of the proposed Maintenance Outage as soon as practicable but in any event at least ~~five (5)~~ fifteen (15) days before the outage begins. The qualifying facility must take all reasonable measures consistent with Prudent Electrical Practices to not schedule any Maintenance Outage during the High Demand Months identified by the public utility.

(b) Notice of a proposed Maintenance Outage by the qualifying facility must include the expected start date and time of the outage, the amount of generation capacity of the Facility that will not be available, and the expected completion date and time of the outage. The purchasing public utility will promptly respond to such notice and may request reasonable modifications in the schedule for the outage. The qualifying facility must use all reasonable efforts to comply with any request to modify the schedule for a Maintenance Outage provided that such change has no substantial impact on the qualifying facility.

(c) Once the Maintenance Outage has commenced, the qualifying facility must keep the public utility apprised of any changes in the generation capacity available from the Facility during the Maintenance Outage and any changes in the expected Maintenance Outage completion date and time. As soon as practicable, any notifications given orally must be confirmed in writing. The qualifying facility ~~may~~ must take all reasonable measures consistent with Prudent Electrical Practices to minimize the frequency and duration of Maintenance Outages.

(4) Forced Outages in standard power purchase agreements. The qualifying facility must promptly notify the purchasing public utility orally, via telephone to a number specified by the purchasing public utility (or other method approved by the purchasing public utility), of any Forced Outage resulting in more than ten percent (10%) of the Nameplate Capacity Rating of the Facility being unavailable. This report from qualifying facility must include the amount of the generation capacity of the Facility that will not be available because of the Forced Outage and the expected return date of such generation capacity. The qualifying facility must promptly update the report as necessary to advise the purchasing public utility of changed circumstances. As soon as practicable, any oral report of a Forced Outage must be confirmed in writing to the purchasing public utility.

(5) Notice of Emergency Deratings and Outages in standard power purchase agreements. Notwithstanding the requirements of subsections (2~~4~~)-(4~~6~~), the qualifying facility will inform the purchasing public utility, via telephone to a number specified by the purchasing public utility (or other method approved by the purchasing public utility), of any limitations, restrictions, deratings or outages reasonably predicted by the qualifying facility to affect more than five percent (5%) of the Nameplate Capacity R~~r~~ating of the Facility for the following day and will

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promptly update such notice to the extent of any material changes in this information.

G. Definitions

The Joint Utilities propose the following changes to definitions to provide clarification and ensure consistency throughout the Draft Rules and with the utilities' current practices.

1. Commercial Operation Date

The Joint Utilities propose to revise the definition of "commercial operation date" to avoid any suggestion that a QF achieves commercial operation simply because it "begins operating." Rather, "commercial operation" is a contractual concept, and a QF achieves commercial operation after satisfying the criteria in the PPA, informs the utility that it has done so, and the utility agrees.

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

2. Effective Date

The Joint Utilities recommend revising the definition of "Effective Date" to clarify that the effective date is not necessarily that date on which the contract "is executed by both" parties, which could cause confusion if the parties execute on different days. Rather, consistent with the Joint Utilities' current practice, the "Effective Date" should be defined simply as the date specified in the PPA on which the agreement between becomes effective.

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

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3. Index Rate

The definition of "index rate" in the Draft Rules—i.e., the lowest avoided cost price approved by the Commission—is not consistent with how that term is currently used in the utilities' PPAs, and it is not clear how Staff's proposed definition should be interpreted. The utilities' understanding, and current practice, is that the "index rate" refers to a *market* index rate, such as the Mid-C Index Price. Under the Draft Rules, the Index Rate is paid during the non-fixed price term at the end of a standard PPA and also is paid for Test Energy before the Scheduled COD. In addition, the Joint Utilities propose using "index rate" in the rules describing various damages calculations.

As utilities use different index rates and often include provisions in PPAs for alternative successor indices should the chosen market index rate no longer be published, the Joint Utilities suggest that "index rate" be broadly defined as a "market index rate" approved by the Commission for inclusion in the PPA. This will avoid the need to change the rules should a particular market index rate become unpublished, and because the Index Rate must be approved by the Commission, the utility does not have unilateral discretion to change the Index Rate.

> (27) "Index rate" means the ~~lowest avoided cost~~ market index rate 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~~ inclusion in the purchasing public utility's standard power purchase agreement.

4. Point of Interconnection

The Joint Utilities recommend removing "a public utility's" from the definition of "point of interconnection" because an off-system QF may be interconnected to the system of another entity—not just to that of a "public utility," which is defined in the Draft Rules to mean a utility

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regulated by the Commission under ORS 757. For example, many QFs selling to Oregon utilities interconnect with the Bonneville Power Administration, which is not a "public utility."

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

5. Scheduled Commercial Operation Date

For clarification purposes, the Joint Utilities recommend revising the definition of "scheduled commercial operation date" to refer back to the definition of "commercial operation date" so that there are no inconsistencies between the two terms, which could create confusion.

> (60) "Scheduled commercial operation date" means the commercial operation date specified ~~selected~~ by the qualifying facility and included in ~~on which~~ the standard power purchase agreement ~~qualifying facility intends to be fully operational and reliable and able to commence the sale of energy or energy and capacity to the public utility~~.

6. Supplementary Power

The Joint Utilities recommend deleting the definition of "supplementary power" as it is not used in the Draft Rules.

> ~~(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.~~

7. System

The Joint Utilities recommend deleting from this definition the reference to "owned or operated by the purchasing public utility" to comport with how the term "system" is used in the Draft Rules. A system may refer to that of the purchasing public utility as regulated by the Commission under ORS 757 or to that of a third-party.

> (634) "System" means the electric transmission and distribution system ~~owned or operated by the purchasing public utility~~.

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III. CONCLUSION

The Joint Utilities look forward to continuing to work with Staff, parties, and the Administrative Hearings Division to develop terms and conditions for standard PPAs that will implement PURPA consistent with legal requirements and sound public policy, thereby encouraging efficient development of QFs while protecting utility customers. The Joint Utilities offer their redlines to the Group 2 Draft Rules as Attachment A to these comments.

DATED: September 16, 2022

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ATTACHMENT A

Group 2 Draft Rules - Redline

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

860-029-0010
Definitions for Division 029 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~~System.

Commented [JU1]: Please note that capitalization of "System" is inconsistent in the rules. The Joint Utilities offer revisions to capitalize "System" where appropriate.

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

Commented [MK*P2]: We believe this is a reasonable caveat and have included it.

Commented [JU3]: Because a QF will be operating before the COD and because "commence operation and begin operating" is repetitive, Joint Utilities propose these slight revisions, which are not intended to substantively change the definition.

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

(11) “Contract Price~~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~~s~~ the reasonable costs of connection, switching, dispatching, metering, transmission, distribution, equipment necessary for ~~system~~ 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 in the prevailing time zone in which the qualifying facility is located on the day before the scheduled commercial operation date.

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

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

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

(18) "Energy costs" means:

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

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

(19) "Existing QF" 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.

Commented [JU4]: This is redundant and the Joint Utilities suggest removal.

Commented [JU5]: Because the parties will likely execute on different days, the Joint Utilities recommend clarifying that the "Effective Date" is the date specified in the PPA.

(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.

(27) "Index Rate~~rate~~" means the market index rate~~lowest avoided cost~~ approved by the Commission for inclusion in~~a generating utility for~~ the purchasing public utility’s standard power purchase agreement~~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~~point~~ of Interconnection~~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~~point~~ of Interconnection~~interconnection~~.

(34) “NERC” means the North American Electric Reliability Corporation.

Commented [JU6]: The former definition is not consistent with the Joint Utilities' current standard PPAs, which use market index rates. The Joint Utilities recommend that the definition be drafted flexibly to allow the Commission to adopt different market index rates for each utility and/or to change the rate over time.

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

Commented [JU7]: This is the correct term.

Commented [JU8]: There is a comma missing here that is important.

(36) “Network Upgrades” means an addition, modification, or upgrade to the transmission system of a purchasing utility required at or beyond the Point of Delivery to accommodate the transmission provider’s receipt of energy from a generation facility to the transmission provider’s ~~system~~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 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~~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 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 Delivery is the Point of Interconnection.

(46) "Point of Interconnection" means the point where the qualifying facility is electrically connected to the~~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.~~(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" means the purchase of electric energy or capacity or both from a qualifying facility by an electric utility.

(50~~(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.

(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).

(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 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.

Commented [JU9]: The Joint Utilities recommend removing "a public utility's" from the definition of "point of interconnection" because an off-system QF may be interconnected to the system of another entity—not just to that of a "public utility," which is defined in the Draft Rules to mean a utility regulated by the Commission under ORS 757. For example, many QFs selling to Oregon utilities interconnect with the Bonneville Power Administration, which is not a "public utility."

Commented [JU10]: "Purchase" was inadvertently combined with "Primary Energy Source" so Joint Utilities moved it to the correct location but did not change the text.

Commented [MK*P11]: The redundant term "purchase term" should now have been replaced in all instances with "purchase period."

(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 rates~~prices~~ for standard power purchase agreements~~ and prices~~.

(60) "Scheduled commercial operation date" means the commercial operation date specified ~~selected~~ by the qualifying facility and included in~~on which~~ the standard power purchase agreement~~qualifying facility intends to be fully operational and reliable and able to commence the sale of energy or energy and capacity to the public utility~~.

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

(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(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.~~

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

(64~~65~~) "System emergency" means a condition on a public utility’s ~~system~~ System which is likely to result in imminent, significant disruption of service to customers, in imminent danger of life or property, or both.

(65~~66~~) “Test energy” means electric energy generated by the Facility during the Test Period, and RECs and capacity rights associated with such electric energy.

(66~~67~~) “Test period” means a period during which Start-Up Testing is conducted.

(67~~68~~) "Time of delivery" means:

Commented [JU12]: Replaced "prices" with "rates", which is defined in this section.

Commented [JU13]: The Joint Utilities recommend clarifying this definition by referencing back to the definition of commercial operation date.

Commented [JU14]: The Joint Utilities suggests deleting this definition as it is not used in the Draft Rules.

Commented [JU15]: The Joint Utilities recommend that the "owned or operated by the purchasing public utility" be deleted to comport with how "system" is used in the rules (i.e., not limited to the purchasing public utility's system).

(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.

(68~~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.

(69~~70~~) "Total output" means all energy produced by the Facility.

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

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

860-029-0043
Standard Rates for Purchase

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

Commented [MK*P16]: We deleted the last term "Total Term" as redundant.

Commented [MK*P17]: Joint Utilities flagged this as an item where changes are needed to ensure consistency with the new rules. We agree in principle but have not yet had a chance to undertake a comprehensive review.

Commented [JU18]: Please note that Group 1 provisions are highlighted in gray.

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

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

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

Commented [MN19]: Our current recommendation, also solidified by Commission guidance, is that this language remain in place unchanged for now, though we note that it may need to be addressed in future proceedings as the situation changes.

860-029-00XX [New Rule #1]
Obligation for Costs to Accept Deliveries from ~~Off System~~ Qualifying Facilities

Commented [JU20]: The Joint Utilities propose that New Rule #1 apply to both on-system and off system QFs, and therefore recommend removing all references to "off-system" in New Rule # 1.

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

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

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

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

Commented [JU21]: The Joint Utilities suggest using this descriptor throughout this rule for clarity.

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

Commented [JU22]: The Joint Utilities oppose allowing deferment of the development period.

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

(~~c~~b) Request an effective date for commencement of network transmission service for the qualifying facility that is (i) 90~~180~~ days prior to the scheduled commercial operation date, or (ii) as soon as practicable after the Effective Date of the ~~executed~~ standard power purchase agreement if the scheduled commercial operation date is less than 90~~180~~ days following the Effective Date.

(~~d~~c) No later than five (5) business days after the public utility's receipt of a response to the application submitted under subsection (b), inform the qualifying facility of the transmission provider's response.

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

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

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

Commented [JU23]: The Joint Utilities understand that a QF must have firm transmission to the purchasing utility's system before the utility can request to designate it as a network resource. The Joint Utilities recommend the following revisions to clarify this point.

Commented [JU24]: The Joint Utilities recommend that they be required to obtain transmission 90 days, not 180 days, in advance. The recommendation is consistent with the Joint Utilities' position regarding allowing QFs to come online early under New Rule #4(4).

Commented [JU25]: The Joint Utilities recommend clarifying that each party has a right to proceed with a contested case.

Commented [JU26]: Suggest using 5-day increments and business days (i.e., fifteen (15) business days) for consistency with other timelines in this rule.

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

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

860-029-XXXX [New Rule #2]

Eligibility for Standard Avoided Cost Prices and Purchase Agreements

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

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

(b) For purposes of this section:

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

Commented [JU27]: Because of tight-turnaround deadlines in New Rule #1 (e.g., five (5) days), the Joint Utilities recommend specifying a 30-day cure period for failure to meet the deadlines in subsection (4) of New Rule #1 rather than immediate default.

Commented [MK*P28]: Commission has given guidance that it does not want to reopen this item.

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

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

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

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

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

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

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

(d) Notwithstanding subsections (4)(a) and (b), two or more qualifying facilities that otherwise are not owned or operated by the same person(s) or affiliates(s) will not be determined to be a single qualifying facility based on the fact that they have in place a shared interest or agreement regarding interconnection facilities, interconnection-related

Commented [MK*P29]: Clarifying change.

~~S~~system upgrades, or any other infrastructure not providing motive force or fuel. Two or more qualifying facilities will not be held to be owned or controlled by the same person(s) or affiliate(s) solely because they are developed by a single entity so long as they are not owned or operated by the same person(s) or affiliate(s) of the same person(s) at the time each qualifying facility~~QF~~ seeks to enter into a power purchase agreement or thereafter~~PPA~~.

860-029-XXXX [New Rule #3]

Process for Procuring Standard Power Purchase Agreement

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

(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. A letter of intent or other documentation showing that the lease will be granted contingent upon receipt of a power purchase agreement~~PPA~~ by the developer will be sufficient.

Commented [JU30]: Added "thereafter" to address potential problem that by specifying that it applies at the time the QF seeks to enter the PPA the rule accidentally suggests they could have common ownership later after the PPA is entered.

Commented [MK*P31]: Clarifying change.

Commented [MK*P32]: Addition based on Commission guidance.

Commented [MK*P33]: Our intention is for this to be a clarification in the order, not incorporated into the text of the rules.

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

(A) demonstration of ability to obtain certified qualifying facility status prior to commercial operation; for qualifying facilities~~QFs~~ larger than 1 MW, a Form 556 self-certification of the proposed qualifying facility or a FERC order granting an application for certification of the proposed qualifying facility is required.
(B) demonstration of eligibility for standard power purchase agreement and pricing under OAR 860-029- 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~~System,
(E) generation technology and other related technology applicable to the site,
(F) non-binding estimate of 12 x 24 delivery schedule and 8760 generation profile when practicable,
(G) motive force or fuel plan,
(H) proposed commercial operation date,
(I) proposed contract term,
(J) proposed pricing provisions,
(K) Point of Delivery as well as Point of Interconnection or multiple Points of Interconnection under consideration,
(L) latitude and longitude of proposed facility and site layout,
(M) for a qualifying facility with battery storage system, description of the storage design capacity, description of technology used by battery storage system, storage system duration, and net power output, and
(N) other information specified in the utility's avoided cost rates schedule or standard power purchase agreement approved by the Commission.

Estimates of the net amount of power to be delivered to the purchasing public utility's 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(14). A 12 x 24 delivery schedule may be used by the purchasing public utility to calculate damages.

(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.

(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 (10) business

Commented [MK*P34]: Edit to attempt to conform with Commission guidance.

Commented [MK*P35]: We seek comment on this clarification of this requirement.

Commented [MK*P36]: We are inclined to leave this in – but note that the other information to be asked for is still subject to Commission approval; it is not a blank check. For the same reason we have not added a "reasonableness" standard here – the Commission will consider that when reviewing the standard contract.

Commented [JU37]: Recommended keeping this provision in the Draft Rules to acknowledge that 12 x24 delivery schedule, while not binding, may be used to calculate damages and may be requested when seeking facility upgrades.

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.

Commented [MK*P38]: We are leaving this as is.

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

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

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

(9) A legally enforceable obligation will be considered established on the date on which the qualifying facility executes the final executable form of the power purchase agreement.

860-029-0120
Standard Power Purchase Agreements

(1) Each public utility must offer standard power purchase agreements to eligible qualifying facilities. Each public utility must submit all forms of standard power purchase agreements to the Commission for approval.

(2) Qualifying facilities have the unilateral right to select a purchase period of up to 20 years for a standard power purchase agreement. Qualifying facilities electing to sell firm output at fixed prices have the unilateral right to a fixed-price term of up to 15 years in the standard power purchase agreement, subject to the reduction specified in subsection (6) for a development period that exceeds three years, and may select a non-fixed price term of up to five years.

(3~~4~~) The development period of a standard power purchase agreement begins on the Effective Date~~, unless the start of the development period is delayed by the initiation of the Network Upgrade cost allocation process in OAR 860-029-XXXX [Rule #1]~~. The development period ends at 24:00 in the time zone in which the qualifying facility is located on the day before the scheduled commercial operation date specified in the standard power purchase agreement.

Commented [JU39]: The Joint Utilities oppose allowing this process to delay Scheduled COD. Accordingly, the Joint Utilities recommend deleting the reference to New Rule #1.

(4~~5~~) The purchase period of a standard power purchase agreement begins on the scheduled commercial operation date. The scheduled commercial online~~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 modified under subsection (6~~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.

(5~~6~~) A qualifying facility may specify a scheduled commercial operation date for a standard power purchase agreement subject to the following requirements:

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

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

(A) The qualifying facility has received an interconnection-related system impact study report, cluster study report, or facilities study report indicating interconnection will take longer 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 except as specified in subsection (d) below.

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.

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

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

Commented [JU40]: The Joint Utilities recommend deleting "excused delay" as it is not defined in the Draft Rules.

Commented [MK*P41]: This was previously a stand-alone note that we have incorporated into the rule text.

Commented [JU42]: Incorporation of this note may cause confusion or introduce inconsistencies. In any case, it is redundant of subsection (6), which addresses these same issues.

(6~~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 is longer than the development period in the executed standard power purchase agreement; or
(B) includes an estimate of costs to interconnect that render the project uneconomic in the qualifying facility's opinion.

(b) A qualifying facility that chooses to modify the scheduled commercial operation date under subsection (6~~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 (6~~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 the qualifying facility is delayed in reaching commercial operation because of an event of Force Majeure or the public utility's default under the standard power purchase agreement or any other agreement related to the interconnection of the qualifying facility to the purchasing utility's S~~s~~ystem, including interconnection study agreements and interconnection agreements, the scheduled commercial operation date in the standard power purchase agreement will be extended commensurately with the delay caused by the event of Force Majeure or the public utility's default, except for periods of delay that could have been prevented had the qualifying facility taken mitigating actions using commercially reasonable efforts. An extension of the scheduled commercial operation date under this subsection is not subject to the fixed-price term reduction in subsection (5~~6~~)(c) or the four-year limitation in subsection (5~~6~~)(d).

(7~~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 180 days~~one year~~ in which to cure the default for failure to meet the scheduled commercial operation date, during which the public utility may collect damages for failure to deliver.

(8) Subject to the 180-day cure period in section (7~~(a) Unless excused under the standard power purchase agreement, damages for failure to meet the scheduled commercial operation date in a standard power purchase agreement are equal to 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.~~

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

(9~~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 power purchase agreement. The purchasing public utility may not unreasonably withhold agreement.

(10~~11~~) The standard power purchase agreement must include a mechanical availability guarantee (MAG) for intermittent wind and run-of-the-river hydro qualifying facilities as follows:

(a) For new ~~A 90 percent overall guarantee starting three years after the commercial operation date for~~ qualifying facilities, an 85 percent overall guarantee for the first ~~with new contracts or one~~ year starting on~~after~~ the commercial operation date, with a 90 percent overall guarantee thereafter.

(b) For existing ~~for~~ qualifying facilities renewing contracts~~that renew contract~~ or entering~~enter~~ into a superseding contract, a 90 percent overall guarantee.~~, subject to an allowance for 200 hours of planned maintenance per turbine per year that does not count toward the calculation of the overall guarantee.~~

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

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

Commented [JU43]: Recommend moving this below to New Rule #6 with the other damages provisions as that is a better fit.

Commented [MK*P44]: Conform when final.

Commented [JU45]: Because parties expressed concerns in the informal phase about run-of-the-river hydro QFs and the MDG, the Joint Utilities propose to clarify that run-of-river hydro QFs are subject to the MAG--not the MDG.

Commented [JU46]: The Joint Utilities oppose the exception in the MAG requirements for planned maintenance as such a provision is unnecessary; the percentage guarantees inherently include the time needed for maintenance, and thus there should not be an additional allowance needed for maintenance.

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

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

Commented [JU47]: The Joint Utilities propose minor modifications to the calculation of damages for failure to meet the MAG to clarify that the shortfall in output is multiplied by the Index Rate, which is straightforward to implement and consistent with the Joint Utilities' current practice.

(11~~12~~) A purchasing public utility may issue a Notice of Default, and subsequently terminate a standard power purchase agreement pursuant to its terms and limitations, for failure to meet the MAG if the qualifying facility does not meet the MAG for two (2) consecutive years if such failure is not otherwise excused by the power purchase agreement.

(12~~13~~) The standard purchase agreement will include an annual minimum delivery guarantee (MDG) for solar, geothermal, biomass, and baseload hydro qualifying facilities equal to 90 percent of the qualifying facility's expected energy for the year.

(a) The qualifying facility will owe damages for failure to meet the MDG equal to:

(A) the product of the deficiency for such period, which is ~~and~~ the difference between (1) 90 percent~~utility's cost to cover;~~

~~(B) the cost of any replacement energy procured by the utility as a result~~ of the qualifying facility's expected energy for the year and (2) the actual Net Output delivered by the qualifying facility to the purchasing public utility in the year, ~~failure to meet the MDG~~ and the positive difference, if any, obtained by subtracting the Contract Price from the Index Rate; the cost of any ~~resulting~~ incremental ancillary services and transmission costs resulting from the qualifying facility's failure to meet the MDG; and

(C) the cost of replacement Renewable Energy Credits.

Commented [JU48]: The Joint Utilities generally support the MDG provisions in the Draft Rules but offer the following edits to add detail regarding how damages for failure to meet the MDG are calculated.

(b) The 90 percent MDG will be reduced on a pro rata basis for any portion of the annual period the qualifying facility was prevented from generating or delivering electricity for reasons of Force Majeure.

(13) A purchasing~~(14) A~~ public utility may issue a Notice of Default, and subsequently terminate a standard power purchase agreement pursuant to its terms and limitations, for failure to meet the MDG if the qualifying facility does not meet the MDG for three (3) consecutive years if such failure is not otherwise excused by the standard power purchase agreement.

(14~~15~~) Incremental Facility~~Utility~~ Upgrades.

(a) The qualifying facility is obligated to provide the purchasing public utility an as-built supplement describing the Facility~~facility~~ within 90 days after the commercial operation date. Except as expressly permitted under subsection 14(b), the Facility reflected in the as-built supplement~~facility~~ may not:

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

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

(b) During the term of the power purchase agreement, ~~except as permitted under subsection 14(c),~~ the Facility~~facility~~ may not be modified in a manner that materially deviates from the as-built supplement without the purchasing public utility's prior written approval. That approval may not unreasonably be withheld, conditioned, or delayed, provided that the purchasing public utility is not required to approve any modification of the facility Facility that:

(A) results in the facility Facility increasing its nameplate Nameplate capacity Capacity rating Rating beyond the nameplate Nameplate capacity Capacity rating Rating specified in the power purchase agreement at the time it was executed; or

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

(c) In the event that the qualifying facility seeks to upgrade the ~~facility~~ Facility during the term of the power purchase agreement in a manner that does not increase the ~~nameplate~~ Nameplate ~~capacity~~ Capacity ~~rating~~ Rating of the ~~facility~~ Facility in the power purchase agreement, but which is reasonably likely to cause the expected annual Net Output specified in the power purchase agreement at the time it was executed to increase by more than ten ~~expected to exceed~~ (10) percent ~~of expected annual net output in the power purchase agreement~~, such upgrades may be made ~~without the utility's prior approval~~ under this subsection 14(c) subject to the following requirements:

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

(B) At least six (6) months in advance of the scheduled installation date for the proposed Facility upgrades, the qualifying facility must send written notice to the purchasing public utility containing a detailed description of the proposed upgrades and their impact on expected Net Output~~net output~~ and a revised 12 x 24 delivery schedule, and must request~~requesting~~ indicative pricing for the incremental additional Net Output~~net output~~ expected to be generated as a result of the upgrades.

Commented [JU49]: As proposed by Staff, subsection (b) is confusing when read in conjunction with (c) immediately below. Subsection (b) says the utility does not have to agree to an increase of more than ten (10) percent annual net output, but then (c) says the QF can unilaterally do such an increase in certain circumstances. For consistency and clarity, the Joint Utilities propose that written approval for facility modifications is required in all circumstances.

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

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

(d) Within 90 days after the date on which upgrades are installed under subsection~~subsections~~ 14,~~(a) (b) or (c),~~ the qualifying facility is obligated to provide the purchasing public utility an as-built supplement describing in detail the upgraded Facility.

(~~facility.~~(e) A qualifying facility that wishes to install upgrades that would cause the Facility to~~facility fto~~ increase its Nameplate Capacity Rating~~nameplate capacity rating~~ must terminate its existing power purchase agreement and may choose to enter a new standard or new non-standard power purchase agreement based on the then current avoided cost. In calculating damages resulting from the early termination of the original standard power purchase agreement, if any, the cost to cover will be calculated based on the pricing set forth in the new non-standard pricing agreement notwithstanding any other provision in these rules to the contrary. ~~A qualifying facility that chooses to negotiate a new power purchase agreement under this subsection will not be liable for damages for any default caused by its failure to maintain eligibility for a standard power purchase agreement.~~

(15~~16~~) 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 60 days of the Effective Date of the standard power purchase agreement. The amount of required Default Security will be set forth in the public utility's form of standard power purchase agreement approved by the Commission. The obligation to maintain the Project Development Security will expire once the qualifying facility commences commercial operation. The qualifying facility may use either of the following options to post Project Development Security:

(a) Cash Escrow Security. The qualifying facility shall deposit in an escrow account established by the purchasing utility in a banking institution acceptable to both the qualifying facility and purchasing utility, Project Development Security. Such sum shall earn interest at the rate applicable to money market deposits at such banking institutions

Commented [MK*P50]: Clarifying edits.

Commented [MK*P51]: We invite the participants to propose guidelines for determining the amount of Project Development Security that could be included in the PPAs.

Commented [MK*P52]: Based on Commission guidance.

Commented [MK*P53]: Deleted reference to creditworthiness standard being in the PPA – once we are closer to a final standard we will need to figure out the best way for the Commission to adopt it.

We did not add a reasonableness standard here because the Commission will approve the amount in the PPA based on the standards it deems appropriate, which will include whether the amount is reasonable.

from time to time. To the extent the purchasing utility receives payment from the Project Development Security for damages in the event of default, the qualifying facility will, within 15 days, restore the Project Development Security as if no such deduction had occurred.

(b) Letter of Credit Security. The qualifying facility shall post and maintain in an amount equal to the Project Development Security: (a) a guaranty from a party that satisfies the purchasing public utility's creditworthiness requirements, in a form acceptable to the public utility in its reasonably-exercised 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.

(16~~17~~) Default Security. A qualifying facility that has executed a standard power purchase agreement that does not meet the public utility's credit worthiness requirements must post Default Security upon commencing commercial operation. The amount of required Default Security will be set forth in the public utility's form of standard power purchase agreement approved by the Commission. The qualifying facility may use one of the following options to post Default Security:

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

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

(c) Step-In Rights and Senior Liens. Default security can be satisfied through grant of step-in rights or a senior lien to the purchasing utility in a form acceptable to the purchasing public utility in its reasonable-exercised discretion.

~~(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:

Commented [MK*P54]: Added "reasonableness" standard here.

Commented [MK*P55]: Same comment as on "Project Development Security" above.

Commented [MK*P56]: Added reasonableness standard.

Commented [MK*P57]: Based on Commission guidance, we are proposing to leave this as-is.

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

(b) Insurance coverage will include:

(A) general commercial liability insurance covering bodily injury and property damage in the amount of $1,000,000 each occurrence combined single limit, or greater if desired by the qualifying facility; and

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

(18~~19~~) Except as explicitly provided in these rules, any qualifying facility that has entered into a standard power purchase agreement with a public utility under PURPA will not make any changes in its ownership, control or management that would cause the qualifying facility to fail to satisfy the eligibility requirements for entering into the standard power purchase agreement or receipt of standard pricing reflected in the agreement. No more than once every 24 months, at the request of the public utility, the qualifying facility will provide documentation and information reasonably requested by the public utility to establish the qualifying facility's continued compliance with eligibility requirements for the standard power purchase agreement executed by the qualifying facility and public utility. The public utility shall take reasonable steps to maintain the confidentiality of any such documentation and information the qualifying facility identifies as confidential, provided that the public utility may provide all such information to the Commission in a proceeding before the Commission.

Commented [MK*P58]: Deleting jurisdiction clause based on guidance from the Commission.

860-029-XXXX [New Rule #4]
Delivery and Purchase under Standard Power Purchase Agreement

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

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

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

(b) the transmitting entity or entities require the qualifying facility to schedule deliveries in increments of no less than one (1) megawatt;

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

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

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

(a) for on-system qualifying facilities, Net Output~~net output~~ at the Point of Interconnection that exceeds the qualifying facility’s Nameplate Capacity Rating;

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

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

(5~~4~~) A qualifying facility may not commence commercial operation any sooner than 90~~180~~ days before the scheduled commercial operation date of the standard power purchase agreement unless the purchasing public utility consents to early operation. ~~A public utility may require a qualifying facility to wait to commence commercial operation until no sooner than 90 days prior to the scheduled commercial operation if the public utility is unable to accept delivery from the qualifying facility.~~

(6~~5~~) The purchasing public utility will accept Test Energy delivered to the Point of Delivery as early as 90 days prior to the scheduled commercial operation date, as long as the purchasing public utility has commenced transmission service for the Facility; provided that, in such case, the purchasing public utility’s obligation to purchase Test Energy will not exceed a maximum period of 90 days. The purchasing public utility will pay the qualifying facility the lower of 85 percent of Index Rate or 85 percent of Contract Price~~index rate~~ for Test Energy delivered prior to the scheduled commercial operation date.

860-029-XXXX [New Rule #5]
Force Majeure

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

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

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

Commented [JU59]: To avoid confusion and the potential for disputes, the Joint Utilities propose language specifying when an off-system QF may deliver imbalance energy.

Commented [JU60]: The Joint Utilities revised to clarify what is meant by "excess" energy, which the Joint Utilities propose is more correctly referred to as "surplus delivery" of energy.

Commented [JU61]: The Joint Utilities recommend that this provision be revised such that a QF may only come online 90 days prior to the scheduled COD, because 180 days is too long for utilities to be expected to reserve capacity.

Commented [JU62]: This time limit on delivering test energy is consistent with the Joint Utilities' Community Solar PPAs.

Commented [JU63]: The Joint Utilities oppose being required to pay the full index rate for test energy, which is not consistent with currently approved standard PPAs or the Joint Utilities’ negotiated QF and non-QF agreements.

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

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

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

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

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

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

(b) the cost or availability of fuel or motive force to operate the Facility.

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

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

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

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

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

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

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

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

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

(a) provides the other party written notice describing the Force Majeure, no later than fourteen (14) days~~two weeks~~ after its occurrence;~~,~~

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

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

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

(7) If an event of Force Majeure exceeds 180 days, the party not claiming a Force Majeure defense or delay may terminate the power purchase agreement by providing written notice to the other party.

860-029-XXXX [New Rule #6]~~XXX~~
Default, Damages and Termination ~~[New Rule #6]~~

(1) The following events, if uncured within the applicable cure period, may~~eventsmay~~ constitute a default by the qualifying facility under a standard power purchase agreement for which the purchasing utility may terminate the power purchase agreement subject to the provisions of this OAR 860-029-XXXX:

(a) failure to begin power deliveries by scheduled commercial operation date;~~,~~

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

(c) failure to maintain ~~status as a certified qualifying facility once power deliveries have commenced,~~

~~(d) failure of the~~ qualifying facility status;

(d) failure to sell entire Net Output~~net output~~ to the purchasing public utility;~~,~~

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

Commented [JU64]: If an event of Force Majeure extends beyond 180 days, the party not claiming Force Majeure should have the right to terminate the PPA. Extraordinary events that are not reasonably foreseeable at the time of contracting and which cannot be overcome by reasonable diligence provide a basis for temporarily suspending the parties' obligations and performance. However, with changing avoided cost prices and the long-term nature of these contracts, it is unreasonable to permit indefinite extensions of the parties' rights and obligations.

Commented [JU65]: For clarification purposes, the Joint Utilities first propose to separate the utility and QF events of default.

(f) abandonment of the Facility;~~,~~

~~(g(h) failure to receive or purchase all or part of Net Output~~

~~(i~~) failure to satisfy applicable Minimum Availability Guarantee for two (2) consecutive years;~~,~~

(h~~j~~) failure to satisfy applicable Minimum Delivery Guarantee for three (3) consecutive years;~~,~~ ~~(l) or~~

(i) breach of any warranty or representation in the power purchase agreement; or

(j~~(k~~) failure to comply with any other material obligation~~provide a timely notice of early termination~~ under the power purchase agreement.~~OAR 860-029-XXX [New Rule #1].~~

Commented [JU66]: With respect to the events of default for both QFs and utilities, the Joint Utilities recommend adding "breach of any warranty or representation in the power purchase agreement" and "failure to comply with any other material obligation under the power purchase agreement" to clarify that—in addition to the specified events of default in the Draft Rules—any other general breach in warranties and representations, or failure to comply with material obligations under the PPA will also qualify as an event of default under the agreement.

(2) The following events, if uncured within the applicable cure period, may constitute a default by the purchasing public utility ~~Unless otherwise excused~~ under a~~the~~ standard power purchase agreement ~~by Excused Delay, Force Majeure, or otherwise, the non-defaulting party is authorized to issue a Notice of Default upon any of the events described in subsection (1).~~

~~(3) Cure periods~~for which

~~(a) If a Notice of Default is issued under subsection (1)(a),~~ the qualifying facility may terminate the power purchase agreement subject to the provisions of this OAR 860-029-XXXX:

(a) failure to receive or purchase Net Output;

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

(c) breach of any warranty or representation in the power purchase agreement; or

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

(3) Cure periods.

(a) The qualifying facility has 180 days from the date of the scheduled commercial operation date~~one year~~ in which to cure a~~the default for~~ failure to meet the scheduled commercial operation date.

(b) Except with respect to a failure to meet the Minimum Availability Guarantee or the Minimum Delivery Guarantee, which failures are not capable~~If a Notice~~ of cure, and as otherwise specified in ~~Default is issued under~~ subsection (3)(a), a ~~1)(b), (1)(c), (1)(d), 1(e), 1(f), or 1(g), the~~ non-defaulting party has thirty (30) days following written notice from the other party in which to cure any failure to comply with its obligations under the power purchase agreement.

(4) If damages are incurred as a result~~in which to cure the event~~ of any default under the standard purchase agreement the breaching party~~.~~
~~(c) There is no cure period for a Notice of Default issued under subsection (1)(h), (1)(i) or (j).~~

~~(4) Imposition of damages.~~

~~(a) The public utility may impose damages after issuing a Notice of Default under subsection (1)(a) or (1)(d) as specified in OAR 860-029-0120(7).~~

~~(b) If damages are imposed, they~~ must remit payment in the full amount of the damages ~~be remitted~~ to the non-breaching party no later than 30 days after the breaching party receives~~received~~ an invoice from the non-breaching party~~for damages~~. The invoice for damages must include a written statement explaining in reasonable detail the calculation of the damages amount.

(5) Subject to the cure periods in subsection (3), the non-defaulting party may issue a Notice of Termination to terminate a standard power purchase agreement for a default under subsection(1) or (2), as applicable. ~~(1).~~

(6) The non-defaulting party must provide the defaulting party a Notice of Termination at least 30 days prior to date of Termination. The notice period for termination may run concurrently with the applicable cure~~default~~ period.

(7) Termination of Duty to Buy. If a standard power purchase agreement is terminated because of default~~an Event of Default~~ by the qualifying facility and the qualifying facility wishes to sell Net Output to the purchasing public utility following such termination, the purchasing public utility may require the qualifying facility do so subject to the terms of the terminated agreement, including but not limited to the contract price, until the expiration date, and may require the qualifying facility to post default security. ~~termination date.~~ The qualifying facility may not take any action or permit any action to occur the result of which avoids or seeks to avoid the restrictions in this subsection through use or establishment of a special purpose entity or other Affiliate.

(8) Termination Damages. If the standard power purchase agreement is terminated by the purchasing public utility as a result of ~~an event of~~ default by the qualifying facility, termination damages owed by the qualifying facility to the purchasing public utility will be calculated as follows:

(a) the product of (1 ~~the positive difference, if any, between (a~~) the deficiency~~public utility's estimated costs to secure replacement power and Renewable Energy Credits, if applicable,~~ for a period of twenty -four (24) months following the date of termination, which is equal to the expected Net Output for ~~including any associated transmission necessary to deliver~~ such period, and (2) the positive difference, if any, obtained by

Commented [JU67]: Added to clarify that a QF may be required to post default security in order to ensure customers are not subject to risk if a QF defaults and then later seeks to re-enter a PPA

Commented [JU68]: The Joint Utilities revised this section so that the structure aligns with the rules describing damage calculations for the MAG & MDG and so that it more clearly conveys how damages are calculated.

subtracting the Contract Price from the Index Rate~~replacement power; and (b) the contract price~~ for such period;

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

(c) the cost of replacement Renewable Energy Credits if the qualifying facility would have been required to transfer RECs during the twenty-four (24) months following the date of termination.

~~month period ("Termination Damages").~~ The purchasing public utility must calculate the Termination Damages on a monthly basis and in a commercially reasonable manner and provide to the qualifying facility a written statement explaining in reasonable detail the calculation of Termination Damages in the Notice of Termination. Termination damages are due by qualifying facility within thirty (30) days of receipt of the written Notice of Termination from the purchasing public utility.

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

(a) the positive difference between the Index Price 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

(b) any incremental ancillary services and transmission costs resulting from the qualifying facility's failure to deliver during the applicable period; and

(c) the cost of replacement Renewable Energy Credits if the qualifying facility would have been required to transfer RECs during such monthly period.

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

(11~~10~~) Security. If a standard power purchase agreement is terminated because of the qualifying facility's default, the purchasing public utility may, in addition to pursuing any and all other remedies available at law or in equity, proceed against any security held by the purchasing public utility in whatever form to reduce the amounts that the qualifying facility owes the purchasing public utility arising from such default.

(12~~11~~) Cumulative Remedies. Except in circumstances in which a remedy provided for in the power purchase agreement is described as a sole or exclusive remedy, the rights and remedies

Commented [JU69]: The Joint Utilities propose to move this section from OAR 860-029-0120(7) to New Rule #6 with the other damages provisions. The Joint Utilities offer further revisions to clarify precisely how damages are calculated. Please note that some of this language is the same as what Staff proposed in OAR 860-029-0120(7), but it is all shown in redline because the language has been moved.

provided to the parties in the standard power purchase agreement are cumulative and not exclusive of any other rights or remedies of the parties.

860-029-XXXX [New Rule #7]
Coordination between qualifying facility and public utility under standard power purchase agreements.

(1) Coordination with System. The qualifying facility's delivery of electricity to the purchasing public utility under a standard power purchase agreement must be at a voltage, phase, power factor, and frequency as reasonably specified by the purchasing public utility. The qualifying facility will furnish, install, operate, and maintain in good order and repair, and without cost to the purchasing public utility, such switching equipment, relays, locks and seals, breakers, automatic synchronizers, and other control and protective apparatus as required in the interconnection agreement or determined by the purchasing public utility to be reasonably necessary for the safe and reliable operation of the Facility in parallel with the System, or the qualifying facility may contract with the purchasing public utility to do so at the qualifying facility's expense. The purchasing public utility must at all times have access to all switching equipment capable of isolating the Facility from the System.

(2) Planned Outages in standard power purchase agreements.

(a) The qualifying facility must provide the purchasing public utility with an annual forecast of Planned Outages for each year of the purchase period at least one (1) month, but no more than three (3) months, before the first day of that year, and may update such Planned Outage forecast as necessary to comply with Prudent Electrical Practices. Any such update to the Planned Outage forecast must be promptly submitted to the purchasing public utility.

(b) The purchasing public utility may specify in the power purchase agreement two (2) calendar months in each year in which the qualifying facility may not schedule planned outages ("High Demand Months") except to the extent reasonably required to enable a vendor to satisfy a guarantee requirement. The purchasing public utility may change either or both High Demand Months with no less than twelve (12) months advance notice to the qualifying facility.

(3) Maintenance Outages in standard power purchase agreements.

(a) If the qualifying facility reasonably determines that it is necessary to schedule a Maintenance Outage, the qualifying facility must notify the purchasing public utility of the proposed Maintenance Outage as soon as practicable but in any event at least five (5) days before the outage begins. The qualifying facility must take all reasonable measures consistent with Prudent Electrical Practices to not schedule any Maintenance Outage during the High Demand Months identified by the public utility.

(b) Notice of a proposed Maintenance Outage by the qualifying facility must include the expected start date and time of the outage, the amount of generation capacity of the Facility that will not be available, and the expected completion date and time of the outage. The purchasing public utility will promptly respond to such notice and may request reasonable modifications in the schedule for the outage. The qualifying facility must use all reasonable efforts to comply with any request to modify the schedule for a Maintenance Outage provided that such change has no substantial impact on the qualifying facility.

(c) Once the Maintenance Outage has commenced, the qualifying facility must keep the public utility apprised of any changes in the generation capacity available from the Facility during the Maintenance Outage and any changes in the expected Maintenance Outage completion date and time. As soon as practicable, any notifications given orally must be confirmed in writing. The qualifying facility~~ may~~ must take all reasonable measures consistent with Prudent Electrical Practices to minimize the frequency and duration of Maintenance Outages.

(4) Forced Outages in standard power purchase agreements. The qualifying facility must promptly notify the purchasing public utility orally, via telephone to a number specified by the purchasing public utility (or other method approved by the purchasing public utility), of any Forced Outage resulting in more than ten percent (10%) of the Nameplate Capacity Rating of the Facility being unavailable. This report from qualifying facility must include the amount of the generation capacity of the Facility that will not be available because of the Forced Outage and the expected return date of such generation capacity. The qualifying facility must promptly update the report as necessary to advise the purchasing public utility of changed circumstances. As soon as practicable, any oral report of a Forced Outage must be confirmed in writing to the purchasing public utility.

(5) Notice of Emergency Deratings and Outages in standard power purchase agreements. Notwithstanding the requirements of subsections (2)-(4~~) (6~~), the qualifying facility will inform the purchasing public utility, via telephone to a number specified by the purchasing public utility (or other method approved by the purchasing public utility), of any limitations, restrictions, deratings or outages reasonably predicted by the qualifying facility to affect more than five percent (5%) of the Nameplate Capacity Rating~~rating~~ of the Facility for the following day and will promptly update such notice to the extent of any material changes in this information.