BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 631

In the Matter of Rulemaking to Address Procedures, Terms, and Conditions Associated with Qualifying Facilities (QF) Standard Contracts	JOINT FINAL COMMENTS OF THE COMMUNITY RENEWABLE ENERGY ASSOCIATION, NORTHWEST & INTERMOUNTAIN POWER PRODUCERS COALITION, AND RENEWABLE ENERGY COALITION ON STAFF'S PROPOSED RULES GROUP 1

I. INTRODUCTION

The Community Renewable Energy Association ("CREA"), the Northwest & Intermountain Power Producers Coalition ("NIPPC"), and the Renewable Energy Coalition (the "Coalition") (collectively the "QF Trade Associations") respectfully submit these Final Comments on Group 1 Issues. These Comments address Staff's latest draft of proposed administrative rules related to contracting process and power purchase agreement ("PPA") terms circulated October 14, 2021 ("Staff's Draft Rules")[1] and the Administrative Hearing Division's rule redline circulated via email on April 13, 2022 for implementation of the state and federal Public Utility Regulatory Policies Acts ("PURPA") by the Public Utility Commission of Oregon ("OPUC" or the "Commission"). Further, these Comments respond to issues and questions raised at the Commission Workshop held on April 20, 2022, and the arguments of Portland General Electric Company ("PGE"), PacifiCorp dba Pacific Power ("PacifiCorp"), and Idaho

[1] *See* Order No. 21-353, Appendix A at 14-41 (Oct. 26, 2021).

Power Company ("Idaho Power") (collectively the "Joint Utilities"). Additionally, the QF Trade Associations provide limited feedback on certain very recent changes and proposals in the most recent set of changes to the draft rules circulated by Administrative Law Judge ("ALJ") Mapes via email on May 3, 2022, with responsive comment bubbles in the draft rules, but the comments therein should not be considered inclusive of all concerns or proposals the QF Trade Associations have with the currently proposed draft rules.

II. FINAL GROUP 1 COMMENTS

A. Standard Contracts Provide Many Benefits to Developers of Qualifying Facility Projects

At the various workshops, items of discussion have been the parties' overall aims and goals of the rulemaking, the purposes of these reforms and rule changes, and the values parties are looking to advance through this rulemaking.[2] The QF Trade Associations provide some background on the benefits of standard contracts and rules implementing a contracting process. Standard contracts for small-scale qualifying facility ("QF") projects provide many benefits that should be taken into consideration when developing these rules. Standard contracts help ensure that the utilities comply with their obligations under PURPA and reduce costs and the likelihood of litigation because they are easy to use and implement, reduce the need to hire lawyers, and help mitigate the imbalance of bargaining power that exists between utilities and these small-scale developers. These standard contracts and their benefits drive developers to Oregon and

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[2] Agenda for Commission Workshop at 1-2 (Apr. 15, 2022); Description for the April 1, 2022 AHD Workshop at 1 (Mar. 28, 2022).

result in more investment in Oregon. Thus, it is crucial to take these benefits into consideration for new rules adopted and ensure these benefits are not eliminated. Otherwise, Oregon could see a decrease in investment in the state.

One benefit of standard contracts is that the standard contracts are easy to use and implement. Developers of these small projects need to reduce the costs of active management in developing the project, and they want to keep the transactional costs low. Rules that outline the contracting process and establish standard contracts will help keep the transactional costs low for these developers. If developers of these small projects need to negotiate the contract every time the developer wanted to develop a project in Oregon, then the transaction costs would be much higher, and the developer may not even consider a project in Oregon in the first place. Thus, standard contracts and an established contracting process in the rules are necessary to ensure there is continued investment in Oregon.

Another benefit of standard contracts is that standard contracts reduce the need to hire lawyers during the development process or at least drastically reduce the amount of work a lawyer must be paid to perform in assisting the developer or owner of the facility to secure a reasonable PPA. Developers do not want to engage lawyers in extensive legal work if it is not necessary because it only increases their costs, risks, delay, and the complexity of building and operating these facilities. Standard contracts and rules implementing a contracting process will reduce the need to engage lawyers during the contract negotiating process. Further, developers would also prefer not to need to engage lawyers to understand or implement a contract. Contracts that are short and easy to use and understand will reduce the need to hire lawyers in the

implementation of the contract as well as in the contracting process. This will decrease transactional costs and encourage investment in Oregon.

A third benefit of the standard contracts and rules implementing the contracting process is it helps mitigate the imbalance of bargaining power that exists between utilities and developers of these small QF projects. Without a standard contract with preestablished and clear terms available to the developer, the utility holds most, if not all, of the bargaining power. Other than the threat of an expensive and uncertain complaint, small developers and owners of renewable energy facilities would be powerless if the utility were to act unreasonably during the contracting process or insist on unreasonable terms in the contract. The Commission should be mindful that this is a monopsony business transaction in which, for the smaller projects under discussion in this proceeding, the utility does not voluntarily enter into the contract, but is required by law to do so. A standard contract and contracting process in which the utility is required to act reasonably is the best and most cost-effective way in which the Commission can implement PURPA and police utility actions and behavior. Thus, having these standard contracts and a well-established contracting process in the rules helps mitigate some of the imbalance and encourages development in Oregon.

The utilities point to the fact that a single developer may enter into multiple standard contracts and claim that represents a reason that those developers no longer need standard contracts. In fact, the opposite is true. The existence of a standard contract (and published non-negotiated prices) means that Oregon is a success in reducing both the costs associated with negotiating the contract and the costs of operating and managing a constructed facility so that

developers will invest their capital. Without these contracts, many of these smaller projects will never be constructed.

B. Small Qualifying Facility Developer Business Model

The QF Trade Associations provide additional information regarding the small developer business model to provide background for the Commission and rebut some of the misunderstandings underlying the Joint Utilities' arguments. A core theme of the Joint Utilities' comments is that besides irrigation districts or local governments, most or all of the developers of small QF projects are regional, national, or international companies that do not deserve the protection of standard contracts.[3] In regulated markets, all independent power producer developers, regardless of size or whether they are selling under PURPA or non-PURPA transactions, warrant at least some Commission protection. The QF Trade Associations agree that projects above a certain size selling via PURPA or a request for proposal should have to negotiate contracts because of the project's unique characteristics, but these projects still need policies protecting them and Commission guidance or rules regarding certain contract terms and conditions.

There are many different independent power producer developer business models that exist. For example, some companies' business models focus on projects to bid into request for proposals or developing build transfer projects. These larger, non-PURPA independent power producers are the backbone and drivers of the Northwest's competitive wholesale market,

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[3] *See, e.g.*, Joint Utilities' Initial Comments at 7-10, Appendix A (Mar. 11, 2022).

without which retail energy costs would be significantly more expensive, our electric system would be far less reliable, and the region would have far greater difficulty to reaching its clean energy goals. Other proceedings related to the Commission's competitive procurement rules and investigations, as well as requests for proposals, address protection of these independent power producers from the utility monopsony power. The discussion of this docket and the remainder of these comments are focused on small-scale projects 10 MWs and lower. These comments provide background regarding the unique business characteristics and needs of these small-scale projects.

When discussing small projects that are at the center of this proceeding, there are many different business models, which for the sake of simplicity we divide into six main and sometimes overlapping categories: 1) entities that sell electricity to the utility for a secondary purpose; 2) small-scale developers that are Oregon based; 3) private companies or individuals that only develop a few projects; 4) developers or financiers that only invest in small-scale projects; 5) entities that do only one part or various parts of the development process for small-scale projects; and 6) large, national or international companies. The range of developers of these small-scale projects is not as black and white as the Joint Utilities make it appear. All of these different business models will benefit from standard contracts and a fair contracting

process established in rules, and some developers need additional or more unique protections or exceptions.[4]

The QF Trade Associations, contrary to the Joint Utilities' arguments, are not asking that the Commission "subsidize" these developers.[5] The prices should be set on the avoided costs, which are often lower than the costs when the utilities actually build and own their own facilities over their operational lives. Without addressing the fraught discussion regarding utility motives or why they will not contract with these projects, the simple fact is that, even when they are lower cost and more reliable, the utilities will not and do not contract with these smaller projects absent government mandates like PURPA.

1. Entities that Sell Electricity to the Utility for a Secondary Purpose

The business model of selling electricity to the utility for a secondary purpose consists of irrigation districts, biomass facilities, dairy digestors, cities with wastewater treatment facilities, universities, and more. Some of these entities in Oregon include Baker City, City of Astoria, City of Cove, City of Gresham, Deschutes Valley Water District, Douglas County, Farmers Irrigation District, Freres Lumber Co., James and Sharon Jans with Odell Creek Hydro, Middle Fork Irrigation District, Port of Tillamook Bay, Roseburg Forest Products Co., Rough & Ready Lumber Co., Oregon Institute of Technology, Oregon State University, Swalley Irrigation

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4 For example, there is no reason why a small seasonal run of the river or irrigation hydro facility should be required to provide a 12x24 generation estimate because it will be inaccurate and it is an unnecessary expense for the developer; however, a non-binding 12x24 generation estimate can be useful to the utility for the purposes of its integrated resource planning and power cost estimates.

5 Joint Utilities' Initial Comments at 2-4, 6.

District, Three Sisters Irrigation District, Tualatin Valley Water District, and many more. Generally, these entities are mainly engaged in another purpose, but the entity creates and sells electricity as a secondary purpose. These entities are often sophisticated in the sense that they are designed to do their primary function and they are good at that. However, these entities are generally not in the business of or well versed in the small-scale energy development process because the generation of electricity is secondary to the entity's primary purpose, and they do not have the internal expertise to enter into power and interconnection contracts. The utilities rarely, if ever, voluntarily enter into non-PURPA contracts with these facilities. Thus, these types of entities benefit from standard contracts and a contracting process established in rules.

2. Small-Scale Developers that Are Oregon Based

Another business model is small-scale developers that are only based in Oregon. These companies are not part of regional, national, or international companies. There are some developers who work out their home and only develop small-scale projects in Oregon. Some examples of these companies include GreenKey Solar, LLC, TLS Capital, Inc., and Conifer Energy Partners, LLC. The Joint Utilities included GreenKey Solar on their list of large developers,[6] but GreenKey Solar in a sole proprietor solar developer.[7]

These companies may be a one-person operation or may have a limited number of employees. These companies know the area, find sites for development, initiate and often

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[6] Joint Utilities' Initial Comments, Appendix A at 1.

[7] It is surprising that PGE listed GreenKey Solar as a large developer, as the company filed a waiver application in an interconnection dispute with PGE and explained their business model to both PGE and the Commission at a Public Meeting.

complete the interconnection contracting, complete land use requirements, obtain permits, complete initial due diligence, navigate the power contracting process, and estimate the overall financing and development process.

After contracting, these companies can have different business models for construction and operation. The companies may: 1) fully develop, construct, and operate the project; 2) sell development rights to project pre-construction to larger companies that have the capital to invest in the project; or 3) sell operational rights to the project post-construction to larger companies that have the capital to operate the project. The companies may retain ownership or payout rights that occur during specific milestones in the construction process, and can continue on in providing ongoing services during the development process.

These types of companies also benefit a great deal from standard contracts and a contracting process established in rules. These companies are innovators and experts in finding and developing local projects, and are certainly among the type of developers that PURPA, and the Oregon standard contract, should encourage. Similar to irrigation districts and other developers that sell power as a secondary business model, these developers would likely not exist but for PURPA or another government mandate to purchase their net output, given a history of utility resistance to purchasing this output, even at highly competitive prices. Thus, these companies need the protections offered from standard contracts and a contracting process established in rules.

3. Private Companies or Individuals that Only Develop a Few Projects

Another business model is small-scale developers that only develop a few projects. Examples of these companies or individuals include the developer of the Falls Creek Hydro

project and the PáTu Wind Farm project. These developers are not large, national or international developers as the Joint Utilities would claim. These developers also do the development work themselves and own and operate the projects, and also benefit from standard contracts that are easy to execute and implement over the life of the contract and a reasonable contracting process established in rules.

4. Developers or Financiers that Only Invest in Small-Scale Projects

Another business model is developers that only invest in small-scale projects but invest in various markets. These companies may be small, medium sized or even large, international developers, and are only successful if they can drive costs down by reducing transaction costs and building and operating projects with innovative technologies and business models. Developing numerous smaller projects only works for these companies because each project may have thin profit margins, and they must be developed in "bulk" for the companies to be successful. One example of these types of companies are community solar developers, and an example of this type of successful business model is Neighborhood Power Corp.

These companies will only bring capital to a state to develop projects if there are markets with low transaction, development, and operational costs. These companies build and/or operate projects, and do not have the resources to negotiate all the terms and conditions of contracts. Further, the contracts need to be simple and easy to understand to develop and operate projects in a state. In addition, given that Oregon's utilities are well known to be generally averse to small-scale developers, the regulatory protections afforded to developers with reasonable standard contracts and a contracting process are important. Many of these types of companies will select markets based in part on the ease of contracting, the interconnection process, and implementation

as well as the regulatory environment, and it is important these rules and standard contracts are just that. Otherwise, these companies could leave (or never come to) Oregon, and Oregon would lose those investments and the renewable energy opportunities they create.

5. Entities that Focus on Discrete Portions of the Development Process for Small-Scale Projects

Another business model is companies that focus on discrete portions of the development process for small-scale projects. There are many parts of the development process from the contracting and interconnection process, construction, operations, and financing. There are some companies that will only perform contracting and interconnection, some that only perform construction, some that only act as operators, and some that only finance projects. Some companies may do several of these. This group could include larger businesses that are experts in construction or financing but have limited knowledge or expertise in other aspects of project development or operations as they only focus on one aspect of development. However, the companies are not going to bring capital to Oregon to invest in these smaller projects if the contracts are hard to understand, there are not reasonable contracting process rules, and the bargaining power is much higher for the utility. This would narrow their profit margin and make these small-scale Oregon projects less economical. Thus, these companies, even though they could be larger, still benefit from standard contracts that are easy to understand and implement and a fair contracting process that is established in rules.

6. Regional, National or International Companies

A final business model is the regional, national, or international companies that invest in small-scale projects. These companies will have more experience developing projects and more experience with negotiating contracts, but these companies will often choose to invest in smaller

projects because of the protections offered from standard contracts and a fair contracting process established in rules. Further, standard contracts and a contracting process will help mitigate the imbalance in bargaining power that exists for these companies as well and increase the chance that these small-scale renewable opportunities will be successfully developed in Oregon.

C. Reasonableness

In response to discussion at the April 20, 2022 Commission Workshop, the QF Trade Associations provide more explanation and examples on why a reasonableness standard is necessary. At its most simple, if there is no reasonableness standard that can be enforced by the Commission, then the utility (the monopsony party with market power) gets to decide whatever it wants. This gives the utility the unilateral discretion to act unreasonably if it desires. The QF Trade Associations' position is not that the utilities always (or even the majority of the time) are unreasonable. Instead, the QF Trade Associations position is that the utilities are not always reasonable, and QFs should have an effective remedy when the utilities are unreasonable.

At its most simple, a reasonableness standard allows the Commission (and not the utility) to decide whether a utility's actions were reasonable and appropriate. If there is no reasonableness standard, then the Commission is essentially giving away its power, or at least making it more difficult, to review utility actions. It would be easier for the utility to take actions that are unreasonable or inappropriate.

A reasonableness standard could decrease potential litigation for several reasons. First, a reasonableness standard would deter a utility from acting unreasonably because it knows the Commission could review its actions. As a result, the utility would engage in more reasonable behavior. Second, inserting a reasonableness standard into the rules would decrease litigation

costs because it would eliminate the need to fight over whether there is a reasonableness standard and instead focus attention on whether a utility's actions were reasonable. If a reasonableness standard is not explicitly included in the rules, then a utility is likely to argue a reasonableness standard does not apply.[8] However, inserting a reasonableness standard avoids having to litigate this issue every time a complaint is brought because it would be clear from the rules that the standard does apply.

There are several examples in which a reasonableness standard would be useful such as an interconnection customer's right to hire a third-party to independently review the utility's interconnection studies, timing requirements in the contracting process, information required by the utility to obtain a draft PPA, and more. The Commission has applied a reasonableness standard in other cases, and it is an expert in reviewing the reasonableness of utility actions.[9] Thus, it would not be difficult for the Commission to determine if a utility's actions were reasonable or not.

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8 *See, e.g.*, *Waconda Solar, LLC v. PGE*, Docket No. UM 1971, PGE's Modified Second Motion for Summary Judgment at 40-41 (Sept. 15, 2021); *See also*, Docket No. UM 1971, PGE's Declaration of Rebecca Dodd in Support of PGE's Modified Second Motion for Summary Judgment, Exhibit 7 at 2-3.

9 *See generally, e.g.*, *In re PacifiCorp Cost Recovery Adjustment and Coal Removal Mechanism*, Docket No. UM 2183 (Commission opened a new docket following PacifiCorp's 2020 general rate case to evaluate the reasonableness of coal decommissioning cost estimates because the record in the rate case was inadequate). *See also, e.g.*, *In re PacifiCorp Request for a General Rate Revision*, Docket No. UE 374, Order No. 20-473 at 35-39 (Dec. 18, 2020) (the Commission reviewed the reasonableness of cost overruns for various transmission projects and disallowed many costs).

1. Interconnection Customer's Right to Hire a Third-Party to Construct Upgrades

One area where a reasonableness standard has been debated is with an interconnection customer's ability to hire a third-party consultant to construct interconnection upgrades. The case of *Sandy River Solar, LLC v. PGE* highlights the impact of adding a reasonableness requirement to the rules.[10] In that proceeding, a QF, Sandy River Solar, argued that PGE had unreasonably refused the QF's request to hire a third-party consultant to perform the interconnection upgrades in violation of OAR 860-082-0060(8)(f).[11] The rule states, "[a] public utility and an applicant may agree in writing to allow the applicant to hire a third-party consultant to complete the interconnection facilities and system upgrades, subject to public utility oversight and approval."[12] Notably, the Commission's interconnection rules lack an explicit reasonableness standard regarding third-party consultants, but the interconnection customer argued that such a requirement was implicit.

PGE responded by arguing the term "may" gives the utility total discretion to deny such requests without any reasonableness standard because "may" is permissive, not mandatory.[13]

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10 While they have a substantive position, in these comments the QF Trade Associations are not raising the issue to debate whether or not as a matter of policy an interconnection customer should have the right to retain a utility approved third party consultant to construct interconnection facilities under the supervision of the utility. Instead, the QF Trade Associations raise the issue as an example of the practical impact of including or not including a reasonableness requirement.

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

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

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

PGE noted several examples elsewhere in the small generator interconnection rules where reasonableness is a requirement.[14] PGE used these examples to contrast against the third-party consultant rule, OAR 860-082-0060(8)(f), that does not expressly contain a reasonableness requirement.[15] The Commission ultimately agreed with PGE, holding that the utility had discretion to decide whether to hire a third-party consultant and that discretion was not subject to a reasonableness standard.[16]

In effect, PGE argued that utilities may act unreasonably whenever the rules do not explicitly proscribe it, and the Commission agreed in at least this circumstance. Under this precedent, the Commission removed itself from reviewing whether a utility would implement this rule reasonably. Under *Sandy River Solar*, it may be difficult for any QF or even the Commission to hold utilities accountable for unreasonable, potentially illegal behavior unless the rules explicitly include a reasonableness standard. This is why it is so important for the Commission to explicitly include a reasonableness requirement, unless the Commission expressly wishes to provide the utility with unilateral discretion.

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

15 Docket No. UM 1967, PGE's Reply in Support of Motion for Partial Summary Judgment at 12.

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

The practical impact of *Sandy River Solar* is that a utility has unilateral discretion to decide whether an interconnection customer can hire a third-party consultant to construct upgrades. The QF Trade Associations are unaware of any of the Joint Utilities allowing an interconnection customer to hire a third party to construct the upgrades. This has two practical impacts.

First, if this rule had included a reasonableness standard, then the utilities may have been more willing to work with interconnection customers and reach a compromise on construction of the upgrades. For example, the rule could provide that the utility may not unreasonably withhold consent to allow an interconnection customer to hire a third party to construct the upgrades. However, the utility currently has unilateral discretion, and either the utilities are behaving unreasonably or, because they know they do not have the right to do so, interconnection customers are not requesting to hire a third party to construct the upgrades.[17] A reasonableness standard for this rule would have mitigated the imbalance of bargaining power between a utility and developer and provided protections to interconnection customers against utility abuse.

Second, an interconnection customer cannot challenge the utility's decision because the Commission has decided that it will not review any utility decisions. For example, a utility can currently discriminate against one interconnection customer in favor of another interconnection customer when it makes its decisions, because the Commission is powerless to review the

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[17] In theory, a third possibility is that there is no reasonable circumstance that an interconnection customer should be allowed to retain a third party to construct the interconnection upgrades. The QF Trade Associations disagree that there are no circumstances in which it would be reasonable to retain a third party.

utility's actions. The Joint Utilities are correct that this will reduce litigation before the Commission, because there will be no litigation. This is similar to any circumstance in which one party is provided unilateral rights. For example, if you removed the right to sue for negligence or willful misconduct, then no one will be able to sue for negligence or willful misconduct. That does not make negligence or willful misconduct disappear, but instead it results in an overall increase in negligence and willful misconduct, and simply prevents the harmed individuals from obtaining relief for their harms. The Commission should ensure that it retains the ultimate decision-making authority and ability to review whether the utilities are complying with their legal obligations under PURPA and the Commission's other enabling statutes, and not abdicate that authority to the utilities, except in rare and discrete circumstances in which it explicitly desires the utilities to have the right to behave unreasonably or discriminate.

2. Timing Requirements in the Contracting Process

Another area where there can be abuse of the system if there is no reasonableness standard is during the contracting process. If there is no reasonableness standard for timelines in the contracting process, then a utility or QF could take the full allotted time, which could result in harm to either of the parties. For example, a QF could be harmed if the contracting process is delayed and there is an upcoming avoided cost change or the utility files a surprise avoided cost price change. However, if there was a reasonableness standard, then the Commission could review whether it was reasonable for the party to take the full period to respond. Further, if there was a reasonableness standard, then both parties would act more reasonably from the start and not take the full period to respond if there was something wrong in a draft PPA such as a typo. A

lack of a reasonableness standard gives the utility unilateral discretion to take the full period of time when taking the full period of time could be unreasonable and result in harm.

The case of *Falls Creek Hydro LLP v. PGE* highlights the importance of adding a reasonableness requirement to the contracting process rules. In that proceeding, Falls Creek, a QF, brought a complaint against PGE arguing PGE had refused to purchase the energy from Falls Creek by refusing to execute a PPA, and PGE delayed the negotiation process causing harm to Falls Creek because of the surprise avoided cost price reductions.[18] Falls Creek accurately provided all the relevant information for PGE to prepare the draft contract. PGE put "Lane" county instead of "Linn" county in a draft PPA and listed the nameplate capacity of the facility as 4.96 MW instead of 4.1 MW.[19] Falls Creek then requested that PGE make these two corrections and to use the information that was initially provided by Falls Creek. Falls Creek also requested that, because of PGE's error, PGE expedite the remaining contracting process so that it would obtain an executable PPA at the same time it would have otherwise obtained the executable PPA, but for PGE's mistake.[20] The timing issue associated with PGE's mistake was material because PGE made a surprise avoided cost filing that reduced the prices.[21] Thus, PGE was simultaneously seeking to reduce the prices Falls Creek was eligible to receive on an

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18 *Falls Creek Hydro LLP v. PGE*, Docket No. UM 1859, Complaint at 1-4 (Aug. 7, 2017).
19 Docket No. UM 1859, Complaint at ¶ 23.
20 Docket No. UM 1859, Complaint at ¶¶ 24-57.
21 Docket No. UM 1859, Complaint at ¶¶ 24-57.

expedited basis while it was delaying Falls Creek's ability to obtain a contract because of PGE's own mistakes. The parties ultimately reached a settlement and agreed to dismiss the case.[22]

A general reasonableness standard in PGE's QF negotiation tariff (Schedule 201) would clearly ensure that the Commission, and not PGE, would be the arbiter of whether PGE was allowed to take the full time to provide a revised draft PPA. If the rules or PGE's Schedule 201 included any reasonableness requirement or outlined how long a utility should respond to non-substantive changes to correct utility errors, then the Commission would clearly have the authority to determine whether it is unreasonable for PGE to take the full 15 business days to make the non-substantive changes to fix the utility's errors when there was a pending surprise avoided cost price reduction. A reasonableness standard would allow the Commission to review these types of scenarios, and it would also discourage this type of behavior from the utility from the start.

3. Information Required to Obtain Draft PPA

Another area where a reasonableness standard is necessary is the information a QF must provide to the utility to obtain a draft PPA. If there is no reasonableness standard for the information required to obtain a draft PPA, then a utility could require any type of information even if it is not necessary to begin or complete PPA negotiations. Additionally, a utility could require unreasonable information at any point in the contracting process. Inserting a reasonableness standard for the information required to obtain a draft PPA allows the

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[22] Docket No. UM 1859, Parties' Joint Stipulated Motion to Dismiss Complaint (Mar. 12, 2019).

Commission to review information requested by utilities and ensure it is reasonable. Also, a reasonableness standard would deter utilities from requesting unnecessary and unrelated information before presenting the QF with a draft PPA. Thus, a reasonableness standard provides necessary protections to QFs that have uneven bargaining power compared to the utilities.

The case of *Red Prairie Solar, LLC v. PGE* highlights the importance of adding a reasonableness requirement to the rules outlining the information required to obtain a draft PPA. In that proceeding, Red Prairie Solar, a QF, brought a complaint against PGE arguing PGE had refused to purchase the energy from the Red Prairie Solar facility by refusing to execute a PPA.[23] Specifically related to information required to obtain a draft PPA, Red Prairie Solar argued PGE inappropriately required Red Prairie Solar to provide different information regarding the maximum solar generation numbers.[24] Red Prairie's owners had previously provided the same type of information for a different project, which PGE had accepted for the previous projects and provided draft PPAs.[25] Additionally, almost three months after requesting the draft PPA, PGE responded by further questioning information in the Initial Information Request instead of providing a draft or executable PPA.[26] This delay in the contracting process and refusal to accept the same type of information as PGE accepted for other projects, occurred at the same

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23 *Red Prairie Solar, LLC v. PGE*, Docket No. UM 1860, Complaint at 1-4 (Aug. 7, 2017).
24 Docket No. UM 1860, Complaint at ¶¶ 19-29, 34-42, 45-46.
25 Docket No. UM 1860, Complaint at ¶¶ 19-29, 34-42, 45-46.
26 Docket No. UM 1860, Complaint at ¶¶ 43-50.

time PGE filed the surprise avoided cost price change as in the *Falls Creek Hydro* case.[27] Red Prairie Solar ultimately withdrew its complaint.[28]

The case of *Tickle Creek Solar, LLC v. PGE* also highlights the importance of adding a reasonableness requirement to the rules outlining the information required to obtain a draft PPA. In that proceeding, Tickle Creek Solar, a QF, brought a complaint against PGE arguing PGE had refused to purchase the energy from the Tickle Creek Solar facility by refusing to execute a PPA.[29] Specially related to information required to obtain a draft PPA, Tickle Creek Solar argued PGE inappropriately stated Tickle Creek Solar's submission of information was incomplete because Tickle Creek Solar submitted PVWatts instead of PVSyst for the solar facility's generation profile when PVWatts was acceptable for previous PPA requests for other projects.[30] This delayed the contracting process while PGE filed the surprise avoided cost price change as in the *Falls Creek Hydro* case.[31] Tickle Creek Solar ultimately withdrew its complaint.[32]

Finally, in another example PGE "updated" its Initial Information Request Excel spreadsheet to include a new name for a specific Excel "cell," but did not request any additional

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27 Docket No. UM 1860, Complaint at ¶¶ 30-33, 51-59.
28 Docket No. UM 1860, Red Prairie Solar, LLC's Notice of Withdrawal (Oct. 18, 2017).
29 *Tickle Creek Solar, LLC v. PGE*, Docket No. UM 1862, Complaint at 1-4 (Aug. 7, 2017).
30 Docket No. UM 1862, Complaint at ¶¶ 15-27.
31 Docket No. UM 1862, Complaint at ¶¶ 28-54.
32 Docket No. UM 1862, Tickle Creek Solar's Notice of Withdrawal (Aug. 28, 2017).

new information.[33] PGE rejected a developer's request for a draft PPA because the developer used the previous Initial Information Request Excel file.[34] The developer was required to re-submit it with exactly the same information, but with the single Excel cell with the new name.[35] This delayed the process as PGE had more time to respond to the draft PPA request.

All of these examples demonstrate why a reasonableness standard is needed for the information required to request a draft PPA. If there is no reasonableness standard, a utility could ask for any information it wants or ask for information halfway through the contracting process. Further, the utility could require different information for different projects. Any of these scenarios could delay the contracting process. If there was a reasonableness standard, then it would deter the utility from requiring unreasonable, unnecessary, or unrelated information to obtain a draft PPA. Further, a reasonableness standard would allow the Commission to review the utility's request if a QF believed the utility's request was unreasonable. A reasonableness standard would provide protection to the QF, encourage the utility to act reasonably, and discourage intentional delay of the contracting process.

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33 *See In re PGE Application to Lower Standard Price and Standard Contract Eligibility Cap for Solar QFs*, Docket No. UM 1854, NIPPC, CREA, and the Coalition's Joint Response to PGE Motion for Interim Relief at 37 n93 (July 27, 2017).

34 Docket No. UM 1854, NIPPC, CREA, and the Coalition's Joint Response to PGE Motion for Interim Relief at 37 n93.

35 Docket No. UM 1854, NIPPC, CREA, and the Coalition's Joint Response to PGE Motion for Interim Relief at 37 n93.

4. The Commission Has Applied a Reasonableness Standard in Other Contexts

The Commission has applied a reasonableness standard in other contexts, demonstrating that such a standard is practical and meaningful. As noted above, the Commission routinely applies a reasonableness standard in its rate cases, and it is an expert in reviewing the reasonableness of utility actions.[36] Similarly, in the interconnection process, the Commission has acknowledged and adjudicated a reasonableness standard in interconnection disputes. In *Sunthurst Energy, LLC v. PacifiCorp*, the Commission stated that interconnection "requirements … must be reasonable not only with regard to cost, but also with regard to scope and technical standards."[37] The Commission's order then addressed several contested requirements and determined that they were reasonable.[38] For instance, on one item, the Commission declared that "[i]t is reasonable to require an interconnecting generator to pay for interconnection costs to ensure that system efficiencies remain in place and customer savings already in effect can continue."[39] Similarly, in *Zena Solar, LLC v. PGE*, the Commission determined that the various interconnection requirements were "reasonable" in the absence of evidence of a viable

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36 *See generally, e.g.*, *In re PacifiCorp Cost Recovery Adjustment and Coal Removal Mechanism*, Docket No. UM 2183 (Commission opened a new docket following PacifiCorp's 2020 general rate case to evaluate the reasonableness of coal decommissioning cost estimates because the record in the rate case was inadequate). *See also, e.g.*, *In re PacifiCorp Request for a General Rate Revision*, Docket No. UE 374, Order No. 20-473 at 35-39 (Dec. 18, 2020) (the Commission reviewed the reasonableness of cost overruns for various transmission projects and disallowed many costs).

37 Docket No. UM 2118, Order No. 21-296 at 2 (Sept. 15, 2021).

38 Docket No. UM 2118, Order No. 21-296 at 5, 7-8, 15-16.

39 Docket No. UM 2118, Order No. 21-296 at 5.

alternative solution.[40] The Commission emphasized the importance of this evidentiary standard, noting that:

> [O]ur conclusion should not be interpreted as having established that PGE cannot reasonably require upgrades for reverse power flow supervision as part of its interconnection requirements, but it should also not be interpreted as having established that in all instances interconnection customers must pay the costs associated with reverse power flow supervision, where a viable alternative exists.[41]

These cases demonstrate that a reasonableness standard enables the Commission to provide substantive review of utility decisions. In the specific example of interconnection requirements, the Commission can evaluate whether similarly effective and lower-cost alternatives are available, such that a utility's requirements are not reasonable. Conversely, the Commission can consider the potential negative impacts to customers from less costly interconnection requirements and find that prioritizing savings over reliability is not reasonable. The QF Trade Associations believe many more possible determinations could be made, and a reasonableness standard provides the Commission sufficient discretion in its rules to provide space to consider potentially complex arguments on highly fact-specific circumstances. Thus, the Commission should adopt a generic reasonableness standard in its PURPA contracting rules and standard contracts to provide similar discretion to the Commission to police potentially contentious utility behaviors.

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40 Docket No. UM 2164, Order No. 22-134 at 14-16 (Apr. 29, 2022).
41 Docket No. UM 2164, Order No. 22-134 at 16.

5. Sections of the Proposed Rules for Group 1 that Would Benefit from a Reasonableness Standard

The administrative law judges and Commission Staff have inserted a reasonableness standard into a few places in the Proposed Rules for Group 1[42] instead of adopting a general reasonableness standard that is applicable to all the rules. The QF Trade Associations still recommend a general reasonable standard applicable to all the rules, and that the Commission should explicitly identify any areas in which it wants the utilities to have the discretion to be unreasonable. It is not possible to predict future disputes or identify all areas in which a reasonableness standard is appropriate; however, the QF Trade Associations provide some examples of places in the rules where a reasonableness standard would be beneficial. Here is a non-comprehensive list of examples where the utility has discretionary authority, and it would be beneficial to add a reasonableness standard:[43]

- New Rule #3(2)(c)(N) other reasonable information specified in the utility's avoided cost rates schedule or standard power purchase agreement approved by the Commission.

- New Rule #3(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

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[42] Administrative Law Judges' and Commission Staff's Proposed Rules for Group 1 at OAR 860-029-0120(6)(b)(B); OAR 860-029-0120(7)(d); OAR 860-029-0120(10); OAR 860-029-0120(15)(b), (c) (which is an issue in Group 2); OAR 860-029-0120(19) (May 3, 2022).

[43] This list is not comprehensive and provided to demonstrate that there are parts of the rules that would benefit from a reasonableness standard. Note the administrative law judges' proposed edits are in red text and the QF Trade Associations' recommended edits are in green text.

as approved by the Commission. The public utility should respond in a shorter period if reasonable.

- New Rule #3(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. The public utility should respond in a shorter period if reasonable.

- New Rule #3(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 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. The public utility should respond in a shorter period if reasonable. 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.

- OAR 860-029-0120(16)(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 ~~Credit Requirements~~purchasing public utility's creditworthiness requirements, in a reasonable form acceptable to the public utility in its discretion, or (b) a Letter of Credit in favor of the purchasing public utility. To the extent the public utility receives payment from the Project Development Security for damages in the event of default, the qualifying facility will, within 15 days, restore the Project Development Security as if no such deduction had occurred.

- OAR 860-029-0120(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 utility's credit requirements and the amount of required Default Security must be reasonable and 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: …

D. Qualifying Facility Contract Renewal Assumption Correction

At the April 20, 2022 Commission Workshop, one topic brought up by Commissioner Tawney was QF assumptions in planning dockets such as a utility's integrated resource plan

("IRP") in relation to the Joint Utilities' statements that the utilities rely on these QFs coming online. Commissioner Tawney mentioned the utilities' refusal to include QFs in forecasts. PGE responded that it currently forecasts all QFs with executed contracts will come online in its IRP planning assumptions. While this is correct, it leaves out what the QF Trade Associations believe Commissioner Tawney was referencing. PGE and PacifiCorp both assume no QFs will renew their contracts by assuming a zero percent renewal in IRP planning assumptions.[44] In Idaho Power's last IRP, Idaho Power assumed all non-wind QFs renewed.[45] Thus, the QF Trade Associations wanted to clarify that no utility uses a 100 percent QF renewal assumption in their respective IRPs, but Idaho Power has assumed that all non-wind QFs will renew. The QF Trade Associations wanted to ensure that the record reflects QF planning assumptions for new projects and renewing projects.

E. Amount of Security

An issue raised at the April 20, 2022 Commission Workshop concerned the appropriate amount of project development and default security. The QF Trade Associations continue to recommend liquid security is not necessary especially for existing QFs that renew their contracts. However, if the Commission is inclined to require project development and default security, then

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44 *In re PacifiCorp 2021 IRP*, Docket No. LC 77, PacifiCorp 2021 IRP, Tables 6.11 & 6.12 at 153-57 (Sept. 1, 2021); *In re PGE 2019 IRP*, Docket No. LC 73, PGE 2019 IRP, Tables E-3 & E-4 at 281-82 (July 19, 2019).

45 *In re Idaho Power 2019 IRP*, Docket No. LC 74, Idaho Power's Reply Comments at 67 (May 15, 2020).

the numbers proposed by the Joint Utilities are excessive and would unduly burden small QF development in Oregon.[46]

Regarding the amount of security, there seemed to be some assumption by the administrative law judges and Commissioners that the level of project development security must cover all potential damages. In application, this is not how it would work with a PPA. Generally, PPAs that require default security contain a provision that requires the seller to keep the security amount constant. Thus, if the utility draws on the default security, the QF is supposed to replenish the security. Failure to maintain the required amount of security is itself usually a default for which the utility could terminate the PPA subject to applicable cure periods. Therefore, project development security should not be based on an estimate of all potential damages that could arise in the event of a default, and doing so will certainly discourage small-scale renewable energy development in Oregon.

F. Creditworthiness Criteria

Another issue raised at various Workshops is related to a utility's criteria to determine whether a developer or owner of a facility possesses the requisite level of creditworthiness to relieve it of the requirement to post a liquid form of Project Development or Default Security (e.g., letter of credit or cash escrow). In the QF Trade Associations' view, even if a liquid security requirement is adopted for some developers, such a requirement should not be required of counterparties that are going concern businesses or public organizations that clearly have the

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46 *See* Joint Reply Comments of CREA, NIPPC, and the Coalition on Staff's Proposed Rules Group 1 at 7-9 (Mar. 25, 2022).

assets and wherewithal to pay any damages that might arise under the contract. Otherwise, the security deposit becomes nothing more than a pool of money from which the utility can award itself damages whenever it determines – in its sole discretion – that the QF committed a default and owes damages.

The QF Trade Associations had requested the Joint Utilities provide more information on their creditworthiness requirements.[47] The Joint Utilities responded with more information and detail regarding their creditworthiness requirements, but only PacifiCorp provided any meaningful description in its comments from which it is possible to determine which types of QF developers or owners would be relieved of a liquid security requirement.[48] Additionally, this information was provided later in the process, and the QF Trade Associations are still reviewing these requirements.

At this point, the QF Trade Associations strongly believe that any such creditworthiness requirements should not be left to the utilities to develop in individual contract submittals or rate schedules, and certainly not in an ad hoc basis through individual negotiations. Instead, the Commission's administrative rules should include objective criteria that could be met by a QF developer or owner to be relieved of the requirement to post a liquid security. The QF Trade Associations are still working on making a proposal on this subject, and recommend that it be left open for discussion in a later phase of the rulemaking if the Commission elects to adopt a

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47 *See* Joint Supplemental Comments of CREA, NIPPC, and the Coalition on Staff's Proposed Rules Group 1 at 14-15 (Apr. 6, 2022).

48 Joint Utilities' Response Comments to QF Trade Associations' Supplemental Comments at 1-5, Exhibit A (Apr. 12, 2022).

liquid security requirement for some QFs in this phase. This would allow all parties to fully digest and comprehend the Joint Utilities' proposed requirements. Further, it would also provide for more opportunity for the parties to discuss the requirements and reach a compromise if there was disagreement.

G. Increases in Net Output

The administrative law judges propose clarifying edits to OAR 860-029-0120(15) related to incremental utility upgrades. The QF Trade Associations understand that this is a Group 2 issue[49] and have not submitted any comments on incremental utility upgrades. Therefore, the QF Trade Associations reserve the right to comment on these proposed edits in the next phase of the proceeding.

H. Extensions of Time for Utility Caused Delay

In the proposed rules, OAR 860-029-0120(7)(d) discusses the extension of the commercial operation date ("COD") due to Force Majeure or a public utility's *default*. This section contains inadequate carve outs for delays caused by the utility. This section is intended to provide excuses for the QF's inability to achieve the Scheduled COD on time. This section should provide excuse for *any utility-caused delay*, not just *utility defaults*.[50] Instead of doing so, the rules only excuse the QF from an inability to achieve Scheduled COD in the case where the

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49 Ruling at 2 (Jan. 21, 2022).

50 The QF Trade Associations assume that a "default" would include the failure to comply with an administrative rule, including the requirement to provide interconnection documents in specific periods of time.

utility's actions rise to the level of a default or tariff violation under the interconnection process and contracts.

The proposed rules also many include an unintentional "gap" in which a QF may not be able to obtain an extension of its Scheduled COD. The interconnection rules include specific requirements to provide and execute certain interconnection documents.[51] However, the rules do not proscribe the exact number of days to complete the interconnection studies—instead, the utility is required to provide a proposed schedule, which is incorporated into the study agreement.[52] The utilities then must make reasonable, good-faith efforts to follow the schedule.[53] It is unclear whether a utility providing an unreasonable schedule would constitute a "default." Similarly, it is unclear if the utility fails to follow the schedule, but the utility made reasonable, good faith efforts to do so would constitute a "default." In either case, the utility's delay could easily be the *sole* cause of the QF's failure to achieve commercial operation by the scheduled commercial operation date in the PPA. In turn, such utility-caused delay would result *in the QF being in default* under the PPA and thus at risk of PPA termination or, even if the utility agreed not to terminate the PPA, at risk of losing a portion of the critical 15-year fixed-price period in the PPA that begins to expire on the scheduled commercial operation date under the currently proposed rules. The QF Trade Associations respectfully submit that scenario is completely unfair and unreasonable and needs to be corrected in the rules.

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51 *E.g.*, OAR 860-082-0060(5), 5(c), 5(d), 6(g).
52 OAR 860-082-0060(6)(a), 7(a).
53 OAR 860-082-0060(6)(d), 7(d).

The rules should avoid these types of disputes, and simply provide an extension for any utility caused delay.[54]

Thus, the QF Trade Associations recommend the following changes to OAR 860-029-0120(7)(d):

> (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 delay or default under the standard power purchase agreement or ~~under~~ any other agreement related to the interconnection of the qualifying facility to the purchasing utility's system, including interconnection study agreements and interconnection agreements, the scheduled commercial operation date in the standard power purchase agreement will be extended commensurately with the delay caused by the event of Force Majeure or the public utility's delay or 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 (6)(c) or the four-year limitation in subsection (6)(d).[55]

III. CONCLUSION

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

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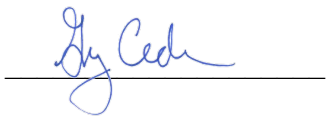
54 *See* Joint Comments of CREA, NIPPC, and the Coalition on Staff's Proposed Rules Group 1 at 25-27 (Mar. 11, 2022).

55 Note the administrative law judges' proposed edits are in red text and the QF Trade Associations' recommended edits are in green text.

Dated this 10th day of May 2022.

Respectfully submitted,

Richardson Adams, PLLC



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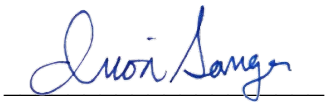

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DIVISION 29
REGULATIONS RELATED TO AGREEMENTS BETWEEN ELECTRIC UTILITIES AND ELECTRIC COGENERATION AND SMALL POWER PRODUCTION FACILITIES

860-029-0010
Definitions for Division 029 Rules

(1) "AC" means alternating current.

(2~~1~~) "Avoided costs" means the electric utility's incremental costs of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, the electric utility would generate itself or purchase from another source, including any costs of interconnection of such resource to the system.

(3~~2~~) "Back-up power" and "stand-by power" mean electric energy or capacity supplied by a public utility to replace energy ordinarily generated by a qualifying facility's own generation equipment during an unscheduled outage of the facility.

(4~~3~~) "Capacity" means the average output in kilowatts (kW) committed by a qualifying facility to an electric utility during a specific period.

(5~~4~~) "Capacity costs" mean the costs associated with supplying capacity; they are an allocated component of the fixed costs associated with providing the capability to deliver energy.

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

(7~~5~~) "Cogeneration" means the sequential generation of electric energy and useful heat from the same primary energy source or fuel for industrial, commercial, heating, or cooling purposes.

(8~~6~~) "Cogeneration facility" means a facility which produces electric energy and steam or other forms of useful energy (such as heat) by cogeneration that are used for industrial, commercial, heating, or cooling purposes.

(9~~7~~) "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, and the qualifying facility has satisfied the criteria required by the power purchase agreement to commence operation and begin operating. ~~is fully operational and capable of delivering net output~~.

(10~~8~~) "Commission" means the Public Utility Commission of Oregon.

(11~~x~~) "Contract price" means for the fixed price term, the applicable fixed price for On-Peak Hours and Off-peak Hours specified in the purchasing utility's avoided cost price schedule, and

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Commented [MK*P1]: This is a proposal from the Joint Utilities. We understand that they request this this language so a QF must complete the ***entire*** facility and have it interconnected before the COD. We include it here for discussion purposes, and are not yet prepared to propose it before the Commission.

Commented [QFs2]: This is a new proposal that has not been discussed and with which the QF Trade Associations do not agree. It is not out of the ordinary for a PPA to have a partial completion provision where the project can achieve COD without full nameplate capacity, so the "entire facility" standard is not necessarily the norm. Additionally, hard-wiring this requirement in to the rules could have unintended consequences of eliminating flexibility for use of a partial completion standard even where the parties agree to do so due to the circumstances, such as utility inability to complete the full interconnection or network upgrade capacity. We recommend reverting the prior language.

during the subsequent non-fixed price term, the purchasing utility's applicable Index Price in effect when the energy is generated.

(12~~9~~) "Costs of interconnection" mean~~s~~ the reasonable costs of connection, switching, dispatching, metering, transmission, distribution, equipment necessary for system protection, safety provisions, and administrative costs incurred by an electric utility directly related to installing and maintaining the physical facilities necessary to permit purchases from a qualifying facility.

(13~~10~~) "Demand" means the average rate in kilowatts at which electric energy is delivered during a set period, to be determined by mutual agreement between the electric utility and the customer.

(14~~x~~) "Development period" means the time period commencing on the power purchase agreement Effective Date and ending 24:00 PPT the day before the scheduled commercial operation date.

Commented [MK*P3]: Note that some of Oregon is on Mountain Time.

(15~~11~~) "Effective ~~d~~Date" means the date on which a power purchase agreement is executed by both the qualifying facility and the public utility.

(16~~12~~) "Electric utility" means a nonregulated utility or a public utility as defined in ORS 758.505.

(17~~13~~) "Energy" means electric energy, measured in kilowatt hours (kWh).

(18~~14~~) "Energy costs" means:

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

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

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

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

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

(2215) "Firm energy" means a specified quantity of energy committed by a qualifying facility to an electric utility.

(2316) "Fixed ~~rate~~ 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~~x~~) "Force Majeure" is defined at OAR 860-029-XXXX [New Rule #].

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

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

(2717) "Index rate" means the lowest avoided cost approved by the Commission for a generating utility for the purchase of energy or energy and capacity of similar characteristics including on-line date, duration of obligation, and quality and degree of reliability.

(2818) "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.

(2919) "Maintenance power" means electric energy or capacity supplied by a public utility during scheduled outages of a qualifying facility.

(30~~x~~) "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~~x~~) "MW" means megawatt.

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

(3320) "Nameplate ~~e~~Capacity Rating" means the maximum installed instantaneous power production capacity of the completed Facility, expressed in MW (AC), and measured at the point of interconnection, when operated in compliance with the Generation Interconnection Agreement and consistent with the recommended power factor and operating parameters provided by the manufacturer of the generator, inverters, energy storage devices, or other equipment within the Facility affecting the Facility's capability to deliver useful electric energy to the grid at the point of interconnection. ~~full-load electrical quantities assigned by the designer to a generator and its prime mover or other piece of electrical equipment, such as transformers and circuit breakers, under standardized conditions, expressed in amperes, kilovoltamperes, kilowatts, volts, or other appropriate units. Nameplate capacity is usually indicated on a nameplate attached to the individual machine or device~~.

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

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

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

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

(38~~21~~) "Nonfirm energy" means energy to be delivered by a qualifying facility to an electric utility on an "as available" basis; or energy delivered by a qualifying facility in excess of its firm energy commitment. The rate for nonfirm energy may contain an element representing the value of aggregate capacity of nonfirm sources.

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

(40~~22~~) "Nonregulated utility" means an entity providing retail electric utility service to Oregon customers that is a people's utility district organized under ORS Chapter 261, a municipal utility operating under ORS Chapter 225, or an electric cooperative organized under ORS Chapter 62.

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

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

(43~~x~~) "Permits" mean the permits, licenses, approvals, certificates, entitlements and other authorizations issued by governmental authorities required for the construction, ownership or operation of the Facility or occupancy of the site it is located.

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

(4723) "Primary energy source" means the fuel or fuels used for the generation of electric energy. The term does not include minimum amounts of fuel required for ignition, start-up, testing, flame stabilization, and control uses; the term does not include minimum amounts of fuel required to alleviate or prevent unanticipated equipment outages and emergencies which directly affect the public health, safety, or welfare.4(24) "Purchase" means the purchase of electric energy or capacity or both from a qualifying facility by an electric utility.

(4825) "Public utility" means a utility regulated by the Commission under ORS Chapter 757, that provides electric power to customers.

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

(5127) "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). ~~by these rules~~.

(52~~x~~) "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.

(5328) "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~~x~~) "Renewable energy certificate" has the meaning given that term in OAR 330-160-0015(8) (effective September 3, 2008).

(5529) "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~~x~~) "Renewable qualifying facility" means a qualifying facility that generates electricity that may be used for compliance with the RPS.

Commented [MK*P4]: We deleted the defined term "purchase term" as redundant with "purchase period" but the rules we don't currently propose to amend will need a careful review to make sure all uses of "purchase term" have been replaced with "purchase period."

Commented [QFs5]: Ok, but we note "purchase term" is still used extensively in the rules if a word search is performed.

(5730) "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.

(5831) "Sale" means the sale of electric energy or capacity or both by a public utility to a qualifying facility.

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

(6032) "Scheduled commercial operation date" means the date selected by the qualifying facility on which the qualifying facility intends to be fully operational and reliable and able to commence the sale of energy or energy and capacity to the public utility.

(6133) "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~~x~~) "Start-Up Testing" means the start-up testing required by the manufacturer or interconnection provider that establish that the Facility is reliably producing electric energy.

(6334) "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~~x~~) "System" means the electric transmission and distribution system owned or operated by the purchasing public utility.

(6535) "System emergency" means a condition on a public utility's system which is likely to result in imminent, significant disruption of service to customers, in imminent danger of life or property, or both.

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

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

(6836) "Time of delivery" means:

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

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

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

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

(6937) "Time the obligation to purchase the energy capacity or energy and capacity is incurred" means the earlier of:

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

(b) The date determined by the Commission.

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

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

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

~~The public utility's internal procedural requirements and information needs; Any contract offered by the public utility is subject to negotiation;~~

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

Commented [MK*P6]: Joint Utilities flagged this as an item where changes are needed to ensure consistency with the new rules. We agree in principle but want to discuss proposed changes.

Commented [MK*P7]: Joint utilities recommend deleting as New Rule # 3 now covers the contracting process.

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

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

860-029-0043
Standard Rates for Purchase

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

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

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

(34) 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.

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

Commented [MN8]: Our current recommendation is that this language remain in place unchanged for now, though we note that it may need to be addressed in future.

860-029-XXXX [New Rule #2]

Eligibility for Standard Avoided Cost Prices and Purchase Agreements

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

Commented [MK*P9]: Our conclusion at this time is that this is generally outside the scope of this proceeding. Years ago, the Commission made a policy decision to limit standard contracts to 3 MW for solar facilities. Though we do not plan to propose a change to this provision at this time, we will note for the Commission that it has the ability to provide policy guidance to revise this requirement.

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

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

Commented [MN10]: This change would prevent deviation from the standard described above, where RECs are ceded only during the period of deficiency.

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

(a) 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.

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

(b) For purposes of this section:

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

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

(C) To the extent a person or affiliate is a closely held entity, a "look through" rule applies so that project equity held by LLCs, 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.

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Commented [MK*P11]: Here we adopt this proposed clarification of the five mile rule from CREA, NIPPC, and REC.

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

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

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

(d) Notwithstanding subsections (4)(a) and (b), two or more qualifying facilities that otherwise are not owned or operated by the same person(s) or affiliates(s) or are not otherwise associated will not be determined to be a single qualifying facility ~~or have~~based on the fact that they have in place a shared interest or agreement regarding interconnection facilities, interconnection-related system upgrades, or any other infrastructure not providing motive force or fuel. ~~For the purposes of this subsection,~~ T~~t~~wo 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.

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

Commented [MK*P12]: Clarifying change.

Commented [QFs13]: We have previously recommended deleting the "or are not otherwise associated" clause here. It is not in the UM 1129 Partial Stipulation. It is vague, confusing, and will very likely cause problems for parties trying to use the common developer aspect of the rule.

Commented [MK*P14]: Clarifying change.

Commented [MK*P15]: Clarification on who will resolve standard PPA disputes.

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 PPA by the developer will be sufficient.

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

(A) demonstration of ability to obtain certified qualifying facility status prior to commercial operation; for QFs larger than 1 MW, a Form 556 self-certification of the proposed qualifying facility or a FERC order granting an application for certification of the proposed qualifying facility is required.
(B) demonstration of eligibility for standard power purchase agreement and pricing under OAR 860-029- XXXX [New Rule # 2],
(C) design capacity (MW),
(D) estimate of station service requirements and net amount of power to be delivered to the purchasing public utility's electric system,
(E) generation technology and other related technology applicable to the site,
(F) estimate of 12 x 24 delivery schedule and 8760 generation profile,
(G) motive force or fuel plan,
(H) proposed commercial operation date,
(I) proposed contract term,

Commented [MK*P16]: This clarification would be provided in the order approving the rules. We will review associated FERC precedent but have added an additional clarification that we believe better expresses the intent of this provision.

Commented [QFs17]: We believe that important substantive clarifications should be found in the administrative rules. It is hard for developers, and even attorneys, to recall exactly where every exception or clarification might be located, so simply including it in the rules is very much preferable.

On the substance, we still are concerned that that the rules are requiring the developer to actual secure site control in violation of FERC Order No. 872, for the reasons explained in our prior comments.

Commented [MK*P18]: Our intention is for this and any other "notes" in the redline to be a clarification in the order, not incorporated into the text of the rules.

Commented [QFs19]: To be clear, the QF Trade Associations continue to object to requiring the QF to provide and update a Form 556 during PPA negotiations. This is just a tool that can be used by a reluctant utility to slow down negotiations and initiate new litigation at the OPUC and FERC. It will deter development.

Commented [QFs20]: For reasons previously communicated the QF Trade Associations object to this requirement for a 12x24 and 8760 profile in part (F)

(J) proposed pricing provisions,
(K) Point of Delivery and Interconnection,
(L) latitude and longitude of proposed facility and site layout,
(M) for a qualifying facility with battery storage system, description of the storage design capacity, 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.
~~(O) purchase agreement approved by the Commission. (O) for a qualifying facility selecting a scheduled commercial operation date between three and four years after the Effective Date of the standard power purchase agreement pursuant to [insert cross-reference], an interconnection study supporting the scheduled commercial operation date.~~

Commented [MK*P21]: Joint Utilities say they need information about the POI for off-system QFs to make 3rd party transmission arrangements.

Commented [QFs22]: We do not agree with the unsubstantiated assertion by the Joint Utilities and recommend that the "and" be changed to an "or". There should be flexibility to use more than one potential Point of Interconnection, especially in the early stages of contract negotiations and especially for an off-system QF.

Commented [MK*P23]: We are inclined to leave this in – but note that the other information to be asked for is still subject to Commission approval.

Commented [QFs24]: The QF Trade Associations continue to object to (N) for reasons previously stated.

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Commented [MK*P25]: From the Joint Utilities – we are inclined to strike this proposal as an unnecessary hurdle to interconnection but are interested in hearing more on the rationale for or against in comments.

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Estimates of the net amount of power to be delivered to the public utility's electric system and the 12 x 24 delivery schedule are subject to commercially reasonable revisions based upon the expected performance of the qualifying facility until the date the qualifying facility commences commercial operation, provided that any such revision must be consistent with OAR 860-029-0120(15).

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

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

(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 days

Commented [MK*P26]: Proposed by Joint Utilities – we ask for comments about whether this is the right standard and/or necessary to include.

Commented [QFs27]: This proposal is unclear and needs further clarification if it will be included. The QF should not be locked into the plus or minus 10 percent change referenced in OAR 860-029-0120(15) based on the initial PPA request submittal. The plus or minus 10-percent change (or whatever is adopted later in the rulemaking) should be based on the information existing at time of execution of the PPA, not at time of initial PPA request.

Between the initial PPA request and the time the PPA is executed there should be no limit on updates the QF can make to any details at all, including the 12x24.

Commented [MN28]: We need to have further conversation about the intent for the use of these delivery schedules – we need to be clear about the extent to which and how utilities will rely on these schedules, what happens when these schedules are not accurate, and how the most accurate data – a year's worth of actual performance (for a solar facility) is or can be utilized.

to (i) notify the qualifying facility it cannot make the requested changes, (ii) notify the qualifying facility it does not understand the requested changes or requires additional information, or (iii) provide a revised draft power purchase agreement. However, the public utility will have fifteen (15) business days to respond or provide a revised draft standard power purchase agreement when the qualifying facility requests a change to the Point of Delivery.

(6) The process outlined in subsections (4) and (5) will continue until both the qualifying facility and 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 ~~signed~~ executed by the qualifying facility, the purchasing public utility has five (5) business days in which to sign the final executable agreement.

(9) The final executable form of the purchase agreement will be considered effective on the date on which it is executed by the qualifying facility.

Commented [MK*P29]: Joint Utilities would like to include other types of changes – we invite comment on which changes are appropriate here. Particularly:

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

Commented [QFs30]: We do not agree to these proposals. It is not clear why the utility needs more time to incorporate such items into a draft PPA where the QF has sole discretion to change these details at any time before PPA execution and the utility has no discretion to reject such changes.

Additionally, none of these changes, or any other changes, necessitate filing a new Form 556 before the facility is operational, as we have explained in our comments.

Commented [MN31]: As discussed in the last workshop.

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) 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 that satisfies the requirements of this rule.~~

(~~3~~)(2) Qualifying facilities have the unilateral right to select a purchase period~~term~~ 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) The total term of a standard power purchase agreement is any development period followed by the purchase term. The total term starts on the date the power purchase agreement is executed by both parties and ends the last day of the purchase term.

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

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

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

~~(~~4)(6) A qualifying facility may specify a scheduled commercial operation date for a standard power purchase agreement subject to the following requirements: ~~consistent with the following:~~

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

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

(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.

Commented [MK*P32]: Joint utilities recommend removing and incorporating into definition of "Term"

Commented [MK*P33]: Again, note issues with Mountain Time.

Commented [MK*P34]: Is this redundant with previous sections?

Commented [MK*P35]: These would be included as clarifications in the order, not in the rule itself. We invite comments on whether this note contradicts later sections of the rules.

Commented [QFs36]: In general, it is preferable for substantive points to be in the rules, not an accompanying order. But in this case, the last sentence here could be construed to contradict the statement in Section (7)(d) below that the QF gets the 15-year period extended in the case of the force majeure or utility delay. So that should be clarified wherever the statement is located.

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

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

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

(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.

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(b) A qualifying facility that chooses to modify the scheduled commercial operation date under subsection (7)(a) may not select a new scheduled commercial operation date more than four years from the date the standard power purchase agreement was executed.

Commented [MN37]: Consider movement to five years given interconnection challenges.

(c) If a qualifying facility terminates the standard power purchase agreement under subsection (7)(a), it is liable for damages incurred by the public utility up until the date of termination, which may be taken from the Project Development Security posted by the qualifying facility.

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

Commented [MK*P38]: Joint Utilities recommend separating the discussion of Force Majeure – we invite comments in response to the JU proposal as to how Force Majeure should be handled (as contained in their comments and redline).

Commented [QFs39]: We disagree with the utilities' proposal that Force Majeure should not be included here. Force Majeure is beyond the QF's control and should not result in PPA termination or loss of 15-year fixed price period.

~~(5)~~(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 ~~on-line~~ operation date in the standard power purchase agreement. If a Notice of Default is issued for failure to meet the scheduled commercial ~~on-line~~ operation date in the standard power purchase agreement, the qualifying facility has one year in which to cure the default for failure to meet the scheduled commercial ~~on-line~~ operation date, during which the public utility may collect damages for failure to deliver.

Commented [MK*P40]: Joint Utilities propose shortening to 180 days; we are inclined to leave this at one year.

(a) Unless excused under the standard power purchase agreement, d~~D~~amages 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.

~~(6)~~(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 ~~on-line~~operation date in the power purchase agreement, if such failure is not otherwise excused under the agreement.

Commented [MK*P41]: Conform when final.

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

~~(7)~~(11) The standard power purchase agreement must include a mechanical availability guarantee (MAG) for ~~intermittent~~ wind qualifying facilities as follows:

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

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

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

availability for the contract year and the actual net output provided by the qualifying facility for the contract year;

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

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

~~(8)~~(12) A public utility may issue a Notice of Default, and subsequently terminate a standard power purchase agreement pursuant to its terms and limitations, for failure to meet the MAG if the qualifying facility does not meet the MAG for two consecutive years if such failure is not otherwise excused by the power purchase agreement.

(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 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; 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.

(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 consecutive years if such failure is not otherwise excused by the standard power purchase agreement.

(15) Incremental Utility Upgrades.

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

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

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

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

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

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

(c) In the event that the qualifying facility seeks to upgrade the facility during the term of the power purchase agreement in a manner that does not increase the nameplate capacity rating of the facility in the power purchase agreement, ~~and~~ but which is reasonably expected to exceed 10 percent of expected annual net output in the power purchase agreement, such upgrades may be made without the utility's prior written 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 ~~to require~~necessitate network upgrades in order to maintain designated network status.

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

(C) Within 30 days after receiving such a request, the purchasing utility must respond with indicative pricing for the expected incremental additional net 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.

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Commented [MK*P42]: Flag for review. Clarifying edit.

Commented [MK*P43]: Flag for review. Clarifying edit.

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(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 resulting from the proposed upgrades, the purchasing utility may create a blended rate based on the proportion the expected incremental additional net output bears to the expected total net output following the installation of the upgrades.

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

(e) A qualifying facility that wishes to install upgrades that would cause the facility to increase its nameplate capacity rating must terminate its existing power purchase agreement and may choose ~~to may seek~~ to enter a new standard or new non-standard power purchase agreement ~~or~~ 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.

(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 ~~30 6 days~~ months of the Effective Date of the standard power purchase agreement. The purchasing public utility's credit requirements, consistent with those used in wholesale transactions, will be set forth in the purchasing public utility's form of standard power purchase agreement approved by the Commission. ~~The amount of required Project Development Security will be set forth in the purchasing public utility's form of standard power purchase agreement approved by the Commission.~~ The obligation to maintain the Project Development Security will expire once the qualifying facility commences commercial operation. The qualifying facility may use either of the following options to post Project Development Security:

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

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

Commented [MK*P44]: Clarifying edits.

Commented [MK*P45]: This issue has been well developed in the comments and AHD-led workshops and raises important policy issues; we believe it is important for the Commission to hear discussion of participants' position at the public workshop.

Commented [MN46]: Given the challenges with meeting security requirements discussed during the meeting, we'd like to consider ways to address this. One potential solution is to extend the period under which security can be provided by projects. We would like to understand when reliance on the contract creates practical implications and costs for a utility. We also need to review the creditworthiness information submitted by utilities yesterday.

Commented [QFs47]: We believe the rules should contain objective criteria the utility must use to evaluate creditworthiness of the QF.

Commented [MK*P48]: Clarification that these requirements need to be set in a separate process.

(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 utility's credit requirements and the amount of required Default Security will be set forth in the public utility's form of standard power purchase agreement approved by the Commission. The qualifying facility may use one of the following options to post Default Security:

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

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

(18) Insurance requirements. The standard power purchase agreement must specify that a qualifying facility with a Nameplate Capacity Rating greater than 200 kW must secure and maintain general liability insurance coverage that complies with the following:

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

(b) Insurance coverage will include:

(A) 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.

(19) Except as explicitly provided in these rules, a~~A~~ny 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

Commented [MN49]: We understand that all sides of this issue recognize that default security is less crucial. We'd like to explore ways to make this provision less of a burden, if possible.

Commented [MK*P50]: Joint Utilities would add separate requirement for facilities under 200 kW. We invite comments on this proposal.

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.

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

Commented [MK*P51]: Clarifying language.

Commented [QFs52]: We continue to strongly disagree with this aspect of the proposed rules that states the Commission has jurisdiction over all disputes related to standard power purchase agreements.