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December 12, 2023

VIA ELECTRONIC FILING

Public Utility Commission of Oregon
Filing Center
201 High Street SE, Suite 100
Salem, Oregon 97301-3398

Re: Docket UM 2299 – In the Matter of PORTLAND GENERAL ELECTRIC COMPANY; PACIFICORP dba PACIFIC POWER; and IDAHO POWER COMPANY, Joint Utilities Application for Approval of Proposed Schedules and Standard Power Purchase Agreement for Qualifying Facilities up to 10 MW.

Attention Filing Center:

Attached for filing in the above-captioned docket are the Joint Utilities' December 12 Comments. This filing also includes Attachment A – Joint Utilities' Standard Power Purchase Agreement with Redlines and Comments.

Please contact this office with any questions.

Sincerely,

Cole Albee

Cole Albee
Paralegal
McDowell Rackner Gibson PC

Attachment

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2299

In the Matter of The Joint Utilities' Application for Approval of Proposed Schedules and Standard Power Purchase Agreement for Qualifying Facilities up to 10 MW.	**JOINT UTILITIES' DECEMBER 12 COMMENTS**

December 12, 2023

Table of Contents

I. INTRODUCTION 1

II. RESPONSES TO QF TRADE GROUPS' ISSUES LIST 4

1. Section 1.1: "Abandonment" 4
2. Section 1.1: "Commercial Operation" 5
   A. Subsection (iv) 5
   B. Joint Utilities' Proposed New Subsection (iv) 6
3. Section 1.1: "Contract Year" 8
4. Section 1.1: "Delay Damages" 9
5. Section 1.1: Excused Delay 11
6. Section 1.1: "Expected Monthly Net Output" 12
7. Section 1.1: "Expected Net Output" 12
8. Section 1.1: "Fixed Price Period End Date" 13
9. Section 1.1: "Forced Outage," "Maintenance Outage," and "Planned Outage" 14
10. Section 1.1: "Nameplate Capacity Rating" 16
11. Section 1.1: "Net Output" 17
12. Section 1.1: "Replacement Power Costs" 19
13. Section 1.1: "Required Facility Documents" 19
14. Section 1.1: "Schedule Recovery Plan" 21
15. Section 1.1: "Utility" 21
16. Section 1.1: "Utility's Cost to Cover" 22
17. Section 1.2.4 Interpretation with FERC Orders. 23
18. QF Trade Groups' Proposed Section 1.3 – Good Faith and Fair Dealing. 24
19. The Joint Utilities' Proposed Section 2.3 – Obligation to Report on Progress. 25
20. Section 2.4 Delay Damages; Schedule Recovery Plan. 26
21. Section 2.7 Utilities Right to Monitor. 28
22. Section 2.8 Excused Delay. 29
23. Section 3.2.3 Required Facility Documents. 30
24. Section 3.2.6 Litigation. 30
25. Section 3.4 Continuing Nature of Representations and Warranties; Notice. 31

26. Section 4.1 Purchase and Sale. 32
27. Section 4.2 Designation as Network Resource. 33
A. Subsection (a) 33
28. Section 4.5 Curtailment. 34
29. Section 4.6. Utility as Merchant or Otherwise as Purchaser. 35
30. Section 4.7 Ownership of Environmental Attributes' RPS Certification. 36
31. Section 5.1 Contract Price; Includes Capacity Rights. 37
32. Section 6.2.1 General (Standard of Facility Construction and Operation). 37
33. Section 6.3 Interconnection. 38
34. Section 6.6.2 Schedule Coordination. 38
35. Section 6.7 Forecasting. 39
36. Section 6.8.3 Allowable Upgrades. 40
37. Section 6.9 Telemetering. 42
38. Section 6.11 Dedicated Communication Circuit. 43
39. Section 6.12.1 Electronic Fault Log. 44
40. Section 6.12.2. Other Information to be Provided to Utility. 45
41. Section 6.12.3 Information to Governmental Authorities. 45
42. Section 6.12.4 Data Requests. 46
43. Section 6.12.6 Notice of Material Adverse Events. 47
44. Section 6.12.7 Notice of Litigation. 48
45. Section 6.12.8 Additional Information. 48
46. Section 8.2 Project Development Security. 49
47. Section 8.3 Default Security. 49
48. Section 9.3 Inspection, Testing, Repair and Replacement of Meters. 51
49. Section 11.1.2 Defaults by Seller. 51
A. Subsection (b) 51
B. Subsection (d) 53
C. Subsection (e) 53
50. Section 11.2.1 Remedy for Seller's Failure to Deliver. 54
51. Section 11.4 Termination of Duty to Buy. 54
52. Section 11.5: Termination Damages. 56

53. Section 14 Force Majeure. 56
54. Section 19 Governmental Authorities. 58
55. Section 20.2.2 Assignments by Utility. 60
56. Section 24.2 Alternative Dispute Resolution. 61
57. Section 24.4 Waiver of Jury Trial. 61
58. Exhibit A – Expected Monthly Net Output. 62
59. Exhibit F – Mechanical Availability Guarantee. 62
A. Timing 62
B. Operational Hours as Defined in Exhibit F 63
C. Damages Calculation 64
D. Invoicing for Availability Shortfall 65
60. Exhibit F – Minimum Delivery Guarantee. 65
A. Exhibit F Definition of Seller Uncontrollable Minutes; Supervisory Control and Data Acquisition (SCADA)/Electronic Fault Logs 65
B. Output Shortfall and Damages Calculations 66
C. Invoicing for Output Shortfall 67
61. Exhibit H – Required Insurance. 68
A. Section 1.1. Required Policies and Coverage. 68
62. Exhibit I – NERC Event Types. 69
63. Exhibit L – Off-System Addendum. 69
A. Recitals 69
B. Exhibit L Definition of Firm Delivery 70
C. Supplemental Provision 2 – Dynamic Scheduling 72
64. Proposed Changes to Schedules. 73
A. PacifiCorp Rate Schedule 73
B. PGE Rate Schedule 74
C. Idaho Power Rate Schedule 75
III. RESPONSE TO NEWSUN'S ISSUES LIST 76
IV. CONCLUSION 78

I. INTRODUCTION

These comments by Portland General Electric Company (PGE), PacifiCorp dba Pacific Power (PacifiCorp), and Idaho Power Company (Idaho Power) (together, the Joint Utilities) address the issues presented as remaining in dispute by the Community Renewable Energy Association, the Northwest & Intermountain Power Producers Coalition, and the Renewable Energy Coalition (together, the QF Trade Groups) and NewSun Energy LLC (NewSun) regarding the Joint Utilities' proposed standard power purchase agreement (PPA) for qualifying facilities (QF) of 10 megawatts (MW) or less and revised schedules filed on July 24, 2023 in accordance with Order Nos. 23-152 and 23-214.[1] The Joint Utilities have reviewed Staff's and stakeholders' issues lists and provide further explanation and rationale for provisions in the standard PPA and clarify why the standard contract provisions proposed in the Joint Utilities' October 17, 2023 Reply Comments are aligned with the Commission's rules, and are otherwise reasonable and appropriate.

To date, the Joint Utilities have made significant efforts to understand the concerns raised by the QF Trade Groups and other stakeholders and to make concessions and offer compromises in an attempt to narrow the issues remaining in dispute and facilitate an efficient resolution of this proceeding. Specifically, in their Initial Comments, the QF Trade Groups had identified approximately 123 definitions, provisions, and subsections of the PPA that they proposed be revised, deleted, or added, as well as discrete recommendations concerning the utilities' schedules. Of these 123-plus issues, the Joint Utilities agreed to incorporate or partially incorporate the QF Trade Groups' recommendations on approximately 73 issues. Moreover, for each issue where the Joint Utilities determined that they could not reasonably accept a position proposed by the QF

[1] In their Issues List, the Public Utility Commission of Oregon (Commission) Staff did not include their positions on the issues and attempted to present the issues neutrally. *See* Staff Issues List at 3 (Nov. 15, 2023). Accordingly, the Joint Utilities do not expressly address Staff's positions on issues in these comments.

Trade Groups, they made every effort to propose compromise language that might meet the needs of both the utilities and the QFs. As a result, the Joint Utilities offered such compromise revisions in approximately 55 instances, which in certain cases overlapped with acceptance or partial acceptance of the QF Trade Groups' proposal.[2]

The Joint Utilities understand that, despite their efforts to narrow the number of provisions in dispute and issues before the Commission in this docket, the QF Trade Group's Issues List makes it clear that many issues remain open. Moreover, the Joint Utilities recognize that, while a handful of the open issues represent disagreements over significant policy matters, the majority of them are disputes over the specific wording that will best give effect to the Commission's policy determinations and goals. This fact puts the Commission in the position of parsing the precise phrasing of contractual provisions—a task that can be both challenging and time-consuming. Nevertheless, this work is crucial because clear and up to date QF contracts are necessary to facilitate contracting under the Public Utility Regulatory Policies Act of 1978 (PURPA) while at the same time protecting utility customers and minimizing disputes.

Given the significant effort to review new standard contracts, some of the QF parties have questioned whether a comprehensive overhaul of the existing PPAs is necessary, and whether more modest changes would suffice. The simple answer is no, the contracts must be comprehensively updated. Not only are the new rules comprehensive and complex such that they do not easily lend themselves to simple integration into the existing contract templates, but the utilities' current PPAs

[2] For example, the Joint Utilities did not object to the QF Trade Groups' proposal to remove the previous Sections 2.3 (Obligation to Report on Certain Project Milestones), 2.7 (Utilities Right to Monitor), and 6.12.2 (Other Information to be Provided to Utility); provided, however, that the Joint Utilities proposed a new, less burdensome Section 2.3 that requires that Seller provide Utility updates concerning the facility's progress in coming online by the Scheduled Commercial Operation Date (COD) in writing on a quarterly basis to help inform the utility's system planning and to ensure good communication between the parties during the development period. While the Joint Utilities understand that only the newly proposed Section 2.3 remains in dispute, the QF Trade Groups view all the above sections as remaining in dispute since they do not agree to the Joint Utilities' newly proposed Section 2.3.

are also close to 20 years old. Since the time they were approved, the industry has dramatically changed and best practices in PPAs have evolved. Significantly, provisions that may have been deemed acceptable 20 years ago are regarded by contract lawyers as hopelessly out of date, insufficient to protect the utilities and their customers, and likely to cause confusion and foster disputes. Indeed, the Joint Utilities have updated their PPA forms for non-standard QFs, requests for proposal (RFP), and other bi-lateral transactions multiple times during this 20-year period to keep pace with changing contract norms and to implement on-going drafting improvements. It is for this reason that it is appropriate for the utilities to update their standard PPA, and some of them have been attempting to do so for many years. Specifically, PGE made its initial filing to update its standard contracts in docket UM 1987 in 2018—a little over five years ago.[3] The QFs resisted PGE's efforts to comprehensively update its contracts at that time, and certain of the QFs continue to resist the Joint Utilities' efforts to do the same. Nevertheless, the work is essential.

In short, the Joint Utilities have worked hard to understand the concerns raised by the stakeholders and to propose revisions and compromise language wherever reasonably possible. The Joint Utilities propose some additional revisions to respond to the QF Trade Groups in an effort to resolve yet more issues in these comments. However, in the end, the standard PPAs must contain sufficient protections to shield utility customers from unreasonable costs and risks—which is the intent of the Joint Utilities' versions of the provisions that remain in dispute. Therefore, to ensure that utility customers remain indifferent and are not harmed by QF purchase, the Joint Utilities, which have compromised substantially to accommodate the QF Trade Groups' concerns (as shown in the attached redline, Attachment A), ask the Commission to accept their proposals on the issues discussed herein.

[3] *In re Portland General Electric Co., Request to Update Its Schedule 201 and Standard Power Purchase Agreements*, Docket UM 1987, Initial Application (Dec. 7, 2018).

These comments first summarize the status of each issue remaining in dispute and provide the Joint Utilities' responses to the QF Trade Groups' Issues List and current stances on the PPA provisions and schedules. The Joint Utilities then briefly respond to NewSun's comments in its Issues List concerning the form and scope of the Joint Utilities' standard PPA, as well as NewSun's proposal to adjust the procedural schedule.[4]

II. RESPONSES TO QF TRADE GROUPS' ISSUES LIST

1. Section 1.1: "Abandonment"

Summary of Issue: "Abandonment" of a QF is an event of default under OAR 860-029-0123(1)(f) and Section 11 of the PPA, and accordingly, the term must be defined to provide clarity to parties concerning their rights and obligations under the contract and to avoid future disputes. It is critical that utilities understand as early as possible if a contracted QF will not be coming online as planned to allow it to make any necessary adjustments in its resource and system planning.

The Joint Utilities initially proposed that abandonment be defined as (a) the relinquishment of all possession and control of the Facility by Seller or (b) prior to the Commercial Operation Date (COD), a complete cessation of the construction, testing, and inspection of the Facility for 90 days, but only if such relinquishment or cessation is not caused by or attributable to an Event of Default by Utility, a request by Utility, or an event of Force Majeure.

The QF Trade Groups disagreed with the Joint Utilities' proposal and argued that because the rules do not define "abandonment," the term should simply reflect the word's normal meaning, i.e., a *permanent* setting aside. The QF Trade Groups also proposed that "abandonment" specifically exclude "Seller's sale of the Facility and an Assignment of this Agreement conforming with Section 20." The QF Trade Groups argued in the alternative, positing that if the Commission chooses to adopt a specific period of time in which cessation of construction activity would constitute abandonment, that period of time should be at least 180 days with the opportunity to demonstrate that a longer period is necessary for a reason other than abandonment. The QF Trade Groups claimed that a longer period was necessary to account for "cessation of construction during the normal period of winter when it is too cold to perform construction in many parts of Oregon."

In an effort to find common ground and narrow the dispute, the Joint Utilities accepted the QF Trade Groups' proposal that abandonment exclude Seller's sale of the facility and an assignment of the contract under Section 20 of the PPA and did not object to the QF Trade

[4] From previous comments, the Joint Utilities understand that other QF parties also support NewSun's recommendation that the Commission require the Joint Utilities to redline their current contracts. *See* Oregon Solar + Storage Industries Association Initial Comments at 2-3 (Oct. 3, 2023).

Groups' alternative proposal for a construction cessation period of 180 days. However, the issue remains in dispute as the QF Trade Groups continue to argue for their primary proposal and do not agree that the Joint Utilities accepted all of their alternative recommendations.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The QF Trade Groups appear to agree with subpart (a) of the definition that now reads that "abandonment" means "the relinquishment of all possession and control of the Facility by Seller, except in the case of Seller's sale of the Facility and an Assignment of this Agreement conforming with Section 20[.]" However, the Joint Utilities clarify that they do not agree with the QF Trade Groups' assertion that "abandonment" can only mean "a *permanent* setting aside." Such an interpretation would require the utilities to demonstrate a QF developer's intent and will likely lead to litigation.

In a further effort to compromise on this issue, the Joint Utilities propose that instead of defining abandonment as a construction cessation period, subpart (b) now define abandonment as Utility's receipt of notice from Seller informing Utility of Seller's intent to not proceed with development of the facility:

> "Abandonment" means (a) the relinquishment of all possession and control of the Facility by Seller, except in the case of Seller's sale of the Facility and an Assignment of this Agreement conforming with Section 20 or (b) Utility's receipt of notice from Seller informing Utility of Seller's intent not to proceed with the development of the Facility. ~~if after commencement of the construction, testing, and inspection of the above-ground portions of the Facility (exclusive of road building), and prior to the Commercial Operation Date, there is a complete cessation of the construction, testing, and inspection of the Facility for one hundred and eighty (180) consecutive days, but only if such relinquishment or cessation is not caused by or attributable to an Event of Default by Utility, a request by Utility, or an event of Force Majeure.~~

This proposal should reasonably respond to the QF Trade Groups' and Staff's concerns about the references to cessations of construction and limit the determination of abandonment to those actions that would definitively indicate an intention on the part of the QF to walk away from its obligations under the PPA.

2. Section 1.1: "Commercial Operation"

A. Subsection (iv)

Summary of Issue: In order for a QF to demonstrate that it is ready to begin commercial operation, the Joint Utilities initially proposed that they must receive a certificate from an officer of Seller stating that neither Seller nor the facility are in violation of or subject to any liability under any Requirements of Law. The Joint Utilities' proposed PPA defines "Requirements of Law" as "any applicable federal, state, and local law, statute, regulation, rule, action, order, code or ordinance enacted, adopted, issued or promulgated by any

Governmental Authority (including those pertaining to electrical, building, zoning, environmental and wildlife protection, and occupational safety and health)."

Both Staff and the QF Trade Groups argued that this subsection of the definition of "Commercial Operation" was too broad and could prevent a QF from beginning commercial operation if there was a pending claim unrelated to the development of the facility, such as a claim before the Oregon Bureau of Labor & Industries (BOLI). In response, the Joint Utilities proposed to narrow the provision such that the certificate from an officer or authorized agent of Seller need only certify that neither Seller nor the facility are in violation of or subject to any liability under any Requirements of Law "***applicable to Seller's construction, repair, operation, and maintenance of the Facility and performance of its obligations under the Agreement***." The QF Trade Groups contend that the Joint Utilities' proposal to narrow the provision does not address their concerns that the provision is overly broad because a QF could be prevented from beginning commercial operation if permitting issues remain or there is a dispute over payment to a vendor, which the QF Trade Groups claim "do not necessarily preclude the ability to operate the facility safely and reliably."

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities maintain that it is customary and appropriate for Seller to have obtained all legal rights and permits that are required for it to construct, own, operate, and maintain the project upon Commercial Operation, and that the Joint Utilities' proposal to narrow the required certification as described above is reasonable and appropriate. If permitting issues remain, as in the QF Trade Groups' hypothetical, then the facility is not ready to begin operating in a legal manner. Moreover, the proposed definition focuses on compliance with applicable laws and orders, and therefore the existence of a contractual dispute with a vendor would not stand in the way of commercial operations under the PPA.

B. Joint Utilities' Proposed New Subsection (iv)

Summary of Issue: OAR 860-029-0046(2)(c)(F) provides that "estimates of the net amount of power to be delivered to the public utility's electric system and the 12 x 24 delivery schedule are subject to revision until" the COD. Because these values, including the Expected Monthly Net Output and Expected Net Output, are fixed in the PPA at execution and are relied upon by the utilities for both resource planning and to calculate delay, termination, and performance guarantee damages under the PPA, having contract documentation of any changes in these estimates at Commercial Operation is essential to administer and enforce these contracts and to avoid disputes.

The Joint Utilities inadvertently did not incorporate this rule in their initial draft of the PPA. The QF Trade Groups noted the issue and proposed to revise the definitions of "Expected Monthly Net Output" and "Expected Net Output" in the PPA by adding language to each of these definitions stating that such values may be "updated by Seller prior to the Commercial Operation Date." In their Reply Comments, the Joint Utilities

acknowledged this rule and that these values may be revised up until COD. However, to ensure that all such updates are captured and included in the administration of the PPA, the Joint Utilities determined that it is necessary and appropriate to require the QF to provide any updates to these values in a certification as a condition to Commercial Operation. Accordingly, the Joint Utilities added a new subsection (iv) to the definition of "Commercial Operation" which describes the process for updating the Expected Monthly Net Output in Exhibit A and Expected Net Output in Section 1.1 prior to COD.[5]

The QF Trade Groups oppose the Joint Utilities' new subsection (iv) in the definition of "Commercial Operation," arguing that the newly proposed certification requirement "contradicts the right to provide notice of reasonable modifications in design" through the As-Built Supplement up to 90 days after COD in OAR 860-029-0120(14)(a), and it creates significant confusion as to how the Seller will be "bound" by the "Expected Monthly Net Output" and "Expected Net Output."

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The new mechanism for updating the values for Expected Monthly Net Output and Expected Net Output as proposed in subsection (iv) in the definition of "Commercial Operation" is necessary to support resource planning, administer and enforce contracts (including calculating damages), and avoid disputes.

Moreover, the QF Trade Groups' argument that the certification contradicts the requirement in OAR 860-029-0120(14)(a) that the QF provide the As-Built Supplement within 90 days after COD is meritless. As an initial matter, delivery of the As-Built Supplement refers to the drawings and specifications for the final design of the facility and nothing in this newly proposed subsection prevents the QF from providing the As-Built Supplement (Exhibits B and C) 90 days after COD. While it may take some time after

[5] New subsection (iv) of the definition of "Commercial Operation" is as follows:

> Utility has received a certificate from an officer or authorized agent of Seller certifying as to whether the Facility's Expected Net Output has been modified to the extent permitted under Section 6.1 and Section 6.8 and whether there have been changes to the definition of Expected Net Output (if applicable), Exhibit A (Expected Monthly Net Output) and Seller's 12 x 24 delivery schedule, which certificate shall also contain specific certifications as to the following items: (1) If the Facility has not been so modified, i.e., the amount of Expected Net Output has not changed, Seller shall certify either (a) that there are no changes to either Exhibit A (Expected Monthly Net Output) or Seller's 12 x 24 delivery schedule; or (b) that there have been changes to Exhibit A (Expected Monthly Net Output) or Seller's 12 x 24 delivery schedule, and, in such case, Seller shall attach revised versions of said document(s), certifying as to their accuracy and completeness and conveying Seller's agreement to be bound by such document(s) under this Agreement; or (2) If the Facility has been so modified, Seller shall certify as to the changes to Expected Net Output, Exhibit A (Expected Monthly Net Output) and Seller's 12 x 24 delivery schedule, and, in such case, Seller shall attach revised versions of said document(s), certifying as to their accuracy and completeness and conveying Seller's agreement to be bound by such document(s) under this Agreement; provided that any such certified changes to Expected Net Output and Exhibit A (Expected Monthly Net Output) are consistent with the requirements of this Agreement, they shall be deemed to amend and replace the definition of Expected Net Output and Exhibit A (Expected Monthly Net Output), respectively, upon execution and delivery of the certification and countersignature by Utility[.]

COD to complete the As-Built Supplement final design drawings, QFs do not need the drawings to understand the impact of their final design on Expected Net Output. Working with their consultants, QFs will understand their final designs and the impacts of the designs on Expected Net Output well in advance of COD. Consistent with Section 6.1, which allows QFs to unilaterally modify the facility shown in the As-Built Supplement and increase the Expected Net Output—***as that term is defined as of the Effective Date***—by no more than ten percent (10%) (unless the QF complies with the requirements of Section 6.8.3), the certification the QF provides with respect to the updated Expected Monthly Net Output and Expected Net Output values under the new subsection (iv) in the definition of "Commercial Operation" is necessary to confirm these unilateral increases in Expected Net Output of up to ten percent (10%) and other changes as allowed under Section 6.8.3.

3. Section 1.1: "Contract Year"

Summary of Issue: Defining "Contract Year" is necessary to implement the Mechanical Availability Guarantee (MAG) and Minimum Delivery Guarantee (MDG) provisions in Exhibit F, establish the parameters for the definition of "Expected Net Output," and provide the appropriate timing requirements for various provisions throughout the contract, such as the timing for providing the schedules for outages. The Joint Utilities proposed defining a Contract Year as a calendar year starting on January 1, provided, however, that the first Contract Year would commence on the Effective Date and end on the next succeeding December 31, and the last Contract Year would end on the Termination Date. The QF Trade Groups proposed that the Contract Year be defined as a calendar year that begins on the COD in order to prevent difficulties regarding partial Contract Years in implementing the MAG and MDG. For instance, OAR 860-029-0120(1)(a) requires that the MAG will be calculated annually "starting three years after the [COD] for [QFs] with new contracts or one year after the [COD] for [QFs] that renew a contract or enter into a superseding contract[.]"

The Joint Utilities rejected the QF Trade Groups' proposal because having the Contract Year start on January 1 would ease contract administration and the utilities would not need to separately track the contract year for each individual contract. However, to address the QF Trade Groups' concerns as to how the definition of Contract Year would be implemented for the MAG and MDG in Exhibit F, the Joint Utilities proposed that only full Contract Years be counted for purposes of the performance guarantees. The QF Trade Groups responded that the Joint Utilities' efforts to address their concerns with the MAG and MDG were only partially successful as the revisions addressed only the first partial Contract Years to which the MAG applies and did not address circumstances where there is an end partial Contract Year. The QF Trade Groups also claimed that the Joint Utilities' use of the term "full Contract Year" in Exhibit F is unclear and undefined.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities maintain the position that the definition of a Contract Year as a calendar year starting on January 1 is reasonable and appropriate for ease of contract administration as

the utilities would otherwise have to separately track the contract year for each individual contract. Furthermore, the "Contract Year" term applies to other provisions in addition to the MAG and MDG in Exhibit F, so having the Contract Year start at the COD is inappropriate. To address the QF Trade Groups' concerns regarding a partial final Contract Year, the Joint Utilities submitted an Errata to Exhibit F on November 21, 2023, that states that the guarantee will end with "the last full Contract Year in the Term." With respect to the QF Trade Groups' concerns regarding the definition of a "full Contract Year", the Joint Utilities propose adding the following:

> "Contract Year" means a twelve (12) month period commencing at 00:00 hours [Pacific Prevailing Time/Mountain Prevailing Time] on January 1 and ending on 24:00 hours [PPT/MPT] on December 31; provided, however, that the first Contract Year shall commence on the Effective Date and end on ~~the next succeeding~~ December 31 of the same calendar year, and the last Contract Year shall end on the Termination Date. For the purposes of this Agreement, "Full Contract Year" means a complete twelve (12) month period during the Term commencing at 00:00 hours [Pacific Prevailing Time/Mountain Prevailing Time] on January 1 and ending on 24:00 hours [PPT/MPT] on December 31.

With this additional language, if the Effective Date of the PPA for a new QF is May 12, 2024, then the first Contract Year is May 12, 2024 to December 31, 2024. Assuming that the QF chooses a COD three years from the Effective Date, and the COD is May 12, 2027, the MAG will be calculated annually commencing with the first day of the fourth Full Contract Year following COD, i.e., January 1, 2031. Similar examples are already provided in Exhibit F. The Joint Utilities' proposal clearly complies with the requirements of OAR 860-029-0120(10)(a).

The Joint Utilities also revised the definition to make clear that the first Contract Year commences on the Effective Date and ends on December 31 "of the same calendar year."

4. Section 1.1: "Delay Damages"

Summary of Issue: The Commission's rules provide terms and conditions governing a variety of different types of defaults (e.g., delay, termination, failure to satisfy MAG and MDG). For each type of default addressed, the rules provide distinct requirements governing how the damages are to be calculated and invoiced, and capped. While the parties do not have a substantive disagreement as to how the damages for each type of default should be calculated, they do disagree as to the most clear and accurate approach to express those calculation approaches in the PPA, and in particular with respect to the definition of Delay Damages.

OAR 860-029-0120(7), in particular, specifies how delay damages are to be calculated and invoiced, and imposes a cap on delay damages for which QFs may be liable. Specifically,

that rule provides that delay damages are aggregated and invoiced as a monthly sum and the total amount of delay damages "may not exceed an amount equal to what the [QF] would have received under the standard [PPA] for energy delivered during the default period."

To implement that rule, the Joint Utilities propose to define delay damages as follows:

> "Delay Damages" for any given day in a given month are equal to (a) the Expected Monthly Net Output for such month, expressed in MWhs per month, divided by the number of days in such month, multiplied by (b) Utility's Cost to Cover; provided that, ***Delay Damages are to be aggregated and invoiced as a monthly sum and total Delay Damages for a given month or partial month may not exceed the aggregate amount Utility would have incurred to purchase Seller's Net Output and Environmental Attributes during that month or partial month***. (Emphasis added).

The QF Trade Groups propose to remove the damages cap in the "Delay Damages" definition emphasized above, and rather retain a general damages cap applicable to all types of damages under the "Utility's Cost to Cover" definition (i.e., "the lower of (i) the positive difference between the Replacement Power Costs less the Contract Price in effect, and (ii) the Contract Price in effect.").

The Joint Utilities do not agree that the damages cap for each type of damages should be placed under the "Utility's Cost to Cover" definition because each type of damages provision has different terminology and specifications for calculating damages, including how the damages should be aggregated for the purposes of applying the damages caps. The QF Trade Groups claim that the Joint Utilities' changes are "somewhat confusing and unclear" and "do not correctly implement the administrative rules as well as the QF Trade Groups' proposed edits."

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities continue to propose that the PPA clearly and accurately describe the way in which damages are calculated for each type of default, as required by the Commission's rules. As noted above, the rules require application of the damages cap separately for each type of damages. For delay damages in particular, the Joint Utilities' proposal includes the critical clarification that the delay damages are aggregated and invoiced as a monthly sum and the total damages cap applies on a monthly or partial monthly basis, which is consistent with OAR 860-029-0120(7)(a) ("determined on a daily basis with positive differences aggregated and invoiced as a monthly sum") and Section 2.6 (Damages Invoicing) of the PPA stating that delay damages are invoiced on a monthly basis.

In contrast, under OAR 860-029-0123(9), while termination damages are calculated on a monthly basis, they are also capped over a 24-month period. Accordingly, in Section 11.5 of the PPA, the cap for termination damages is as follows: "Notwithstanding the foregoing, Termination Damages for the twenty-four-(24) month term may not exceed the aggregate amount Utility would have incurred to purchase Seller's Net Output and Environmental Attributes had the Agreement not been terminated."

5. Section 1.1: Excused Delay

Summary of Issue: A QF's delay to the Scheduled COD and COD is allowed without reduction to the fixed-price term pursuant to the limitations enumerated in OAR 860-029-0120(6)(d). That rule provides in relevant part that if the QF is delayed in reaching commercial operation because of an event of Force Majeure, the public utility's default under the standard PPA, or any other agreement related to the interconnection of the QF "to the purchasing utility's system," including interconnection study agreements and interconnection agreements, the Scheduled COD in the PPA will be extended commensurately with the delay except for periods of delay that could have been prevented had the QF taken mitigating actions using commercially reasonable efforts. To implement this rule, the Joint Utilities added a definition for Excused Delay as follows:

> "Excused Delay" means the failure of Seller to achieve Commercial Operation on or before the Scheduled Commercial Operation Date, but only to the extent such failure is caused by an event of Force Majeure or an Event of Default by Utility, a default by Utility Transmission under the Generation Interconnection Agreement or related interconnection study agreement(s) for Seller's Facility, including a default resulting from any breach by Utility Transmission of any obligation to meet a material deadline included in such agreement(s), or Utility Transmission's violation of applicable tariff provisions governing the interconnection of Seller's Facility; provided that the duration of any Excused Delay shall not extend to any period of delay that could have been prevented had Seller taken mitigating actions using commercially reasonable efforts.

It is the Joint Utilities' understanding that the QF Trade Groups do not dispute that a definition of "Excused Delay" is appropriate in the PPA; rather, the QF Trade Groups argue that the use of the term "Utility Transmission" in the definition is a "qualifier not included in the administrative rules" and not acceptable to the QF Trade Groups.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: Use of "Utility Transmission" in the definition of "Excused Delay" appropriately reflects the terminology used in OAR 860-029-0120(6)(d). Specifically, as discussed above, delay to the Scheduled COD may be excused in part by a default of the purchasing utility under any agreement related to the interconnection of the QF "to the purchasing utility's system," including interconnection study agreements and interconnection agreements. The Joint

Utilities' proposed language is intended to clarify and confirm that it is the utility's transmission function—as opposed to the purchasing/merchant function—that is the party to such interconnection agreements. For example, for PacifiCorp, the named party to the interconnection agreement is PacifiCorp, acting in its transmission function. While that clarification is not present in OAR 860-029-0120(6)(d), having this clarification in the contract is consistent with the rule in that it does not change the scope of relief available to the QF. Put simply, this clarification will confirm for the QFs that violations of interconnection tariffs and defaults under interconnection agreements occur outside and independently of the PPA notwithstanding that the PPA, consistent with the rules, provides them with relief for such violations and defaults in certain circumstances. Specifically, consistent with the rule, the definition of "Excused Delay" in the PPA provides remedies for QFs under the contract when the utility's transmission function defaults under the Generation Interconnection Agreement (GIA) or violates applicable tariffs governing interconnection of the QF facility. In such cases, QFs are able to extend their Scheduled COD under the PPA without damages and without commensurate reduction to the fixed-price term.

6. Section 1.1: "Expected Monthly Net Output"

Summary of Issue: Please see the issue summary above concerning the Joint Utilities' newly proposed subsection in the definition of "Commercial Operation." The QF Trade Groups disagree with the certification process proposed by the Joint Utilities in "Commercial Operation" and do not agree to the deletion of "as updated by Seller prior to the Commercial Operation Date" from the definition of "Expected Monthly Net Output."

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities revised the definition of "Commercial Operation" to describe the process for updating the Expected Monthly Net Output in Exhibit A prior to COD. To avoid the potential for confusion, the Joint Utilities deleted the QF Trade Groups' addition of "as updated by Seller prior to the Commercial Operation Date" to the definition of "Expected Monthly Net Output." Please see the Joint Utilities' comments above regarding new subsection (iv) in the definition of "Commercial Operation" and why such a provision is a reasonable mechanical device that is necessary for enforcement of the PPA.

7. Section 1.1: "Expected Net Output"

Summary of Issue: Please see the issue summary above concerning the Joint Utilities' newly proposed subsection in the definition of "Commercial Operation." The QF Trade Groups disagree with the certification process proposed by the Joint Utilities in "Commercial Operation" and do not agree to the deletion of "as may be updated by Seller prior to the Commercial Operation Date" from the definition of "Expected Net Output."

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities revised the definition of "Commercial Operation" to describe the process for updating the Expected Net Output amounts in Section 1.1 prior to COD. To avoid the

potential for confusion, the Joint Utilities deleted the QF Trade Groups' addition of "as may be updated by Seller prior to the Commercial Operation Date" to the definition of "Expected Monthly Net Output." Please see the Joint Utilities' comments above regarding new subsection (iv) in the definition of "Commercial Operation" and why such a provision is a reasonable mechanical device that is necessary for enforcement of the PPA.

8. Section 1.1: "Fixed Price Period End Date"

Summary of Issue: OAR 860-029-0120(5)(b) states the conditions under which a QF may specify a COD anytime within five years from the Effective Date as follows:

> If the qualifying facility can, utilizing the process specified in section (6), ***provide an interconnection study by the purchasing utility showing that the time it will take the purchasing utility to complete the interconnection to the qualifying facility necessitates a commercial operation date longer than three years from the Effective Date***, then the additional time necessitated by the interconnection up to an additional two years will not be taken off the period of the fixed-price term. Under other circumstances, the additional time will be taken off the period of the fixed-price term[.] (emphasis added).

The Joint Utilities' definition of "Fixed Price Period End Date" clarifies that the fixed-price term ends on the last day of the 15-year period following the Fixed Price Period Start Date[6] if: (1) Seller selects a Scheduled COD that occurs no later than three years from the Effective Date; or (2) Seller selects a Scheduled COD that occurs between three and five years from the Effective Date and aligns with *Utility Transmission's estimate in an interconnection study* of the date of completion of the interconnection for the facility.

The QF Trade Groups recommend that that the QF's right to specify a Scheduled COD between three and five years from the Effective Date (without commensurate reduction in the fixed-price term), as provided in the rules, be significantly broadened. Specifically, they argue that QFs be allowed to specify a Scheduled COD beyond three years from the Effective Date (without commensurate reduction in the fixed-price term) based on an interconnection study not only by Utility Transmission, but also by interconnection studies from other interconnection providers such as Bonneville Power Administration (BPA) or an electric cooperative. The Joint Utilities did not agree with the QF Trade Groups' proposal as it conflicted with the plain language and intent of the rules. The QF Trade Groups maintain their position.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The plain language of OAR 860-029-0120(5)(b) clearly states that in order for the commencement of the fixed price period to be delayed beyond three years from the Effective Date, the

[6] "Fixed Price Period Start Date" means the earlier to occur of the Commercial Operation Date or the Scheduled Commercial Operation Date.

interconnection study justifying such extension must be "by the purchasing utility," so the QF Trade Groups' recommended edits to this definition are inconsistent with the rules. Furthermore, requiring an interconnection study by Utility Transmission is necessary to ensure that the purchasing utility's customers are not saddled with delay, stale prices, and associated risk caused by another utility over which the purchasing utility has no control. This was the balance struck by Staff and the Commission in allowing a Scheduled COD up to five years without corresponding reduction in the fixed-price term, i.e., utility customers would be burdened with more risk and potentially stale avoided cost prices because the reason for the QF specifying a Scheduled COD beyond three years was due to interconnection delays on the part of the purchasing utility. The Joint Utilities have therefore retained the reference to "Utility Transmission" in this definition.

While "purchasing public utility" or "purchasing utility" are not defined in the rules, these terms very clearly refer to the specific utility party to the standard PPA with the QF as used throughout the rules. If the QF Trade Groups' seeming interpretation is that "purchasing utility" may mean any other electric utility, many rules and rule definitions become meaningless. For example, "Point of Delivery" is defined in the rules as "for off-system qualifying facilities, the point ***on the purchasing public utility's distribution or transmission system*** where the qualifying facility and ***purchasing public utility*** have agreed the qualifying facility will deliver energy ***to the purchasing public utility***…."[7] "Point of Interconnection," on the other hand, is defined as "the point where the qualifying facility is electrically connected ***to an electric utility's*** transmission or distribution system."[8] If OAR 860-029-0120(5)(b) was intended to include other interconnection providers, such as the BPA or an electric cooperative, the rule would have explicitly stated so as done above and in OAR 860-029-0030(4) regarding options to wheel.[9]

9. <u>Section 1.1: "Forced Outage," "Maintenance Outage," and "Planned Outage"</u>

<u>Summary of Issue:</u> Several key provisions of the PPA require notice and reporting of the various types of outages the QF might experience for scheduling purposes, as well as an allowance for 200 Planned Outage hours under the MAG, and therefore the Joint Utilities have proposed definitions for "Forced Outage," "Maintenance Outage," and "Planned Outage." Each of these definitions includes a description of the outage, and then references the North American Electric Reliability Corporation (NERC) standards for each Event Type. The definitions also reference Exhibit I, which includes the NERC definitions for each Event Type so that the parties to the contract would not need to look outside the agreement for that information.

[7] OAR 860-029-0010(44) (emphasis added).
[8] OAR 860-029-0010(45) (emphasis added).
[9] "Option to wheel power to ***other electric utilities*** or ***to the Bonneville Power Administration***: At the request of a qualifying facility, a public utility (which would otherwise be obliged to purchase energy or capacity from such qualifying facility) may transmit (wheel) energy or capacity to any other electric utility or to the Bonneville Power Administration, at the expense of the qualifying facility. Use of a public utility's transmission facilities shall be on a cost-related basis." OAR 860-029-0030(4) (emphasis added).

The QF Trade Groups argued to remove all references to the NERC Event Types and Exhibit I from the outages definitions, claiming that it was inappropriate to reference the NERC Event Types because they were not referenced in the administrative rules and because the QF Trade Groups did not "agree it is reasonable or necessary to require small QFs to cross reference NERC definitions to understand how such definitions may change over time and affect their rights and obligations with respect to outages in the PPA." The QF Trade Groups also recommended deleting the Joint Utilities' clarification that a Maintenance Outage is any outage involving 10 percent of the facility's Net Output. While the Joint Utilities agreed to remove the reference to 10 percent of the facility's Net Output from the definition of "Maintenance Outage," they did not agree to remove the references to the correlating NERC Event Types and Exhibit I for the definitions of "Forced Outage," "Maintenance Outage," and "Planned Outage."

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The QF Trade Groups' arguments for deleting references to the NERC standards makes little sense. The utilities are obligated to comply with the NERC standards when they identify and report the various types of outages. For example, the Commission has found that the utilities may not deviate from NERC standard equations when modeling planned outages.[10] Furthermore, when the utilities report certain resource outages to the Western Resource Adequacy Program (WRAP),[11] for example, they must adhere to the NERC definitions for such outages, which have clear delineations between forced outages and planned outages that may not be as recognizable under the more generally worded language in the rules. Moreover, by having consistent definitions of these types of operational limitations or disruptions, utilities may more accurately conduct system balancing and resource planning. Accordingly, both parties to the PPA, as owners and operators of facilities connected to the electric grid, be they large or small, must understand how NERC definitions may change over time and affect their rights and obligations with respect to outages in the PPA.

Therefore, to the extent that the NERC standards provide additional information beyond that included in the PPA definition section, reference to such standards can only serve to clarify the definitions and therefore prevent future misunderstandings.

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[10] *See, e.g.*, *In re Portland General Electric Co., Application for Annual Adjustment to Schedule 125 Under the Terms of the Resource Valuation Mechanism*, Docket UE 139, Order No. 02-772 at 23-24 (Oct. 30, 2002) ("[W]e disagree with PGE's adjustment to a standard industry equation used to compute forced outage rates.").

[11] The Joint Utilities are Participants to the WRAP. All generation resources owned (or jointly owned) and/or operated by a Participant and any resources (e.g., contracts or demand-side resources) claimed by a Participant on its Forward Showing (FS) portfolio will be required to register with the Program Operator (PO) in order to receive a Qualified Capacity Contribution (QCC) value. *See* Western Power Pool (WPP), WPP Western Adequacy Program Detailed Design Executive Summary 66 (Aug. 2022), *available at* https://www.westernpowerpool.org/private-media/documents/2023-03-10_WRAP_Draft_Design_Document_FINAL.pdf. The proposed minimum resources must be 1 MW or larger to qualify for certification. *Id*. The registration and certification process for all resources will require outage data, specifically, NERC Generator Availability Data System (GADS) data (or equivalent) for thermal and storage hydro resources. *Id.* at 67. Outage data will not be necessary for wind, solar, or Run-of-River (RoR) resources. *Id.*

In arguing against the references to the NERC standards, the QF Trade Groups point out that the administrative rules do not incorporate the NERC standards by reference because it would be an unlawful delegation of agency authority for the Commission to do so.[12] This may be the case. However, the rules do not preclude the PPA from specifically referencing the applicable NERC standards, and doing so benefits both parties to the PPA by increasing clarity. In fact, the QF Trade Associations' (now QF Trade Groups') prior comments noted with approval that "PacifiCorp's [existing] power purchase agreement form included the NERC definitions as an exhibit to avoid confusion in its cross reference to those NERC definitions."[13] For these very same reasons, the Joint Utilities urge the Commission to retain reference to the NERC definitions for outages.

10. Section 1.1: "Nameplate Capacity Rating"

Summary of the Issue: Clearly defining the "Nameplate Capacity Rating" of the facility in the PPA is necessary not only for system planning purposes, but also to enforce the eligibility requirements for the standard contract and avoid cost prices, as well as the incremental facility upgrades provisions in the contract. OAR 860-029-0046(2)(c)(A) requires "[d]emonstration of ability to obtain certified [QF] status prior to commercial operation; for [QFs] larger than 1 MW, a Form 556 self-certification of the proposed qualifying facility or a [Federal Energy Regulatory Commission (FERC)] order granting an application for certification of the proposed [QF] is required." The Joint Utilities have proposed that the definition of Nameplate Capacity Rating in the PPA include a reference to the nameplate capacity rating in the FERC Form 556 to ensure that the values match, and to further confirm QF eligibility. In response to concerns by the QF Trade Groups, the Joint Utilities have also proposed that the reference to the FERC Form 556 include the qualifier "if applicable" because the rule does not require submission of the FERC Form 556 for QFs that are 1 MW or under.

The QF Trade Groups argue that the Joint Utilities' insertion of "if applicable" in reference to reliance on the FERC Form 556 does not resolve their concerns as the administrative rules define "Nameplate Capacity Rating" for purposes of eligibility to the standard contract and/or standard rates, and reliance on the FERC Form 556 may be inappropriate if FERC's current eligibility rules change or if the FERC Form 556 is inconsistent with the Commission's rules. Specifically, the QF Trade Groups note that the FERC Form 556 uses a 10-mile separation rule that is already inconsistent with the Commission's five-mile rule for aggregation of nearby facilities.

[12] *In re Rulemaking to Address Procedures, Terms, and Conditions Associated with Qualifying Facilities (QF) Standard Contracts*, Docket AR 631, Comments of the Community Renewable Energy Association, Northwest & Intermountain Power Producers Coalition, and Renewable Energy Coalition on Staff's Proposed Group 2 Rules at 28 (Sept. 16, 2022) ("Further, for clarity, the definitions of the Planned Outage, Maintenance Outage, and Forced Outage should not simply cross reference the North American Electric Reliability Corporation ('NERC') outage types and definitions because NERC definitions could change over time and without notice to the Commission or stakeholders.").

[13] *Id.*

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities' proposal is appropriately tailored and consistent with the rules. The nameplate capacity rating of a QF is a fundamental characteristic that determines the generation capacity of the facility as well as its eligibility for a standard PPA. Despite that fact, the Joint Utilities have found in many cases that the nameplate capacity rating of the QF has been a bit of a moving target during the contracting process. Therefore, the Joint Utilities wish to ensure the accuracy of the nameplate capacity rating value in the PPA by confirming that it is identical to the nameplate capacity rating reported by the QF to FERC for its QF certification. To the extent that those numbers do not match, the utility can ask the QF to clarify which number is correct and can ask that the relevant document be corrected. As such, the Joint Utilities' proposal constitutes a simple common-sense requirement.

The QF Trade Groups' argument that reliance on the FERC Form 556 to determine the nameplate capacity rating of the facility is inappropriate because the Commission's rules and FERC Form 556 may be inconsistent is meritless. Only the listed maximum net power production capacity for the facility from the FERC Form 556 will be relied on to confirm the nameplate capacity rating for the facility in this definition. With respect to the QF Trade Groups' argument that FERC Form 556 uses a 10-mile separation rule that is inconsistent with the Commission's five-mile rule, that argument is also flawed for several reasons. First, the nameplate capacity rating of the facility designated in this definition is not in any way dependent on the nameplate capacity ratings of affiliated QFs within any distance. Second, even when QFs larger than 1 MW have to demonstrate their ability to obtain certification of QF status[14] and the cumulative nameplate capacity rating of the facility and affiliated QFs within five miles is relevant,[15] those values are separate and identifiable in the FERC Form 556 even though facilities further out than five miles are also listed. For the above reasons, reliance on FERC Form 556 is reasonable and appropriate to confirm the facility's nameplate capacity rating as designated in this definition.

11. Section 1.1: "Net Output"

Summary of Issue: The Joint Utilities' initial definition of "Net Output" inadvertently referenced the Point of Delivery rather than the Point of Interconnection. The QF Trade Groups noted that OAR 860-029-0010(34) defines "Net Output" as the amount of power flowing through the Point of Interconnection,[16] not the Point of Delivery, and the Joint

[14] *See* OAR 860-029-0046(2)(c)(A) ("Demonstration of ability to obtain certified qualifying facility status prior to commercial operation; for qualifying facilities 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[.]").
[15] OAR 860-029-0045.
[16] "Net Output" means "all energy and capacity produced by the qualifying facility, less station service, losses, and other adjustments, flowing through the Point of Interconnection." OAR 860-029-0010(34).

Utilities agreed to revise the definition to conform to the rules. However, for the sake of clarity, the Joint Utilities have proposed wording that is slightly different from the definition in the rules for clarity out of concern that the phrase "flowing through" the Point of Interconnection is vague and could be subject to different interpretations. Accordingly, the Joint Utilities proposed that "Net Output" be defined as "all energy and capacity produced by the Facility, and less transformation and transmission losses and other adjustments (e.g., Seller's load other than station use), if any, ***measured at*** the Point of Interconnection." (Emphasis added).

The QF Trade Groups argue that their proposed definition mirrors the administrative rules and that the Joint Utilities' proposal confusingly deducts "Seller's load other than station use" from Net Output, which the QF Trade Groups claim contradicts FERC's buy-sell rule. The QF Trade Groups also deleted the words "transformation and transmission" to describe the type of losses to be deducted from Net Output.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities do not oppose removing the reference to "Seller's load other than station use" such that the definition of "Net Output" reads as follows:

> "Net Output" means all energy and capacity produced by the Facility, less station service, and less transformation and transmission losses and other adjustments ~~(e.g., Seller's load other than station use)~~, if any, measured at the Point of Interconnection.

The Joint Utilities still propose using "measured at" rather than "flowing though" in the definition for clarity because "flowing through" the Point of Interconnection could be subject to different interpretations. Furthermore, the Joint Utilities continue to support use of the phrase "transformation and transmission losses" to describe the losses that are subtracted from Net Output. The term losses in and of itself is inherently vague, and as far as the Joint Utilities are aware, transformation and transmission losses are precisely the types of losses that the rule intends to cover—and so the inclusion of that phrase constitutes a helpful clarification. To be clear, the QF Trade Groups have not identified any other types of losses that should be covered by the rule, or any reason why they oppose deletion of those words.

It is true that the Commission's rule more generally refers to "losses." However, to the extent that the Commission agrees with the utilities that transformation and transmission losses are the types of losses they had in mind, the Joint Utilities proposal is consistent with the rule's intent and will provide helpful detail to reduce potential disputes. For these reasons, the Joint Utilities support the definition of "Net Output" as proposed above.

12. Section 1.1: "Replacement Power Costs"

Summary of Issue: The Joint Utilities did not oppose the QF Trade Groups' revisions to the definition of "Replacement Power Costs" folding the potential costs for Environmental Attributes and transmission into the definition, but provided some minor clarifying edits which do not appear to be in dispute.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: As discussed above, the Joint Utilities understand that the QF Trade Groups view this issue in dispute only to the extent the Joint Utilities did not accept the QF Trade Groups' other recommended changes with respect to the definitions of "Delay Damages" and "Utility's Cost to Cover." The Joint Utilities continue to support different damages caps for each type of damages provision to better conform to the terms and wording in the rules.

13. Section 1.1: "Required Facility Documents"

Summary of Issue: OAR 860-029-0020(2)(a) requires in part that:

> All contracts between a qualifying facility and a public utility for energy, or energy and capacity must include language which substantially conforms to the following: … 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.

The Joint Utilities' proposed definition of "Required Facility Documents" and requirements for such documents in the PPA are consistent with this rule. Under subsection (iii) of the definition of "Commercial Operation" in the PPA,[17] as proposed by the Joint Utilities, in order to achieve Commercial Operation, the Seller's officer or authorized agent must provide Utility with a certificate that the QF has obtained or entered into "all Required Facility Documents." The Joint Utilities defined "Required Facility Documents" as "those Permits and other authorizations, rights, and agreements necessary for construction, ownership, operation, and maintenance of the Facility, and to deliver the Net Output to Utility in accordance with this Agreement and Requirements of Law, including those listed in Exhibit D." A requirement that such documents be provided prior to commercial operation is standard, required by the Commission's rules (in part, i.e., with respect to governmental licenses, permits and approvals), and assures the purchasing utility that the project is completed, ready to commence deliveries, and continues to operate in compliance with all necessary permits and authorizations.

[17] Section 3.2.3 (Required Facility Documents) of the PPA also provides in relevant part that Seller represents and warrants that "Seller holds as of the Effective Date, or will hold by the Commercial Operation Date (or such other later date as may be specified under Requirements of Law), and will maintain for the Term all Required Facility Documents."

The QF Trade Groups argued that the Joint Utilities' proposed definition is too open ended and could lead to disputes "over how minor an agreement or authorization falls within the definition." Instead, the QF Trade Groups recommended that Required Facility Documents be defined as those "Permits and other authorizations, rights, and agreements" identified in Exhibit D at contract execution. In other words, the QF Trade Groups are suggesting that each individual QF decide unilaterally what types of documents should be provided to the utility *only at contract execution* without reference that these documents must be "necessary for construction, ownership, operation, and maintenance of the Facility, and to deliver the Net Output to Utility in accordance with this Agreement and Requirements of Law."

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The QF Trade Groups' argument that the definition of "Required Facility Documents" is "too open ended and could lead to disputes" is meritless. As an initial matter, the specific Required Facility Documents are listed in Exhibit D, which the QF fills in when the PPA is executed. Section 3.2.3 of the PPA requires that all Required Facility Documents as of the Effective Date be listed in Exhibit D and requires the QF provide—upon the Utility's request—new or revised Required Facility Documents during the Term should new laws or regulations require new permits, authorizations, rights, or agreements necessary to own, operate, and maintain the facility. For the above reasons, the definition must be inclusive enough to identify categories of documents that may be necessary during the Term beyond those initially identified at execution in Exhibit D.

This definition is also reasonable as it is substantively the same as the definitions of "Required Facility Documents" in both PacifiCorp's and PGE's existing contracts.[18] The QF Trade Groups have not provided any evidence that this definition has led to disputes—or even a single dispute—in the nearly 20 years that it has been in use.

It is customary and appropriate for a QF to warrant that it has obtained all legal rights and permits that are required for it to construct, own, operate, and maintain the project. Minor

[18] *See, e.g.*, PacifiCorp's Power Purchase Agreement for a New Firm Qualifying Facility with 10,000 kW Facility Capacity Rating, or Less and an Intermittent Resource with Mechanical Availability Guarantee at Section 1.42 *available at* https://www.pacificpower.net/content/dam/pcorp/documents/en/pacificpower/rates-regulation/oregon/tariffs/purpa/Power_Purchase_Agreement_for_New_Firm_QF_And_Intermittent_Resource_with_MAG.pdf (last visited Oct. 17, 2023) ("'Required Facility Documents' means all licenses, permits, authorizations, and agreements, including a Generation Interconnection Agreement or equivalent, necessary for construction, operation, and maintenance of the Facility consistent with the terms of this Agreement, including without limitation those set forth in Exhibit C.") [hereinafter, "PacifiCorp's PPA for New Firm QF And Intermittent Resource with MAG"]; PGE's Schedule 201: Standard In-System Variable Power Purchase Agreement at Section 1.31, *available at* https://assets.ctfassets.net/416ywc1laqmd/6BkeRZ0p3HBy6JSSDJuKVO/4cb9cb718bb00b15dc30d80da78c0a46/standard_in_system_variable_solar_plus_storage_PPA_Eff_Sept_22.2023.pdf (last visited Dec. 12, 2023) ("'Required Facility Documents' means all licenses, permits, authorizations, and agreements necessary for construction, operation, interconnection, and maintenance of the Facility including without limitation those set forth in Exhibit B.") [hereinafter, "PGE's Standard In-System Variable PPA"].

agreements that are not "necessary" for the construction ownership, operation, and maintenance of the facility are excluded by definition, so the Joint Utilities disagree that this provision is overly broad. Further, disputes are only likely in cases where a breach of the warranty in Section 3.2.3 of the PPA causes the utility damages, which is exactly the scenario in which the utility and its customers need the protection of this warranty. Accordingly, the Joint Utilities maintain their position that the definition should remain as provided in their Reply Comments.

14. Section 1.1: "Schedule Recovery Plan"

Summary of Issue: The Joint Utilities initially proposed including in the PPA the concept of a "Schedule Recovery Plan," whereby the Seller would provide to the Utility a written recovery plan for approval by the Utility that would include a detailed plan to complete all necessary work to achieve commercial operation by the Cure Period Deadline. The Joint Utilities proposed such a concept in order to ensure that the project was making continued progress to coming online even in the face of delay and to inform system planning.

The QF Trade Groups argued that the "Schedule Recovery Plan" concept was an unreasonable new condition that encroached on the QF's one-year cure period rights for delay default as provided in OAR 860-029-0123(4)(a). In their Reply Comments, the Joint Utilities proposed an alternative that they hoped the QF Trade Groups would find acceptable. Specifically, the Joint Utilities agreed to remove the concept of a Schedule Recovery Plan from the contract, and to instead add a new Section 2.3 (Obligation to Report on Progress) that would require the QF to provide to the utility quarterly updates on the progress of the facility prior to coming online. The QF Trade Groups state that this issue remains in dispute to the extent removal of the "Schedule Recovery Plan" concept from the PPA is conditioned on inclusion of the Joint Utilities' newly proposed Section 2.3, which the QF Trade Groups also oppose.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities agreed to remove the concept of the "Schedule Recovery Plan" concept from the PPA and therefore view this issue as moot. However, the Joint Utilities continue to support as reasonable and appropriate the quarterly updates on the facility's progress as required by the newly proposed Section 2.3, which is discussed in more detail below. Regular reporting requirements ensure that the utility is informed as to whether generation from the facility should be relied upon and included in the utility's system planning.

15. Section 1.1: "Utility"

Summary of Issue: In the contract, "Utility" is defined in the Recitals and Section 1.1, and "explicitly excludes Utility Transmission."[19] The Joint Utilities included this clarification and related provisions in the PPA to reflect the fact that utilities' transmission and

[19] "Utility Transmission" means [UTILITY NAME], a/an [TYPE OF ORGANIZATIONAL ENTITY AND STATE OF ORGANIZATION], acting in its interconnection or transmission function capacity.

merchant/purchasing groups function independently under long-standing federal regulation, and to clarify that the PPA signed by the merchant/purchasing group is separate from and operates independently of the GIA, which is signed by the transmission group. The QF Trade Groups oppose treating the Utility as a separate entity from its own transmission department and argue that the "three Oregon public utilities are a single, unitary corporate entity including both merchant and transmission functions." For the same reasons, the QF Trade Groups oppose the Joint Utilities' recommendation to insert "acting in its merchant function or otherwise as purchaser" as the definition of the Utility contracting party in the Recitals.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities continue to support separate designation of Utility and Utility Transmission with respect to enforcement of the PPA. Including this distinction in the PPA will clarify for the QF that interconnection issues under the GIA must be taken up with the transmission function and will not impact enforcement of the PPA—except as explicitly incorporated into the PPA.[20] In sum, these provisions are needed to ensure that it is clear to QFs that the GIA and PPA are separate agreements with separate rights, obligations, and remedies. Disputes under one should not have bearing on the other unless otherwise stated in the PPA.

16. Section 1.1: "Utility's Cost to Cover"

Summary of the Issue: The "Utility's Cost to Cover" is a component of the damage calculations for certain types of QF defaults in the PPA. For example, the Utility's Cost to Cover is incorporated into the calculation of delay damages as follows:

> "Delay Damages" for any given month are equal to (a) the Expected Monthly Net Output expressed in MWhs per month, divided by the number of days in such month, multiplied by the Utility's Cost to Cover.

The Joint Utilities propose that "Utility's Cost to Cover" means "for any day for which Utility's Cost to Cover is calculated the positive difference between the Replacement Power Costs less the Contract Price in effect, stated as an amount per MWh."

Importantly, however, the "Utility's Cost to Cover" as defined in the PPA is ***not*** a component of the calculation of damages for failure to meet the performance guarantees under the MAG and MDG, which are addressed in Exhibit F. These damage calculations, which still incorporate the cost to cover concept, are significantly more granular than the damages for other defaults, in particular as they distinguish between costs incurred by the utility during On-Peak and Off-Peak periods.

The QF Trade Groups noted that the initial Exhibit F, which addresses the MAG and MDG, used the terms "On-Peak Utility's Cost to Cover" and "Off- Peak Utility's Cost to Cover",

[20] For example, under Section 6.8.3 (Allowable Upgrades) of the PPA, the QF's proposed upgrades must not cause Seller "to breach its [GIA]."

so they edited the definition to clarify that the calculation for the MAG and MDG damages provisions is performed the same as for Utility's Cost to Cover for all other types of damages. Specifically, the QF Trade Groups propose (as shown in red) that the Utility's Cost to Cover should be defined as:

> "Utility's Cost to Cover" means for any day for which Utility's Cost to Cover is calculated, or for the On-Peak Hours in such day (the "On-Peak Utility's Cost to Cover") or the Off-Peak Hours in such day (the "Off-Peak Utility's Cost to Cover"), stated as an amount per MWh, stated as an amount per MWh, the lower of (i) the positive difference between the Replacement Power Costs less the Contract Price in effect, and (ii) the Contract Price in effect.

The QF Trade Groups also support maintaining the contract price cap in the definition of "Utility's Cost to Cover." The QF Trade Groups further claim that their changes to the definitions of "Delay Damages," "Replacement Power Costs," and the "Utility's Cost to Cover" are reasonable and are clearer and easier to understand than the Joint Utilities' proposal.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities rejected the QF Trade Groups' additions referring to "On-Peak Utility's Cost to Cover" and "Off- Peak Utility's Cost to Cover" because the Joint Utilities made efforts to further clarify the damages calculations in Exhibit F, and as a result, the terms referenced by the QF Trade Groups are no longer necessary. For example, for the MDG, damages are calculated by multiplying the On-Peak and Off-Peak Output Shortfalls ***by the positive difference between the applicable On-Peak and Off-Peak Average Firm Electric Market Prices and the On-Peak and Off-Peak Contract Prices*** (plus applicable costs related to acquiring transmission and replacement renewable energy certificates (RECs)) to determine what the utility would have paid had the QF satisfied the guarantee. Accordingly, as stated above, while the cost to cover concept is implemented in the MAG and MDG provisions in compliance with the rules, the specific terms proposed by the QF Trade Groups are no longer necessary.

Further, the Joint Utilities object to including the "lower of" language because, as discussed in more detail above regarding "Delay Damages," the caps are now implemented separately for each specific type of damages, and retaining this language would be duplicative. The Joint Utilities maintain that implementing the caps separately for each specific type of damages is reasonable and appropriate and more consistent with the rules because the rules have different terminology and aggregation periods for the purposes of the damages caps.

17. Section 1.2.4 Interpretation with FERC Orders.

Summary of Issue: Section 1.2.4, as initially proposed by the Joint Utilities, required that each "Party conducts its operations in a manner intended to comply with FERC Order

No. 717, Standards of Conduct for Transmission Providers, and its companion orders, requiring the separation of its transmission and merchant functions." The provision also required acknowledgement that (1) the GIA is a separate and free-standing contract and the terms of the PPA are not binding upon the Interconnection Provider; and (2) that unless expressly provided by the PPA, nothing in the GIA, an alleged event of default under the GIA, nor any other agreement between Seller and Transmission Provider or Interconnection Provider, will affect the parties' rights, duties, and obligations under the PPA.

The QF Trade Groups opposed inclusion of this language, arguing that this section, along with the definition of "Utility" and other sections in the PPA, were an "attempt to insulate the purchasing utility against any accountability or liability for financial harm to the QF caused by the utility's interconnection and/or transmission function employees." Accordingly, the QF Trade Groups recommended deleting this section along with the Utility/Utility Transmission separation concept throughout the PPA. The Joint Utilities agreed to remove this section but maintained that it was appropriate to retain the Utility/Utility Transmission separation concept in the PPA. The Joint Utilities proposed a revised Section 4.6 (Utility as Merchant or Otherwise as Purchaser) as discussed in more detail below.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities agreed to delete this section, and therefore view this specific section as moot. However, for the reasons discussed above regarding the definition of "Utility," the Joint Utilities continue to support the revised Section 4.6.

18. QF Trade Groups' Proposed Section 1.3 – Good Faith and Fair Dealing.

Summary of Issue: The QF Trade Groups proposed inclusion of a "good faith and fair dealing" provision. The Joint Utilities agreed to the following language modified from the QF Trade Groups' proposal: "The Parties shall act reasonably and in accordance with the common law principles of good faith and fair dealing in the performance of this Agreement." However, the Joint Utilities did not agree to the remaining part of the proposed section which imposed a general reasonableness standard on all provisions of the PPA—something that was already rejected by the Commission. The QF Trade Groups claim that this issue remains in dispute as their entire proposal was not accepted by the Joint Utilities.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities maintain their compromise position as stated in their Reply Comments. While the Joint Utilities agree that parties should act in a manner consistent with the common law duty of good faith and fair dealing in the performance of the PPA, and do not oppose this part of the QF Trade Groups' proposal for this reason, the Joint Utilities oppose inserting a general reasonableness standard that creates unnecessary ambiguity and will undermine

explicit deadlines and party rights and obligations contemplated by the rules.[21] Importantly, the Commission explicitly rejected a rule imposing a blanket reasonableness standard throughout the entire contract at the May 25, 2022 Special Public Meeting because of the Commission's inclination to add more clarity, not less, and to avoid inviting further litigation "to the extreme."[22]

To be clear, the Joint Utilities opposition to the overly broad reasonableness standard does not mean that the Joint Utilities believe that they have a "license to behave unreasonable in general;"[23] rather, the Joint Utilities clarify that they will adhere to the common law principles of good faith and fair dealing in the performance of any and all agreements. In drafting the rules, the Commission was extremely careful in its placement of a reasonableness standard in specific rule provisions. A vague, broad, and undefined "reasonableness" standard will create uncertainty and increase future disputes and litigation. For these reasons, the Joint Utilities support the new section only with the removal of the overly broad, blanket reasonableness standard.

19. <u>The Joint Utilities' Proposed Section 2.3 – Obligation to Report on Progress.</u>

<u>Summary of Issue:</u> While the Joint Utilities agreed to remove the concept of a "Schedule Recovery Plan" from the PPA—as well as previous Sections 2.3 (Obligation to Report on Certain Project Milestones), 2.7 (Utility's Right to Monitor), and 6.12.2 (Other Information to be Provided to Utility)—the Joint Utilities maintain that some form of communication from the Seller to the Utility updating the Utility on the facility's progress to coming online is necessary to inform system planning. Accordingly, in their Reply Comments, the Joint Utilities proposed a new Section 2.3 where the Seller would provide in writing to the Utility quarterly updates on the progress of the facility prior to coming online. The QF Trade Groups oppose this new section, arguing that the quarterly reporting requirements create a new risk of a pre-COD default and reporting burden on small QFs not required by the administrative rules.

<u>Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List</u>: The Joint Utilities continue to support the newly proposed Section 2.3 (Obligation to Report on Progress) that requires that Seller provide Utility updates concerning the facility's progress in coming online by the Scheduled COD in writing on a quarterly basis to help inform the utility's system planning and to ensure good communication between the parties during the

[21] For example, if a standard PPA is terminated because of default by the QF and the QF wishes to sell net output to the purchasing utility following such termination, the public utility ***may require***—without limitation—the QF do so subject to the terms of the terminated agreement. *See* OAR 860-029-0123(8).

[22] Special Public Meeting AR 631 Rulemaking to Address Procedures, Terms, and Conditions Associated with Qualifying Facilities (QF) Standard Contracts at 2:07:45-2:14:55 (May 25, 2022) *available at* https://oregonpuc.granicus.com/player/clip/955?view_id=2&redirect=true&h=d27c6503407fd4264d385024dcb554c6 (Chair Decker, Commissioner Thompson, and Commissioner Tawney noting preference for concrete provisions where reasonableness standard is appropriate and persuasive and ambiguity allows for such a standard, rather than a general standard that creates confusion and invites "litigation to the extreme" where there is a bright line rule).

[23] Special Public Meeting AR 631 Rulemaking to Address Procedures, Terms, and Conditions Associated with Qualifying Facilities (QF) Standard Contracts at 2:11:41-2:11:49 (May 25, 2022).

development period. This requirement is a pared down, minimal requirement based on feedback from Staff and the QF Trade Groups but is key to enabling the Joint Utilities to have updated information about whether QFs will meet their Scheduled COD for inclusion in the utility's power cost filings and in utility planning documents. The obligation simply to report on the facility's progress in this new section—not to achieve specific milestones by date certain or provide a remedial plan to cure such milestones if not met—is not in conflict with the one-year cure period and is not burdensome. If Seller fails to report, Seller will get a notice and opportunity to cure. Thus, Seller has full and complete control over compliance and can easily avoid being in default under this provision. Finally, similar reporting requirements are present in PacifiCorp's bilateral PPAs in Oregon and standard contracts in other jurisdictions.[24] PGE's resource procurement contracts also require "monthly written reports regarding Seller's progress in completing the construction, testing and interconnection of the Facility[.]"[25] As discussed at the November 7 Workshop, the Joint Utilities are willing to consider alternate timing for the progress updates. For example, reporting becomes more critical to utilities as the Scheduled COD approaches closer in time. So, a less frequent reporting obligation could be acceptable for the first half of the development period, i.e., utilities really do require frequent updates in the 18-month period leading up to the Scheduled COD.

20. Section 2.4 Delay Damages; Schedule Recovery Plan.

Summary of Issue: Section 2.4 provides the circumstances under which Seller must provide delay damages to Utility. As proposed by the Joint Utilities, that provision states as follows:

2.4 Delay Damages.¶

(a) If Commercial Operation is not achieved on or before the Scheduled Commercial Operation Date, as may be adjusted for Excused Delay, as applicable, Seller must pay to Utility Delay Damages from and after the Scheduled Commercial Operation Date up to, but not including, the earlier to occur of the date that the Facility achieves Commercial Operation or the

[24] *See, e.g.*, PacifiCorp 2020 All-Source Request for Proposals, App. E-2: Form of PPA Resource Only, Section Section 6.10.2 at 30 (July 7, 2020), *available at* https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/suppliers/rfps/2020-all-source-request-for-proposals/documents/main-documents-appendices/rfp-appendices-a-n_no-a-7/RFP_App_E-2_Form_of_PPA_Resource_Only.DOCX ("Following the Effective Date until the Commercial Operation Date, Seller must provide to PacifiCorp a quarterly progress report stating the percentage completion of the Facility and a brief summary of construction activity during the prior quarter and contemplated for the next quarter."); *see also* WUTC Docket No. UE-190666, Standard Power Purchase Agreement, Attachment A, Section 6.12.2 at 27 of 55 (Mar. 1, 2021) ("Following the Effective Date until the Commercial Operation Date, Seller must provide to PacifiCorp a quarterly progress report stating the percentage completion of the Facility and a brief summary of construction activity during the prior quarter and contemplated for the next calendar quarter.").

[25] *See, e.g.*, *In re Portland General Electric Co., 2021 All-Source Request for Proposals*, Docket UM 2166, PGE's 2021 All-Source RFP - Final Draft, App. E – Renewable PPA Form Agreement, Section 3.1.6 at 26 (Oct. 15, 2021).

date of termination as provided in Sections 11.1.2(b) and 11.3, if applicable.[26]

(b) If the Facility does not achieve Commercial Operation within one year following the Scheduled Commercial Operation Date, as may be adjusted for Excused Delay, as applicable, in addition to assessing Delay Damages, Utility may terminate this Agreement under, and subject to, Section 11.1.2(b).[27]

The QF Trade Groups proposed to revise Section 2.4 to: (1) remove reference to the "Schedule Recovery Plan" from subsection (a); and (2) revise subsections (a) and (b) to clarify that the requirement to pay delay damages may be excused under the PPA ***"for a variety of reasons, including Excused Delay, Force Majeure, and other equitable defenses."*** The Joint Utilities agreed to the removal of the Schedule Recovery Plan concept from the entire contract, including subsection (a) of Section 2.4. However, the Joint Utilities proposed revising the QF Trade Groups' suggested changes in subsections (a) and (b) to conform with how "Excused Delay" is defined in the PPA and when delay is allowed without consequences (i.e., damages or reduction in the fixed-price term) in the rules. Specifically, instead of the QF Trade Groups proposal, the Joint Utilities recommended inserting "as may be adjusted for Excused Delay, as applicable" in both subsections. The QF Trade Groups argue that the Joint Utilities' revisions unreasonably narrow the potential excuses for delay by limiting them to "Excused Delay."

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: As discussed above, while the rules do not expressly define "Excused Delay," the definition of "Excused Delay" is consistent with the framework of the rules. OAR 860-029-0120(6)(d) specifically allows for extension of the Scheduled COD without commensurate fixed-price term reduction if the delay in achieving COD occurs: (1) due to an event of Force Majeure; (2) due to "the public utility's default under" the PPA; or (3) due to "any other agreement related to the interconnection of the [QF] to the purchasing utility's system, including interconnection study agreements and interconnection agreements[;]" provided, however, the delay will not be excused if it "could have been prevented had the [QF] taken mitigating actions using commercially reasonable efforts." Excused delay, which is defined in the PPA as follows, is clearly consistent with the rules:

"Excused Delay" means the failure of Seller to achieve Commercial Operation on or before the Scheduled Commercial Operation Date, but only

[26] **Note to Form** – For PPAs with operational QFs, Section 2.4(a) to be deleted and replaced with the following provision: "If Initial Delivery is not achieved on or before the Scheduled Initial Delivery Date, Seller must (i) pay to Utility Delay Damages from and after the Scheduled Initial Delivery Date up to, but not including, the earlier to occur of the date that the Facility achieves Initial Delivery or the date of termination as provided in Section 11.1.2(b) and 11.3, if applicable."

[27] **Note to Form** – For PPAs with operational QFs, Section 2.4(b) to be deleted and replaced with the following provision: "If Initial Delivery does not occur within the cure period prescribed in Section 11.1.2(b), in addition to assessing Delay Damages, Utility may terminate this Agreement as provided therein."

> to the extent such failure is caused by an event of Force Majeure or an Event of Default by Utility, a default by Utility Transmission under the Generation Interconnection Agreement or related interconnection study agreement(s) for Seller's Facility, including a default resulting from any breach by Utility Transmission of any obligation to meet a material deadline included in such agreement(s), or Utility Transmission's violation of applicable tariff provisions governing the interconnection of Seller's Facility; provided that the duration of any Excused Delay shall not extend to any period of delay that could have been prevented had Seller taken mitigating actions using commercially reasonable efforts.

Accordingly, the QF Trade Groups' proposal unreasonably broadens the circumstances under which delay is allowed to extend the Scheduled COD without reduction of the fixed-price term or delay damages outside the specific circumstances enumerated by the rules.

In their Reply Comments, the Joint Utilities did not oppose removal of the concept of the Schedule Recovery Plan from the contract. However, as discussed in more detail above, the Joint Utilities continue to support as reasonable and appropriate the newly proposed Section 2.3 (Obligation to Report on Progress) that requires that Seller provide Utility updates concerning the facility's progress in coming online by the Scheduled COD in writing on a quarterly basis to help inform the utility's system planning and to ensure good communication between the parties during the development period.

21. <u>Section 2.7 Utilities Right to Monitor.</u>

<u>Summary of Issue:</u> Section 2.7 provided that Seller would provide Utility monthly updates regarding the progress of the facility and allow the Utility to monitor. The QF Trade Groups argued that the section imposed new and unreasonable monthly reporting requirements, creating an unreasonable potential for default. The Joint Utilities agreed to remove this section. However, as discussed above, the Joint Utilities proposed a new Section 2.3 (Obligation to Report on Progress) that requires that Seller provide Utility updates concerning the facility's progress in coming online by the Scheduled COD on a quarterly basis to help inform the utility's system planning and to ensure good communication between the parties during the development period. The QF Trade Groups argue that this issue remains in dispute to the extent deletion of Section 2.7 is conditioned on inclusion of the Joint Utilities' newly proposed Section 2.3, which they oppose.

<u>Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List</u>: In their Reply Comments, the Joint Utilities agreed to remove Section 2.7, and therefore do not view this issue as remaining in dispute. However, as discussed in more detail above, the Joint Utilities continue to support as reasonable and appropriate the newly proposed Section 2.3 (Obligation to Report on Progress).

22. Section 2.8 Excused Delay.

Summary of Issue: Section 2.8 provides that the Scheduled COD may be extended due to Excused Delay on a day-for-day basis, "subject to the right to terminate pursuant to Section 14.5 . . ." That section provides both parties with the right to terminate if a Force Majeure event exceeds 180 consecutive days.

The QF Trade Groups recommended deleting the reference to the right to terminate, arguing that the definition of "Excused Delay" in OAR 860-029-0120(6)(d) does not include a right of termination for Force Majeure's lasting 180 days as the Joint Utilities propose. As Force Majeure was not addressed by the Commission, including a right to terminate, the Joint Utilities rejected the QF Trade Groups' deletion of the reference to the right to terminate.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities maintain their position that a right of termination for an event of Force Majeure lasting more than 180 consecutive days is market and reasonable and appropriate. The Commission chose not to address Force Majeure in the rules, so the absence of a 180-day limit in OAR 860-029-0120(6)(d) is not dispositive. It is unreasonable for the PPA to allow an event of Force Majeure to extend the Scheduled COD indefinitely. This is particularly true given that a QF can under the new rules select a Scheduled COD of five years after execution and enjoy another one-year cure period to come online. Given the extremely long timelines permitted under the terms of the PPA and the rules, an extended period due to Force Majeure events is not warranted and unjustifiably transfers additional project risk and the costs of stale pricing onto utility customers. Providing a right to terminate after a limited period deferring contractual obligations because of a Force Majeure event is a standard PPA term and is included in other QF standard PPAs (including the PacifiCorp Oregon and Washington standard PURPA contracts).[28]

The concept of Excused Delay provides QFs with relief from delay damages not just for Force Majeure events, but also under broader circumstances (i.e., delays stemming from Utility Transmission violations and defaults, etc.). The Joint Utilities note that the termination right is specific to Force Majeure, not Excused Delay, as the QF Trade Groups seem to imply. A significant project delay that is neither the fault of the QF nor the utility (e.g., a trade embargo, etc.), and results in stale pricing risk, should be placed on the QF

[28] *See, e.g.*, PacifiCorp's PPA for New Firm QF And Intermittent Resource with MAG at Section 14.4 ("PacifiCorp may terminate the Agreement if Seller fails to remedy Seller's inability to perform, due to an event of Force Majeure, within six months after the occurrence of the event."); WUTC Docket No. UE-190666, Standard Power Purchase Agreement, Attachment A, Section 14.5 (Mar. 1, 2021) ("If a Force Majeure event prevents a Party from substantially performing its obligations under this Agreement for a period exceeding 180 consecutive days, then the Party not affected by the Force Majeure event may terminate this Agreement by giving ten (10) days prior notice to the other Party. Upon such termination, neither Party will have any liability to the other with respect to the period following the effective date of such termination; provided, however, that this Agreement will remain in effect to the extent necessary to facilitate the settlement of all liabilities and obligations arising under this Agreement before the effective date of such termination.").

developer instead of utility customers, which is a reasonable and appropriate risk for a developer to assume.

23. Section 3.2.3 Required Facility Documents.

Summary of Issue: Under Section 3.2.3, the Seller represents and warrants that all Required Facility Documents as of the Effective Date are listed in Exhibit D, and requires that upon the Utility's request, Seller must provide updated copies of all new or revised Required Facility Documents necessary for the operation and maintenance of the facility during the Term. Also, Section 3.2.3 originally required that Seller represent and warrant that the "anticipated use of the Facility complies with all applicable restrictive covenants affecting the Premise" and that following the COD, Seller must promptly notify the Utility of any additional Required Facility Documents.

The QF Trade Groups argued that Section 3.2.3 creates unreasonable cross-default risk and burdensome reporting requirements on small facilities using the standard contract, and therefore recommended deleting the provision in its entirety. To address the QF Trade Groups' concerns regarding any possibility of cross-default, the Joint Utilities proposed to remove the following clause: "The anticipated use of the Facility complies with all applicable restrictive covenants affecting the Premises." The Joint Utilities also revised the QF's obligation to provide copies to reduce the QF compliance obligations under the PPA and risk of technical default for inadvertent non-compliance (noting, of course, that such defaults would not become events of default under the PPA until after the QF fails to cure following notice and the applicable cure period, etc.). The QF Trade Groups continue to argue that the entire section be "deleted due to unreasonable and unnecessary cross-default risk."

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities' accommodations in their Reply Comments to address the QF Trade Groups' concerns were reasonable and sufficiently mitigated any risk of cross-default. As discussed above concerning the definition of "Required Facility Documents," an obligation to obtain Required Facility Documents and to provide the documents to Utility upon request appears in existing contracts, and is necessary to assure the Utility that the facility is operating in a legal manner.[29]

24. Section 3.2.6 Litigation.

Summary of Issue: Section 3.2.6 initially required that the Seller must represent and warrant that (1) no litigation, arbitration, investigation, or other proceeding is pending or, to the best of Seller's knowledge, threatened against Seller or any Affiliate of Seller, with respect to the PPA, the facility, or the transactions contemplated in the PPA; and (2) no

[29] *See, e.g.*, PacifiCorp's PPA for New Firm QF And Intermittent Resource with MAG at Section 1.6.4; PGE's Standard In-System Variable PPA at Section 1.5.5.

other investigation or proceeding is pending or threatened against Seller or any Affiliate of Seller that would "materially and adversely affect Seller's performance of its obligations in this Agreement." This was intended to assure the Utility that there are no imminent adverse circumstances that would impact Seller's ability to continue to satisfy the Creditworthiness Requirements as provided under Section 8.1 of the PPA.

The QF Trade Groups argued that this representation and warranty "would create a cross default risk under the PPA's catch-all default provision in Section 11.1.1(c), any time the QF initiates or defends against, or is even aware of the possibility of, any form of litigation related to the facility." The QF Trade Groups therefore argued that this provision is unreasonable and should be deleted.

To address the QF Trade Groups' concerns regarding cross-default, the Joint Utilities significantly narrowed this representation and warranty such that it only requires ***disclosure*** of impending litigation. The QFs do not have to represent and warrant that there is no pending litigation.

The QF Trade Groups continue to argue that the provision should be deleted in its entirety as it creates an unreasonable automatic termination risk whenever the QFs exercise their right to initiate or defend against litigation.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The QF's satisfaction of the creditworthiness requirements is critical to the utility's ability to manage the financial risk associated with entering into a PPA. It is therefore entirely reasonable to require that, after a PPA is executed, the utility be notified of events that could indicate that a QF is no longer able to satisfy the creditworthiness criteria. Moreover, as revised by the Joint Utilities, the proposed provision should not be burdensome to the QFs.

Contrary to the QF Trade Groups' unfounded arguments, there is no "automatic risk of termination" for exercising their rights to initiate or defend against litigation; to be clear, as modified, Section 3.2.6 requires only that the utility is notified—to the best of Seller's knowledge—of all impending litigation that would "materially and adversely affect Seller's performance of its obligations in this Agreement." Even if a QF inadvertently violates this representation and warranty, they have a right to cure of up to 120 days (30 days + 90 days). Accordingly, the Joint Utilities' compromise position is reasonable and appropriate.

25. Section 3.4 Continuing Nature of Representations and Warranties; Notice.

Summary of Issue: Section 3.4 provides in part that:

> If at any time during the Term, either Party obtains actual knowledge of any event or information that would have caused any of the representations and warranties in this Agreement to be materially untrue or misleading at the time given, such Party must provide the other Party with written notice of

the event or information, the representations and warranties affected, and the action, if any, which such Party intends to take to make the representations and warranties true and correct. The notice required by this section must be given as soon as practicable after the occurrence of each such event.

The QF Trade Groups recommended deleting the language above, arguing that "the duty to notify the other party of issues that could cause a representation or warranty to be untrue creates another unreasonable risk of cross default, when combined with Section 11.1.1(a), for failure to provide such notice[.]" The Joint Utilities did not agree to the deletion of this provision as it was a standard, market term in the utilities' current PPAs necessary to enforce communication between parties when there were changes to status or defaults in order to work toward a cure. The QF Trade Groups maintain that the provision should be deleted in its entirety for the same reasons above.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities maintain their previous position and do not agree with the QF Trade Groups' recommended deletion of the duty to notify. Without this obligation, QFs would be under no obligation to inform the utility of changes to their status that would render them non-compliant and therefore there is no opportunity for the parties to work together toward a cure. In addition, the portion of Section 3.4 that the QF Trade Groups propose to remove is substantively the same as provisions in PacifiCorp's existing standard PURPA contracts.[30] The QF Trade Groups have provided no evidence that this provision has created undue cross-default risks in practice that would warrant deviation from current Commission-approved provisions.

26. Section 4.1 Purchase and Sale.

Summary of Issue: OAR 860-020-0121(3) provides that the "the purchasing public utility must accept but is not obligated to pay for surplus delivery of energy." Consistent with this rule, Section 4.1 of the PPA provides that the utility will accept excess energy from Seller but will not be obligated to pay for such energy except as may be provided in the Agreement including as provided in Exhibit L, if applicable. While the Joint Utilities accepted the QF Trade Groups' revisions specifying that the QF's delivery of excess energy was not a breach under the contract, the utilities restored the language deleted by the QF Trade Groups clarifying that if accepting excess energy causes the Utility to incur charges, then the Seller will be responsible for them. The QF Trade Groups contend that the Joint Utilities' restored language would penalize the QF for delivering in excess of its Maximum Delivery Rate to the extent that value reflects the maximum amount of Network

[30] *See, e.g.*, PacifiCorp's PPA for New Firm QF And Intermittent Resource with MAG at Section 3.3 ("If at any time during this Agreement, any Party obtains actual knowledge of any event or information which would have caused any of the representations and warranties in this Section 3 to have been materially untrue or misleading when made, such Party shall provide the other Party with written notice of the event or information, the representations and warranties affected, and the action, if any, which such Party intends to take to make the representations and warranties true and correct. The notice required pursuant to this Section shall be given as soon as practicable after the occurrence of each such event.")

Transmission the utility reserves internally, which is not reasonable because such deliveries are necessary and in fact the premise behind Exhibit L for off-system QFs.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities continue to support inclusion of the following indemnifying clause, which is consistent with avoided cost pricing principles: "provided that, in the event such excess energy exceeds the amount allocated to Facility as a Network Resource by Utility Transmission, resulting in any charges from Utility Transmission, Seller will defend, indemnify, and hold Utility harmless from and against such charges." As an initial matter, the Joint Utilities clarify that in the context of this indemnity, the concern is not that surplus energy that is balanced and calculated on a monthly basis for off-system QFs as described in Exhibit L and defined in OAR 860-029-0121(3)(b) could cause the utility to incur charges from Utility Transmission. The concern is that deliveries when received for delivery to load could exceed the network transmission allocation designated for the facility. Utilities can take steps to avoid charges with respect to excess deliveries less than 1 MW from off-system QFs that are required to schedule deliveries in 1 MW increments, e.g., by requesting a slightly higher transmission allocation than the Maximum Delivery Rate in their initial Designation of Network Resource (DNR) requests for such resources to the extent necessary, if applicable, to account for the 1 MW increment scheduling requirements. Beyond that limited instance for which utilities can plan, in all other circumstances, the utilities can incur charges outside their reasonable control from accepting surplus delivery where off-system QF delivery exceeds the applicable transmission allocation under the DNR or, in the case of an on-system QF delivery, where the on-system QF delivery exceeds the applicable transmission allocation under the DNR. While it is rare that on-system QFs would deliver surplus energy, the Joint Utilities note that variable, on-system hydro QF resources have delivered surplus energy in the past and have caused a multitude of legal issues and penalties for the purchasing utility. In particular, accepting surplus delivery from on-system and off-system QFs may cause the purchasing utility to violate the network transmission rights enumerated in its Open Access Transmission Tariff (OATT), subjecting the purchasing utility to unauthorized use and imbalance penalty charges. These charges, which are not the fault of the utility and not accounted for in avoided cost pricing, should be borne by the QFs who are in the best position to prevent these penalties from being incurred, to ensure customer indifference under PURPA, and for consistency with the rules, which provide that the utility should not pay for surplus power.

27. Section 4.2 Designation as Network Resource.

A. Subsection (a)

Summary of Issue: Subsection (a) of Section 4.2 of the PPA provides that the Utility will submit an application to Utility Transmission requesting designation of the facility as a network resource within 15 business days of the Effective Date of the PPA, or "in the event the Facility is an On-system QF and there is no interconnection study for the Facility as of

the Effective Date, within fifteen (15) days of the date Seller delivers Utility a copy of the interconnection study." The QF Trade Groups recommend deleting the requirement that on-system QFs provide a copy of the interconnection study prior to designation as a network resource, arguing that there is no limitation in the administrative rules, or any apparent basis to place a limitation on the utility's obligation to request to designate an on-system QF as a network resource until after it obtains an interconnection agreement. The QF Trade Groups further argue that under the OATT, the utility is allowed to request the QF be designated as a network resource at the time it signs the PPA, and the utility should be required to do so without an on-system QF providing an interconnection study. The Joint Utilities do not agree with the QF Trade Groups' deletion in subsection (a) for the reasons below.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities maintain that on-system QFs must have received an interconnection study prior designation as a network resource. The Commission elected to apply OAR 860-029-0044(3) only to off-system QFs because network upgrades necessary to deliver an on-system standard QF's output to load should be identified in the network resource interconnection service study process, and the costs would be allocated pursuant to the Commission's interconnection cost-allocation policies. However, if an on-system QF has not yet gone through the interconnection process and received an interconnection study, then the process of designating the QF as a network resource to obtain transmission service could identify network upgrades that should have been addressed in the interconnection process and for which cost responsibility may have been assigned to the QF under the Commission's interconnection cost-allocation policies. Such a result would inappropriately shift costs for network upgrades to utility customers that are appropriately the responsibility of the QF.

28. Section 4.5 Curtailment.

Summary of Issue: Subsection (b) of Section 4.5 as revised below provides that the Utility is not obligated to purchase, receive, pay for, or pay any damages associated with Net Output not delivered to the Point of Delivery when:

> the Market Operator or Transmission Provider directs a general curtailment, reduction, or redispatch of generation in the area (which would include the Net Output) for any reason required or permitted under applicable Federal laws and regulations, NERC standards or directives, and/or tariffs of the Market Operator, Transmission Provider, or Interconnection Provider, even if and no matter how such curtailment or redispatch directive is carried out by Utility~~, which may fulfill such directive by acting in its sole discretion~~; or if Utility curtails or otherwise reduces the Net Output in any way in order to meet its obligations to the Market Operator or Transmission Provider to operate within System limitations.

Staff requested more information regarding whether this specific subsection is consistent with PURPA and the QF Trade Groups subsequently agreed "with Staff that the curtailment right in Section 4.5 is potentially broader and gives the utility more discretion than the very limited circumstances of allowable curtailment in FERC's rules, which is just during system emergencies. 18 CFR § 292.307(b)."

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: Under PURPA, QFs can be curtailed during system emergencies, and PURPA does not require a utility to purchase net output it does not receive. Subsection (b) of Section 4.5 above is narrowly draft to apply only to curtailments "required or permitted under Federal laws and regulations," etc. It should be noted that this language is reasonable as it is substantially similar to that in existing contracts.[31] The Joint Utilities further revised subsection (b) to respond to Staff's concerns that the utility may curtail outside permitted or required system emergencies.

Importantly, while the QF Trade Groups argue that the language proposed by the Joint Utilities is too broad, they do not explain why they believe this to be true, nor do they propose any revisions.

29. Section 4.6. Utility as Merchant or Otherwise as Purchaser.

Summary of Issue: Section 4.6 provides that "Seller acknowledges that Utility, acting in its merchant capacity function or otherwise as purchaser under this Agreement, has no responsibility for or control over Utility Transmission, in either its capacity as Transmission Provider or Interconnection Provider, as applicable." As discussed above, this language was added to ensure that the QFs understand that the PPA and GIA are separate and operate independently—except as specially provided in the PPA. In order to further emphasize this point, the Joint Utilities subsequently revised Section 4.6 such that it now also requires acknowledgement that (1) the GIA is a separate and free-standing contract and the terms of the PPA are not binding upon the Interconnection Provider; and (2) that unless expressly provided by the PPA, nothing in the GIA, an alleged event of default under the GIA, nor any other agreement between Seller and Transmission Provider or Interconnection Provider, will affect the parties' rights, duties, and obligations under the PPA. For the same reasons as discussed above with respect to the Recitals, definition of "Utility," and Section 1.2.4 (Interpretation with FERC Orders), the QF Trade Groups propose deleting this section and the Joint Utilities propose maintaining this section.

[31] *See, e.g.*, PGE's Standard In-System Variable PPA at Section 5.1 ("Seller shall operate and maintain the Facility in a safe manner in accordance with the Generation Interconnection Agreement, and Prudent Electrical Practices. PGE shall have no obligation to purchase Net Output from the Facility to the extent the interconnection of the Facility to PGE's electric system is disconnected, suspended or interrupted, in whole or in part, pursuant to the Generation Interconnection Agreement, or to the extent generation curtailment is required as a result of Seller's noncompliance with the Generation Interconnection Agreement. Seller is solely responsible for the operation and maintenance of the Facility. PGE shall not, by reason of its decision to inspect or not to inspect the Facility, or by any action or inaction taken with respect to any such inspection, assume or be held responsible for any liability or occurrence arising from the operation and maintenance by Seller of the Facility.").

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: For the reasons discussed above regarding the definition of "Utility," the Joint Utilities continue to support the revised Section 4.6.

30. Section 4.7 Ownership of Environmental Attributes' RPS Certification.

Summary of Issue: Section 4.7 discusses the circumstances under which either the Utility or Seller owns the Environmental Attributes associated with the output of the facility. In their Reply Comments, the Joint Utilities proposed adding clarifying language that nothing in this section should be read to prohibit the utility from excluding greenhouse gas (GHG) emissions from QF generation from the utility's total GHG calculation for compliance purposes under House Bill (HB) 2021:

> Notwithstanding the above, nothing in this Section should be read to prohibit Utility from counting the Facility as a resource generating "nonemitting electricity" as that term is defined in ORS 469A.400 for determining Utility's compliance with the clean energy targets set forth in ORS 469A.410.

The QF Trade Groups oppose this sentence, arguing that such a claim during the sufficiency period when the Utility does not own the renewable energy certificates may be inconsistent with the outcome in docket UM 2273, and would need to be removed from the PPA if found to be inconsistent.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: After further review, the Joint Utilities propose to revise the language above to better clarify that regardless of the disposition of Environmental Attributes under the PPA, nothing in the PPA will interfere with or override ORS 469A.435(2), which states: "Greenhouse gas emissions associated with electricity acquired from net metering of customer resources ***or a qualifying facility under the terms of the Public Utility Regulatory Policies Act shall be excluded from the determination of the retail electricity provider's total greenhouse gas emissions***." (Emphasis added). The Joint Utilities clarify that this provision does not prejudge the outcome in docket UM 2273, but simply explains that nothing ***in the PPA*** regarding the ownership of Environmental Attributes will interfere with or override ORS 469A.435(2) specifying that GHG emissions from QF generation are excluded from the utility's total GHG emissions calculation for compliance with the HB 2021 clean energy targets. For these reasons, the Joint Utilities propose the following language as a replacement:

> Output of the Facility has the greenhouse gas emission attributes of the generating resource regardless of the disposition of the Environmental Attributes under this Agreement and such greenhouse gas emissions shall be excluded from, and may not be imputed in, the Utility's total greenhouse gas emissions

for purposes of compliance with the clean energy targets in ORS 469A.410 pursuant to ORS 469A.435(2).

31. Section 5.1 Contract Price; Includes Capacity Rights.

Summary of Issue: Section 5.1 provides that Utility will pay Seller the Contract Price for all deliveries of Net Output, up to the Maximum Delivery Rate; provided that Utility will be obligated to accept but not pay for any amount of Net Output from Seller in excess of the Maximum Delivery Rate. In their Reply Comment, the Joint Utilities added a clause clarifying that "in the event such excess energy exceeds the amount allocated to Facility as a Network Resource by Utility Transmission, resulting in any charges from Utility Transmission, Seller will defend, indemnify, and hold Utility harmless from and against such charges." For the same reasons as discussed above with respect to Section 4.1 (Purchase and Sale), the QF Trade Groups proposed deleting the clause added by the Joint Utilities.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities continue to support inclusion of the above clause for the reasons discussed in Section 4.1.

32. Section 6.2.1 General (Standard of Facility Construction and Operation).

Summary of Issue: Section 6.2.1 as first proposed by the Joint Utilities was as follows:

> 6.2.1 General. Seller will construct and operate all interconnected equipment associated with the Facility within its control in accordance with all applicable federal, state, and local laws and regulations to ensure system safety and reliability of interconnected operations. At Seller's sole cost and expense, Seller must operate, maintain, and repair the Facility in accordance with (a) the applicable and mandatory standards, criteria, and formal guidelines of FERC, NERC, any RTO, and any other Electric System Authority and any successors to the functions thereof; (b) the Permits and Required Facility Documents; (c) the Generation Interconnection Agreement; (d) all Requirements of Law; (e) the requirements of this Agreement; and (f) Prudent Electrical Practice. Except for any claims Seller may have in connection with Utility's obligation under Section 4.6 acting in its merchant function capacity or otherwise as purchaser to take appropriate action and make good faith efforts to pursue applicable remedies on Seller's behalf, Seller acknowledges that it has no claim under this Agreement against Utility acting as in its capacity Transmission Provider or Interconnection Provider or with respect to the provision of station service.

The QF Trade Groups proposed deleting the entire provision, arguing that it creates an unreasonable cross-default risk.

While the Joint Utilities rejected deletion of this entire provision, they agreed to remove the last sentence referencing the Utility/Utility Transmission separation concept and remove the reference to compliance with the GIA in order to reduce potential cross-default risk. The QF Trade Groups maintain that the provision still introduces an unreasonable risk of cross-default.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities' compromise position reasonably addressed the QF Trade Groups' concerns, and the Joint Utilities maintain that this provision is reasonable and necessary to assure the Utility that the Seller is operating and maintaining the facility in compliance with applicable laws and standards to ensure system safety and reliability of interconnection operations. These are basic requirements of operating a generating facility safely and reliably and are reasonable requirements for any generator—small or large. Finally, this provision is reasonable as it is substantively similar to safety requirements in the utilities' current standard contracts.[32] Because the provision no longer requires compliance with the GIA, there is less risk that the PPA will be terminated for violation of the GIA, therefore reducing the likelihood of cross-default. In fact, the Joint Utilities' proposed compromise is more protective of QFs than under the utilities' current PPAs.

33. Section 6.3 Interconnection.

Summary of Issue: Section 6.3 provides that "Seller is responsible for the costs and expenses associated with obtaining from the Interconnection Provider network resource interconnection service for the Facility at its Nameplate Capacity Rating." The Joint Utilities agreed to the QF Trade Groups' recommendation to delete the last sentence of this provision, which addressed the Utility/Utility Transmission separation concept in the PPA. The QF Trade Groups regard this issue as remaining in dispute to the extent deletion of the last sentence is conditioned on inclusion of revised Section 4.6 (Utility as Merchant or Otherwise as Purchaser).

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: As the Joint Utilities agreed to delete the last sentence in this provision, the Joint Utilities do not view this specific provision as remaining in dispute. However, for the reasons discussed above regarding the definition of "Utility," the Joint Utilities continue to support the revised Section 4.6.

34. Section 6.6.2 Schedule Coordination.

Summary of Issue: As originally proposed, Section 6.6.2 required that if in the future the utility is deemed by an RTO to be responsible for the Seller's performance under the GIA because of the Seller's lack of standing as a scheduling coordinator, then the Seller must

[32] *See, e.g.*, PacifiCorp's PPA for New Firm QF And Intermittent Resource with MAG at Section 6.3 ("Seller shall operate and maintain the Facility in a safe manner in accordance with the Generation Interconnection Agreement (if applicable), Prudent Electrical Practices and in accordance with the requirements of all applicable federal, state and local laws and the National Electric Safety Code as such laws and code may be amended from time to time….").

take all actions necessary to acquire such RTO-recognized standing or must contract through a third party. The Joint Utilities included this provision to clarify that the QFs should bear responsibility for the costs associated with their performance under the GIA. In response to the QF Trade Groups' concerns that Section 6.6.2 unreasonably required small QFs to acquire RTO recognized standing in the case the Utility is deemed a scheduling coordinator by an RTO and shifts costs to QFs, the Joint Utilities revised Section 6.6.2 such that the provision now provides for agreed-upon amendment to the PPA in the event the Utility is deemed by an RTO to be a scheduling coordinator. If an agreement cannot be reached, the matter will be brought before the Commission for resolution. The QF Trade Groups continue to recommend that this provision be deleted in its entirety, arguing that the Joint Utilities' alternative proposal to potentially reopen the PPA before the Commission if the utility joins an RTO does not address their concerns.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: It is reasonably foreseeable that sometime during the term of a the 20-year PPA, an RTO governing the Joint Utilities may be established and the Joint Utilities may be required or ordered to join such RTO. And in this case, it is further reasonably foreseeable that an RTO may deem the Utility to be financially responsible for the Seller's performance under the GIA due to the Seller's lack of standing as a "scheduling coordinator." Given these facts, it only makes sense that the PPA contemplate how such circumstances will be dealt with—and to allow for a reasonable allocation of the costs that would be imposed by such changes. The Joint Utilities' compromise proposal simply requires parties to negotiate allocation of these costs once they are known, or to bring this issue regarding allocation of costs before the Commission if an agreement cannot be reached. The QF Trade Groups' proposal is not acceptable because by not allowing the PPA to be reopened in the event of an RTO, by default, all incremental additional costs associated with assuming responsibility for the QF's performance under the GIA would be borne by the utility's customers. These costs are not included in avoided cost standard pricing, and having customers subsidize QFs by having utilities assume the responsibilities of the QF under its GIA in the context of the emergence of an RTO is a clear violation of PURPA's customer indifference standard.

35. Section 6.7 Forecasting.

Summary of Issue: While the Joint Utilities agreed to remove Section 6.7.1 (Long Range Forecasts) in response to the QF Trade Groups' recommendations, the Joint Utilities did not agree to remove Section 6.7.2 (Day-Ahead Forecasts, Real-Time Forecasting and Updates). Section 6.7.2 provides that:

> At Seller's expense, Utility will either directly provide or solicit and obtain from a qualified renewable energy production forecasting vendor forecast data and information with respect to the Facility, including day-ahead and real-time forecasting services and provision of real-time meteorological

data necessary for compliance with applicable Electric System Authority procedures, protocols, rules, and testing.

The QF Trade Groups argue that the Joint Utilities' proposal to shift the costs of forecasting generation output onto the QF is not supported by the administrative rules, is a cost of operating and managing a generation portfolio that is not included within the avoided cost rates paid to QFs, and is an unreasonable burden on small QFs. The QF Trade Groups further contend that even if these costs are minimal, they should be considered the typical costs of operating a utility and should not be passed on to QFs if they are not costs unique to intermittent QFs.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities continue to support retaining this provision as the utilities require day-ahead and real-time forecasts to reliably and efficiently operate their systems and to participate in the Energy Imbalance Market (EIM). While the utilities have access to certain data that can be used to perform long-term forecasting, such models are not as accurate as day-ahead, real-time forecasting based on information best provided by generators. Importantly, the costs to QFs of providing this data are minimal, and therefore, the requirement is reasonable.

With respect to PacifiCorp, non-QFs and non-standard QFs are required to provide this type of forecasting either through a separate agreement with the utility or through another agreement with a third-party vendor.[33] This same section is also present in PacifiCorp's Washington PPA, which is a standard QF contract.[34] Accordingly, it is market for these types of costs to be the responsibility of generators who are best able to provide the data for the day-ahead, real-time forecasts. These are very minimal charges— e.g., $1.78 per Nameplate Capacity Rating (MW) per month. For a 3 MW facility, the charge would be $5.34 per month. This is not an unreasonable burden on QFs.

36. Section 6.8.3 Allowable Upgrades.

Summary of Issue: There are two disputes under Section 6.8.3: (1) whether QFs may increase the Expected Net Output by more than 10 percent (but not the Nameplate Capacity Rating) "only" by following the process enumerated in OAR 860-029-0120(14)(b) and in Section 6.8.3; and (2) whether the Joint Utilities' alternative language implementing the damages provision in OAR 860 029-0120(14)(d) more clearly explains that Seller will not be liable for damages caused by Seller's failure to maintain the eligibility requirements in the PPA.

[33] *See, e.g.*, PacifiCorp 2020 All-Source Request for Proposals, App. E-2: Form of PPA Resource Only, Section 6.7.2 at 28-29 (July 7, 2020), *available at* https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/suppliers/rfps/2020-all-source-request-for-proposals/documents/main-documents-appendices/rfp-appendices-a-n_no-a-7/RFP_App_E-2_Form_of_PPA_Resource_Only.DOCX.

[34] WUTC Docket No. UE-190666, Standard Power Purchase Agreement, Attachment A, Section 6.7.2 at 26 of 55 (Mar. 1, 2021).

OAR 860-029-0120(14)(a) states that "***[e]xcept with the purchasing utility's written consent or as described in subsection (b) of this rule***," the facility as reflected in the As-Built Supplement may not: (A) have a Nameplate Capacity Rating that exceeds the Nameplate Capacity Rating in the PPA at the time it was executed; or (B) result in an Expected Net Output that is greater than 10 percent above that specified in PPA at the time it was executed. OAR 860-029-0120(14)(b) provides that a QF may, without the utility's approval, upgrade the facility in a manner that does not increase the Nameplate Capacity Rating of the facility, but which is reasonably likely to cause the Expected Net Output to exceed that listed in the PPA by more than 10 percent, in accordance with a list of process requirements included in the rule. Section 6.8.3 of the PPA implements these rules by providing that such upgrades may be made without utility approval "only" subject to the process requirements in OAR 860-029-0120(14)(b). The QF Trade Groups proposed to delete the word "only" in Section 6.8.3, arguing that the word is not in the administrative rule.

OAR 860-029-0120(14)(d) provides:

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

The parties disagree on the wording in Section 6.8.3 implementing the last sentence of the rule above. The Joint Utilities proposed slightly different wording from the rule in Section 6.8.3 in order to reference the eligibility requirements in the PPA and clarify that Seller would not be liable for damages for any default caused by Seller's failure to maintain the eligibility requirements in the contract: "If Seller elects under this Section to terminate the Agreement and enter a new non-standard power purchase agreement, Seller will not be liable for damages for any default caused by Seller's failure to maintain eligibility for a standard power purchase agreement, as provided in Section 7.2." The QF Trade Groups oppose the Joint Utilities' alternate language, arguing that their proposed language that mirrors the rule exactly is more consistent with the intent of the last sentence of OAR 860-029-0120(14)(d) than the Joint Utilities' proposal.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: In proposing to delete the word "only" from Section 6.8.3, it appears that the QF Trade Groups are attempting to argue that there may be circumstances where they should be allowed to increase their Expected Net Output by more than 10 percent without the utility's approval and without complying with the requirements of the rule. This position conflicts with the clear intent of OAR 869-029-120(14)(a) & (b). While the word "only" is not used in OAR 869-029-120(14)(b), it is clear from OAR 869-029-120(14)(a) that the process outlined in OAR 860-029-0120(14)(b) is the only process "without the utility's prior approval" that allows for such upgrades (i.e., where there is not a change in Nameplate Capacity Rating, but the upgrade is likely to increase the Expected Net Output by more than 10 percent). The use of the word "only" is appropriate and reflective of the framework in the rules.

The Joint Utilities also support their alternative language for the damages provision which, while worded slightly different from OAR 860-029-0120(14)(d), is consistent with the intent of the rule and works within the PPA by referencing the eligibility section in the PPA, Section 7.2. The Joint Utilities do not understand there to be a dispute regarding the meaning of OAR 860-029-0120(14)(d) and proposed their alternative language to better clarify that Seller will not be held liable for damages for any default caused by Seller's failure to maintain the eligibility requirements in the contract, as specified in Section 7.2, when Seller terminates the standard PPA and enters into a new non-standard contract. The QF Trade Groups' assertion that the Joint Utilities' proposal is inconsistent with the intent of OAR 860-029-0120(14)(d) is unfounded.

37. Section 6.9 Telemetering.

Summary of Issue: Section 6.9 now provides that "[t]o the extent Seller is required to install telemetering equipment under its [GIA]," Seller must transmit or otherwise make accessible to Utility data from the facility that Seller receives on a real time basis regarding Net Output. The QF Trade Groups argue that the utilities' proposal for telemetry data from small QFs is beyond the requirements in the rules and does not appear to be included in any of the currently effective standard contracts. The QF Trade Groups further argue that a requirement to provide such data could impose a significant new cost on small QFs and that the Joint Utilities have not demonstrated that such data is needed, to the extent it is not already required under the GIA. Finally, the QF Trade Groups argue that Section 6.10 (Transmission Provider Consent), which allows the Utility to read the meter and receive any and all data from the Transmission Provider relating to transmission of output or other matters relating to the facility, is sufficient. While the Joint Utilities did not agree to delete this provision in its entirety, they proposed limiting language so that the PPA does not require telemetry equipment not otherwise already required under the GIA. The QF Trade Groups still propose deleting the provision for the same reasons above.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: Real-time telemetry data is necessary for accurate system planning and dispatch, and implicates

issues concerning system reliability. It is for this reason the GIA requires telemetry equipment for QFs of 3 MW or greater. Given that this requirement exists in the GIA, it only makes sense that the utilities should be able to require that the QFs provide the very information such telemetry equipment is intended to collect. As such, where a QF is required to install telemetry equipment under its GIA, the QF should also provide data from its telemetry equipment to the utility.

To the extent the QF Trade Groups view this requirement as duplicative of GIA requirements, the PPA needs to stand alone for enforcement purposes.

Furthermore, if the QF Trade Groups agree that such telemetry equipment is already required by the GIA for certain QFs, then this provision—which only applies when telemetry equipment is already required—should not present new significant costs on QFs. Moreover, Section 6.10 is a permissive allowance for the Utility to read the facility's meter and receive data from the Transmission Provider—it does not prescribe the Seller's obligation to provide real-time telemetry data to the Utility. While these provisions may overlap in terms of the data that is covered, they are not the same for system planning and enforcement purposes.

Finally, as to the QF Trade Groups' argument that the proposed provision should not be included in the PPA because it is not required by the rules, the Joint Utilities disagree. There is no indication in the Commission's rules or orders suggesting that the rules are intended to define all of the issues that need to be addressed in the PPA, and in fact, as discussed in the Joint Utilities' Reply Comments, the Commission has been clear that there are in fact issues that its rules do not address that it nevertheless understands will be addressed in the PPA (e.g., Force Majeure).

38. <u>Section 6.11 Dedicated Communication Circuit.</u>

<u>Summary of Issue</u>: Section 6.11 provides as follows:

> Seller must install a dedicated direct communication circuit (which may be by common carrier telephone) between Utility and the control center in the Facility's control room or such other communication equipment as the Parties may agree.

The Joint Utilities need a dedicated communication circuit with the facility in order to ensure reliable communications regarding any number of matters under the PPA, from inquiries auditing delivery of Net Output to the Point of Delivery by the facility to any other number of requests allowed by the utility under the contract (e.g., requesting updated copies of all new or revised Required Facility Documents under Section 3.2.3). The QF Trade Groups proposed deleting the requirement for a dedicated form of communication, arguing that such a requirement is not required by the rules and would impose significant costs on QFs. The QF Trade Groups also argue that the Joint Utilities have not

demonstrated a need for a dedicated form of communication. The Joint Utilities rejected deletion of this provision and the QF Trade Groups continue to support removal of the provision in its entirety.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: This provision is intended to set up standard communication contacts and protocols and would not impose significant costs on QFs contrary to the QF Trade Groups' claims. The GIA already sets forth a number of communications requirements, including voice and data. Moreover, the dedicated communication circuit can include, but is not limited to, a voice/common landline telephone line. However, a dedicated communication circuit may be another form of communication as long it is dedicated to communications with the utility and available. In some circumstances, QFs are located in areas without cell service and the utilities are simply requesting a reliable form of communication, which is inherently reasonable. In sum, there is a demonstrated need for a reliable form of communication between parties, the form of communication is flexible, and a communication circuit would not impose significant costs on QFs. Accordingly, Section 6.11 of the PPA is reasonable and appropriate, and should be retained.

39. Section 6.12.1 Electronic Fault Log.

Summary of Issue: Section 6.12.1 provides that Seller must maintain an electronic fault log of operations of the facility during the Term of the PPA and provide the monthly fault log to the Utility upon request. Fault logs are necessary to validate and enforce the MAG because the performance guarantee requires some form of data describing the facility's availability to generate electricity. A fault log will describe whether certain equipment is malfunctioning (or has malfunctioned), for how long, and why. Without access to these logs, the MAG becomes meaningless.

The QF Trade Groups recommended deleting this provision, arguing that they "do not agree it is reasonable to require all small QFs to maintain an electronic fault log" as some older and smaller facilities may not have such equipment. The QF Trade Groups also contend that provision of fault logs is not required by the administrative rules or the current standard contracts.

The Joint Utilities did not agree to remove this provision for all QFs; however, the Joint Utilities proposed to remove this provision for hydro QFs less than 3 MW initially placed in service prior to 1980 to address the QF Trade Groups' concern that such QFs may not have electronic fault logs. While these facilities will still need to provide fault logs under Exhibit F, they will not need to be electronic. The QF Trade Groups continue to recommend deleting this provision based on the same concerns.

Joint Utilities' Response to the QF Trade Groups: The Joint Utilities continue to support inclusion of this provision in some form. While provision of electronic fault logs to the Utility is not expressly mandated by the rules, this section is necessary to validate and

enforce the MAG. Therefore, as a technical matter, this provision is necessary and required under the framework of the rules. Moreover, modern QFs should have these logs readily available, so this requirement is not unreasonable. Finally, provision of these logs is required in modern market PPAs and PacifiCorp's Washington PPA, which is a standard QF contract.[35] If the QF Trade Groups are still concerned that this provision would burden certain smaller and/or older QFs that are not already covered by the Joint Utilities' proposed exemption, the Joint Utilities are willing to consider and discuss alternate exemptions. However, fault logs must be available and provided to the utilities in some way to enforce the MAG.

40. Section 6.12.2. Other Information to be Provided to Utility.

Summary of Issue: As originally proposed, Section 6.12.2 required that following the Effective Date, "Seller must provide to Utility a quarterly progress report stating the percentage completion of the Facility and a brief summary of construction activity during the prior quarter and contemplated for the next calendar quarter." The QF Trade Groups proposed deleting the section, arguing that the provision was unreasonably burdensome on small QFs. The Joint Utilities agreed to remove Section 6.12.2 and proposed a consolidated progress reporting requirement in new Section 2.3 (Obligation to Report on Progress) which is discussed above. The QF Trade Groups view this issue as remaining in dispute to the extent it is reflected in the newly proposed Section 2.3.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities do not agree that the new rules preclude reasonable notification requirements on the progress of the facility, which is necessary for accurate system planning. Furthermore, the Joint Utilities agreed to remove this section. Accordingly, the Joint Utilities view this section as moot and only the newly proposed Section 2.3 as remaining in dispute.

41. Section 6.12.3 Information to Governmental Authorities.

Summary of Issue: Section 6.12.3 (now Section 6.12.2) provides that upon the Utility's request, the Seller must provide Utility with data collected by Seller related to the construction, operation or maintenance of the facility reasonably required for reports to any Governmental Authority or Electric System Authority or information requests from any Governmental Authority. The QF Trade Groups argued that this section should be deleted because it was not required by the rules and placed an unreasonable burden on QFs. The Joint Utilities rejected the QF Trade Groups' deletion of Section 6.12.3 (now Section 6.12.2) and consolidated previous Sections 6.12.3 and 6.12.4 (Data Requests). The QF

[35] *See* PacifiCorp 2020 All-Source Request for Proposals, App. E-2: Form of PPA Resource Only, Section Section 6.10.1 at 30 (July 7, 2020), *available at* https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/suppliers/rfps/2020-all-source-request-for-proposals/documents/main-documents-appendices/rfp-appendices-a-n_no-a-7/RFP_App_E-2_Form_of_PPA_Resource_Only.DOCX; WUTC Docket No. UE-190666, Standard Power Purchase Agreement, Attachment A, Section 6.12.1 at 27 of 55 (Mar. 1, 2021).

Trade Groups continue to argue that this provision, which was consolidated with previous Section 6.12.4, should be deleted in its entirety for the same reasons above.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities continue to support inclusion of this provision. The Joint Utilities are regulated entities that are required to regularly report on numerous aspects of their operations, including the facilities that make up their resource portfolios. In addition, the utilities are regularly required to provide such information in response to data requests served in regulatory proceedings. Accordingly, it is entirely reasonable that QFs be obligated to provide the requested information when the utility is required to produce it. Indeed, it is for this reason that non-QF PPAs between utilities and independent power producers typically include similar provisions.[36] PacifiCorp's Washington PPA, a standard contract, also includes almost identical requirements.[37]

Moreover, to the extent that the QFs argue that this provision imposes an undue burden, such burden is substantially mitigated by the fact that it requires the utilities to provide compensation to the QFs for certain costs imposed. Accordingly, contrary to the QF Trade Groups' assertions, this provision is not unreasonable and burdensome on QFs.

42. Section 6.12.4 Data Requests.

Summary of Issue: As originally proposed, Section 6.12.4 required that upon the Utility's request, Seller must provide Utility with data collected by Seller related to information requests from any Governmental Authority. The QF Trade Groups argued that this section should be deleted because it was not required by the rules and placed an unreasonable burden on QFs. The Joint Utilities agreed to delete this section and consolidate its

[36] *See, e.g.*, PacifiCorp 2020 All-Source Request for Proposals, App. E-2: Form of PPA Resource Only, Sections 6.10.3 and 6.10.4 at 30-31 (July 7, 2020), *available at* https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/suppliers/rfps/2020-all-source-request-for-proposals/documents/main-documents-appendices/rfp-appendices-a-n_no-a-7/RFP_App_E-2_Form_of_PPA_Resource_Only.DOCX ("Information to Governmental Authorities. Seller must, promptly upon written request from PacifiCorp, provide PacifiCorp with data collected by Seller related to the construction, operation or maintenance of the Facility reasonably required for reports to any Governmental Authority or Electric System Authority, along with a statement from an officer of Seller certifying that the contents of the submittals are true and accurate to the best of Seller's knowledge. Seller must use best efforts to provide this information to PacifiCorp sufficiently in advance to enable PacifiCorp to review such information and meet any submission deadlines. PacifiCorp will reimburse Seller for all of Seller's reasonable actual costs and expenses in excess of Five Thousand Dollars ($5,000) per year, if any, incurred in connection with PacifiCorp's requests for information under this Section 6.10.3.") ("Data Request. Seller must, promptly upon written request from PacifiCorp, provide PacifiCorp with data collected by Seller related to the construction, operation or maintenance of the Facility reasonably required for information requests from any Governmental Authorities, state or federal agency intervener or any other party achieving intervenor status in any PacifiCorp rate proceeding or other proceeding before any Governmental Authority. Seller must use best efforts to provide this information to PacifiCorp sufficiently in advance to enable PacifiCorp to review such date and meet any submission deadlines. PacifiCorp will reimburse Seller for all of Seller's reasonable actual costs and expenses in excess of Five Thousand Dollars ($5,000) per year, if any, incurred in connection with PacifiCorp's requests for information under this Section 6.10.4.").

[37] WUTC Docket No. UE-190666, Standard Power Purchase Agreement, Attachment A, Sections 6.12.3 & 6.12.4 at 27-28 of 55 (Mar. 1, 2021).

requirements with Section 6.12.3 (now Section 6.12.2). The QF Trade Groups view this issue as remaining in dispute to the extent it was consolidated with Section 6.12.3 (now Section 6.12.2).

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: As the Joint Utilities agreed to delete this section, they view this specific provision as moot. The only remaining issue should be the newly consolidated Section 6.12.2 (Information to Governmental Authorities; Data Requests) discussed above.

43. Section 6.12.6 Notice of Material Adverse Events.

Summary of Issue: Section 6.12.6 (now Section 6.12.3) requires that the QF must inform the utility of receipt of written notice or actual knowledge of the occurrence of any event of default under any material agreement to which the QF is a party and of any other development, financial, legal (i.e., litigation or threat or litigation) or otherwise, which would have a material adverse effect on the QF, the facility, or the QF's ability to develop, construct, operate, maintain or own the facility. The QF Trade Groups argued that this section should be deleted because it was not required by the rules and placed an unreasonable burden on QFs. The Joint Utilities did not agree to delete this provision and consolidated it with the previous Section 6.12.7 (Notice of Litigation). The QF Trade Groups continue to recommend deleting this provision in its entirety for the same reasons.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities continue to support inclusion of this provision in the PPA which is necessary for the utility to understand the financial status of the QF and whether it may no longer meet the creditworthiness requirements.

While Section 6.12.6 (now Section 6.12.3) does impose an obligation on the QF to provide notice to the utility, such notice is required only in the case of a Material Adverse Event ***affecting the project***. The Material Adverse Event notice obligation in Section 6.12.6 (now Section 6.12.3) ensures that the utility will be aware of the occurrence of the types of "circumstances" the QF Trade Groups contemplate in Section 8.1. Without any requirement for notice of such "circumstances," it is unclear how a utility will be able to determine whether a QF may no longer meet the creditworthiness requirements such that the utility should make a request for updated information under Section 8.1. Furthermore, this provision is thematically consistent with provisions in existing standard contracts in Oregon.[38] Finally, almost identical requirements are all found in bilateral PPAs in Oregon

[38] *See, e.g.*, PacifiCorp's PPA for New Firm QF And Intermittent Resource with MAG at Section 11.2.4 ("Seller promptly shall notify PacifiCorp (or cause PacifiCorp to be notified) anytime it becomes delinquent under any construction related financing agreement or instrument related to the Facility. Such delinquency may constitute a Material Adverse Change, subject to Section 11.1.4.").

and standard contracts in other jurisdictions.[39] For the above reasons, this provision is reasonable and appropriate, and should be retained.

44. Section 6.12.7 Notice of Litigation.

Summary of Issue: As initially proposed, Section 6.12.7 required that the QF inform the utility of any impending litigation that could materially and adversely affect the QF's performance of its obligations under the PPA. The Joint Utilities removed this section and consolidated it with Section 6.12.6 (now Section 6.12.3, Notice of Material Adverse Events). The QF Trade Groups view this issue as remaining in dispute to the extent it was consolidated with Section 6.12.6 (now Section 6.12.3).

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: As the Joint Utilities agreed to delete this section, they view this specific provision as moot. The only remaining issue should be the newly consolidated Section 6.12.6 (now Section 6.12.3) as discussed above.

45. Section 6.12.8 Additional Information.

Summary of Issue: The original Section 6.12.8—now Section 6.12.4—provides that "Seller must provide to Utility such other information as relevant to Seller's performance of its obligations under this Agreement or the Facility as Utility may, from time to time, reasonably request." The QF Trade Groups argued that this section should be deleted because it was not required by the rules and placed an unreasonable burden on QFs. The Joint Utilities rejected the QF Trade Groups' deletion of this section and the QF Trade Groups continue to recommend deletion for the same reasons above.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: This provision, which simply requires the QF to respond to a utility's request for information, is reasonable and necessary to incentivize communication. Moreover, the Joint Utilities note that a utility's request for additional information must itself be reasonable. Standard QF contracts can include projects up to 10 MW, which are not small. And for projects of this size, market and standard informational provisions—such as proposed Sections 6.12.2

[39] *See, e.g.*, PacifiCorp 2020 All-Source Request for Proposals, App. E-2: Form of PPA Resource Only, Sections 6.10.7 & 6.10. 8 at 31 (July 7, 2020), *available at* https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/suppliers/rfps/2020-all-source-request-for-proposals/documents/main-documents-appendices/rfp-appendices-a-n_no-a-7/RFP_App_E-2_Form_of_PPA_Resource_Only.DOCX ("Notice of Material Adverse Events. Seller must promptly notify PacifiCorp of receipt of notice or actual knowledge by Seller or its Affiliates of the occurrence of any event of default under any material agreement to which Seller is a party and of any other development, financial or otherwise, which would have a material adverse effect on Seller, the Facility, or Seller's ability to develop, construct, operate, maintain or own the Facility or otherwise perform its obligations under this Agreement.") ("Notice of Litigation. Seller must promptly notify PacifiCorp following its receipt of notice or knowledge of the commencement of any action, suit, or proceeding before any Governmental Authority against Seller or any of its Affiliates relating to the Facility or this Agreement, or that could materially and adversely affect Seller's performance of its obligations in this Agreement."); *see also* WUTC Docket No. UE-190666, Standard Power Purchase Agreement, Attachment A, Sections 6.12.6 & 6.12.7 at 28 of 55 (Mar. 1, 2021).

through 6.12.4—are reasonable and appropriate.[40] For these reasons, the Joint Utilities continue to support inclusion of this provision in the PPA.

46. Section 8.2 Project Development Security.

Summary of Issue: Section 8.2 describes the requirements for Project Development Security, including when the QF must post and maintain Project Development Security and when the utility must return the security if the QF elected cash escrow or a letter of credit as the form of security. All other issues in this provision except for the timing for the utility to return the Project Development Security are resolved. On this last point, the Joint Utilities initially proposed 60 business days to refund cash escrow or letter of credit security and the QF Trade Groups argued for five business days, claiming that "there have seen cases where a utility retains a letter of credit or cash security for months after it is no longer required, which has real financial consequences for the Seller." The Joint Utilities proposed a compromise of 30 business days to return Project Development Security. The QF Trade Groups maintain that five business days is sufficient.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities maintain that a five-day timeline for returning cash escrow security is not practicable administratively. Accordingly, the Joint Utilities continue to support 30 business days to refund cash escrow or letter of credit Project Development Security.

47. Section 8.3 Default Security.

Summary of Issue: Under OAR 860-029-0120(16) a QF that has executed a standard PPA that does not meet the utility's creditworthiness requirements must post Default Security in the form of (a) cash escrow security; (b) letter of credit; or (c) step-in rights and senior liens. Specifically with respect to the last category, Default Security can be "be satisfied through grant of step-in rights or a senior lien to the purchasing utility ***in a form acceptable to the purchasing public utility in its reasonable-exercised discretion***." (Emphasis added). The Joint Utilities proposed Section 8.3 to implement this rule.

As originally proposed, Section 8.3 did not detail the requirements for an acceptable grant of step-in rights or senior lien, because as provided in the rules and consistent with customary commercial contracting practices, the granting of such rights, if applicable, would be memorialized in a separate, stand-alone document in such form as is "acceptable

[40] *See, e.g.*, PacifiCorp 2020 All-Source Request for Proposals, App. E-2: Form of PPA Resource Only, Section Sections 6.10.1 through 6.10.9 at 30-31 (July 7, 2020), *available at* https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/suppliers/rfps/2020-all-source-request-for-proposals/documents/main-documents-appendices/rfp-appendices-a-n_no-a-7/RFP_App_E-2_Form_of_PPA_Resource_Only.DOCX ("Additional Information. Seller must provide to PacifiCorp such other information as relevant to Seller's performance of its obligations under this Agreement or the Facility as PacifiCorp may, from time to time, reasonably request."); *see also* WUTC Docket No. UE-190666, Standard Power Purchase Agreement, Attachment A, Sections 6.12.2 through 6.12.8 at 27-28 of 55 (Mar. 1, 2021) ("Additional Information. Seller must provide to PacifiCorp such other information as relevant to Seller's performance of its obligations under this Agreement or the Facility as PacifiCorp may, from time to time, reasonably request.").

to the purchasing public utility in its reasonable-exercised discretion." However, the QF Trade Groups argued that, in order to avoid disputes, the PPA should include the detailed requirements governing step-in rights and senior liens. Specifically, the QF Trade Groups proposed new Sections 8.3.1 (Step-In Rights) and 8.3.2 (Senior Lien) that mirrored the terms of PacifiCorp's existing standard PPA for QFs, Section 10.4, and Idaho Power's standard PPA, Section 4.1.

The Joint Utilities do not oppose adding some detail to the PPA about the scope and nature of the step-in rights and senior liens that may be granted by the QF; however, the Joint Utilities ***do not agree*** that such language in the PPA ***is in lieu*** of memorializing these rights in a separate, stand-alone document in such form as is "acceptable to the purchasing public utility in its reasonable-exercised discretion." These rights can be legally complicated, are important to perfect if they are to be of any value, and once exercised often result in litigation. Accordingly, a thorough security agreement with respect to a grant of step-in rights or senior liens is critical to protecting customers' rights to successful recovery in the event of damages under a PPA.

In addition to disagreeing over whether the rule requires stand-alone agreements for step-in rights and senior liens, the parties disagree as to the specific requirements.[41] For example, the Joint Utilities specify that no other entity may have a security interest in the facility equal to or superior to that granted the utility, which the QF Trade Groups oppose. In addition, the QF Trade Groups argued that the utility should return the cash/letter of credit security within five business days, not the Joint Utilities' initially proposed 60 business days. As a compromise, the Joint Utilities proposed 30 business days to refund cash escrow or letter of credit Default Security.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities continue to support their version of Section 8.3, which includes recent modifications made in compromise to incorporate edits requested from the QF Trade Groups and which is consistent with OAR 860-029-0120(16).

It is essential that any step-in rights or senior liens provided as security (i) be documented in stand-alone security agreements that comply with reasonable and customary commercial norms and which are "acceptable to the purchasing public utility in its reasonable-exercised discretion" and (ii) be superior to all other such rights granted by the QF. If either of these criteria are not met, it is not likely that the utility will have any meaningful security to backstop the QF's obligations under the PPA in the event of a default and damages. The Joint Utilities believe this is precisely ***why*** the Commission adopted this rule as drafted. This rule requires that the parties enter into stand-alone security agreements and that specifically provides for the grant of ***senior*** liens.

[41] The Joint Utilities also added a new Section 8.3.1 (Guaranty) explaining the process if the Seller selects Default Security in the form of a guaranty. While the QF Trade Groups generally opposed the Joint Utilities' revisions to Section 6.8.3, they did not specifically address Section 8.3.1 or their reasons for opposing this section in particular.

Accordingly, the QF Trade Groups' proposal to delete the requirement for a stand-alone security agreement to properly document step-in rights and senior liens should be rejected. Likewise, their opposition to the Joint Utilities' language prohibiting the QFs from granting a security interest in the facility equal to or superior to that granted the utility to any other entity should be dismissed as unfounded, and inconsistent with the rules and the policy underlying the rules. As mentioned, the rule requires the QF to grant the utility a ***senior*** lien. To the extent the QF is concerned that its lender will require the senior position, the QF has the option to provide the utility with another form of security, including cash escrow, a letter of credit, or parent guaranty, as further outlined in the rules and PPA.

With respect to the return of the cash escrow, the Joint Utilities also maintain that a five-day timeline for returning cash escrow security is not practicable administratively. Accordingly, the Joint Utilities continue to support the compromise it proposed to reduce the 60-business day turnaround period to a 30-business day turnaround period for refunding cash escrow or letter of credit Default Security.

For these reasons, the Joint Utilities' proposed revisions to Section 8.3 are consistent with the rules and reasonable and appropriate.

48. <u>Section 9.3 Inspection, Testing, Repair and Replacement of Meters.</u>

<u>Summary of Issue</u>: Section 9.3 provides that the utility has the right to "periodically inspect, test, repair and replace the metering equipment." In its original form this section also referenced the Utility/Utility Transmission separation concept that is present throughout the PPA. For the reasons set forth above regarding the definition of "Utility," the Joint Utilities agreed to delete the last sentence of this section referencing this concept, but still support the Recitals, definition of "Utility," and inclusion of revised Section 4.6 (Utility as Merchant or Otherwise as Purchaser). The QF Trade Groups view this issue as remaining in dispute to the extent the deletion of the sentence at controversy is conditioned on inclusion of other related sections throughout the contract, such as the revised Section 4.6.

<u>Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List</u>: As the Joint Utilities agreed to delete the last sentence in this section, they view this issue as moot. The only remaining provisions related to the Utility/Utility Transmission separation concept in the contract that are in dispute should be the Recitals, definition of "Utility," and revised Section 4.6.

49. <u>Section 11.1.2 Defaults by Seller.</u>

A. Subsection (b)

<u>Summary of Issue</u>: Section 11.1.2(b) as proposed by the Joint Utilities, provides that the following shall be an event of default:

> Seller fails to cause the Facility to achieve Commercial Operation on or before the Scheduled Commercial Operation Date Operation and Seller fails to achieve Commercial Operation by the Cure Period Deadline.

Note to Form 28 provides that in the case of PPAs with operational QFs, this subsection is to be replaced with the following language: "Seller fails to achieve Initial Delivery on or before the Scheduled Initial Delivery Date and such failure is not cured by the Cure Period Deadline after Utility gives Seller written notice of such failure."

The QF Trade Groups note that this issue is partly resolved but claim that the Joint Utilities' reference to the "Cure Period Deadline" in Note to Form 28 for existing QFs is ambiguous because the definition of "Cure Period Deadline" for existing QFs includes the terms "Commercial Operation," "Commercial Operation Date," and "Scheduled Commercial Operation Date" but not the "Initial Delivery" framework proposed by the Joint Utilities for existing QFs. For this reason, the QF Trade Groups have proposed the following alternate language be added in Section 11.1.2(b) in red text below:

> Seller fails to cause the Facility to achieve Commercial Operation [or Initial Delivery Date, in the case of an existing QF] on or before the Scheduled Commercial Operation Date [or scheduled Initial Delivery Date, in the case of an existing QF] and Seller fails to achieve Commercial Operation by the Cure Period Deadline.

The QF Trade Groups also propose the following changes to Note to Form 28:

> **Note to Form** – This provision to be replaced for PPAs with operational QFs with the following language: "Seller fails to achieve Initial Delivery on or before the Scheduled Initial Delivery Date and such failure is not cured within one year ~~by the Cure Period Deadline~~ after Utility gives Seller written notice of such failure."

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities maintain that the alternate language proposed by the QF Trade Groups in Section 11.1.2(b) is duplicative of Note to Form 28, and the Joint Utilities support removal of such language for clarity. The Joint Utilities further note that in the case of existing QFs, all references in the PPA to "Commercial Operation" are replaced with "Initial Delivery" (See Note to Form 3). Similarly, in the case of existing QFs, all references in the PPA to "Scheduled Commercial Operation Date" are replaced with "Scheduled Initial Delivery Date" (See Note to Form 11). Accordingly, for existing QFs, the definition of "Cure Period Deadline" will be changed as follows:

> "Cure Period Deadline" means, in the case of failure to achieve ~~Commercial Operation~~ Initial Delivery by the ~~Scheduled Commercial Operation Date~~

Scheduled Initial Delivery Date, the date that occurs one (1) year following the ~~Scheduled Commercial Operation Date~~ Scheduled Initial Delivery Date.

Section 11.1.2(b) therefore does not require the alternate language proposed by the QF Trade Groups, which is duplicative and unclear, and Note to Form 28 should retain the reference to the Cure Period Deadline for internal consistency within the PPA and to avoid duplication.

B. Subsection (d)

Summary of Issue: Section 11.1.2(d) now provides that an event of default by Seller include when the Utility receives notice of foreclosure of the facility (or any part of the facility) of an unpaid lien or other charge or encumbrance. The QF Trade Groups recommend that that the event of default should be deleted because it is not included in the administrative rules and because "notice of foreclosure" on an unpaid lien is not defined in the rules or contract. Furthermore, the QF Trade Groups contend that such action by the contractor may be legitimately disputed by the QF in the foreclosure suit.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities do not agree that a lien that leads to foreclosure should be exempted as an event of default. There is no question that a foreclosure would jeopardize the continued operation of the facility, and therefore would justify termination of the agreement if the event were not cured within the applicable time period allowed by the rules (up to 120 days). Importantly, this provision includes significant protections for the QF; if a QF disputes foreclosure in a lawsuit with the contractor, then the foreclosure will likely be stayed pending the outcome of the litigation, which is already envisioned in subsection (d) ("if the same has not been stayed, paid, or bonded around…"). Including this provision as an event of default is therefore reasonable and appropriate.

C. Subsection (e)

Summary of Issue: Section 11.1.2(e) provides that an event of default includes when "Seller fails to maintain any Required Facility Documents, Permits or leases/land grants necessary to own or operate the Facility and is not able to obtain the necessary Required Facility Documents or Permits…." The QF Trade Groups recommend deleting this provision, arguing that it is beyond the listed defaults allowed by OAR 860-029-0123(1), and it creates unnecessary and unreasonable cross-default risk for the small QF. The Joint Utilities rejected deletion of this event of default.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities continue to support including this event of default in the PPA because it is appropriate that a failure to maintain the legal rights to operate the facility should be an event of default allowing the utility to seek termination of the contract after the applicable cure period (up to 120 days). Contrary to the QF Trade Groups' comments, this provision

would not lead to default any time there is an issue with a Required Facility Document and would not create a cross-default risk.

50. Section 11.2.1 Remedy for Seller's Failure to Deliver.

Summary of Issue: Section 11.2.1 prescribes the calculation for damages for Seller's failure to deliver all Net Output to the Utility. The QF Trade Groups contend that this issue remains in dispute because when the Joint Utilities removed the contract price cap from the "Utility's Cost to Cover" definition, they did not add in a specific damages cap in Section 11.2.1 for this type of breach.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: When revising the PPA such that each type of damages provision had a separate contract price cap consistent with the rules, the Joint Utilities inadvertently did not include a contract price cap in this provision. The Joint Utilities agree that the addition of a damages cap is applicable to Section 11.2.1 and propose the following language:

> 11.2.1 Remedy for Seller's Failure to Deliver. ¶ Upon the occurrence and during the continuation of a breach by Seller of Sections 4.1 and 4.3, Seller must pay Utility within thirty (30) days after receipt of invoice, subject to Sections 10.3 and unless subject to a good faith dispute under Section 10.4, an amount equal to the Utility's Cost to Cover multiplied by the Net Output delivered to a party other than Utility. Notwithstanding the foregoing, total damages under this Section may not exceed the aggregate amount Utility would have incurred to purchase Seller's Net Output and Environmental Attributes had Seller delivered all Net Output to Utility. The invoice for such amount must include a written statement explaining in reasonable detail the calculation of such amount.

To clarify, the Joint Utilities still support separate damages caps for each category of damages to better reflect the different wording and terms in the rules, where applicable.

51. Section 11.4 Termination of Duty to Buy.

Summary of Issue: OAR 860-029-0123(8) provides as follows:

> If a standard power purchase agreement is terminated because of default by the qualifying facility and the qualifying facility wishes to sell Net Output to the purchasing utility following such termination, the public utility may require the qualifying facility do so subject to the terms of the terminated agreement, including but not limited to the Contract Price, until the scheduled end date in the terminated agreement. The purchasing utility may also require the qualifying facility to post default security. The qualifying facility may not take any action or permit any action to occur the result of

which avoids or seeks to avoid the restrictions in this section through use or establishment of a special purpose entity or other affiliate.

The Joint Utilities implemented this rule in Section 11.4 in almost identical language, adding only that the utility has sole discretion as to whether it would exercise its right to purchase subject to the terms of the terminated PPA. In addition, Section 11.4 clarifies that the utility may require the QF to post default security even if it meets the credit requirements. [42]

The QF Trade Groups have raised two objections to the Joint Utilities' proposed language. First, they argue that the term "sole discretion" should be removed because it is not included in the rules and the utility's conduct should still be subject to the doctrine of good faith and fair dealing. Second, they contend that the section should not be titled "Termination of Duty to Buy" because the utility's duty to buy is limited or modified in this scenario but is not terminated altogether.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities continue to support Section 11.4 as initially proposed. First, OAR 860-029-0123(8) provides that after termination for default the utility "may" require that the QF sales be subject to the terms of the original PPA. The word "may" is a discretionary term[43] and there is no indication in the rule that this may be qualified or limited in any way. Therefore, the Joint Utilities' language simply clarifies the rights and obligations of the parties as reflected in the rule. Moreover, given the QF Trade Groups' arguments on this point, it is clear that without the Joint Utilities' language, they believe that QFs would have the right to insist on selling on different terms and conditions from those in the PPA, based on an argument that to do otherwise would violate good faith and fair dealing. In short, it appears that the Joint Utilities inclusion of the "sole discretion" language is necessary to avoid disputes. Finally, PGE's current PPA uses the "sole discretion" language in a similar provision.[44]

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[42] As proposed, Section 11.4 reads:

> Termination of Duty to Buy. If this Agreement is terminated because of an Event of Default by Seller, and Seller wishes to again sell Net Output to Utility following such termination, ***Utility in its sole discretion*** may require that Seller do so subject to the terms of this Agreement, including but not limited to the Contract Price, until the last day of the Term of this Agreement had it not been earlier terminated. ***In such case, Utility may require Seller to post Default Security even if it meets the Credit Requirements. Seller agrees that it will not take any action or permit any action to occur the result of which avoids or seeks to avoid the restrictions in this Section 11.4, e.g., through use or establishment of a special purpose entity or other Affiliate***. (Emphasis added).

[43] *See, e.g.*, *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 346 Or 415, 426-27 (2009) (stating rule that unless context is ambiguous, courts interpret the word "may" according to its ordinary usage, as conveying discretionary authority); *Kime v. Thompson*, 60 Or 183, 188 (1911) ("The discretionary signification is given to the word 'may'").

[44] PGE's Standard In-System Variable PPA at Section 9.5 ("In the event PGE terminates this Agreement pursuant to this Section 9, and Seller wishes to again sell Net Output to PGE following such termination, PGE in its sole discretion may require that Seller shall do so subject to the terms of this Agreement, including but not limited to the Contract Price until the Term of this Agreement (as set forth in Section 2.3) would have run in due course had the Agreement

Second, the Joint Utilities prefer to retain "Termination" because that is the word used in OAR 860-029-0123(8). For the above reasons, the provision should be included as drafted in the Joint Utilities' Reply Comments.

52. Section 11.5: Termination Damages.

Summary of Issue: Section 11.5 prescribes the calculations for termination damages. The QF Trade Groups argue that when read in conjunction with the Joint Utilities' edits to the "Utility's Cost to Cover" definition, the section does not include a contract price cap on the termination damages. The QF Trade Groups object to Section 11.5 on that ground.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The QF Trade Groups are mistaken. The damages cap in Section 11.5 reads as follows: "Notwithstanding the foregoing, Termination Damages for the twenty-four-(24) month term may not exceed the aggregate amount Utility would have incurred to purchase Seller's Net Output and Environmental Attributes had the Agreement not been terminated."

53. Section 14 Force Majeure.

Summary of Issue: Section 14 defines what events do and do not constitute Force Majure. The QF Trade Groups provided their own definition of Force Majeure, claiming that the Joint Utilities' proposal includes "many utility-favorable provisions not typically included in an arms-length commercial agreement where both parties have equal bargaining power." The QF Trade Groups further contend that the Joint Utilities definition would "undermine for the QF the normal contractual excuses of uncontrollable force and impracticality." The key differences between the competing Force Majeure proposals are discussed below.

First, in its specification of events that do not constitute Force Majeure, the Joint Utilities' proposal contains many circumstances not so specified by the QF Trade Groups' proposal including, but not limited to, any delay, alleged breach of contract, or failure by transmission provider or interconnection provider unless due to an independent event of Force Majeure.

Furthermore, under the QF Trade Groups' proposal, a Force Majeure event can continue indefinitely, whereas under the Joint Utilities' proposal, both parties would have a right to terminate the agreement where a Force Majeure event continues for more than 180 consecutive days.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities do not agree with the QF Trade Groups' proposal and have rejected it completely. The Force Majeure provisions proposed by the Joint Utilities are reflective of modern contracting terms and conditions included in both PacifiCorp's 2020 and 2022 All-Source

remained in effect. At such time Seller and PGE agree to execute a written document ratifying the terms of this Agreement.").

pro forma RFP PPAs, as well as included in executed market PPAs over the last five years.[45] Similarly, PacifiCorp's Washington PPA, which is a standard QF contract, includes these same provisions.[46] Accordingly, contrary to the QF Trade Groups' claims, these provisions are commonly found in bilateral agreements where both parties have equal bargaining power, as well as in the standard QF agreement in Washington.

The Joint Utilities note that the QF Trade Groups' proposal relies on existing Oregon standard PPA provisions that are outdated and have led to multiple claims and disputes. There is no reason that the contract cannot clarify events that do and do not constitute Force Majeure in more detail, especially where such detail is used to prevent abuse of Force Majeure that would help avoid and limit future litigation. For example, PGE and numerous developers have had disputes regarding what is and what is not a Force Majeure event; some off-system QF developers have claimed that interconnection issues with other utilities (e.g., BPA) that are not the purchasing utility are Force Majeure events that should extend the Scheduled COD to seven or eight years after execution of the PPA and as long as four years after the original Scheduled COD—which would be extremely prejudicial to utility customers. It is therefore essential, for example, for the Force Majeure provision to the clarify that any delay, alleged breach of contract, or failure by the transmission provider or interconnection provider does not qualify as an event of Force Majeure unless that delay, breach, or failure is due to an independent Force Majeure event as determined pursuant to the governing interconnection agreement or transmission provider's tariff.

Furthermore, the QF Trade Groups' proposal does not include a right of termination for any period of time for which an event of Force Majeure may be continuing. The Joint Utilities proposed that either party have a right to terminate the agreement (with no liability for either party associated with such termination) if an event of Force Majure exceeds 180 consecutive days. Extraordinary events that are not reasonably foreseeable at the time of contracting, and which cannot be overcome by reasonable diligence, provide a basis for ***temporarily*** suspending the parties' obligations and performance. However, with changing avoided cost prices and the long-term nature of these contracts, it is unreasonable to permit indefinite extensions of the parties' rights and obligations. For example, if a QF claims Force Majeure before coming online and its Scheduled COD is extended as a result, a lengthy or indefinite extension could expose utility customers to undue risk of paying stale prices. Similarly, if a utility claims Force Majeure and stops accepting the QF output, the QF may be harmed if it remains under contract with the utility for an extended period of

[45] *See, e.g.*, PacifiCorp 2022 All-Source Request for Proposals, App. E-2.1: PPA Documents Including PPA Appendices, Section 14 at 53-55 (Apr. 29, 2022), *available at* https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/suppliers/rfps/pacificorps-2022-all-source-request-for-proposals/appendix-e-g/PacifiCorp_2022AS_RFP_App_E-2.1_PPA_Document%E2%80%93Generating_Resource_Only.pdf; PacifiCorp 2020 All-Source Request for Proposals, App. E-2: Form of PPA Resource Only, Section 14 at 46-47 (July 7, 2020), *available at* https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/suppliers/rfps/2020-all-source-request-for-proposals/documents/main-documents-appendices/rfp-appendices-a-n_no-a-7/RFP_App_E-2_Form_of_PPA_Resource_Only.DOCX; *see also In re Portland General Electric Co., 2021 All-Source Request for Proposals*, Docket UM 2166, PGE's 2021 All-Source RFP - Final Draft, App. E – Renewable PPA Form Agreement, Section 4.1 at 37-39 (Oct. 15, 2021).

[46] WUTC Docket No. UE-190666, Standard Power Purchase Agreement, Attachment A, Section 14.1 at 37-38 of 55 (Mar. 1, 2021).

time and is unable to find an alternate buyer. In the Joint Utilities' recent experience, QFs have claimed Force Majeure delays of more than three years. Both parties should therefore have the unilateral right to terminate the PPA in the event Force Majeure extends beyond 180 consecutive days. Finally, as discussed above, providing a right to terminate after a limited period deferring contractual obligations because of a Force Majeure event is a standard PPA term and is included in other QF standard PPAs (including the PacifiCorp Oregon and Washington standard PURPA contracts).[47]

For these reasons, the Joint Utilities continue to support their proposed provisions to provide more clarity, not less regarding which events constitute Force Majeure and to explicitly allow either party to terminate the agreement (with no liability for either party associated with such termination) should an event of Force Majeure extend beyond 180 consecutive days.

54. <u>Section 19 Governmental Authorities.</u>

<u>Summary of Issue</u>: OAR 860-029-0020(2)(a) requires in part that:

> All contracts between a qualifying facility and a public utility for energy, or energy and capacity must include language which substantially conforms to the following: This agreement is subject to the jurisdiction of those governmental agencies and courts having control over either party or this agreement….

Section 19 of the PPA, which uses substantially identical language to the above rule, provides that: "This Agreement is subject to the jurisdiction of those Governmental Authorities having jurisdiction over either Party or this Agreement."

The QF Trade Groups recommend deleting this section because "any provision in the Standard PPA purporting to expand Commission jurisdiction or purporting to state a QF's 'agreement' to the Commission's jurisdiction is an inappropriate attempt to drive jurisdiction to the Commission[.]" While the QF Trade Groups acknowledge that OAR 860-029-0020(2)(a) exists, they argue that at the very least Section 19 should reflect the wording of the rule more closely and add "and courts." Furthermore, the QF Trade Groups speculate that the OAR 860-029-0020(2)(a), which has been in place for decades and relied upon by the Commission in its orders, was inadvertently left in because "the Commissioners clearly expressed a desire not to influence jurisdiction through the

[47] *See, e.g.*, PacifiCorp's PPA for New Firm QF And Intermittent Resource with MAG at Section 14.4 ("PacifiCorp may terminate the Agreement if Seller fails to remedy Seller's inability to perform, due to an event of Force Majeure, within six months after the occurrence of the event."); WUTC Docket No. UE-190666, Standard Power Purchase Agreement, Attachment A, Section 14.5 (Mar. 1, 2021) ("If a Force Majeure event prevents a Party from substantially performing its obligations under this Agreement for a period exceeding 180 consecutive days, then the Party not affected by the Force Majeure event may terminate this Agreement by giving ten (10) days prior notice to the other Party. Upon such termination, neither Party will have any liability to the other with respect to the period following the effective date of such termination; provided, however, that this Agreement will remain in effect to the extent necessary to facilitate the settlement of all liabilities and obligations arising under this Agreement before the effective date of such termination.").

administrative rules." The QF Trade Groups continue to object to inclusion in the standard PPA of any provision suggesting Commission jurisdiction over disputes.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities oppose deletion of this section. While the Commission decided not to include ***a new jurisdictional provision in the rules***[48] for fear of that language creating new Commission jurisdiction where it did not exist or overstepping where exclusive jurisdiction was committed to another tribunal, it did not repeal OAR 860-029-0020(2)(a) or otherwise call into question the existing contracting term subjecting an agreement to the jurisdiction of governmental authorities having jurisdiction over the parties to the agreement at question here.[49] In fact, the Commission recently referenced a similar provision from PGE's existing contract when noting that it had jurisdiction over complaints regarding a PPA,[50] and the Oregon Court of Appeals affirmed the Commission's interpretation of its jurisdiction.[51] Such a provision, which is mandated by the Commission's rules, in existing contracts, and interpreted by Commission and Oregon Court of Appeals precedent, does not implicate the concerns that the Commission noted when it rejected including in rules new language that would provide the Commission with jurisdiction to "resolve any action

[48] AHD Report, Attachment A at 21 (May 18, 2022) ("(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.") (emphasis added).

[49] Special Public Meeting AR 631 Rulemaking to Address Procedures, Terms, and Conditions Associated with Qualifying Facilities (QF) Standard Contracts at 2:33:15-2:35:10 (May 25, 2022) (Chair Decker stating "I don't love putting this [jurisdictional] language in rules" and commenting that any such language in rules would have to clarify that the Commission had concurrent jurisdiction, exclude in abstract language places where exclusive jurisdiction was committed to another tribunal, and specify that in certain circumstances the Commission could exercise its discretion whether to exercise its jurisdiction over a matter) (Commissioner Thompson stating "I don't think we can create our own jurisdiction here by saying that we have it in the rules.").

[50] *Portland General Electric Co. v. Alfalfa Solar I LLC et al.*, Docket UM 1931, Order No. 18-174 at 3-5, 4 n.7 (May 23, 2018) (affirming decision in Order No. 18-025 that the Commission has concurrent jurisdiction over PPA disputes and specifically noting that "Section 17 of the standard PPAs that PGE represents have been executed by the NewSun QFs, state in part 'This Agreement is subject to the jurisdiction of those governmental agencies having control over either party or this Agreement'"); *In re Portland General Electric Co. v. Pacific Northwest Solar, LLC*, Docket UM 1894, Order No. 18-025 at 5-6 (Jan. 25, 2018) (Commission noting that the same jurisdictional provision in PGE's contract (This Agreement is subject to the jurisdiction of those governmental agencies having control over either Party or this Agreement) gave the Commission jurisdiction over the agreement because it had control over PGE, a regulated utility, particularly as it relates to the implementation of PURPA).

[51] *Portland Gen. Elec. Co. v. Alfalfa Solar I, LLC*, 323 Or App 531, 534-39 (2023) ("[W]e conclude that, under the plain terms of ORS 756.500(1), the PUC had the authority to resolve PGE's complaint about the interpretation of the parties' PPAs."); *see also Alfalfa Solar I LLC v. Portland Gen. Elec. Co.*, Case No. 3:18-cv-40-SI, 2018 U.S. Dist. LEXIS 92771 at *20-22 (D. Or. May 31, 2018) ("Perhaps most relevant, in this case, is that Plaintiff has consented to the PUC's jurisdiction. Paragraph 17 of Plaintiffs' PPA provides that '[t]his Agreement is subject to the jurisdiction of those governmental agencies having control over either Party or this Agreement.' Thus, even if Plaintiff QFs were to object to the PUC's 'control over' themselves, because there is no question that the PUC 'has control over' Defendant, Plaintiffs have consented to both the personal and subject matter jurisdiction of the PUC for disputes arising from their executed PPA with Defendant.").

or claim relating to this Agreement[.]"[52] The Joint Utilities further clarify that "Governmental Authority" is broadly defined in the PPA to include "any entity or body exercising executive, legislative, judicial, regulatory, or administrative functions[;]" therefore, courts are included without adding "and courts" to Section 19. Contrary to the QF Trade Groups' unfounded claims, the Joint Utilities are not attempting to "put a thumb on the scale in favor of Commission jurisdiction." Rather, the Joint Utilities are simply following the rules. Therefore, the Joint Utilities oppose the QF Trade Groups' proposal to remove or further revise this provision.

55. Section 20.2.2 Assignments by Utility.

Summary of Issue: Section 20.2.2 describes the circumstances under which the Utility may assign the agreement in whole or in part to any person without the need for consent from—but with prior notice to—the Seller. Specifically, that provision, as proposed by the Joint Utilities, states:

> In addition, Utility may without the need for consent from Seller (but with prior notice to Seller, including the name of the assignee) Assign this Agreement in whole or in part to any person or entity; provided, however, that it shall be a condition precedent to such Assignment that such assignee: (a) enters into an assignment and assumption agreement pursuant to which such assignee assumes all of Utility's obligations under this Agreement and otherwise agrees to be bound by the terms of this Agreement; (b) has the same or better credit rating from S&P and Moody's as Utility as of the Execution Date (or if such assignee is not rated by S&P and Moody's, the same or better creditworthiness as Utility, as reasonably determined by Seller); (c) if required by applicable Requirements of Law, has received approval from any applicable public utility commission or equivalent or any other applicable Governmental Authority.

The QF Trade Groups argue that the Joint Utilities' proposal is too broad and that the utility's assignments should be limited to the narrow circumstance of a sale or merger of the utility. The QF Trade Groups contend that aside from that circumstance, assignment of the agreement to some other entity should require the QF's consent. The Joint Utilities did not agree to the QF Trade Groups' revisions, and the issue remains in dispute.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities object to the QF Trade Groups' proposed revisions because there might be broader circumstances under which the utility could sell off a portion of its assets or make a change in connection to its service territory. Giving QFs broad consent rights over utility assignments will hinder these transactions and make them more costly by giving QF counterparties the leverage to extract compensation in exchange for consent. So long as

[52] AHD Report at 7 (May 18, 2022).

the utility ensures the assignee is creditworthy and assumes the utility's obligations as already provided under Section 20.2.2, QFs are protected and it is unclear why QFs would need or should otherwise have control over utility business direction, particularly given any such assignments in connection with asset sales, etc., will most certainly be subject to Commission oversight and approval. For these reasons, Section 20.2.2 is reasonable and sufficiently protective of QFs.

56. Section 24.2 Alternative Dispute Resolution.

Summary of Issue: To address Staff's and the QF Trade Groups' concerns that Section 24.2 (now Section 24.1) mandates an alternative dispute resolution (ADR) process, Section 24.2 (now Section 24.1) now provides that: "If the Parties are not able to resolve any dispute, then the Parties may mutually agree to pursue an alternative dispute resolution process under Oregon Administrative Rules Chapter 860, Division." The QF Trade Groups recommend deleting this provision, arguing that "the PPA should not contain any suggestions as to Commission jurisdiction." The Joint Utilities continue to support including the provision in the PPA.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities see real value in the availability of the Commission's ADR process and believe that it will be beneficial to include a reference to that process in the PPA—in particular for QFs that might otherwise be unaware of the opportunity for ADR by the Commission. Moreover, the Joint Utilities disagree that a non-mandatory ADR provision that clarifies the ability of parties to mutually agree to pursue ADR pursuant to the Commission's rules is inappropriate or somehow requires the parties to be subject to the Commission's jurisdiction. The Joint Utilities maintain that this provision is reasonable and should be included in the PPA to clarify the parties' options to resolve any dispute under the contract.

57. Section 24.4 Waiver of Jury Trial.

Summary of Issue: Section 24.4 (now Section 24.2) provides that "each party knowingly, voluntarily, intentionally and irrevocably waives the right to a trial by jury in respect to any litigation based on, or arising out of, under or in connection with" the PPA. The QF Trade Groups argue that this section should be deleted because they claim it may be "illegal in many cases where a constitutional jury right exists, such as a claim for damages."

Joint Utilities' Response to Staff and the QF Trade Groups: The Joint Utilities continue to support inclusion of this provision in the PPA as a bench trial is more appropriate to review a complicated contract in a complex, regulated environment and any dispute that may arise under the contract. "Waiver of Jury Trial" provisions are common commercial terms in contracts and do not implicate constitutional concerns as the QF Trade Groups argue.

As a matter of background, this standard language has been used in PacifiCorp's contracts since 2012, including its resource procurement contracts.[53] Note that PacifiCorp's Washington PPA, a standard contract, also includes this provision.[54] PGE's resource procurement contracts further include a Waiver of Jury Trial provision.[55] In sum, such a provision is reasonable and appropriate, and should be retained.

58. Exhibit A – Expected Monthly Net Output.

Summary of Issue: OAR 860-029-0046(2)(c)(F) allows the Seller to update its Expected Monthly Net Output up until COD, and therefore the QF Trade Groups recommended that there be a note to that effect referencing the Expected Monthly Net Output values in the table in Exhibit A. The Joint Utilities did not oppose the QF Trade Groups' revisions to Exhibit A, but have added references to the sections of the PPA which allow for changes to the Expected Net Output and Expected Monthly Net Output values. The QF Trade Groups view this issue as resolved in part and do not object to the references to Section 6.1 and 6.8 with respect to the process for updating the Expected Net Output, but note their objection to certain language proposed by the Joint Utilities in Section 6.8.3.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: As neither the Joint Utilities nor the QF Trade Groups object to the wording in Exhibit A, the Joint Utilities regard Exhibit A as resolved. To the extent the QF Trade Groups object to the Joint Utilities' proposal in Section 6.8.3, that issue may be debated and resolved separately.

59. Exhibit F – Mechanical Availability Guarantee.

A. Timing

Summary of Issue: As filed on November 21, 2023, the Exhibit F Errata that applies to the MAG provides that: "The Actual Availability Percentage will be calculated annually, commencing with the first (1st) day of the second full Contract Year after Initial Delivery Date for existing QFs and with the first (1st) day of the fourth full Contract Year after Commercial Operation for new QFs and ending with the last full Contract Year in the Term." The QF Trade Groups argue that the Joint Utilities' revised proposal based on the January 1-based Contract Year framework resolved the identified problem in Exhibit F only for the first year to which MAG applies, and still leave the Seller with less than a full

[53] *See, e.g.*, PacifiCorp 2020 All-Source Request for Proposals, App. E-2: Form of PPA Resource Only, Section 24.4 at 53 (July 7, 2020), *available at* https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/suppliers/rfps/2020-all-source-request-for-proposals/documents/main-documents-appendices/rfp-appendices-a-n_no-a-7/RFP_App_E-2_Form_of_PPA_Resource_Only.DOCX; *see also In re Matter of PacifiCorp, dba Pacific Power, Application for Approval of 2020 All-Source Request for Proposal*, Docket UM 2059, Order No. 20-228 at 6 (July 16, 2020) (rejecting similar arguments from NIPPC that the Waiver of Jury Trial term is "atypical for utility procurements" and allowing the Waiver of Jury Trial provision in PacifiCorp's resource procurement contracts).

[54] WUTC Docket No. UE-190666, Standard Power Purchase Agreement, Attachment A, Section 24.4 at 40 of 55 (Mar. 1, 2021).

[55] *See, e.g.*, *In re Portland General Electric Co., 2021 All-Source Request for Proposals*, Docket UM 2166, PGE's 2021 All-Source RFP - Final Draft, App. E – Renewable PPA Form Agreement, Section 18.4 at 58 (Oct. 15, 2021).

year over which meet its performance target (MAG or MDG) in the last Contract Year, which will almost always be a partial year with the January 1-based Contract Year framework. The QF Trade Groups prefer using a Contract Year that begins on the COD, but alternatively could agree to the January 1-based Contract Year if the Joint Utilities agree to waive the applicability of the MAG/MDG during any partial final "Contract Year" to address their concerns.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: As discussed above with respect to the definition of "Contract Year," the Joint Utilities continue to prefer the January 1-based Contract Year for ease of contract administration. The Joint Utilities agree to the QF Trade Groups' alternative proposal, which is reflected in their Exhibit F Errata filed on November 21, 2023 that provides that the MAG and MDG will end with the last full Contract Year in the Term.

B. Operational Hours as Defined in Exhibit F

Summary of Issue: Under OAR 860-029-0120(10)(a), the MAG allows for 200 hours of planned maintenance per turbine per year that does not count toward the calculation of the overall guarantee. In the part of Exhibit F that applies to the MAG, "operational hours" for the purposes of determining the actual availability percentage for a particular Contract Year is defined as:

> the total across all of the Facility's Generating Units of (i) the number of hours each of the Generating Units was capable of producing power regardless of actual weather, season and time of day or night, without any mechanical operating constraint or restriction, and potentially capable of delivering such power to the Delivery Point; (ii) the number of hours during which each Generating Unit was not available to generate due to a Force Majeure event, a default by Utility under this Agreement, or a default by Utility under the Generation Interconnection Agreement; and (iii) the number of hours during which each Generating Unit was not available to generate due to a Planned Outage, but only to the extent such hours do not exceed 200 hours per Generating Unit per Contract Year.

The QF Trade Groups propose that the definition above be augmented with a new subsection (iv) that reads as follows:

> in the case of a solar facility, the number of hours Planned Outages, Maintenance Outages, and Forced Outages occurring between sunset and sunrise.

The QF Trade Groups argue that this addition is necessary to ensure that solar QFs will not be penalized for being unavailable to deliver energy at nighttime, which the QF Trade Groups claim "is consistent with the Commission's treatment of the High Demand Months

for outages [in OAR 860-029-0124 (Coordination between Qualifying Facility and Public Utility under Standard Power Purchase Agreements)[56]] and will incent solar QFs to conduct outages and maintenance at nighttime."

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities object to the QF Trade Groups' proposal to not count the hours "between sunset and sunrise" in the definition of "Operational Hours" for purposes of the MAG. Contrary to the QF Trade Groups' assertions, this proposal is not consistent with OAR 860-029-0124(2)(b), which simply provides:

> Nothing in the power purchase agreement's provisions limiting Planned Outages during High Demand Months may prohibit a qualifying facility from conducting Planned Outages during High Demand Months at times when motive force is unavailable to generate and deliver energy.

While solar facilities are not *prohibited* from conducting Planned Outages during High Demand Months at times when motive force is unavailable to generate and deliver energy, this does not mean that the facility is allowed to not count additional Planned Outages hours in the MAG calculation when motive force is not available beyond the 200 hours already specified in subsection (iii) and specifically referenced in the rule. The QF Trade Groups' proposal, which would not count additional hours between "sunset and sunrise," would reduce the Actual Availability Percentage in Exhibit F, essentially making it easier for QFs to satisfy the MAG beyond the allowance in the rules.

C. Damages Calculation

Summary of Issue: OAR 860-029-0120(10) provides that the MAG is calculated on an annual basis. The QF Trade Groups argue that the MAG damages calculation in Exhibit F is not acceptable because it seemingly converts the annual MAG to a monthly MAG, which is entirely inconsistent with the administrative rules' use of an annual MAG. The QF Trade Groups were particularly concerned with the following language in the MAG: "If an Availability Shortfall occurs ***in any calendar month*** in the Contract Year, Seller will compensate Utility damages . . . ." (Emphasis added). The QF Trade Groups continue to stand by their proposed edits to Exhibit F in their Initial Comments.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities' Exhibit F Errata filed on November 21, 2023 revised the language identified by the QF Trade Groups to address their concerns:

> In order to determine the damages associated with any such failure to meet the Availability Guarantee, which is determined on an annual basis, the resulting Availability Shortfalls are allocated pro rata to ~~For~~ each calendar month in the Contract Year~~, the Availability Shortfalls~~ and will equal the

[56] OAR 860-029-0124 defines the process for identifying and scheduling different types of outages.

mathematical difference between the Availability Guarantee and the Actual Availability Percentage, multiplied by the monthly Expected Net Output for the applicable calendar month in the Contract Year, expressed in the formula below….

The Joint Utilities' proposed revisions are intended to clarify that the MAG is calculated on an annual basis while the Availability Shortfalls are allocated pro rata to each calendar month in the Contract Year in order to calculate damages. The Joint Utilities support the Exhibit F Errata filed on November 21, 2023.

D. Invoicing for Availability Shortfall

Summary of Issue: The "Invoicing for Availability Shortfall" provision prescribes the procedural invoicing requirements for MAG damages.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: While the QF Trade Groups identified that this issue was resolved in their Issues List filed on November 15, 2023, the Joint Utilities provided minor edits in this provision in their Exhibit F Errata filed on November 21, 2023. Specifically, the Joint Utilities made the following edit to conform with Section 10.4 of the PPA:

> Seller must pay to Utility on or before the thirtieth (30th) day following the receipt of such invoice, except with respect to any invoiced amounts that are ~~unless the invoice is~~ subject to a good faith dispute under Section 10.4 of this Agreement.

60. Exhibit F – Minimum Delivery Guarantee.

A. Exhibit F Definition of Seller Uncontrollable Minutes; Supervisory Control and Data Acquisition (SCADA)/Electronic Fault Logs

Summary of Issue: For the MDG provision in Exhibit F, the Joint Utilities propose that "Seller Uncontrollable Minutes" means:

> for the Facility in any Contract Year, the total number of minutes during such Contract Year during which the Facility was unable to deliver Net Output to Utility (or during which Utility failed to accept such delivery) due to one or more of the following events, each as recorded by Seller's Supervisory Control and Data Acquisition ("SCADA") System (where available) and indicated by Seller's electronic fault log (electronic where available): (a) a Force Majeure event; (b) to the extent not caused by Seller's actions or omissions any interconnection or transmission curtailment initiated by Utility, Interconnection Provider, or the Transmission Provider; and (c) a default by Utility under this Agreement or the Generator Interconnection Agreement….

Seller Uncontrollable Minutes are used in Exhibit F to calculate the Actual Output Percentage used to determine compliance with the MDG.

The QF Trade Groups recommend deleting the SCADA/electronic fault log reference because not all small QFs will necessarily have SCADA and an electronic fault log that will track output and that enables them to distinguish all of these types of events (e.g., force majeure, interconnection curtailment, default by utility, etc.), and that the provision is therefore confusing. The Joint Utilities proposed retaining the language but adding the qualifier "where available" to recognize that some QFs may not have this equipment. The QF Trade Groups also recommend deleting the following language qualifying curtailments in Seller Uncontrollable Minutes: "to the extent not caused by Seller's actions or omissions." The Joint Utilities rejected the QF Trade Groups' deletion of this qualifying clause.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities continue to support including the SCADA/electronic fault log requirement where already available, which is necessary to accurately track and record when the facility is unable to delivery net output and enforce the MDG. The Joint Utilities' proposal that SCADA/electronic fault logs only be required where already available is reasonable and not burdensome to QFs because they already have the data readily available due to requirements under the GIA. Furthermore, identical definitions of Seller Uncontrollable Minutes (or Uncontrollable Circumstances) that reference recording by SCADA and electronic fault logs are present in PacifiCorp's bilateral contracts in Oregon and standard contracts in other jurisdictions.[57]

The Joint Utilities also continue to support the qualification that curtailment, as used in the definition of Seller Uncontrollable Minutes, is not caused by the Seller's actions or omissions. If the curtailment is the Seller's fault, then it should not constitute "Seller Uncontrollable Minutes" under the plain meaning of that term. Again, this qualification is consistent with the definitions of Seller Uncontrollable Minutes (or Uncontrollable Circumstances) present in PacifiCorp's bilateral contracts in Oregon and standard contracts in other jurisdictions.[58]

B. Output Shortfall and Damages Calculations

Summary of Issue: OAR 860-029-0120(12)(a) provides that the MDG is calculated on an annual basis. The QF Trade Groups argue that the Joint Utilities' proposal conflicts with the rule because it relies on individual monthly output shortfalls below a monthly 90 percent output threshold, rather than calculating the shortfalls below a 90 percent

[57] *See, e.g.*, PacifiCorp 2020 All-Source Request for Proposals, App. E-2: Form of PPA Resource Only, Exhibit F at F-1 (July 7, 2020), *available at* https://www.pacificorp.com/content/dam/pcorp/documents/en/pacificorp/suppliers/rfps/2020-all-source-request-for-proposals/documents/main-documents-appendices/rfp-appendices-a-n_no-a-7/RFP_App_E-2_Form_of_PPA_Resource_Only.DOCX; *see also* WUTC Docket No. UE-190666, Standard Power Purchase Agreement, Attachment A, Section 1.1 at 15 of 55 (Mar. 1, 2021) (definition of "Seller Uncontrollable Minutes").

[58] *See id.*

threshold on an aggregate annual basis. The QF Trade Groups also contend that the "Damages Calculation" further suggests that if the QF fails to meet a 90 percent threshold on an On-Peak basis or an Off-Peak basis alone, it will owe damages, even if the Off-Peak shortfall is made up by deliveries in the On-Peak period, or vice versa.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities' Exhibit F Errata filed on November 21, 2023 revised the language identified by the QF Trade Groups to clarify the Joint Utilities' intent and address the QF Trade Groups' concerns:

> In order to determine the damages associated with any such failure to meet the Output Guarantee, which is determined on an annual basis, the resulting Output Shortfalls are allocated pro rata to ~~For~~ each calendar month in the Contract Year and ~~the Output Shortfalls~~ will equal the mathematical difference between the Output Guarantee and the Actual Output Percentage, multiplied by the ~~M~~monthly Expected Net Output for the applicable calendar month in the Contract Year, expressed in the formula below….

The Joint Utilities' proposed revisions are intended to clarify that the MDG is calculated on an annual basis while the Output Shortfalls are allocated pro rata to each calendar month in the Contract Year in order to calculate damages. The Joint Utilities further clarify that the utilities do not use On-Peak and Off-Peak Shortfalls alone for measuring whether the annual MDG is met or not and there can be offsets. Rather, the On-Peak and Off-Peak Shortfalls are separated to correlate to the applicable On-Peak and Off-Peak Average Firm Electric Market Prices and Contract Prices, which are different. The Joint Utilities support the Exhibit F Errata filed on November 21, 2023.

C. Invoicing for Output Shortfall

Summary of Issue: The "Invoicing for Output Shortfall" provision prescribes the procedural invoicing requirements for MDG damages.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: While the QF Trade Groups identified that this issue was resolved in their Issues List filed on November 15, 2023, the Joint Utilities provided minor edits in this provision in their Exhibit F Errata filed on November 21, 2023. Specifically, the Joint Utilities made the following edit to conform with Section 10.4 of the PPA:

> Seller must pay to Utility on or before the thirtieth (30th) day following the receipt of such invoice except with respect to any invoiced amounts that are ~~unless such invoice is~~ subject to a good faith dispute under Section 10.4.

61. Exhibit H – Required Insurance.

A. Section 1.1. Required Policies and Coverage.

Summary of Issue: OAR 860-029-0120(17) provides that the PPA must specify that a QF 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; and (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 QF; and (B) umbrella insurance in the amount of $5,000,000, or greater if desired by the QF. The Joint Utilities implemented the rule above in Exhibit H, which addresses all insurance requirements. Section 1.1 of Exhibit H includes both the general commercial liability insurance and umbrella insurance enumerated by the rule, as well as "all risk" property insurance.

The QF Trade Groups argue that they should not be required to maintain all-risk property insurance in an amount at least equal to the full replacement value of the facility (including coverage for earth movement, flood, and boiler and machinery) because it is not required by the administrative rules and that the value of such insurance would likely exceed the $5 million coverage limit for umbrella insurance and the $ 1 million coverage limit each occurrence combined for general commercial liability insurance.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities do not interpret OAR 860-029-0120(17)(b) as precluding other types of insurance from being required in the contract. Rather, the rules state which types of insurance ***must*** be included in the contract. The Joint Utilities continue to support inclusion of "all risk" property insurance providing coverage in an amount at least equal to the full replacement value of the facility as reasonable and necessary to backstop the QF's obligations under the PPA. Such insurance is currently required in the utilities' existing standard PURPA PPAs.[59] However, in an effort to compromise, the Joint Utilities propose to limit the "all risk" insurance to after the development period, which the lender to the QF should already require.

> 1.1.3 From and after Commercial Operation, ~~A~~all-risk property insurance providing coverage in an amount at least equal to the full replacement value of the Facility against "all risks" of physical loss or damage, including coverage for earth movement, flood, and boiler and machinery. The All-Risk Policy may contain separate sub-limits and deductibles subject to

[59] *See, e.g.*, PacifiCorp's PPA for New Firm QF And Intermittent Resource with MAG at Section 13.2.2 ("All Risk Property insurance providing coverage in an amount at least equal to the full replacement value of the Facility against "all risks" of physical loss or damage, including coverage for earth movement, flood, and boiler and machinery. The Risk policy may contain separate sub-limits and deductibles subject to insurance company underwriting guidelines. The Risk Policy will be maintained in accordance with terms available in the insurance market for similar facilities.").

insurance company underwriting guidelines. The All-Risk Policy will be maintained in accordance with terms available in the insurance market for similar facilities.

62. Exhibit I – NERC Event Types.

Summary of Issue: As discussed above, several key provisions of the PPA require notice and reporting of the various types of outages the QF might experience for scheduling purposes. In their definitions of the various types of outages, the Joint Utilities have proposed to include language indicating that the outages will be determined in compliance with the NERC definitions of Event Types—with which the utilities are required to comply. To assist the QFs' understanding and to eliminate the need for the QFs to locate those definitions, the Joint Utilities have proposed to include Exhibit I, which contains the NERC definitions. The QF Trade Groups have recommended deleting the reference to the NERC Event Types from the definitions section and therefore to remove Exhibit I altogether. They argue that the relevant types of outages (Planned Outage, Forced Outage, and Maintenance Outage) are defined in the administrative rules and in the applicable definitions in the PPA; therefore, the QF Trade Groups contend that definitions of NERC Event Types are unnecessary.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: As discussed above with respect to the definitions of the outages, the utilities are obligated to comply with the NERC standards when they identify and report the various types of outages, and therefore it is important to reference the applicable NERC Event Types for clarity and to avoid potential misunderstandings. The Joint Utilities included this Exhibit I for QFs so that they need not reference NERC Event Types from an external source, and therefore propose to retain the exhibit.

63. Exhibit L – Off-System Addendum.

A. Recitals

Summary of Issue: OAR 860-029-0121(2) provides that an off-system QF may deliver and the purchasing public utility must accept energy imbalance ancillary services if: (a) the transmitting entity or entities require the QF to procure the services; (b) the transmitting entity or entities require the QF to schedule deliveries in increments of no less than 1 MW; (c) the QF is not attempting to sell the purchasing public utility energy or capacity in excess of its expected hourly Net Output; and (d) the energy imbalance service is designed to correct a mismatch between energy scheduled by the QF and the actual real time production by the QF.

Exhibit L is the off-system addendum to the PPA. The recitals in Exhibit L provide in part: "WHEREAS, Utility desires that Seller schedule delivery of Net Output on a firm, hourly basis[.]" The QF Trade Groups argue that the recital should not suggest that the QF must

use "hourly" scheduling since the administrative rules above do not bar use of intra-hour scheduling that may be available from certain transmission providers. Accordingly, the QF Trade Groups recommend deleting the reference to "firm, hourly" scheduling the above recital in Exhibit L. The Joint Utilities oppose the QF Trade Groups' proposal.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The "firm, hourly" language should be retained as it is consistent with the Joint Utilities' current practice[60] and is not otherwise addressed by the rules. Implementing intra-hourly scheduling would require adjusting the avoided cost price and may pose administrative challenges. Specifically, intra-hourly scheduling would require the utilities to hold incremental operating reserves at a cost to account for changes to the schedule within the hour and to actively manage those changes, resulting in additional administrative cost and burden. Therefore, such a change should be explored in docket UM 2000 and not adopted in this docket.

B. Exhibit L Definition of Firm Delivery

Summary of Issue: Exhibit L requires that off-system QFs hold rights sufficient to reserve Firm Delivery of Net Output up to the Maximum Delivery Rate to the Point of Delivery for the Term of the Agreement. "Firm Delivery" is defined as "uninterruptible transmission service (i.e., NERC priority level 7) that is reserved and/or scheduled between the Point of Interconnection and the Point of Delivery pursuant to Seller's Transmission Agreement(s)."

The QF Trade Groups recommend revising this definition to include conditional firm service, i.e., NERC priority level 6. The QF Trade Groups contend that such a change is reasonable because the region has moved to accepting use of conditional firm service (NERC priority level 6) as a firm product and notes that the WRAP Tariff (Section 16.3) allows use of NERC priority 6 or 7 as valid forms of firm transmission in the Forward Showing Program. The Joint Utilities oppose the QF Trade Groups' proposal.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: As noted above, the utilities all require QFs to deliver their output via firm delivery service [61] and the assumption that firm delivery will be used by QFs is built into the calculation of avoided cost pricing, including capacity payments. As discussed below, the use of conditional firm service to deliver QF generation would impose additional risks and potential costs on the

[60] *See, e.g.*, PacifiCorp's Power Purchase Agreement for Firm Off System QF, Addendum W at W-1, *available at* https://www.pacificpower.net/content/dam/pcorp/documents/en/pacificpower/rates-regulation/oregon/tariffs/purpa/Power_Purchase_Agreement_for_Firm_Off_System_QF.pdf (last visited Dec. 12, 2023) ("WHEREAS, PacifiCorp desires that Seller schedule delivery of Net Output on a firm, hourly basis[.]") [hereinafter, "PacifiCorp's PPA for Firm Off System QF"].

[61] *See, e.g.*, PacifiCorp's PPA for Firm Off System QF, Addendum W at W-1 ("'Firm Delivery' means uninterruptible transmission service that is reserved and/or scheduled between the Point of Interconnection and the Point of Delivery pursuant to Seller's Transmission Agreement.").

utility that are not accounted for in the utilities' standard avoided cost pricing and therefore should not be allowed under a standard PURPA PPA.

By way of background, conditional firm transmission service is by definition, an interruptible service.[62] That means that generation delivered via conditional firm transmission service will be less reliable and may—depending on the frequency and length of interruptions—impose significant additional costs on the utility and its customers. In addition to costs to cover generation that is expected but not delivered during an interruption, the use of conditional firm service can impact system reliability and resource planning.

Moreover, specific to the contracting issues raised in this docket, the term conditional firm describes a transmission service provided under broad range of transmission conditions and provides no information as to the expected frequency and length of interruptions associated with the purchase. For that reason, if a QF were to notify the utility that it was relying on conditional firm service, without more information, the utility would have no information whatsoever as to the extent of the interruptions that might be expected. Instead, the actual extent of interruptions that can be expected can only be estimated on a on a case-by-case basis, depending on the transmission conditions specific to a transmission service purchase. And even then, such estimates are never certain.

If the Commission wishes to allow QFs to use conditional firm service to deliver QF output, in order to avoid harm to customers, it would need to consider and build into avoided cost rates the costs that would be imposed on the utility. In the meantime, to the extent that a QF wishes to deliver to the utility using conditional firm transmission service, they are always free to request to negotiate an agreement with the utility. In such a case the utility would have the ability to evaluate the specific transmission service being proposed, the risks of interruptions in delivery, as well as the potential costs associated with those interruptions, and the impact for resource planning and reliability.

The Joint Utilities acknowledge that FERC has accepted the use of conditional firm transmission service as a product, and that use of the product could provide the QFs with flexibility in delivering their generation. However, the current avoided cost prices do not account for the costs and risks associated with that flexibility, and to the extent that use of conditional firm delivery imposes additional risks and costs, they must be accounted for in order to protect customers from harm. The Joint Utilities recommend that this issue therefore be considered in docket UM 2000.

[62] Conditional firm transmission service is a form of long-term point-to-point transmission service that allows the transmission provider to curtail the reservation for a specified number of hours per year or under specific system conditions. *See, e.g.*, PGE's Pro Forma Open Access Transmission Tariff, Section 15.4 at 75-76, *available at* http://www.oasis.oati.com/woa/docs/PGE/PGEdocs/PGE_OATT_11302023-v6.pdf (last visited Dec. 12, 2023).

C. Supplemental Provision 2 – Dynamic Scheduling

Summary of Issue: Supplemental Provision 2 (Seller's Responsibility to Schedule Delivery) provides in part: "Seller shall not schedule any energy to be delivered to Utility pursuant to this Agreement using a Dynamic or Pseudo-Tie e-Tag as such terms are defined and used by NERC." The QF Trade Groups propose deleting this language, arguing that such express limitations against dynamic scheduling and combining schedules from nearby facilities are not included in the administrative rules and are not necessarily reasonable to include in the standard PPA. The Joint Utilities oppose the QF Trade Groups' proposal.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities restored this deleted language regarding dynamic scheduling, which while not expressly addressed in their current PPAs, can be inferred by the flat schedule requirement in the current PPAs and by utility practice and is reasonable.[63] The prohibition against dynamic scheduling is necessary because allowing dynamic scheduling of an off-system QF's output would transform a firm hourly product into a non-firm product without any adjustment to the standard contract's firm-energy avoided cost price. That is, the Transmission Provider "firms up" the QF's deliveries on an hourly basis; however, with dynamic scheduling, the utility would be required to balance the power received from the QF in real time or on an intra-hourly basis at a potentially significant incremental additional cost to the utility that is not captured in standard avoided cost pricing. If a QF wishes to pursue dynamic pricing, the Joint Utilities recommend that the QF enter into discussions with the utility for a non-standard PPA so that the cost to the utility based on how the QF plans to schedule the energy can be precisely determined and reflected in the contract price.

[63] *See, e.g.*, PGE's Schedule 201: Standard Off-System Variable Power Purchase Agreement at Section 4.3, available at https://assets.ctfassets.net/416ywc1laqmd/5BxRh2E0X09uVB2uVaYcdp/7c44d0fb34e5cef4ee68b140e81cfcca/standard_off_system_variable_solar_plus_storage_PPA_Eff_Sept_22.2023.pdf (last visited Dec. 12, 2023) ("Seller shall provide preschedules for all deliveries of energy hereunder, including identification of receiving and generating control areas, by 9:00:00 PPT on the last business day prior to the scheduled date of delivery. All energy shall be scheduled according to the most current North America Energy Reliability Corporation (NERC) and Western Electricity Coordinating Council (WECC) scheduling rules and practices. The Parties' respective representatives shall maintain hourly real-time schedule coordination; provided, however, that in the absence of such coordination, the hourly schedule established by the exchange of preschedules shall be considered final. Seller and PGE shall maintain records of hourly energy schedules for accounting and operating purposes. The final E-Tag shall be the controlling evidence of the Parties' schedule. All energy shall be prescheduled according to customary WECC scheduling practices. Seller shall make commercially reasonable efforts to schedule in any hour an amount equal to its expected Net Output for such hour. Seller shall maintain a minimum of two years records of Net Output and shall agree to allow PGE to have access to such records and to imbalance information kept by the Transmission Provider."); PacifiCorp's PPA for Firm Off System QF, Addendum W at W-2 ("Seller shall coordinate with the Transmitting Entity(s) to provide PacifiCorp with a schedule of the next Day's hourly scheduled Net Output deliveries at least 24 (twenty-four) hours prior to the beginning of the day being scheduled, and otherwise in accordance with the WECC Prescheduling Calendar (which is updated annually and may be downloaded at: http://www.wecc.biz/.").

64. Proposed Changes to Schedules.

A. PacifiCorp Rate Schedule

i. Legally Enforceable Obligation (p. 15)

Summary of Issue: OAR 860-029-0046(9) provides that a "legally enforceable obligation [(LEO)] will be considered established on the date on which the [QF] executes the final executable form of the [PPA] or such earlier date that the Commission may order." The QF Trade Groups proposed to add language mirroring the above rule in all three utilities' schedules.

The Joint Utilities agreed to add language specifically implementing the Commission's LEO rule, but also proposed to add qualifying language clarifying that a LEO was considered established subject to the contracting processes set forth in the schedule, and as provided in OAR 860, Division 029. Specifically, the Joint Utilities proposed the following language:

> Prices and other terms and conditions in the power purchase agreement will not be final and binding until the power purchase agreement has been executed by both parties provided however, subject to the processes set forth above and as provided in OAR 860, Division 029, ~~that~~ a legally enforceable obligation will be considered established on the date on which the qualifying facility executes the final executable form of the power purchase agreement or such earlier date the Commission may order.

The QF Trade Groups oppose the Joint Utilities' proposed qualifying language, arguing that the language is not in the administrative rules and is extraneous. The QF Trade Groups contend that if a utility believes a particular QF did not follow the procedures in the rules or the rate schedule, the utility remains free to argue so in response to such QF's LEO complaint.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: The Joint Utilities do not oppose incorporating the Commission's LEO rule into the standard contract schedules, and do not believe that their proposed language does anything to undercut a QF's right to establish an LEO. Rather, the clarifying language was added to indicate that when an LEO is established by means of signing a "final executable agreement" as referenced in the rule, the term "final executable agreement" refers to the agreement delivered at the culmination of the process described as such under the schedule. This is consistent with the administrative rules, which place the LEO rule last after describing the required steps of the contracting process in chronological order. To be clear, the Joint Utilities believe this clarity is useful in the context of their schedules because, in the past, QFs have attempted to avoid following the contracting process as defined in the utility's schedule and instead have sought to establish a LEO simply by downloading a standard

contract from the utility's website and filling it in on their own. The Joint Utilities' proposed provision clarifies that this approach will not be effective, and that QFs must follow the process to obtain a final executable PPA that can be signed on behalf of the QF to establish a LEO (if they are not otherwise seeking a Commission order to establish a LEO, etc.).

B. PGE Rate Schedule

i. Definition of "Net Output" (p. 1)

Summary of Issue: The definition of "Net Output" in PGE's Schedule mirrors that in the Joint Utilities' proposed standard contract. For the same reasons as discussed above with respect to the definition of "Net Output" in the PPA, the QF Trade Groups oppose the definition of "Net Output" in PGE's Schedule.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: In order to address the QF Trade Groups' concerns, PGE proposes to modify the definition of "Net Output" in PGE's Schedule to remove reference to "Seller's load other than station use" and mirror the Joint Utilities' proposed changes to the definition of "Net Output" in the PPA above. The Joint Utilities still propose using "measured at" rather than "flowing though" in the definition for clarity because "flowing through" the Point of Interconnection could be subject to different interpretations. While the Joint Utilities' definition of "Net Output" in the PPA uses slightly different wording, it is not inconsistent with the definition in the rules.

ii. Edits to "Community Based" (p. 1)

Summary of Issue: OAR 860-029-0045(4)(c)(B) provides as follows:

> 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.

The QF Trade Groups propose edits to the definition of "Community-Based QF" in PGE's Schedule consistent with the above rule and argue that such changes should be accepted. The QF Trade Groups further note that PacifiCorp agreed to these same edits in its schedule.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: After further review, PGE agrees with the QF Trade Groups' proposed edits to the definition of "Community-Based QF."

iii. Legally Enforceable Obligation (p. 5)

Summary of Issue: Please see the Joint Utilities' summary above with respect to PacifiCorp's Schedule.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: Please see the Joint Utilities' response above with respect to PacifiCorp's Schedule.

iv. Credit Review

Summary of Issue: PGE's Schedule now provides as follows:

> Within 30 days of the Seller's submittal of financial information reasonably requested by PGE, PGE will inform the Seller whether it has satisfied the credit requirements in the Standard PPA without providing an additional form of security. Both the Company and the QF are obligated to act in good faith when dealing with each other during the contracting process.

The QF Trade Groups propose a deadline of 15 days after the QF submits the financial information for PGE to conclude its credit review and do not agree that PGE's credit review should be allowed to take 30 days.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: PGE maintains that 15 days is not long enough for PGE to complete its credit review and continues to support a 30-day deadline instead.

C. Idaho Power Rate Schedule

v. Definition of "Net Output" (p. 2)

Summary of Issue: Please see the Joint Utilities' summary above with respect to PGE's Schedule.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: Please see the Joint Utilities' response above with respect to PGE's Schedule.

vi. Legally Enforceable Obligation (p. 5)

Summary of Issue: Please see the Joint Utilities' summary above with respect to PacifiCorp's Schedule.

Joint Utilities' Dec. 12 Comments in Response to QF Trade Groups' Issues List: Please see the Joint Utilities' response above with respect to PacifiCorp's Schedule.

III. RESPONSE TO NEWSUN'S ISSUES LIST

NewSun continues to recommend that the Commission require the Joint Utilities to submit a redline of one or more of their previous contracts narrowly tailored to the topics addressed in the new rules and should reject the Joint Utilities' newly proposed PPA.[64] As stated in previous comments in docket AR 631 and in the Joint Utilities' Reply Comments in this proceeding, the breadth and the scope of the new rules require extensive revisions, and the Joint Utilities do not agree that redlining their 16 existing and outdated contracts is either practical or efficient, especially as the process of reviewing the proposed single standard PPA for all three utilities and resource types is well underway.[65]

In fact, the Joint Utilities' review of NewSun's redline of PGE's Standard Renewable In-System Variable PPA affirms the utilities' position as the Joint Utilities neither view NewSun's redline as consistent with the new rules or sufficiently clear to mitigate future disputes. For example, rather than specifying in the contract the processes and deadlines mandated by OAR 860-029-0120(14)(b) for QFs to increase their expected annual net output by more than 10 percent without prior utility approval, NewSun's redlined PPA simply references the rules.[66] Similarly, NewSun's redlined PPA does not include the creditworthiness requirements for QFs, but simply

[64] NewSun's List of Issues Remaining in Dispute at 1-3 (Nov. 15, 2023).
[65] *See* Joint Utilities' Reply Comments at 31-40 (Oct. 17, 2023).
[66] Comments of NewSun Energy LLC, Exhibit A at 12 (Oct. 3, 2023) ("Seller may, during the Development Period, make modifications to the Facility that do not increase the Nameplate Capacity Rating of the Facility in the Agreement, but which are reasonably likely to cause the expected annual net output to exceed that listed in the Agreement by more than 10 percent, without Purchasing Utility's prior approval ***but subject to the requirements set forth in OAR 860-029-0120(14)(b)***.") (internal emphasis added) [hereinafter, "NewSun's Initial Comments"].

refers to OAR 860-029-0120(18).[67] In addition, the definitions in NewSun's redlined PPA do not include all of those adopted in the new rules,[68] or—in contrast to NewSun's own position—introduce concepts that were discussed during the rulemaking process but intentionally removed by Staff.[69] These types of changes that artificially shorten the PPA by requiring parties to look outside the contract and do not conform to the requirements mandated in the new rules are neither reasonable nor appropriate.

The terms and conditions included in the Joint Utilities' standard PPA are necessary for a comprehensive and effective agreement. As long as the contract complies with the new rules and Commission policy, the Commission should not direct the Joint Utilities to maintain outdated contract language just because the rules do not require an update to such language. Removing ambiguities and adopting clear and easy-to-understand modern contracts should be encouraged, not disallowed. Indeed, Staff disagrees with stakeholders on this very point and "does not oppose the Joint Utilities' effort to expeditiously incorporate AR 631 decisions and update outdated contract[s] in this one proceeding."[70]

NewSun also argues that should the Commission choose to work from the Joint Utilities' proposed PPA, the Commission should: (1) extend the procedural schedule to "allow parties sufficient time to analyze and comment on this dense and complicated document[;]" and (2) should filter the "complex or controversial elements of the AR 631 rules that would not be easily

[67] NewSun's Initial Comments, Exhibit A at 15-16 ("If Seller does not meet the creditworthiness requirements set forth in OAR 860-029-0120(18) …").
[68] NewSun's Initial Comments, Exhibit A at 1 ("Any capitalized terms not expressly defined herein shall have the definition given in OAR 860-029-0010.").
[69] NewSun's Initial Comments, Exhibit A at 3 (NewSun's proposed definition of "Excused Delay"). To this point, the Joint Utilities do not disagree with NewSun that defining terms, such as Excused Delay, that were not addressed by the new rules but are otherwise common contracting provisions necessary to prevent confusion and disputes is appropriate in this proceeding.
[70] Staff Issues List at 2 (Nov. 15, 2023).

implemented without controversy."[71] The Joint Utilities disagree that stakeholders have not had sufficient time to review the proposed PPA. First, the Joint Utilities submitted the compliance filing on July 24, 2023, and as of the date of this filing, parties have had 141 days to review and provide comments on the proposed PPA. This is evidenced by the QF Trade Groups' extensive and detailed comments that have allowed for productive discussions and changes to the proposed PPA in this proceeding. Second, it is worth noting the Joint Utilities used a template PPA that Staff and stakeholders had reviewed during the informal phase in docket AR 631 and which the QF representatives had reviewed and commented upon in Washington. Nothing prevented NewSun from engaging with the Joint Utilities' proposed PPA all this time, especially considering NewSun was already familiar with the template for the PPA. In addition, the Joint Utilities do not agree that filtering complex or controversial elements of the AR 631 rules is necessary. While the number of issues remaining in dispute is extensive, stakeholders have steadily been working to narrow the remaining issues where compromise is feasible. For these reasons, the Commission should reject NewSun's suggestions to require the Joint Utilities to redline one or more of their existing contracts, or extend the procedural schedule and filter the issues to be addressed in this docket.

IV. CONCLUSION

The Joint Utilities have agreed to many changes to their proposed standard PPA and schedules to address Staff's and stakeholders' concerns, where appropriate, and to narrow the number of issues in dispute. The Joint Utilities look forward to continuing to work with Staff and stakeholders in this proceeding to resolve the remaining disagreements.

[71] NewSun's List of Issues Remaining in Dispute at 3-4.

Respectfully submitted this 12th day of December 2023.

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UM 2299

Joint Utilities' December 12 Comments

ATTACHMENT A

Joint Utilities' Standard Power Purchase Agreement with Redlines and Comments

POWER PURCHASE AGREEMENT

BETWEEN

_____

AND

UTILITY

This working draft is provided pursuant to [UTILITY NAME]'s Schedule XX. This working draft does not constitute a binding offer, does not form the basis for an agreement by estoppel or otherwise, and is conditioned upon satisfaction of all requirements of Schedule XX, including each party's receipt of all required internal approvals and any other necessary regulatory approvals.

(continued)

TABLE OF CONTENTS

RECITALS 1
AGREEMENT 1
SECTION 1 DEFINITIONS, RULES OF INTERPRETATION 2
1.1 Defined Terms 2
1.2 Rules of Interpretation. 14
SECTION 2 TERM; MILESTONES 15
2.1 Term. 15
2.2 Milestones. 15
2.3 Obligation to Report on Certain Project Milestones. 17
2.4 Delay Damages; Schedule Recovery Plan. 17
2.5 Damages Calculation. 18
2.6 Damages Invoicing. 18
2.7 Utility's Right to Monitor. 18
2.8 Excused Delay. 18
2.9 Option to Extend Scheduled Commercial Operation Date or Terminate 19
SECTION 3 REPRESENTATIONS AND WARRANTIES 19
3.1 Mutual Representations and Warranties. 19
3.2 Seller's Further Representations, Warranties and Covenants. 19
3.3 No Other Representations or Warranties. 22
3.4 Continuing Nature of Representations and Warranties; Notice. 22
SECTION 4 DELIVERIES OF NET OUTPUT 22
4.1 Purchase and Sale 22
4.2 Designation as Network Resource. 23
4.3 No Sales to Third Parties. 24
4.4 Title and Risk of Loss of Net Output. 24
4.5 Curtailment 24
4.6 Utility as Merchant or Otherwise as Purchaser 24
4.7 Ownership of Environmental Attributes; RPS Certification. 25
4.8 Purchase and Sale of Capacity Rights; Ancillary Services. 25
SECTION 5 CONTRACT PRICE; COSTS 26
5.1 Contract Price; Includes Capacity Rights 26

(continued)

5.2 Costs and Charges. **26**
5.3 Station Service **27**
5.4 Taxes. **27**
5.5 Costs of Ownership and Operation. **27**
5.6 Rates Not Subject to Review. **27**
5.7 Participation in an RTO. **27**
SECTION 6 OPERATION AND CONTROL **27**
6.1 As-Built Supplement; Modifications to Facility **28**
6.2 Standard of Facility Construction and Operation. **28**
6.3 Interconnection **29**
6.4 Coordination with System. **29**
6.5 Outages. **29**
6.6 Scheduling. **30**
6.7 Forecasting. **31**
6.8 Increase in Nameplate Capacity Rating; Expansion or New Project; Allowable Facility Upgrades **31**
6.9 Telemetering. **33**
6.10 Transmission Provider Consent. **33**
6.11 Dedicated Communication Circuit **33**
6.12 Reports and Records. **33**
6.13 Financial and Accounting Information. **35**
6.14 Access Rights **35**
6.15 Performance Guarantee **35**
SECTION 7 QUALIFYING FACILITY STATUS; ELIGIBILITY FOR STANDARD PRICING **35**
7.1 Seller's QF Status. **35**
7.2 Seller's Eligibility for a Standard Power Purchase Agreement and Standard Pricing **35**
SECTION 8 SECURITY AND CREDIT SUPPORT **36**
8.1 Provision of Security. **36**
8.2 Project Development Security. **36**
8.3 Default Security. **37**
8.4 No Interest on Security. **39**
8.5 Grant of Security Interest in Security. **39**
8.6 Security is Not a Limit on Seller's Liability. **40**

(continued)

SECTION 9 METERING **40**
9.1 Installation of Metering Equipment. **40**
9.2 Metering. **40**
9.3 Inspection, Testing, Repair and Replacement of Meters. **40**
9.4 Metering Costs. **40**
9.5 SQMD Plan. **41**
9.6 WREGIS Metering. **41**
SECTION 10 BILLINGS, COMPUTATIONS AND PAYMENTS **41**
10.1 Monthly Invoices. **41**
10.2 Offsets. **41**
10.3 Interest on Late Payments. **41**
10.4 Disputed Amounts. **41**
10.5 Audit Rights. **41**
SECTION 11 DEFAULTS AND REMEDIES **42**
11.1 Defaults. **42**
11.2 Remedies for Events of Default. **44**
11.3 Termination and Remedies. **45**
11.4 Termination of Duty to Buy. **46**
11.5 Termination Damages. **46**
11.6 Duty/Right to Mitigate. **47**
11.7 Security. **47**
11.8 Cumulative Remedies. **47**
SECTION 12 INDEMNIFICATION AND LIABILITY **47**
12.1 Indemnities. **47**
12.2 Survival. **49**
SECTION 13 INSURANCE **49**
SECTION 14 FORCE MAJEURE **49**
14.1 Definition of Force Majeure. **49**
14.2 Suspension of Performance. **52**
14.3 Force Majeure Does Not Affect Other Obligations. **52**
14.4 Strikes. **52**
14.5 Right to Terminate. **52**
SECTION 15 SEVERAL OBLIGATIONS **52**

(continued)

SECTION 16 CHOICE OF LAW **52**
SECTION 17 PARTIAL INVALIDITY **52**
SECTION 18 NON-WAIVER **53**
SECTION 19 GOVERNMENTAL JURISDICTION AND AUTHORIZATIONS **53**
SECTION 20 SUCCESSORS AND ASSIGNS **53**
20.1 Restriction on Assignments. **53**
20.2 Permitted Assignments. **53**
SECTION 21 ENTIRE AGREEMENT **54**
SECTION 22 NOTICES **55**
SECTION 23 PUBLICITY **55**
SECTION 24 DISAGREEMENTS **55**
24.1 Negotiations. **55**
24.2 Alternative Dispute Resolution. **56**
24.3 Choice of Forum. **56**
24.4 WAIVER OF JURY TRIAL. **56**
EXHIBIT A **58**
EXHIBIT B **59**
EXHIBIT C **60**
EXHIBIT D **61**
EXHIBIT E **62**
EXHIBIT F **63**
EXHIBIT G **71**
EXHIBIT H **72**
EXHIBIT I **74**
EXHIBIT J **75**
EXHIBIT K **76**
EXHIBIT L **77**

(continued)

EXHIBITS

Exhibit A	Estimated Monthly Net Output
Exhibit B	Description of Seller's Facility
Exhibit C	Seller's Interconnection Facilities
Exhibit D	Required Facility Documents
Exhibit E	Leases
Exhibit F	Performance Guarantee
Exhibit G	Seller Authorization to Release Generation Data to Utility
Exhibit H	Required Insurance
Exhibit I	NERC Event Types
Exhibit J	[UTILITY NAME]'s Schedule No. XX
Exhibit K	Party Notice Information
Exhibit L	Off-System QF Addendum (if applicable)

(continued)

POWER PURCHASE AGREEMENT

THIS POWER PURCHASE AGREEMENT (this "Agreement"), is entered into between [COMPANY NAME], a/an [TYPE OF ORGANIZATIONAL ENTITY AND STATE OF ORGANIZATION] (the "Seller"), and [UTILITY NAME], a/n [TYPE OF ORGANIZATIONAL ENTITY AND STATE OF ORGANIZATION] acting in its merchant function or otherwise as purchaser ("Utility"). Seller and Utility are sometimes referred to in this Agreement collectively as the "Parties" and individually as a "Party."

Commented [JU1]: Please see JUs' explanation in comments to the definition of "Utility" below.

RECITALS[1]

A. Seller intends to construct, own, operate and maintain a [___]-powered generating facility for the generation of electric energy located in [_____] County, Oregon, with a nameplate capacity rating of [__][2] MW (the "Facility"); and

B. Seller will operate the Facility as a Qualifying Facility ("QF"); and

C. Seller desires to sell, and Utility agrees to purchase, the Net Output delivered by the Facility in accordance with the terms and conditions of this Agreement; and

D. The rates, terms, and conditions in this Agreement are in accordance with the rates, terms, and conditions approved by the Commission for purchases from QFs.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing and the mutual promises below and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties mutually agree as follows:

[1] **Note to Form** – Recital A to be adjusted in case of PPA with operational QF: "Seller owns, operates and maintains a [___]-powered generating facility for the generation of electric energy located in [_____] County, Oregon, with a nameplate capacity rating of [__] MW (the "Facility")."

[2] **Note To Form** – Must be ten (10) MWAC or less.

(continued)

SECTION 1
DEFINITIONS, RULES OF INTERPRETATION

1.1 Defined Terms. Unless otherwise required by the context in which any term appears, initially capitalized terms used in this Agreement have the following meanings:

"Abandonment" means ~~(a)~~ (a) the relinquishment of all possession and control of the Facility by Seller, except in the case of Seller's sale of the Facility and an Assignment of this Agreement conforming with Section 20, or (b) Utility's receipt of notice from Seller informing Utility of Seller's intent not to proceed with the development of the Facility. ~~If after commencement of the construction, testing, and inspection of the above-ground portions of the Facility (exclusive of road building), and prior to the Commercial Operation Date, there is a complete cessation of the construction, testing, and inspection of the Facility for one hundred and eighty (180) consecutive days, but only if such relinquishment or cessation is not caused by or attributable to an Event of Default by Utility, a request by Utility, or an event of Force Majeure or (b) if after commencement of the construction, testing, and inspection of the above-ground portions of the Facility (exclusive of road building), and prior to the Commercial Operation Date, there is a complete cessation of the construction, testing, and inspection of the Facility for ninety (90) consecutive days, but only if such relinquishment or cessation is not caused by or attributable to an Event of Default by Utility, a request by Utility, or an event of Force Majeure~~.

"AC" means alternating current.

"Affiliate" means, with respect to any entity, each entity that directly or indirectly controls, is controlled by, or is under common control with, such designated entity, with "control" meaning the possession, directly or indirectly, of the power to direct management and policies, whether through the ownership of voting securities or by contract or otherwise. [Notwithstanding the foregoing, with respect to PacifiCorp, "Affiliate" only includes Berkshire Hathaway Energy Company and its direct, wholly-owned subsidiaries.]

"Agreement" is defined in the introductory paragraph above.

~~"Ancillary Services" has the meaning set forth in the Tariff. Ancillary Services shall include reactive power, but shall not include any Capacity Rights.~~

"As-built Supplement" is a supplement to Exhibit B and Exhibit C of this Agreement, as provided in Section 6.1, which provides the final "as-built" description of the Facility, including the Point of Delivery and, subject to the provisions of Section 6.1, identifies changes in equipment or Facility configuration, or other modifications to the information provided in Exhibit B and Exhibit C as of the Effective Date.

"Business Day" means any day on which banks in Portland, Oregon, are not authorized or required by Requirements of Law to be closed.

~~"Capacity Rights" means any current or future defined characteristic, certificate, tag, credit, ancillary service or attribute thereof, or accounting construct, including any of the same counted towards any current or future resource adequacy or reserve requirements, associated with the electric generation capability and capacity of the Facility or the Facility's capability and ability to produce energy and any of those services necessary to support the transmission of electric power from Seller to Utility and to maintain reliable operations of the System, including voltage control, operating reserve, spinning reserve and reactive power. Capacity Rights do not include any Ancillary Services, Environmental Attributes, Tax~~

(continued)

Commented [JU2]: In a further effort to compromise on this issue, the JUs propose that instead of defining abandonment as a construction cessation period, subpart (b) now define abandonment as Utility's receipt of notice from Seller informing Utility of Seller's intent to not proceed with development of the facility.This proposal should reasonably respond to the QFTGs' and Staff's concerns about the references to cessations of construction and limit the determination of abandonment to those actions that would definitively indicate an intention on the part of the QF to walk away from its obligations under the PPA.

Commented [QFs3]: "Abandonment" - The administrative rules do not define "abandonment" so we have proposed an edit using the word's normal meaning, i.e., a *permanent* setting aside, should apply. https://www.dictionary.com/browse/abandonment. For example, the utilities' proposed 90-day cessa ... [1]

Commented [JU4R3]: With respect to the specific definition proposed by the QFTGs, the JUs are willing to compromise by retaining the provision regarding construction cessation but expanding the abandonment period from 90 to 180 days.

Commented [QFs5]: "Ancillary Service" should be deleted. The utilities appear to have included this new defined term in the PPA along with "Capacity Rights" with the intent of requiring the QF to provide more than its entire net output, which is all QFs are cu ... [2]

Commented [JU6R5]: In the JUs' view, avoided cost pricing compensates a QF for providing ancillary services, reactive power, and capacity rights. These are attributes that would be provided by the utility-owned resource, which the QF is being compensated to help the utility avoid. However, in the interest of narr ... [3]

Commented [QFs7]: "Capacity Rights" should be deleted. The utilities appear to have included this new defined term in the PPA along with "Ancillary Services" with the intent of requiring the QF to provide more than its entire net output, which is ... [4]

Commented [JU8R7]: In the JUs' view, avoided cost pricing compensates a QF for providing ancillary services, reactive power, and capacity rights. These are attributes that would be provided by the utility-owned resource, which the QF is being compensated to help the utility avoid. However, in the interest of narr ... [5]

~~Credits or other tax incentives existing now or in the future associated with the construction, ownership or operation of the Facility.~~

"Commercial Operation" means that 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, all of which are Seller's responsibility to receive or obtain, and which occurs when Seller has achieved the Milestones set forth in Section 2.2 and all of the following events (a) have occurred, and (b) remain simultaneously true and accurate as of the date and moment on which Seller gives Utility notice that Commercial Operation has occurred:

(i) Utility has received a letter addressed to Utility from a Licensed Professional Engineer licensed in the state of Oregon certifying: (1) the Nameplate Capacity Rating of the Facility at the anticipated time of Commercial Operation, and (2) that the Facility is able to generate electric energy in amounts expected by and consistent with the terms and conditions of this Agreement;

(ii) Utility has received a letter addressed to Utility from a Licensed Professional Engineer certifying that, in conformance with the requirements of the Generation Interconnection Agreement: (1) all required Interconnection Facilities have been constructed, (2) all required interconnection tests have been completed, and (3) the Facility is physically interconnected with the System in conformance with the Generation Interconnection Agreement;

~~(iii) Utility has received a letter from a Licensed Professional Engineer licensed in the state of Oregon addressed to Utility certifying that Seller has obtained or entered into all Required Facility Documents;~~

(~~iv~~iii) Utility has received a certificate from an officer or authorized agent of Seller certifying that Seller has obtained or entered into all Required Facility Documents and stating that neither Seller nor the Facility are in violation of or subject to any liability under any Requirements of Law applicable to Seller's construction, repair, operation, and maintenance of the Facility and performance of its obligations under the Agreement;

~~(v) Seller has satisfied its obligation to pay for any network upgrades or other interconnection costs required under the Generation Interconnection Agreement (as terms are defined in the Generation Interconnection Agreement);~~

(iv) Utility has received a certificate from an officer or authorized agent of Seller certifying as to whether the Facility's Expected Net Output has been modified to the extent permitted under Section 6.1 and Section 6.8 and whether there have been changes to the definition of Expected Net Output (if applicable), Exhibit A (Expected Monthly Net Output) and Seller's 12 x 24 delivery schedule, which certificate shall also contain specific certifications as to the following items: (1) If the Facility has not been so modified, i.e., the amount of Expected Net Output has not changed, Seller shall certify either (a) that there are no changes to either Exhibit A (Expected Monthly Net Output) or Seller's 12 x 24 delivery schedule; or (b) that there have been changes to Exhibit A (Expected Monthly Net Output) or Seller's 12 x 24 delivery schedule, and, in such case, Seller shall attach revised versions of said document(s), certifying as to their accuracy and completeness and conveying Seller's agreement to be bound by such document(s) under this Agreement; or (2) If the Facility has been so modified, Seller shall certify as to the changes to Expected Net Output, Exhibit A (Expected Monthly Net Output) and Seller's 12 x 24 delivery schedule, and, in such case, Seller shall attach revised versions of said document(s), certifying

(continued)

Commented [QFs9]: "Commercial Operation" - Our edits to the first sentence mirror the language of OAR 860-029-0010(9).

Additionally -
(iv) Is far too broad and unnecessary given the other requirements, so it should be deleted. A Seller's facility could have arguable permitting issues it is working out, or a dispute over payment to a vendor, etc., which do not necessarily preclude the ability to operate the facility safely and reliably.

(v) The proposed requirement to pay network upgrade costs prior to COD is not possible in most cases because the final invoice under the GIA is not due from the utility until *after* the facility is placed in service. Additionally, a dispute over the proper amount of the invoices for those costs should not preclude COD under the PPA; as proposed here by the utilities in the PPA, the utility could charge whatever it wanted under the GIA and the QF would have to agree to pay whatever the utility charges, even far in ex ... [6]

Commented [JU10R9]: JUs do not object to this revision.

Commented [JU11]: Taking into consideration Staff's concerns, the JUs propose consolidating this subsection (iii) with subsection (iv) and requiring certification from an officer or authorized agent of Seller rather than a Licensed Professional Engineer, which is a reasonable and appropriate compromise. For context, PGE's currently approved PPA requires that a Licensed Professional Engineer certify that the QF has obtained all Required Facility Document ... [7]

Commented [JU12]: The JUs propose retaining this subsection, but adding limiting language to address Staff's and the QFTGs' concerns that this subsection is overly broad and could prevent a QF from beginning commercial operation if there is a pending claim unrelated to the development of the facility, such as claim before the Oregon Bureau of Labor & Industries (BOLI).

Commented [JU13]: Because the definition of "Commercial Operation" already requires the facility to be "interconnected, fully integrated, and synchronized with the System," the JUs do not oppose removing this subsection.

as to their accuracy and completeness and conveying Seller's agreement to be bound by such document(s) under this Agreement; provided that any such certified changes to Expected Net Output and Exhibit A (Expected Monthly Net Output) are consistent with the requirements of this Agreement, they shall be deemed to amend and replace the definition of Expected Net Output and Exhibit A (Expected Monthly Net Output), respectively, upon execution and delivery of the certification and countersignature by Utility;

(vi) Utility has received a copy of the executed Generation Interconnection Agreement and Transmission Agreements (as applicable);

(vii) In the case of an Off-System QF, Seller shall demonstrate that it has made arrangements sufficient to reserve Firm Delivery (as defined in Exhibit L) of Net Output up to the Maximum Delivery Rate to the Point of Delivery for the full term of the Agreement, which may be demonstrated by obtaining Firm Delivery or rights to obtain Firm Delivery (i.e., rollover rights) under the third-party Transmission Provider(s) tariff for the period covering the Term; and

(viii) Utility has received the Default Security, as applicable.

Seller must provide written notice to Utility stating when Seller believes that the Facility has achieved Commercial Operation and its Nameplate Capacity Rating accompanied by the documentation described above. Utility must respond to Seller's notice within ten (10) Business Days of receipt of a notice satisfying the requirements of the preceding sentence. If Utility does not respond to Seller's complying notice within such time period, the Commercial Operation Date will be the date of Utility's receipt of such complying notice from Seller. If Utility informs Seller within such ten (10) Business Day period that Utility believes the Facility has not achieved Commercial Operation, identifying the specific areas of deficiency, Seller must address the concerns stated in Utility's deficiency notice to the reasonable satisfaction of Utility; the Commercial Operation Date will then be the date that the matters identified in Utility's deficiency notice have been addressed to Utility's reasonable satisfaction.[3]

"Commercial Operation Date" means the date that Commercial Operation is achieved for the Facility but in no event earlier than ninety (90) days before the Scheduled Commercial Operation Date unless Utility, after undertaking reasonable efforts to obtain transmission service, is able to accept delivery from Seller earlier; provided that in no event will the Commercial Operation Date occur earlier than one hundred eighty (180) days before the Scheduled Commercial Operation Date.[4]

"Commission" means the Public Utility Commission of Oregon.

"Conditional DNR Notice" is defined in Section 4.2.

[3] **Note to Form** – This definition and references to "Commercial Operation" to be deleted in case of PPA with operational QF and replaced with definition of and references to "Initial Delivery". "Initial Delivery" means the later of (i) the date on which Seller's obligations under Section 2.2 are satisfied; (ii) the date on which Utility provides written notification to Seller that the Facility has been designated a Network Resource as provided under Section 4.2; and (iii) the Scheduled Initial Delivery Date.

[4] **Note to Form** – This definition and references to "Commercial Operation Date" to be deleted in case of PPA with operational QF and replaced with definition of and references to "Initial Delivery Date". "Initial Delivery Date" means the date on which Initial Delivery occurs.

(continued)

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

"Contract Price" means the applicable price, expressed in $/MWh, for Net Output ~~, Capacity Rights, Ancillary Service,~~ and Environmental Attributes, which shall be Standard Fixed Pricing or Renewable Fixed Pricing, as applicable during the Fixed Price Period, as stated in Exhibit J, and otherwise shall be Firm Electric Market Pricing.[5]

"Contract Year" means a twelve (12) month period commencing at 00:00 hours [Pacific Prevailing Time/Mountain Prevailing Time] on January 1 and ending on 24:00 hours [PPT/MPT] on December 31; provided, however, that the first Contract Year shall commence on the Effective Date and end on ~~the next succeeding~~ December 31 of the same calendar year, and the last Contract Year shall end on the Termination Date. For the purposes of this Agreement, "Full Contract Year" means a complete twelve (12) month period during the Term commencing at 00:00 hours [Pacific Prevailing Time/Mountain Prevailing Time] on January 1 and ending on 24:00 hours [PPT/MPT] on December 31.

"Credit Requirements" means (1) a senior, unsecured long term debt rating (or corporate rating if such debt rating is unavailable) of (a) 'BBB+' or greater from S&P, or (b) 'Baa1' or greater form Moody's; provided that if such ratings are split, the lower of the two ratings must be at least 'BBB+' or 'Baa1' from S&P or Moody's; or (2) if (1) (a) or (b) is not available, an equivalent rating as determined by Utility through a reasonable ~~n~~ internal process review and utilizing a credit scoring model of two full years of audited financial statements (including balance sheet, income statement, statement of cash flows, and accompanying footnotes) which information is evaluated considering (i) the type of generation resource, the size of the resource the Scheduled Commercial Operation Date and the term of the Agreement and (ii) at minimum, profitability, cash flow, liquidity and financial leverage metrics.

"Cure Period Deadline" means, in the case of failure to achieve Commercial Operation by the Scheduled Commercial Operation Date, the date that occurs one (1) year following the Scheduled Commercial Operation Date.[6]

"Default Security" is an amount equal to fifty dollars ($50) per kW of the final Nameplate Capacity Rating.

"Delay Damages" for any given day in a given month are equal to (a) the Expected Monthly Net Output for such month, expressed in MWhs per month, divided by the number of days in such month, multiplied by (b) Utility's Cost to Cover; provided that, ~~To the extent Utility reasonably incurs additional costs to~~

[5] **Note to Form** – The Contract Price in this form of agreement assumes that Seller elects Standard Fixed Pricing or Renewable Fixed Pricing for the Fixed Price Period, in each case, as determined at the time of contract execution. This form of Agreement will be revised for solar QFs with a Nameplate Capacity Rating of more than three (3) MW and less than ten (10) MW, which are not eligible for Standard Fixed Pricing or Renewable Fixed Pricing.

[6] ~~**Note to Form** – This definition to be deleted in case of PPA with operational QF.~~

(continued)

Commented [QFs14]: "Contract Price" - Per above comments, we recommend deleting the suggestion that the contract price pays the QF for these broadly defined capacity rights and ancillary services.

Commented [JU15R14]: Per comments above, JUs do not oppose the QFTGs' revisions for the purposes of this proceeding and will address this issue in docket UM 2000.

Commented [QFs16]: "Contract Year" - The utilities' proposal to start Contract Years on Jan. 1 results in the first contract year being shorter than a full year, which makes it very difficult to implement the requirements of the administrative rules for the MAG and MDG. It results in the QF having less than a full year for the first "Contract Year" of the MDG, and it complicates correctly implementing the one-year and three-year grace period (for existing and new QFs, respectively) before the MAG being applicable. The easiest fix is just use a Contract Year that starts o ... [8]

Commented [JU17R16]: The JUs object to the QFTGs' proposed changes and propose to retain the definition of a Contract Year as a calendar year ... [9]

Commented [JU18]: The JUs revised the definition to make clear that the first Contract Year comm ... [10]

Commented [JU19]: With respect to the QFTGs' concerns regarding the term "full Contract Year ... [11]

Commented [QFs20]: "Credit Requirements" - the word "reasonable" from the administrative rules ... [12]

Commented [JU21R20]: As indicated in the JUs' responses to questions from the September 12 workshop, absence of the word "reasonable" wa ... [13]

Commented [QFs22]: "Cure Period Deadline" - Footnote 9 - We object to limiting the cure period for an operational QF to just 30 days. This limitati ... [14]

Commented [JU23R22]: The JUs' original proposal is consistent with Commission-approved practice: compare Section 11 in each of PacifiCorp's ... [15]

Commented [QFs24]: "Delay Damages" - OAR 860-029-0120(7)(c) caps delay damages at the Contract Price, but the utilities' draft PPA adds ... [16]

Commented [JU25R24]: As reflected in the response to questions from the September 12 workshop, the JUs acknowledge after further re ... [17]

~~purchase replacement power, including, for example, transmission charges to deliver replacement energy to the Point of Delivery, and, to the extent Seller is required to convey Environmental Attributes to Utility under this Agreement during any portion of the delay period, and Utility reasonably incurs additional costs to acquire replacement Environmental Attributes, such sums, in each case as applicable, shall be added to the Delay Damages.~~ Delay Damages are to be aggregated and invoiced as a monthly sum and total Delay Damages for a given month or partial month may not exceed the aggregate amount Utility would have incurred to purchase Seller's Net Output and Environmental Attributes during that month or partial month.

"Effective Date" is defined in Section 2.1.

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

"Environmental Attributes" means any and all claims, credits, benefits, emissions reductions, offsets, and allowances associated with the avoidance of the emission of any gas, chemical, or other substance to the air, soil or water, including green tags and renewable energy certificates. Environmental Attributes include: (a) any avoided emissions of pollutants to the air, soil, or water such as sulfur oxides, nitrogen oxides, carbon monoxide, and other pollutants; and (b) any avoided emissions of carbon dioxide, methane, and other greenhouse gases that have been determined by any Governmental Authority to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere. Environmental Attributes do not include (i) Tax Credits or other tax incentives existing now or in the future associated with the construction, ownership or operation of the Facility, (ii) matters designated by Utility as sources of liability, or (iii) adverse wildlife or environmental impacts.

"Environmental Contamination" means the introduction or presence of Hazardous Materials at such levels, quantities or location, or of such form or character, as to constitute a violation of federal, state, or local laws or regulations, and present a material risk under federal, state, or local laws or regulations that the Premises will not be available or usable for the purposes contemplated by this Agreement.

"Event of Default" is defined in Section 11.1.

"Excused Delay" means the failure of Seller to achieve Commercial Operation on or before the Scheduled Commercial Operation Date, but only to the extent such failure is caused by an event of Force Majeure or an Event of Default by Utility, a default by Utility Transmission under the Generation Interconnection Agreement or related interconnection study agreement(s) for Seller's Facility, including a default resulting from any breach by Utility Transmission of any obligation to meet a material deadline included in such agreement(s), or Utility's Transmission's violation of applicable tariff provisions governing the interconnection of Seller's Facility; provided that the duration of any Excused Delay shall not extend to any period of delay that could have been prevented had Seller taken mitigating actions using commercially reasonable efforts.

"Expected Monthly Net Output" means the estimated monthly Net Output as determined in Exhibit A ~~as updated by Seller prior to the Commercial Operation Date~~.

"Expected Net Output" means [_____] MWh of Net Output in the first ~~full~~ Full Contract Year~~, as may be updated by Seller prior to the Commercial Operation Date,~~ reduced, as applicable, by an annual

(continued)

Commented [QFs26]: "Expected Monthly Net Output" - OAR 860-029-0046(2)(c)(F) allows Seller to update its expected net output up until COD, so the PPA should state so.

Commented [JU27R26]: As an initial matter, the JUs acknowledge that OAR 860-029-0046(2)(c)(F) provides that "estimates of the net amount of power to be delivered to the public utility's electric system and the 12 x 24 delivery schedule are subject to revision until" the COD. The JUs revised the definition of "Commercial Operation" to describe the process for updating the Expected Monthly Net Output in Exhibit A prior to COD. To avoid the potential for confusion, the JUs deleted the QFTGs' addition of "as updated by Seller prior to the Commercial Operation Date" to the definition of "Expected Monthly Net Output."

Commented [QFs28]: "Expected Net Output" - OAR 860-029-0046(2)(c)(F) allows Seller to update its expected net output up until COD, so the PPA should state so. Also, it's not clear why Seller must declare the number of hours of Planned Outages assumed and we recommend deleting this requirement. The Planned Outage assumption may not be uniform throughout the term, so identifying a single year's amount may be difficult.

Commented [JU29R28]: The JUs revised the definition of "Commercial Operation" to describe the process for updating the Expected Net Output amounts in Section 1.1 prior to COD. To avoid the potential for confusion, the JUs deleted the QFTGs' addition of "as may be updated by Seller prior to the Commercial Operation Date" to the definition of "Expected Monthly Net Output." The JUs do not object to the QFTGs' removal of the sentence regarding Planned Outages.

degradation factor of [__] per Contract Year, measured at the Point of ~~Delivery~~Interconnection. Seller estimates that the Net Output will be delivered during each Contract Year according to the Expected Monthly Net Output provided in Exhibit A, as reduced each Contract Year, as applicable, by the annual degradation factor. ~~Expected Net Output assumes a reduction of [_____] MWh of Net Output for Planned Outages.~~

"Facility" is defined in the Recitals and is more fully described in attached Exhibit B and includes all equipment, devices, associated appurtenances owned, controlled, operated, and managed by Seller in connection with, or to facilitate, the production, storage, generation, transmission, delivery, or furnishing of electric energy by Seller to Utility and required to interconnect with the System.

"FERC" means the Federal Energy Regulatory Commission.

"Firm Electric Market Pricing" means the hourly value calculated based on the average prices reported by the Intercontinental Exchange, Inc. ("ICE") Day-Ahead Mid-C On-Peak Index and the ICE Day-Ahead Mid-C Off-Peak Index (each an "ICE Index") for a given day, weighted by the count of hours for each ICE Index on such day, multiplied by the hourly CAISO day-ahead market locational marginal price for the ["Utility CAISO LMP"[7]] location and divided by the average of the same CAISO index over all hours in such day. If applicable, the resulting value will be reduced by the integration costs specified in the then-current Utility Oregon Schedule XX as applicable to the Facility. If any index is not available for a given period, Firm Electric Market Pricing will mean the average price derived from days in which all published data is available, for the same number of days immediately preceding and immediately succeeding the period in which an index was not available, regardless of which days of the week are used for this purpose. If Firm Electric Market Pricing or its replacement or any component of that index or its replacement ceases to be published or available, or useful for its intended purpose under this Agreement, during the Term, the Parties must agree upon a replacement index or component that, after any necessary adjustments, provides the most reasonable substitute quotation of the hourly price of electricity for the applicable periods.

"Fixed Price Period" means the portion of the Term commencing on the Fixed Price Period Start Date and ending on the Fixed Price Period End Date.[8]

"Fixed Price Period End Date" means (i) if Seller selects a Scheduled Commercial Operation Date that occurs no later than three (3) years from the Effective Date or a Scheduled Commercial Operation Date that occurs between three (3) and five (5) years from the Effective Date and aligns with ~~Interconnection Provider's~~ ~~Utility~~ ~~Transmission's~~ Utility Transmission's estimate in an interconnection study of the date of completion of the interconnection for the Facility (as of the Effective Date or otherwise as selected under Section 2.9), the last day of the fifteen (15)-year period following the Fixed Price Period Start Date; or (ii) if Seller selects a Scheduled Commercial Operation Date that occurs between three (3) and five (5) years from the Effective Date for any other reason, the last day of the eighteen (18)-year period following the Effective Date; provided that the Fixed Price Period End Date described in clause (ii) shall be extended on a day-for-day basis for each day that the Scheduled Commercial Operation Date is extended for Excused Delay under Section 2.8.

Commented [QFs30]: "Fixed Price Period" - We recommend that the allowance for use of an interconnection study with COD later than three years after the Effective Date of PPA should also be available for an Interconnection Provider other than Utility Transmission, such as BPA or an electric cooperative.

Commented [JU31R30]: OAR 860-029-0120(5)(b) clearly states that in order for the commencement of the fixed price period to be delayed beyond three years from the effective date, the interconnection study justifying such extension must be "by the purchasing utility," so the QFTGs' recommended edits to this definition are inconsistent with the rules. The JUs have therefore retained the reference to Utility Transmission in this definition.

[7] **Note to Form** – Each Utility to specify applicable LMP.

[8] **Note to Form** – The definition of Fixed Price Period assumes that Seller elects Standard Fixed Pricing or Renewable Fixed Pricing for the Fixed Price Period.

(continued)

"Fixed Price Period Start Date" means the earlier to occur of the Commercial Operation Date or the Scheduled Commercial Operation Date.

"Force Majeure" is defined in Section 14.1.

"Forced Outage" means (i) an outage that requires immediate removal of a unit from service, another outage state or a reserve shutdown state; (ii) an outage that does not require immediate removal of a unit from the in-service state but requires removal within six (6) hours; or (iii) an outage that can be postponed beyond six (6) hours but requires that a unit be removed from the in-service state before the end of the next weekend. Forced Outages include NERC Event Types U1, U2, or U3, as provided in attached Exhibit I. A Forced Outage specifically excludes any Maintenance Outage or Planned Outage.

"Generation Interconnection Agreement" means the generator interconnection agreement entered into separately between Seller and Interconnection Provider concerning the Interconnection Facilities.

"Governmental Authority" means any supranational, federal, state, or other political subdivision thereof, having jurisdiction over Seller, Utility, or this Agreement, including any municipality, township, or county, and any entity or body exercising executive, legislative, judicial, regulatory, or administrative functions of or pertaining to government, including any corporation or other entity owned or controlled by any of the foregoing.

"Hazardous Materials" means any waste or other substance that is listed, defined, designated, or classified as or determined to be hazardous under or pursuant to any environmental law or regulation.

"Indemnified Party" is defined in Section 6.2.3(b).

"Interconnection Facilities" means all the facilities installed, or to be installed under the Generation Interconnection Agreement, including electrical transmission lines, interconnection upgrades, network upgrades, transformers and associated equipment, substations, relay and switching equipment, and safety equipment.

"Interconnection Provider" means the interconnection provider specified in Exhibit C.

"KW" means kilowatt.

"Lender" means an entity lending money or extending credit (including any financing lease, monetization of tax benefits, transaction with a tax equity investor, back leverage financing, or credit derivative arrangement) to Seller or Seller's Affiliates (a) for the construction, term or permanent financing or refinancing of the Facility, (b) for working capital or other ordinary business requirements for the Facility (including for the maintenance, repair, replacement, or improvement of the Facility), (c) for any development financing, bridge financing, credit support, and related credit enhancement or interest rate, currency, weather, or Environmental Attributes in connection with the development, construction, or operation of the Facility, or (d) for the purchase of the Facility and related rights from Seller.

"Letter of Credit" means an irrevocable standby letter of credit in a form reasonably acceptable to Utility, naming Utility as the party entitled to demand payment and present draw requests that:

(1) is issued by a Qualified ~~Qualifying~~ Institution;

(continued)

Commented [QFs32]: "Forced Outage" - The administrative rules do not incorporate the NERC definitions by reference, but instead provide a specific definition that can be plugged into the PPA for Forced Outage, Maintenance Outage, and Planned Outage. OAR 860-029-0010(24), (28), (43). We do not agree it is reasonable or necessary to require small QFs to cross reference NERC definitions to understand how such definitions may change over time and affect their rights and obligations with respect to outages in the PPA. We thus recommend deleting reference to NERC definitions and use of Exhibit I.

Commented [JU33R32]: The JUs rejected the QFTGs' deletion of the sentence referencing NERC standards and Exhibit I. The administrative rules do not incorporate the NERC standards by reference because it would be an unlawful delegation of agency authority for the Commission to adopt rules that reference the most recent version of another entity's standards, as the QF Trade Associations—now QFTGs—pointed out in their September 16, 2022 comments in docket AR 631. However, the rules do not preclude the PPA from specifically referencing the applicable NERC standards, and doing so benefits both parties to the PPA by increasing clarity. In fact, the QF Trade Associations' (now QFTGs') prior comments noted with approval that "PacifiCorp's power purchase agreement form included the NERC definitions as an exhibit to avoid confusion in its cross reference to those NERC definitions." Thus, contrary to the QFTGs' assertion in recent comments, it is not burdensome for QFs to reference NERC definitions because they are included in Exhibit I for the QF's convenience and "to avoid confusion."

(2) by its terms, permits Utility to draw up to the face amount thereof for the purpose of paying any and all amounts owing by Seller under this Agreement;

(3) permits Utility to draw the entire amount available if such letter of credit is not renewed or replaced at least thirty (30) Business Days prior to its stated expiration date;

(4) permits Utility to draw the entire amount available if such letter of credit is not increased or replaced as and when provided in Section 8;

(5) is transferable by Utility to any party to which Utility may assign this Agreement; and

(6) remains in effect for at least ninety (90) days after the end of the Term.

"Liabilities" is defined in Section 12.1.1.

"Licensed Professional Engineer" means a person proposed by Seller and acceptable to Utility in its reasonable judgment who (a) to the extent mandated by Requirements of Law is licensed to practice engineering in the appropriate engineering discipline for the required certification being made, in the United States, and in all states for which the person is providing a certification, evaluation or opinion with respect to matters or Requirements of Law specific to such state, (b) has training and experience in the engineering disciplines relevant to the matters with respect to which such person is called upon to provide a certification, evaluation, or opinion, (c) is not an employee of Seller or an Affiliate, and (d) is not a representative of a consulting engineer, contractor, designer, or other individual involved in the development of the Facility, or a representative of a manufacturer or supplier of any equipment installed in the Facility.

"Maintenance Outage" means an outage that can be deferred beyond the next weekend but requires that the unit be removed from service before the next Planned Outage. A Maintenance Outage can occur any time during the year, has a flexible start date, may or may not have a predetermined duration and is usually shorter than a Planned Outage. ~~.~~ Maintenance Outages include NERC Event Type MO, as provided in attached Exhibit I ~~, and include any outage involving ten percent (10%) of the Facility's Net Output that is not a Forced Outage or a Planned Outage~~.

"Market Operator" means the California Independent System Operator ("CAISO") or any other entity performing the market operator function for any organized day-ahead or intra-hour market.

"Maximum Delivery Rate" means the maximum hourly rate of delivery of Net Output in MWh from the Facility to the Point of ~~Delivery~~Interconnection, calculated as the lower of the Net Output delivered in an hour accruing at an average rate equivalent to the actual Nameplate Capacity Rating, as stated in Exhibit A, or the maximum rate of delivery that is permissible under the Generation Interconnection Agreement.

"Moody's" means Moody's Investor Services, Inc.

"Mountain Prevailing Time" or "MPT" means Mountain Standard Time or Mountain Daylight Time, as applicable in Oregon on the day in question.

"MW" means megawatt.

"MWh" means megawatt-hour.

(continued)

Commented [QFs34]: "Maintenance Outage" - see comment on "Forced Outage" for explanation of edit. Also, the utilities' proposed addition that a Maintenance Outage is any outage involving 10% of the Facility's Net Output is beyond the requirements of the administrative rules, and we recommend deleting it.

Commented [JU35R34]: The JUs rejected the QFTGs' deletion of the reference to NERC and Exhibit I. See comment on "Forced Outage" for explanation. With respect to the 10% threshold, the JUs included this language to provide a bright line definition and avoid disputes regarding what constitutes a "Maintenance Outage." However, the JUs do not object to removing this language if the QFTGs prefer.

Commented [QFs36]: "Maximum Delivery Rate" - It appears that Maximum Delivery Rate is used elsewhere in the agreement, including Exhibit L Example 1, to mean the maximum amount that is delivered to the POI, not the POD in the case of an off-system QF. So we recommend defining that way.

Commented [JU37R36]: The JUs agree with this change.

"Nameplate Capacity Rating" means the maximum installed instantaneous power production capacity of the completed Facility, expressed in MW (AC), 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, and energy storage devices where relevant. The Nameplate Capacity Rating of the Facility is [__] MW, as reflected in the Seller's FERC Form 556, if applicable.

"NERC" means the North American Electric Reliability Corporation.

"Net Output" means all energy and capacity produced by the Facility, less station service, ~~losses, and other adjustments, flowing through the Point of Interconnection, and less~~ transformation and transmission losses and other adjustments ~~(e.g., Seller's load other than station use)~~, if any, measured at the Point of Interconnection.

"Network Resource" is defined in the Tariff.

"Non-Fixed Price Period" means the period of the Term commencing on the first (1st) day following the Fixed Price Period End Date and ending on the last day of the Term.[9]

"Off-Peak Hours" has the meaning as provided in Utility's Schedule XX, as attached in Exhibit J.

"Off-System QF" means a QF that is not directly interconnected to Utility's transmission or distribution system and schedules delivery of Net Output to a Point of Delivery on Utility's transmission system.

"On-Peak Hours" has the meaning as provided in Utility's Schedule XX, as attached in Exhibit J.

"On-System QF" means a QF that is directly interconnected to Utility's transmission or distribution system.

"Output" means all energy produced by the Facility.

"Pacific Prevailing Time" or "PPT" means Pacific Standard Time or Pacific Daylight Time, as applicable in Oregon on the day in question.

"Party" and "Parties" are defined in the Recitals.

"Performance Guarantee" has the meaning set forth in Section 6.15.

"Permits" means 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 Premises.

"Planned Outage" means an outage that is scheduled well in advance and is of a predominate duration, and includes a NERC Event Type PO, as provided in attached Exhibit I, and specifically excludes any Maintenance Outage or Forced Outage.

[9] **Note to Form** – The definition of Non-Fixed Price Period assumes that Seller elects Standard Fixed Pricing or Renewable Fixed Pricing for the Fixed Price Period.

(continued)

Commented [QFs38]: "Nameplate Rating" - We recommend deleting reference to the Form 556 as it could cause confusion. Not all small QFs are required to file a Form 556.

Commented [JU39R38]: The JUs rejected the QFTGs' deletion of the last sentence because the QFTGs removed the space for designating the nameplate capacity rating without any explanation. Also, the reference to the Form 556 should be retained but the JUs added "if applicable" to account for the fact that not all QFs must file a Form 556.

Commented [QFs40]: "Net Output" - OAR 860-029-0010(34) defines "net output" as the amount of power flowing through the Point of Interconnection, not the Point of Delivery. The edits we propose here match the definition in the rules. The distinction is important with off-system QFs, who should be compensated at avoided cost rates for all net output measured at the POI, as netted to remove excess imbalance energy over the month.

Commented [JU41R40]: JUs have revised the definition of "Net Output" to address Staff's and the QFTGs' concerns. JUs propose wording that is slightly different from, but not inconsistent with, the definition in the rules for clarity because "flowing through" the POI is vague and could be subject to different interpretations.

Commented [JU42]: The JUS do not oppose removing the reference to "Seller's load other than station use." However, the JUs still propose using "measured at" rather than "flowing though" in the definition for clarity because "flowing through" the Point of Interconnection could be subject to different interpretations. Furthermore, the JUs continue to support use of the phrase "transformation and transmission losses" to describe the losses that are subtracted from Net Output. The term losses in and of itself is inherently vague, and as far as the JUs are aware, transformation and transmission losses are precisely the types of losses that the rule intend... [18]

Commented [QFs43]: "Planned Outage" - see comment on "Forced Outage" for explanation of edit.

Commented [JU44R43]: The JUs rejected the QFTGs' deletion of the reference to NERC and Exhibit I. See comment on "Forced Outage" for explanation.

"Point of Delivery" means (i) for Off-System QFs, the point on the System where Seller will deliver Net Output to the Utility as described in Exhibit C; and (ii) for On-System QFs, the Point of Delivery is the point of interconnection between the Facility and the System, as specified in the Generation Interconnection Agreement and as further described in Exhibit C.

"Premises" means the real property on which the Facility is or will be located, as more fully described on Exhibit B.

"Project Development Security" is an amount equal to one hundred-fifty dollars ($150) per kW of the Nameplate Capacity Rating.[10]

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

"PURPA" means the Public Utility Regulatory Policies Act of 1978.

"QF" means "Qualifying Facility," as that term is defined in the FERC regulations (codified at 18 CFR Part 292) in effect on the Effective Date.

"Qualified ~~Qualifying~~ Institution" means a United States commercial bank or trust company organized under the laws of the United States of America or a political subdivision thereof having assets of at least $10,000,000,000 (net of reserves) and a credit rating on its long-term senior unsecured debt of at least 'A' from S&P and 'A2' from Moody's.

"Renewable Fixed Pricing" means the applicable renewable fixed avoided cost prices as published in Utility's Oregon Schedule XX.

"Renewable Resource Deficiency Period" means the period commencing on [____].

"Renewable Resource Sufficiency Period" means the period from the Effective Date until the Renewable Resource Deficiency Period.

"Replacement Power Costs" means for each day for which the Utility's Cost to Cover is calculated, stated as an amount per MWh, the Firm Electric Market Pricing~~.~~; plus, ~~To T~~to the extent Utility reasonably incurs ~~additional costs to purchase replacement power, including, for example,~~ transmission charges to deliver replacement energy to the Point of Delivery, and, to the extent Seller is required to convey Environmental Attributes to Utility under this Agreement during ~~any portion of the delay period~~ the day for which the Utility's Cost to Cover is calculated, and Utility reasonably incurs additional costs for ~~transmission charges or to acquire~~ replacement Environmental Attributes, such additional sums so incurred~~, in each case as applicable, shall be added to the Delay Damages Replacement Power Costs.~~.

"Required Facility Documents" means ~~those~~ Permits and other authorizations, rights, and agreements necessary for construction, ownership, operation, and maintenance of the Facility, and to deliver the Net

[10] **Note to Form** – This definition to be deleted in case of PPA with operational QF.

(continued)

Commented [JU45]: JUs replaced references to "Qualifying Institution" with "Qualified Institution" throughout the PPA after noticing that the term was referenced inconsistently.

Commented [QFs46]: "Replacement Power Costs" - The Replacement Power Costs owed for Seller breach of delayed COD, MAG, MDG, and other breaches is supposed to be capped at the contract price in the administrative rules. As we have noted throughout the PPA, the utilities' proposal has failed to properly implement that contract price cap. So we have used "Utility's Cost to Cover" which includes such contract price cap in those sections on damages in the PPA, and added these additional costs for Environmental Attributes and transmission into the term "Replacement Power Costs" which is used in Utility's Cost to Cover, subject to the contract price cap. We note that the utilities have proposed a contract price cap on their own damages owed to Seller for failure to purchase Seller's output under Section 11.2.2 and the definition of "Seller's Cost to Cover", even though Seller would normally experience additional damages in the form of lost REC sales, lost tax credits, additional transmission costs to resell power elsewhere, etc. So our edit is also consistent with the utilities' own proposed treatment of the Seller.

Commented [JU47R46]: JUs do not oppose the QFTGs' revisions to the definition of "Replacement Power Costs," but provide some minor clarifying edits.

Commented [QFs48]: "Required Facility Documents" - The utilities' proposed definition is too open ended and could lead to disputes over how minor an agreement or authorization falls within the definition. We recommend the "Required Facility Documents" be limited to the identified items in the Exhibit to remove ambiguity.

Commented [JU49R48]: JUs do not agree with the QFTGs' proposed changes to this definition. This definition is reasonable as it is substantively the same as the definitions of "Required Facility Documents" in both PacifiCorp's and PGE's existing contracts. Note that Section 3.2.3 requires that all Required Facility Documents as of the Effective Date be listed in Exhibit D and requires the Seller to notify the Utility of additional Required Facility Documents during the Term. Therefore, this provision is not overly broad and is unlikely to cause disputes, and the QFTG ... [19]

Output to Utility in accordance with this Agreement and Requirements of Law, including those ~~necessary for construction, ownership, operation, and maintenance of the Facility, and to deliver the Net Output to Utility in accordance with this Agreement and Requirements of Law, including those~~ listed in Exhibit D.

"Requirements of Law" means any applicable federal, state, and local law, statute, regulation, rule, action, order, code or ordinance enacted, adopted, issued or promulgated by any Governmental Authority (including those pertaining to electrical, building, zoning, environmental and wildlife protection, and occupational safety and health).

"RTO" means any entity (including an independent system operator) that becomes responsible as system operator for, or directs the operation of, the System.

"S&P" means Standard & Poor's Rating Group (a division of S&P Global, Inc.).

"Schedule XX" means Utility's Oregon Schedule No. XX as attached in Exhibit J, and as approved by the Commission on the Effective Date.

~~"Schedule Recovery Plan" means a written recovery plan, approved by Utility, an initial draft of which Seller shall submit to Utility (i) within five (5) Business Days after Seller's receipt of a written request from Utility in the event of Seller's Abandonment of the Facility under clause (b) of the definition thereof or (ii) by the Scheduled Commercial Operation Date in the event of Seller's failure to achieve Commercial Operation by the Scheduled Commercial Operation Date. The Schedule Recovery Plan shall include a detailed plan to complete all necessary work to achieve Commercial Operation by the Scheduled Commercial Operation Date, in the case of Abandonment, or, in the case of failure to achieve Commercial Operation by the Scheduled Commercial Operation Date, by the Cure Period Deadline. Upon its receipt of a draft recovery plan, Utility shall promptly approve or submit reasonable revisions to the draft. Seller promptly shall incorporate any such revisions into the draft recovery plan and resubmit it to Utility for approval. Upon approval of the revised recovery plan by Utility, Seller shall diligently prosecute the work in accordance with the Schedule Recovery Plan. Seller shall be responsible for any costs or expenses incurred by Seller as a result of the formulation and implementation of the Schedule Recovery Plan. Approval by Utility of such plan shall not be deemed in any way to have relieved Seller of its obligations under this Agreement relating to the failure to timely achieve Commercial Operation by the Scheduled Commercial Operation Date or be a basis for any increase in the Contract Price or other claim against Utility.~~

"Scheduled Commercial Operation Date" means [_____], subject to extension for Excused Delay as provided in Section 2.8, in the event Seller exercises its option under Section 2.9 and as provided in Section 4.2. The Scheduled Commercial Operation Date must be a date that occurs ninety (90) days or more after the Effective Date but no later than the last day of the five-year period following the Effective Date (except to the extent extended for Excused Delay or under Section 4.2).[11]

"Seller" is defined in the Recitals.

Commented [QFs50]: "Schedule Recovery Plan" - The proposed Schedule Recovery Plan, approved by the utility, as used in proposed Section 2.4 and 11.1.2(b) of the utilities' proposed PPA, is an unreasonable new condition on exercise of the QF's one-year cure rights for a delay default, as provided in OAR 860-029-0123(4)(a). We recommend deleting this new concept throughout the PPA.

Commented [JU51R50]: While the JUs do not believe that informational provisions, such as a Schedule Recovery Plan, are inconsistent with the rules, in order to address concerns that the Schedule Recovery Plan would place inappropriate conditions on the Seller's cure period for failure to achieve Scheduled COD, in the spirit of compromise, the JUs do not object to removing the concept of a Schedule Recovery Plan from the contract so long as reporting requirements to the Utility of Seller's progress in developing the facility are maintained as proposed. Regular reporting requirements ensure that the Utility is informed as to whether generation from the facility should be relied upon and included in the Utility's system planning.

[11] **Note to Form** – This definition and references to "Scheduled Commercial Operation Date" to be deleted in case of PPA with operational QF and replaced with definition of and references to "Scheduled Initial Delivery Date." "Scheduled Initial Delivery Date" means [____].

(continued)

"Seller Indemnitees" is defined in Section 12.1.2.

"Seller'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 Seller from the sale to a third party of Net Output not purchased by Utility as required under this Agreement.

"Standard Fixed Pricing" means the standard fixed avoided cost prices as published in Utility's Oregon Schedule XX.

"System" means the electric transmission substation and transmission or distribution facilities owned, operated, or maintained by the Transmission Provider, the Interconnection Provider, and/or Utility Transmission, as the context requires, and includes the circuit reinforcements, extensions, and associated terminal facility reinforcements or additions required to interconnect the Facility, all as provided in the Generation Interconnection Agreement.

"Tariff" means Utility's Open Access Transmission Tariff on file with FERC, as such tariff is revised from time to time.

"Tax Credits" means any state, local, or federal production and investment tax credits, tax deductions, or other tax benefits specific to the production of renewable energy or investments in renewable energy facilities.

"Term" is defined in Section 2.1.

"Termination Damages" is defined in Section 11.5.

"Transmission Agreements" means any transmission service agreement required to deliver the Net Output of the Facility to the Point of Delivery. Such transmission service agreements must have a start date that is on or before the Commercial Operation Date of the Facility and continue through, or have rollover rights for, the entire Term.

"Transmission Provider" means Utility Transmission or, as the context requires, a third-party transmission provider (i.e., in the case of an Off-System QF), including the business unit responsible for the safe and reliable operation of the Transmission Provider's balancing authority area(s).

"Utility" is defined in the Recitals, and explicitly excludes Utility Transmission.

"Utility Indemnitees" is defined in Section 12.1.1.

"Utility Representatives" is defined in Section 6.14.

"Utility Transmission" means [UTILITY NAME], a/an [TYPE OF ORGANIZATIONAL ENTITY AND STATE OF ORGANIZATION], acting in its interconnection or transmission function capacity.

"Utility's Cost to Cover" means for any day for which Utility's Cost to Cover is calculated, ~~, or for the On-Peak Hours in such day (the "On-Peak Utility's Cost to Cover") or the Off-Peak Hours in such day (the "Off-Peak Utility's Cost to Cover"), stated as an amount per MWh, the lower of (i)~~ the positive difference between the Replacement Power Costs less the Contract Price in effect, stated as an amount per MWh~~, and (ii) the Contract Price in effect~~.

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Commented [QFs52]: "Utility" - We oppose treating the Utility as a separate entity from its own transmission department and have proposed an edit to remove any such suggestion. Each of the three Oregon public utilities are a single, unitary corporate entity including both merchant and transmission functions at this time.

Commented [JU53R52]: While the JUs do not agree to remove this concept from the contract entirely, the JUs have reviewed and consolidated provisions addressing this topic in order to respond to the concerns of Staff and the QF Trade Groups. The JUs included this clarification and related provisions in the PPA to reflect the fact that utilities' transmission and merchant/purchasing groups function independently under long-standing federal regulation. It is not appropriate for interconnection issues (handled by the transmission function in a separate contract) to be raised in connection with the PPA. Any generator interconnection issues QFs have must be taken up with the transmission function under the GIA. In sum, these provisions are needed to ensure that it is clear that the GIA and PPA are separate agreements with separate rights, obligations, and remedies. Disputes under one should not have bearing on the other. These provisions simply clarify the legal relationship between the parties with respect to the agreements and between the agreements themselves.

Transmission service arrangements to deliver the QF power on the utility's transmission system, on the other hand, are addressed in the PPA directly be ... [20]

Commented [QFs54]: "Utility's Cost to Cover" - The MAG and MDG exhibits use the terms "On-Peak Utility's Cost to Cover" and "Off-Peak Utility's Cost to Cover", so our edit clarifies that the calculation is done the same way as for daily Utility Cost to cover, which we assume is the utilities' intent.

Commented [JU55R54]: The JUs rejected the QFTGs' additions because the Joint Utilities have made efforts to streamline the damages calculations in Exhibit F, and as a result, the terms referenced by the QFTGs no longer apply. Further, the JUs have removed the "lower of" language because, as discussed in more detail above regarding "Delay Damages," the caps are now implemented separately for each specific type of damages.

"WECC" means the Western Electricity Coordinating Council.

"WREGIS" means the Western Renewable Energy Generation Information System or successor organization in case WREGIS is ever replaced.

"WREGIS Certificate" means "Certificate" as defined by WREGIS in the WREGIS Operating Rules dated [_____].

"WREGIS Operating Rules" means the operating rules and requirements adopted by WREGIS, dated [_____].

1.2 Rules of Interpretation.

1.2.1 General. Unless otherwise required by the context in which any term appears, (a) the singular includes the plural and vice versa; (b) references to "Articles," "Sections," "Schedules," "Appendices" or "Exhibits" are to articles, sections, schedules, appendices or exhibits of this Agreement; (c) all references to a particular entity or an electricity market price index include a reference to such entity's or index's successors; (d) "herein," "hereof" and "hereunder" refer to this Agreement as a whole; (e) all accounting terms not specifically defined in this Agreement must be construed in accordance with generally accepted accounting principles, consistently applied; (f) the masculine includes the feminine and neuter and vice versa; (g) "including" means "including, without limitation" or "including, but not limited to"; (h) all references to a particular law or statute mean that law or statute as amended from time to time; (i) all references to energy or capacity are to be interpreted as utilizing alternating current, unless expressly stated otherwise; and (j) the word "or" is not necessarily exclusive. Reference to "days" means calendar days, unless expressly stated otherwise in this Agreement.

~~1.2.2 Terms Not to be Construed For or Against Either Party. Each term in this Agreement must be construed according to its fair meaning and not strictly for or against either Party.~~

1.2.~~3~~2 Headings. The headings used for the sections and articles of this Agreement are for convenience and reference purposes only and in no way affect the meaning or interpretation of the provisions of this Agreement.

~~1.2.4 Interpretation with FERC Orders. Each Party conducts its operations in a manner intended to comply with FERC Order No. 717, Standards of Conduct for Transmission Providers, and its companion orders, requiring the separation of its transmission and merchant functions. Moreover, the Parties acknowledge that Utility Transmission offers transmission service on its System in a manner intended to comply with FERC policies and requirements relating to the provision of open-access transmission service.~~

~~(a) The Parties acknowledge and agree that the Generation Interconnection Agreement is a separate and free-standing contract and that the terms of this Agreement are not binding upon the Interconnection Provider.~~

~~(b) Notwithstanding any other provision in this Agreement, except as expressly provided herein, nothing in the Generation Interconnection Agreement, nor any other agreement between Seller on the one hand and Transmission Provider or Interconnection Provider on the other hand, nor any alleged event of default under the Generation Interconnection Agreement, will alter or modify the Parties' rights, duties, and obligations in this Agreement. This Agreement will not be~~

(continued)

Commented [QFs56]: Section 1.2.2 - The form contract has been drafted by the utilities, so we do not agree it should contain a provision disavowing the construed against the drafter rule, and this provision should thus be deleted. If the utilities believe someone else drafted some provision that becomes subject to a dispute, they would remain free to so argue and prove that, but even if all of our edits were accepted the vast majority of this PPA, as well as its overall structure and form, are a product of the utilities' drafting. The QF Trade Groups volunteer and offer to draft the form contract, and if so would be willing to include a provision that the contract should not be construed against the ~~d~~ the utilities.

Commented [JU57R56]: The JUs do not agree with the QFTGs' arguments given the significant extent to which the JUs are negotiating with stakeholders in this docket but are willing to remove this term from the PPA to narrow the disputed issues. Parties may make appropriate arguments regarding PPA interpretation in any future dispute.

Commented [QFs58]: Section 1.2.4 - This section, along with several others throughout the agreement, attempt to insulate the purchasing utility against any accountability or liability for financial harm to the QF caused by the utility's interconnection and/or transmission function employees. This is very problematic and would present unreasonable and artificial barriers to recovery of reasonable damages in the case of a utility breach or violation of law, and such limitation on potential damages will also limit the utility's incentive not commit such breaches or violations of law. For example, because the interconnection agreement will typically purport to waive consequential damages, financial harm under the PPA (e.g., lost revenue) caused by the utility's interconnection/transmission personnel may not even be available under the GIA, or at a minimum will face affirmative defense of waiver of damages in the GIA. We thus strongly recommend deletion of these provisions.

Commented [JU59R58]: For the reasons set forth above regarding the definition of "Utility," the JUs do not oppose deleting this section as long as revised Section 4.6 is retained.

~~construed to create any rights between Seller and the Interconnection Provider or between Seller and the Transmission Provider.~~

~~Seller acknowledges that, for purposes of this Agreement, consistent with FERC Order No. 717, Standards of Conduct for Transmission Providers, and its companion orders, the Interconnection Provider and Transmission Provider are deemed separate entities and separate contracting parties from Utility. Seller acknowledges that Utility, acting in its merchant capacity function or otherwise as purchaser in this Agreement, has no responsibility for or control over Interconnection Provider or Transmission Provider.~~

1.3 Parties' Good Faith. The Parties shall act reasonably and in accordance with the common law principles of good faith and fair dealing in the performance of this Agreement~~. Unless expressly provided otherwise in this Agreement, (i) where this Agreement requires the consent, approval, or similar action by a Party, such consent or approval shall not be unreasonably withheld, conditioned or delayed, and (ii) wherever this Agreement gives a Party a right to determine, require, specify or take similar action with respect to a matter, such determination, requirement, specification or similar action shall be reasonable~~.

SECTION 2
TERM; MILESTONES

2.1 Term. This Agreement is effective when executed and delivered by both Parties (the "Effective Date") and, unless earlier terminated as provided in this Agreement, shall remain in effect until the last day of the twenty (20)-year period following the first to occur of the Commercial Operation Date or the Scheduled Commercial Operation Date, as may be extended for Excused Delay as provided in Section 2.8 (the "Term").[12]

2.2 Milestones.[13] Time is of the essence in the performance of this Agreement, and Seller's completion of the Facility and delivery of Net Output by the Scheduled Commercial Operation Date is critically important. Therefore, Seller must achieve the milestones provided in (a) through (~~e~~d) below at the times so indicated.

~~(a) Seller must provide a fully executed and effective Generation Interconnection Agreement and~~

[12] **Note to Form** – This Section assumes Seller elects a twenty (20)-year term. If Seller chooses a shorter Term, this provision would require revision.

[13] **Note to Form** – This Section will be adjusted in case of PPA with operational QF, and the milestones in (a) through (~~e~~d) are to be replaced with the following:

(a) Before the Initial Delivery Date, as may be extended for Excused Delay as provided in Section 2.8~~By the Effective Date~~, Seller shall provide Utility with (i) a copy of an executed Generation Interconnection Agreement, or wheeling agreement, as applicable, which shall be consistent with all material terms and requirements of this Agreement, (ii) the Required Facility Documents, and (iii) an executed copy of Exhibit G – Seller's Authorization to Release Generation Data to Utility.

(b) ~~By the date that occurs thirty (30) days after the Effective Date~~On or before the Initial Delivery Date in this Agreement, if and to the extent required by this Agreement, Seller shall provide Default Security if required under this Agreement.

(continued)

Commented [QFs60]: QFs' Proposed Section 1.3 - We propose inclusion of the good faith and fair dealing provision drawn from a Tri-State Power Purchase Agreement previously cited by the QF Trade Groups.

Commented [JU61R60]: As an initial matter, the JUs agree that parties should act in a manner consistent with the common law duty of good faith and fair dealing in the performance of this Agreement, and do not oppose this part of the QFTGs' proposal for this reason. However, inserting a general reasonableness standard creates unnecessary ambiguity and will undermine explicit deadlines and party rights and obligations contemplated by the rules. In fact, the Commission explicitly rejected a rule imposing a blanket reasonableness standard throughout the entire contract at the May 25, 2022 Special Public Meeting because of the Commission's inclination to add more clarity, not less, and to avoid inviting further litigation "to the extreme." To be clear, the JUs opposition to the overly broad reasonableness standard does not mean that the JUs believe that they have a "license to behave unreasonable in general;" rather, the JUs clarify that they will adhere to the common law principles of good faith and fair dealing in the performance of any and all agreements. In drafting the rules, the Commission was extremely careful in its placement of a reasonableness standard. For these reasons, the JUs are willing to accept the new section only with the JUs' proposed revisions.

Commented [JU62]: The JUs do not object to the QFTGs' addition referencing extension of the Scheduled COD due to Excused Delay, while noting that it is not contractually necessary given that, by definition, Scheduled COD is already extended due to Excused Delay

Commented [QFs63]: Section 2.2 & footnote 13 - The QF Trade Groups agree that a QF should generally have an effective GIA and Transmission Agreement to deliver their net output. However, the utility should be required to pay for all net output in the circumstance in which the utility is at fault for not providing an effective GIA.

Subpart (a) - For new QFs, the proposal to require an executed and effective GIA and Transmission ... [21]

Commented [JU64]: JUs do not object to the QFTGs' revisions to footnote 13.

~~Transmission Agreement, if applicable, to Utility before the Scheduled Commercial Operation Date.~~

~~(b)~~(a) If and to the extent required by this Agreement, on or before the one hundred and twentieth (120th) day following the Effective Date, Seller must post the Project Development Security.

(b) On or before the Commercial Operation Date, Seller shall supply for inclusion in Exhibit E evidence of all leases and other real property rights required for operation of the Facility or the performance of any obligations of Seller in this Agreement.

~~(c) If and to the extent required by this Agreement, on or before the Commercial Operation Date, Seller must post the Default Security.~~

~~(d)~~(c) Seller must provide Utility with documentation showing that Seller has obtained retail electric service for the Facility before the Commercial Operation Date.

~~(e)~~(d) Seller must cause the Facility to achieve Commercial Operation on or before the Scheduled Commercial Operation Date.

Commented [JU65]: JUs do not object to the QFTGs' removal of this milestone.

Commented [JU66]: JUs moved the requirement to provide evidence of all leases and other real property rights by COD from Section 3.2.5 to Section 2.2 for clarity and organization.

Commented [JU67]: JUs removed subsection (c) regarding posting of Default Security because it was duplicative of other provisions in the contract.

(c) In the case of an Off-System QF, on or before the Initial Delivery Date in this Agreement, Seller shall demonstrate that it has made arrangements sufficient to reserve Firm Delivery (as defined in Exhibit L) of Net Output up to the Maximum Delivery Rate to the Point of Delivery for the full term of the Agreement, which may be demonstrated by obtaining Firm Delivery or rights to obtain Firm Delivery (i.e. rollover rights) under the third-party Transmission Provider(s) tariff for the period covering the Term.

(d) Seller must cause Initial Delivery to occur on or before the Scheduled Initial Delivery Date.

(continued)

2.3 Obligation to Report on Progress.[14] Beginning on the Effective Date, Seller will provide quarterly updates in writing to Utility concerning (a) the progress of Seller regarding the acquisition, design, financing, engineering, construction, and installation of the Facility, (b) the contractors' performance of tests required to achieve Commercial Operation, and (c) an estimate of the percentage completion of the Facility. Seller's obligation to report on progress ends upon the Commercial Operation Date. Notwithstanding the foregoing, nothing in this Agreement will be construed to require Utility to monitor Seller's development of the Facility or to review, comment on, or approve any contract between Seller and a third party.

~~2.3 Obligation to Report on Certain Project Milestones.[15] Within thirty (30) days of completion of each project milestone listed below, but not later than the date specified for achievement of each such milestone, Seller shall notify Utility in writing of the achievement of the milestone, attaching evidence demonstrating such achievement. If any milestone is not achieved on or before the dates specified below, then Seller shall: (a) inform Utility of a revised projected date for the achievement of such milestone, and any impact on the timing of the Commercial Operation Date (and on any other project milestone); and (b) provide Utility with a written report containing Seller's analysis of the reasons behind the failure to meet the original project milestone deadline and whether remedial actions are necessary or appropriate, and describing any remedial actions that Seller intends to undertake to ensure the timely achievement of the Commercial Operation Date by the Scheduled Commercial Operation Date. These milestones include:~~

~~(a) If Seller has not received an interconnection study as of the Effective Date, receipt of an interconnection study by [_____].~~

~~(b) If Seller does not have a signed Generation Interconnection Agreement as of the Effective Date, receipt of a Generation Interconnection Agreement by [_____].~~

~~(c) If Seller has not issued a notice to proceed with construction of the Facility as of the Effective Date, issuance of a notice to proceed with construction (or its equivalent) of the Facility by [_____].~~

2.4 Delay Damages~~; Schedule Recovery Plan~~.

(a) If Commercial Operation is not achieved on or before the Scheduled Commercial Operation Date, as may be adjusted for Excused Delay, as applicable~~and such failure is not excused under this Agreement or appliable law~~, Seller must ~~(i)~~ pay to Utility Delay Damages from and after the Scheduled Commercial Operation Date up to, but not including, the earlier to occur of the date that the Facility achieves Commercial Operation or the date of termination as provided in Sections 11.1.2(b) and 11.3, if applicable~~, and (ii) deliver a Schedule Recovery Plan to Utility no later than the Scheduled Commercial Operation Date~~.[16]

[14] **Note to Form** – To be deleted in case of PPA with operational QF.

[15] ~~**Note to Form** – To be deleted in case of PPA with operational QF.~~

[16] **Note to Form** – For PPAs with operational QFs, Section 2.4(a) to be deleted and replaced with the following provision: "If Initial Delivery is not achieved on or before the Scheduled Initial Delivery Date,

(continued)

Commented [JU68]: JUs do not object to the QFTGs' proposal to remove the previous Sections 2.3, 2.7, and 6.12.2; provided, however, that the JUs propose a new Section 2.3 that requires that Seller provide the Utility updates concerning the facility's progress in coming online by the Scheduled COD in writing on a quarterly basis to help inform the utility's system planning and to ensure good communication between the parties during the development period. The JUs must have updated information about whether QFs will meet their Scheduled COD for inclusion in the utility's power cost filings and in utility plan ... [22]

Commented [QFs69]: Section 2.3 - Similar to the proposed "Schedule Recovery Plan", the utilities proposal to report on pre-COD milestones and to develop a cure to any such milestones not met creates a new risk of pre-COD default and termination that undermines the QF's right to a one-year cure period of a delay default provided in the 860-029-0123(4)(a). As the utilities agreed at the workshop, a QF that misses a milestone and failure to provide suitab ... [23]

Commented [JU70R69]: As an initial matter, the new rules were never intended to be so encompassing that they encapsulated an entire contract and reporting requirements on the progress of the facility are reasonable and appropriate. However, in order to narrow the issues in dispute, the JUs have proposed a new Section 2.3 above that addresses reporting requirements without requiring the QF to meet milestones by date certain.

Commented [QFs71]: Section 2.4 - "Schedule Recovery Plan" - See comments on definition of "Schedule Recovery Plan" for explanation of basis for proposed edits.

Additionally, the requirement to pay delay damages during delay and potential termination after a one-year delay in achieving COD may be excused under this Agreement for a variety of reasons, including E ... [24]

Commented [JU72R71]: The JUs do not object to the QFTGs' revisions regarding removal of the Schedule Recovery Plan concept as long as the reporting requirements in the new Section 2.3 are retained. However, the JUs propose revising the QFTGs' proposed changes to subsections (a) and (b) to conform with how Excused Delay is defined in the PPA.

(b) If the Facility does not achieve Commercial Operation within one year following the Scheduled Commercial Operation Date, ~~and such failure is not excused under this Agreement or appliable law~~ as may be adjusted for Excused Delay, as applicable, in addition to assessing Delay Damages, Utility may terminate this Agreement under, and subject to, Section 11.1.2(b).[17]

2.5 Damages Calculation. Each Party agrees that the damages Utility would incur due to Seller's delay in achieving Commercial Operation are difficult or impossible to predict with certainty, and that it is impractical and difficult to assess actual damages in the circumstances stated. Delay Damages, however, fairly represent the Parties' expectations for actual damages. Except with respect to Utility's termination rights and as otherwise provided in Section 11.5, Delay Damages are Utility's exclusive remedy for Seller's delay in achieving Commercial Operation.

2.6 Damages Invoicing. By the tenth (10th) day following the end of the calendar month in which Delay Damages begin to accrue and continuing on the tenth (10th) day of each subsequent calendar month while such Delay Damages continue to accrue, Utility will deliver to Seller an invoice and a written explanation providing reasonable detail of the proposed calculation for the amount of Delay Damages due Utility. No later than ~~ten (10)~~ thirty (30) days after receiving such an invoice and subject to Sections 10.3 and ~~unless~~except to the extent the amount invoiced is subject to a good faith dispute under Section 10.4, Seller must pay to Utility, by wire transfer of immediately available funds to an account specified in writing by Utility, the amount stated in such invoice.

~~2.7 Utility's Right to Monitor.[18] During the Term, Seller will allow Utility to monitor and will provide monthly updates to Utility concerning (a) the progress of Seller regarding the acquisition, design, financing, engineering, construction, and installation of the Facility, and (b) the contractors' performance of tests required to achieve Commercial Operation. Seller must provide Utility at least one hundred and twenty (120) days prior notice of each such performance test. Notwithstanding the foregoing, nothing in this Agreement will be construed to require Utility to monitor Seller's development of the Facility or to review, comment on, or approve any contract between Seller and a third party.~~

2.8 Excused Delay. If Seller fails to achieve Commercial Operation on or before the Scheduled Commercial Operation Date due to an Excused Delay, the Scheduled Commercial Operation Date shall be deemed extended on a day-for-day basis to match the duration of such Excused Delay, subject to the right to terminate pursuant to Section 14.5 in the event that the Excused Delay is caused by a Force Majeure event. Upon the request of Seller, and provided that the existence or duration of any Excused Delay is not the subject of a good faith dispute between the Parties and no Seller Event of Default has occurred and is continuing, Utility agrees to provide reasonable assurances to Seller's Lenders and other financial institutions that the Scheduled Commercial Operation Date has been extended under this Section 2.8.

Seller must (i) pay to Utility Delay Damages from and after the Scheduled Initial Delivery Date up to, but not including, the earlier to occur of the date that the Facility achieves Initial Delivery or the date of termination as provided in Section 11.1.2(b) and 11.3, if applicable."

[17] **Note to Form** – For PPAs with operational QFs, Section 2.4(b) to be deleted and replaced with the following provision: "If Initial Delivery does not occur within the cure period prescribed in Section 11.1.2(b), in addition to assessing Delay Damages, Utility may terminate this Agreement as provided therein."

[18] ~~**Note to Form** – To be deleted in case of PPA with operational QF.~~

(continued)

Commented [QFs73]: Section 2.6 - Delay Damages invoicing - OAR 860-029-0123(5) provides a 30-day period to pay damages invoices. The rule also requires reasonable explanation of the damage calculation and that the amount is only due if there is no reasonable dispute. The utilities' proposal of 10 days, no requirement they explain the calculation, and no clear statement of the tolling of the 30-day due date to resolve reasonable disputes is inconsistent with the rule. Our edits add these points in an unambiguous fashion, consistent with the rules. We note also that this entire Section 2.6 appears to be duplicative to Section 11.2.1, which uses the 30-day due date. We have made edits to both sections to ensure consistency.

Commented [JU74R73]: As explained in the JUs' responses to questions from the September 12 workshop, the 10-day timeline was an oversight, and the JUs agree the timeline should be 30 days. The JUs also do not object to the QFTGs' other added language but revised it slightly to clarify that the deadline ... [25]

Commented [QFs75]: Section 2.7 - Utility Right to Monitor - This section imposes new and unreasonable monthly reporting requirements on QFs beyond anything required in the administrative rules. Combined with the catch-all default provision in the PPA, Section 11.1.1(c), it also creates new and unreasonable default for failing to provide such ... [26]

Commented [JU76R75]: The JUs do not object to deletion of this provision so long as new proposed Section 2.3 is adopted. See comments above for explanation.

Commented [QFs77]: Section 2.8- "Excused Delay" - The definition of excused delay in OAR 860-029-0120(6)(d) does not include a right of termination for Force Majeure's lasting 180 days as the utilities propose, and we have also proposed an edit to Force Majeure that deletes that 180-day termination right. So it should be deleted in Section 2.8 also.

Commented [JU78R77]: The JUs rejected the QFTGs' revisions. The Commission chose not to address Force Majeure in the rules, so the absence of a 180-day limit in OAR 860-029-0120(6)(d) is not dispositive. It is unreasonable for the PPA to allow an event of Force Majeure to extend the Scheduled COD indefinitely. This is particularly true given that ... [27]

2.9 Option to Extend Scheduled Commercial Operation Date or Terminate.[19] If Seller receives ~~its first~~any interconnection study results from Utility within the six-month period following the Effective Date (or restudy results~~)~~ that indicate a material increase in the estimated completion date for the required Interconnection Facilities or the cost of interconnection~~)~~, ~~anytime within such six-month period~~, Seller may elect by providing written notice to Utility anytime within such six-month period following the Effective Date:

(a) To extend the Scheduled Commercial Operation Date if the estimated completion date for the construction of Interconnection Facilities described in such study occurs after the then-current Scheduled Commercial Operation Date; provided that the extended Scheduled Commercial Operation may not occur after the last day of the five-year period following the Effective Date; or

(b) To terminate this Agreement if Seller determines in its ~~reasonable~~ judgment that the estimated costs to interconnect the Facility to the Interconnection Provider's System renders the project uneconomic; provided that Seller shall be liable to Utility for damages incurred by Utility up until the date of termination, which damages may be taken from the Project Development Security posted by Seller.

SECTION 3
REPRESENTATIONS AND WARRANTIES

3.1 Mutual Representations and Warranties. Each Party represents and warrants to the other that:

3.1.1 Organization. It is duly organized and validly exists under the laws of the State of its organization.

3.1.2 Authority. It has the requisite power and authority to enter this Agreement and to perform according to the Agreement's terms.

3.1.3 Corporate Actions. It has taken all corporate actions required to be taken by it to authorize the execution, delivery, and performance of this Agreement and the consummation of the transactions contemplated.

3.1.4 No Contravention. The execution and delivery of this Agreement does not contravene any provision of, or constitute a default under, any indenture, mortgage, security instrument or undertaking, or other material agreement to which it is a party or by which it is bound, or any valid order of any court, or any regulatory agency or other Governmental Authority having authority to which it is subject.

3.1.5 Valid and Enforceable Agreement. This Agreement is a valid and legally binding obligation of it, enforceable in accordance with its terms, except as enforceability may be limited by general principles of equity or bankruptcy, insolvency, bank moratorium or similar laws affecting creditors' rights generally and laws restricting the availability of equitable remedies.

3.2 Seller's Further Representations, Warranties and Covenants. Seller further represents, warrants, and covenants to Utility that:

3.2.1 Authority. Seller (a) has (or will have prior to the Commercial Operation Date) all required

[19] ~~**Note to Form** – To be deleted in case of PPA with operational QF.~~

(continued)

Commented [QFs79]: Section 2.9 - Option to Extend SCOD - OAR 860-029-0120(6)(a) states that the QF may exercise this termination right upon receipt of "an interconnection study" meeting the requirements, not just the "first interconnection study" as the utilities propose here. It is often the case that a second or subsequent study contains major unexpected costs or delays not included in prior studies, and thus those circumstances should also allow for the early termination right. Our edit corrects this issue and tracks the rule's language, which does not use the word "reasonable" in describing the QF's determination as in subpart (b) of the utilities' proposal here.

Additionally, the rules do not limit this right to new QFs and therefore the footnote 18 should be deleted as this could be an important right for existing QFs facing large upgrade costs.

Commented [JU80R79]: As explained in the JUs' responses to questions from the September 12 workshop, the JUs drafted this provision consistent with their understanding of the rule's intent. However, the JUs do not object to the QFTGs' revisions, which also resolve Staff's question. The JUs further propose certain revisions to clarify that Seller must elect to terminate the PPA or extend the Scheduled COD within six months after the Effective Date, as provided in OAR 860-029-0120(6)(a).

regulatory authority to make wholesale sales from the Facility; (b) has the power and authority to own and operate the Facility and be present upon the Premises for the Term; and (c) is duly qualified and in good standing under the laws of each jurisdiction where its ownership, lease or operation of property, or the conduct of its business requires such qualification.

3.2.2 No Contravention. The execution, delivery, performance, and observance by Seller of its obligations in this Agreement do not and will not:

(a) contravene, conflict with, or violate any provision of any material Requirements of Law presently in effect having applicability to either Seller or any owner of Seller;

(b) require the consent or approval of or material filing or registration with any Governmental Authority or other person other than consents and approvals which are (i) provided in Exhibit D or (ii) required in connection with the construction or operation of the Facility and expected to be obtained in due course; or

(c) result in a breach of or constitute a default under any provision of (i) any security issued by Seller or any owner of Seller, the effect of which would materially and adversely affect Seller's performance of, or ability to perform, its obligations in this Agreement, or (ii) any material agreement, instrument or undertaking to which either Seller or any owner or other Affiliate of Seller is a party or by which the property of either Seller or any owner or other Affiliate of Seller is bound, the effect of which would materially and adversely affect Seller's performance of, or ability to perform, its obligations in this Agreement.

3.2.3 Required Facility Documents. All Required Facility Documents as of the Effective Date are listed in Exhibit D. Pursuant to the Required Facility Documents, Seller holds as of the Effective Date, or will hold by the Commercial Operation Date (or such other later date as may be specified under Requirements of Law), and will maintain for the Term all Required Facility Documents. ~~The anticipated use of the Facility complies with all applicable restrictive covenants affecting the Premises. Following the Commercial Operation Date, Seller must promptly notify Utility of any additional Required Facility Documents. If reasonably requested by~~Upon Utility's request, Seller must provide updated copies of ~~any or~~ all new or revised Required Facility Documents.

3.2.4 Delivery of Energy; Accurate Nameplate Capacity Rating. As of the Commercial Operation Date, Seller will hold all rights sufficient to enable Seller to deliver Net Output at the Nameplate Capacity Rating from the Facility to the Point of Delivery pursuant to this Agreement throughout the Term.

3.2.5 ~~Reasonable~~Meaningful Steps Towards Control of Premises. As of the Effective Date, Seller has taken ~~reasonable~~meaningful steps to secure ~~all~~ legal rights necessary for the Seller to enter upon and occupy the Premises for the purpose of constructing, operating, and maintaining the Facility for the Term ~~for the Term~~, including, by way of example and not limitation, (a) an ownership of, a leasehold interest in, or a right to develop a site of sufficient size to construct and operate the Facility, (b) an option to purchase or acquire a leasehold interest in a site of sufficient size to construct and operate the Facility~~such ownership or leasehold rights~~, or (c) another document that clearly demonstrates the commitment by the grantor to convey ~~such~~sufficient rights to Seller to occupy a site of sufficient size to construct and operate the Facility, such as an executed agreement to negotiate an option to lease or purchase the site. ~~A~~on ~~or before the Commercial Operation Date, Seller shall supply for inclusion in Exhibit E evidence of all leases and other real property rights of real property required for the operation of the Facility or the performance of any obligations of Seller in this Agreement are identified in Exhibit E.~~ On and after the Commercial

(continued)

Commented [QFs81]: Section 3.2.3 creates unreasonable cross default risk and burdensome reporting requirements on small facilities using the standard contract. We recommend deleting it.

Commented [JU82R81]: The JUs rejected the complete deletion of 3.2.3 which is an ordinary and customary representation & warranty. An obligation to obtain "Required Facility Documents" and provide the documents to Utility upon request appears in existing contracts and does not create an unreasonable cross-default risk as the QFTGs assert without foundation. Nevertheless, to address the QFTGs' concerns regarding any possibility of cross-default, the JUs propose to remove the following clause: "The anticipated use of the Facility complies with all applicable restrictive covenants affecting the Premises." The JUs also revised the QF's obligation to provide copies to reduce the QF compliance obligations under the PPA and risk of technical default for inadvertent non-compliance (noting, of course, that such defaults would not become Events of Default under the PPA until after the QF fails to cure following notice and the applicable cure period, etc.).

Commented [QFs83]: Section 3.2.5 - Control of Premises - OAR 860-029-0046(2)(b) only requires "reasonable steps" towards site control to enter into the PPA, which is consistent with Order No. 872. As drafted here, the utilities' proposed language would require fully executed leases for the full site for the full term at the time of PPA execution, thus repealing the administrative rule and Order No. 872. Our proposed edits correct this problem.

Commented [JU84R83]: As communicated in the JUs' responses to questions from the September 12 workshop, the JUs interpret the PPA provision as originally drafted to allow use of an option so long as all underlying rights will be there once exercised. However, the JUs do not oppose the QFTGs' recommended changes to the extent they conform with the rules, and the JUs proposed further revisions to more closely mirror OAR 860-029-0046(2)(b). The JUs also propose moving the language regarding Exhibit E to Section 2.2 (Milestones) as this is more appropriately designated as a project milestone that must be completed prior to or on COD.

Commented [JU85]: Moved to Section 2.2 for clarity and organization.

Operation Date. Seller must maintain all leases or other land grants necessary for the construction, operation, and maintenance of the Facility. Upon request by Utility, Seller must provide copies of the memoranda of lease recorded in connection with the development of the Facility.

3.2.6 Litigation. Except as has been disclosed in writing to Utility, (i) nNo litigation, arbitration, investigation, or other proceeding is pending or, to the best of Seller's knowledge, threatened against Seller or any Affiliate of Seller, with respect to this Agreement, the Facility, or the transactions contemplated in this Agreement~~—~~; and (ii) ~~No~~ no other investigation or proceeding is pending or threatened against Seller or any Affiliate of Seller, the effect of which under either clauses (i) or (ii) alone or combined, would materially and adversely affect Seller's performance of its obligations in this Agreement.

3.2.7 Eligible Contract Participant. Seller, and any guarantor of its obligations under this Agreement, is an "eligible contract participant" as that term is defined in the United States Commodity Exchange Act.

3.2.8 Undertaking of Agreement; Professionals and Experts. Seller has engaged those professional or other experts it believes necessary to understand its rights and obligations pursuant to this Agreement. In entering into this Agreement and agreeing to undertake the obligations within, Seller has investigated and determined that it is capable of performing and has not relied upon the advice, experience or expertise of Utility in connection with the transactions contemplated by this Agreement.

3.2.9 Verification. All information relating to the Facility, its operation and output provided to Utility and contained in this Agreement has been verified by Seller and is true and accurate.

3.2.10 Credit Representations and Warranties.

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

~~(b) Neither Seller nor any of its principal equity owners is or has at any time defaulted in any of its payment obligations for electricity purchased from Utility.~~

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

(~~d~~b) Seller owns and will continue to own through the Term of this Agreement all right, title, and interest in and to the Facility, free and clear of all liens and encumbrances other than liens and encumbrances related to third-party financing of the Facility and except to the extent that Seller sells the Facility pursuant to an Assignment of this Agreement allowed under Section 20. ~~.~~

3.2.11 Seller's QF Status. As of the ~~Effective Date and the~~ Commercial Operation Date, the Facility holds QF status, which it will continue to hold throughout the Term.

3.2.12 Seller's Eligibility for a Standard Power Purchase Agreement and Standard Pricing. As of the Effective Date and the Commercial Operation Date, Seller has not made any changes in its ownership, control or management that would cause the Facility to fail to satisfy the eligibility requirements for

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Commented [QFs86]: Section 3.2.6 - Litigation - The utilities' proposal would create a cross default risk under the PPA's catch-all default provision in Section 11.1.1 (c), any time the QF initiates or defends against, or is even aware of the possibility of, any form of litigation related to the facility, which could include a myriad of issues. This is unreasonable and should be deleted. QFs can and do end up in litigation related to their facilities and the consequence cannot be default and loss of right to sell power and operate under a PPA solely due to an exercise of the right to initiate or defend against some litigation. The utilities' carve out limiting the provision to litigation that "would materially and adversely affect Seller's performance of its obligations under this Agreement" is vague and does not remove the unreasonable risk inherent in this type of PPA requirement - which has no analogue for utility-owned facilities, which also frequently ... [28]

Commented [JU87R86]: The JUs have significantly narrowed this representation & warranty such that it only requires disclosure of impending litigation. The QFs do not have to represent and warrant that there is no pending litigation.

Commented [QFs88]: Section 3.2.10(b)-(c) - The utilities' proposed Seller representations that the Seller and its equity owners have never defaulted on any payment obligation to the utility, and the requirement to be current on all financial obligations create unreasonable cross default risk combined with ... [29]

Commented [JU89R88]: The JUs do not object to the QFTGs' removal of subsections (b) and (c) given that creditworthiness is addressed in other PPA provisions. The JUs also do not object to the QFTGs' proposed clarifying language in subsection (d).

Commented [JU90]: The JUs do not object to this clarifying language proposed by the QFTGs.

Commented [QFs91]: Section 3.2.11 - QF Status - OAR 860-029-0046(2)(c)(C) requires Seller to demonstrate ability to obtain certification status by COD, so we propose an edit to make the PPA consistent with that rule.

Commented [JU92R91]: JUs do not object to the QFTGs' proposed revisions, but clarify that the Facility must hold its QF status throughout the term of the agreement.

entering into the standard power purchase agreement or receipt of standard pricing under Utility's Schedule XX, as applicable.

3.3 No Other Representations or Warranties. Each Party acknowledges that it has entered into this Agreement in reliance upon only the representations and warranties provided in this Agreement, and that no other representations or warranties have been made by the other Party with respect to the subject matter.

3.4 Continuing Nature of Representations and Warranties; Notice. The representations and warranties provided in this Section 3 are made as of the Effective Date and deemed repeated as of the Commercial Operation Date. If at any time during the Term, either Party obtains actual knowledge of any event or information that would have caused any of the representations and warranties in this Agreement to be materially untrue or misleading at the time given, such Party must provide the other Party with written notice of the event or information, the representations and warranties affected, and the action, if any, which such Party intends to take to make the representations and warranties true and correct. The notice required by this section must be given as soon as practicable after the occurrence of each such event.

SECTION 4
DELIVERIES OF NET OUTPUT

4.1 Purchase and Sale. Subject to the provisions of this Agreement, Seller must sell and make available to Utility, and Utility must purchase and receive the entire Net Output from the Facility at the Point of Delivery; provided that, ~~in no event will~~ if Seller delivers any amount of Net Output in excess of the Maximum Delivery Rate, Utility will accept such excess energy but will not be obligated to pay for such energy except as may be provided in this Agreement including as set forth in Exhibit L if applicable; provided that, in the event such excess energy exceeds the amount allocated to Facility as a Network Resource by Utility Transmission, resulting in any charges from Utility Transmission, Seller will defend, indemnify, and hold Utility harmless from and against such charges. Utility is under no obligation to make any purchase other than Net Output and is not obligated to purchase, receive, or pay for Net Output that is not delivered to the Point of Delivery. ~~in violation of Seller's Generation Interconnection Agreement or in excess of the transmission service allocated to Facility as a Network Resource by Utility Transmission. Seller will defend, indemnify, and hold Utility harmless from and against any and all losses and penalties Utility incurs as a result of Seller's violation of this Section 4.1, as provided in Section 6.2. Utility is under no obligation to make any purchase other than Net Output and is not obligated to purchase, receive, or pay for Net Output that is not delivered to the Point of Delivery.~~

Commented [QFs93]: Section 3.4 - The duty to notify the other party of issues that could cause a representation or warranty to be untrue creates another unreasonable risk of cross default, when combined with Section 11.1.1(a), for failure to provide such notice, and we recommend deletion of it.

Commented [JU94R93]: The JUs do not agree with the QFTGs' recommended deletion of the duty to notify. Without this obligation, QFs would be under no obligation to inform the utility of changes to their status that would render them non-compliant and therefore there is no opportunity for the parties to work together toward a cure. In addition, the portion of Section 3.4 that the QFTGs propose to remove is substantively the same as provisions in PacifiCorp's existing contracts. The QFTGs have provided no evidence that this provision has created undue cross-default risks in practice that would warrant deviation from current Commission-approved provisions.

Commented [QFs95]: Section 4.1 - First, OAR 860-020-0121(3) states that Utility must accept but need not pay for surplus delivery, so we edited this section to state that as opposed to the utilities' proposal suggesting it would be a breach to deliver such surplus delivery. A delivery in excess of the amount allowed in the GIA should be dealt with in the GIA, not also in the PPA. Second, The proposed bar on delivering energy in excess of Maximum Delivery Rate, and the Utility's obligation to purchase the same, certainly cannot apply for off-system QFs that will often need to deliver in whole MW increments in excess of Maximum Delivery Rate in order to deliver all net output each month, which is the premise of Exhibit L. Our proposed edit corrects this problem.

Commented [JU96R95]: The JUs accepted the QFTGs' revisions and added language clarifying that if accepting excess energy causes the Utility to incur charges, then Seller will be responsible for them.

(continued)

4.2 Designation as Network Resource.

(a) Within fifteen (15) Business Days following the Effective Date, or, in the event the Facility is an On-system QF and there is no interconnection study for the Facility as of the Effective Date, within fifteen (15) days of the date Seller delivers Utility a copy of the interconnection study, Utility will submit an application to Utility Transmission requesting designation of the Facility as a Network Resource, effective as of ninety (90) days before the Scheduled Commercial Operation Date or as soon as practicable after the Effective Date of the Agreement if the Scheduled Commercial Operation Date occurs less than ninety (90) days following the Effective Date, thereby, in either case, authorizing transmission service under Utility's Network Integration Transmission Service Agreement with Utility Transmission. Utility Transmission may respond that the designation is granted without a study or may require a study to be performed.

(b) If the Facility is an Off-System QF and Utility Transmission requires a study to be performed, Utility will notify Seller of the results of the study within five (5) Business Days after Utility's receipt of the results from Utility Transmission. If Utility is notified in writing by Utility Transmission that designation of the Off-System QF as a Network Resource requires the construction of network upgrades or otherwise requires potential redispatch of other Network Resources of Utility (the "Conditional DNR Notice"), within fifteen (15) Business Days after receiving the Conditional DNR Notice, Utility will notify Seller in writing whether Utility has determined that associated costs should be allocated to Seller and, if so, the amount of the costs ("Cost Allocation Notice"). Seller must notify Utility within fifteen (15) Business Days of receiving the Cost Allocation Notice if it objects to the allocation of the costs in the Cost Allocation Notice ("Cost Allocation Objection Notice").

(c) If Utility timely receives a Cost Allocation Objection Notice under Section 4.2(b), Utility shall initiate a proceeding with the Commission within fifteen (15) Business Days of its receipt of the Cost Allocation Objection Notice by filing its proposed cost allocation determination. The Parties reserve the right to present their respective positions to the Commission as to whether and how the Contract Price or other non-rate terms and conditions of this Agreement should be adjusted in light of the Conditional DNR Notice.

(d) Any time between Seller's receipt of the Cost Allocation Notice and the last day of the fifteen (15)-day period after the Commission issues an order allocating costs of transmission service network upgrades in whole or in part to Seller, by written notice to Utility, Seller may terminate this Agreement or, subject to the requirements of OAR 860-029-0044 and Schedule XX, designate an alternate Point of Delivery that is acceptable to Utility upon written notice to Utility. Termination by Seller under this Section 4.2(d) will not be an Event of Default and no damages or other liabilities under this Agreement will be owed by one Party to the other Party; provided, however, that Seller's right to terminate the Agreement under this Section 4.2(d) will cease following ~~(a)~~ any amendment of this Agreement associated with addressing matters covered under this Section 4.2 ~~or (b) Utility incurring costs at Seller's request in furtherance of addressing matters covered under this Section 4.2~~. In the event the Parties agree to amend the Agreement to address an agreed-upon cost allocation or there is an order by the Commission allocating costs of transmission service network upgrades, if this Agreement is not terminated, the Scheduled Commercial Operation Date, Fixed Price Term, and Term will be extended on a day-for-day basis for each day that occurs from the date of the Cost Allocation Notice and the earlier of the date of any such amendment or date of issuance of an order by the Commission.

(continued)

Commented [QFs97]: Section 4.2 - "Designation of Network Resource"-
(a) There is no limitation in the administrative rules, or any apparent basis to place a limitation, on the utility's obligation to request to designate on-system QF as a network resource until after it obtains an interconnection agreement as the utilities have proposed here. Under the OATT, the utility is allowed to request the QF be so designated at the time it signs the PPA, and it should be required to do so. Our edit corrects this problem.

(b) The words "in writing" are missing from the utilities' proposed draft regarding the obligation to inform the QF if upgrades costs should be allocated. See OAR 860-029-0044(e).

(d) - The utilities' proposed Section 4.2(d)(b) confusingly purports to limit the QF's right to terminate in a case where the utility incurs any costs in addressing the network transmission issue, which is not a condition on the QF's termination right under the applicable administrative rule, OAR 860-029-0044(6). It also very unreasonable and would appear to eliminate the QF's right to terminate the PPA expressly allowed in the rules because the utility will always incur some costs in processing this type of dispute/negotiation. It should be deleted. Also, we propose an edit that clarifies that the fixed price term and term should also clearly be stated to be extended in the case of utility a Commission proceeding.

Commented [JU98R97]: JUs do not agree with the QFTGs' deletion in subsection (a). The Commission elected to apply OAR 860-029-0044(3) only to off-system QFs because network upgrades necessary to deliver an on-system standard QF's output to load should be identified in the network resource interconnection service study process, and the costs would be allocated pursuant to the Commission's interconnection cost-allocation policies. However, if an on-system QF has not yet gone through the interconnection process and received an interconnection study, then the process of desig ... [30]

Commented [JU99]: The JUs do not object to this addition.

Commented [JU100]: The JUs do not object to the proposed revisions to this section.

4.3 No Sales to Third Parties. During the Term, Seller will not sell any Net Output, energy, capacity ~~Capacity Rights, Ancillary Services~~ or Environmental Attributes from the Facility to any party other than Utility; provided, however, that this restriction does not apply during periods when Utility is in default under this Agreement because it has failed to accept or purchase Net Output as required under this Agreement or, with respect to Environmental Attributes, to the extent title to such Environmental Attributes does not pass to Utility under this Agreement.

4.4 Title and Risk of Loss of Net Output. Seller must deliver Net Output to the Point of Delivery ~~and Capacity Rights~~ free and clear of all liens, claims, and encumbrances. Title to and risk of loss of all Net Output transfers from Seller to Utility upon its delivery to Utility at the Point of Delivery. Seller is in exclusive control of, and responsible for, any damage or injury caused by, all Output up to and at the Point of Delivery. Utility is in exclusive control of, and responsible for, any damages or injury caused by, Net Output after the Point of Delivery.

4.5 Curtailment. Utility is not obligated to purchase, receive, pay for, or pay any damages associated with Net Output not delivered to the Point of Delivery due to any of the following: (a) the interconnection between the Facility and the System is disconnected, suspended or interrupted, in whole or in part, consistent with the terms of the Generation Interconnection Agreement; (b) the Market Operator or Transmission Provider directs a general curtailment, reduction, or redispatch of generation in the area (which would include the Net Output) for any reason required or permitted under applicable Federal laws and regulations, NERC standards or directives, and/or tariffs of the Market Operator, Transmission Provider, or Interconnection Provider, even if and no matter how such curtailment or redispatch directive is carried out by Utility~~, which may fulfill such directive by acting in its sole discretion~~; or if Utility curtails or otherwise reduces the Net Output in any way in order to meet its obligations to the Market Operator or Transmission Provider to operate within System limitations; (c) the Facility's Output is not received because the Facility is not fully integrated or synchronized with the System; or (d) an event of Force Majeure prevents either Party from delivering or receiving Net Output. ~~Seller will reasonably determine the MWh amount of Net Output curtailed under this Section 4.5 based on the amount of energy that could have been generated at the Facility and delivered to Utility as Net Output but that was not generated and delivered because of the curtailment. Seller must promptly provide Utility with access to such information and data as Utility may reasonably require to confirm to its reasonable satisfaction the amount of energy that was not generated or delivered because of a curtailment described in this Section 4.5.~~

4.6 Utility as Merchant or Otherwise as Purchaser. Seller acknowledges that Utility, acting in its merchant capacity function or otherwise as purchaser under this Agreement, has no responsibility for or control over Utility Transmission, in either its capacity as Transmission Provider or Interconnection Provider, as applicable~~, consistent with the FERC Standards of Conduct, 18 CFR Part 358~~.

(a) The Parties acknowledge and agree that the Generation Interconnection Agreement is a separate and free-standing contract and that the terms of this Agreement are not binding upon the Interconnection Provider.

(b) Notwithstanding any other provision in this Agreement, except as expressly provided herein, nothing in the Generation Interconnection Agreement, nor any other agreement between Seller on the one hand and Transmission Provider or Interconnection Provider on the other hand, nor any alleged event of default under the Generation Interconnection Agreement, will alter or modify the Parties' rights, duties, and obligations in this Agreement. This Agreement will not be construed to create any rights between Seller and the Interconnection Provider or between Seller and the Transmission Provider.

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Commented [QFs101]: Section 4.3 - Per the above comments, we recommend deleting use of the broadly defined Ancillary Services and Capacity Rights.

Commented [JU102R101]: Per above comments, the JUs do not object to these revisions at this time and will address this is in docket UM 2000.

Commented [JU103]: Per above comments, the JUs do not object to these revisions at this time and will address this is in docket UM 2000.

Commented [JU104]: The JUs further revised subsection (b) to respond to Staff's concerns that the utility may curtail outside permitted or required system emergencies.

Commented [QFs105]: Section 4.5 - The last two sentences proposed by the utility in this section require the Seller to calculate the amount of lost output due to a Section 4.5 curtailment, but this is an unnecessary requirement of Seller. The only provision of the PPA where this appears potentially relevant is the calculation of Seller Uncontrollable Minutes in the MDG, but that definition should not be limited to just Section 4.5 curtailments. So we recommend deletion of this proposal in Section 4.5. If retained, this requirement needs to be triggered by a specific written request from Utility because Seller will often not know why it was curtailed or whether the curtailment falls within the Section 4.5 criteria absent information from Utility.

Commented [JU106R105]: While the JUs think it benefits QFs to provide this information in order to mitigate future disputes, JUs do not object if the QFTGs desire to delete it.

Commented [QFs107]: Section 4.6 - See comments on Section 1.2.4 for explanation of proposed deletion of Section 4.6.

Commented [JU108R107]: The JUs have reinstated the original language in this section and consolidated with previous Section 1.2.4 for the reasons set forth above regarding the definition of "Utility."

Notwithstanding the foregoing, it is understood and agreed that to the extent Utility has any rights or claims against Utility Transmission under the Network Integration Transmission Services Agreement and/or the Tariff with respect to any actual or alleged breach by Utility Transmission of its duties and obligations thereunder, e.g., in connection with a wrongful curtailment, etc., upon written notice from Seller that such breach adversely impacts Seller, Utility will take appropriate action and make good faith efforts to pursue applicable remedies on Seller's behalf.

4.7 Ownership of Environmental Attributes; RPS Certification.

(a) If the Contract Price is based on Standard Fixed Pricing, the Seller shall own any Environmental Attributes associated with the Output of the Facility;

(b) If the Contract Price is based on Renewable Fixed Pricing, (i) Seller shall own all Environmental Attributes associated with the Output of the Facility during the Renewable Resource Sufficiency Period; and (ii) Utility shall own all Environmental Attributes associated with the Output of the Facility during the Renewal Resource Deficiency Period and, in such case, title of the Environmental Attributes, including renewable energy credits, associated with the Output of the Facility, shall transfer from Seller ~~must transfer~~ to Utility immediately upon the generation of the Output of the Facility at no further cost to Utility~~the Environmental Attributes, including renewable energy credits, associated with the Output of the Facility~~. Provided however, the Environmental Attributes transferred to Utility during the Renewable Deficiency Period are limited to those Environmental Attributes directly created by generation of the electric energy produced by the Facility and required to provide Utility with "qualifying electricity" as that term is defined in ORS 469A.010, and ~~the~~ Seller will retain ownership of Environmental Attributes (if any) related to upstream production of fuel, such as greenhouse gas offsets from methane capture not associated with generation of electricity, or the sequential production of steam or thermal energy associated with the Facility, such as thermal renewable energy certificates, as defined in ORS 469A.132. Output of the Facility has the greenhouse gas emission attributes of the generating resource regardless of the disposition of the Environmental Attributes under this Agreement and such greenhouse gas emissions shall be excluded from, and may not be imputed in, the Utility's total greenhouse gas emissions for purposes of compliance with the clean energy targets in ORS 469A.410 pursuant to ORS 469A.435(2). ~~Notwithstanding the above, nothing in this Section should be read to prohibit Utility from counting the Facility as a resource generating "nonemitting electricity" as that term is defined in ORS 469A.400 for determining Utility's compliance with the clean energy targets set forth in ORS 469A.410.~~

(c) Seller represents, warrants, and covenants that, as of the Commercial Operation Date and continuously thereafter during the Term, Seller has obtained and will continue to maintain RPS certification from the Oregon Department of Energy with respect to the Output of the Facility.

~~4.8 Purchase and Sale of Capacity Rights; Ancillary Services. Seller transfers to Utility, and Utility accepts from Seller, any right, title, and interest that Seller may have in and to Capacity Rights, if any, and Ancillary Services, if any, existing during the Term, with respect to the Net Output. Seller represents that it has not sold, and covenants that during the Term it will not sell or attempt to sell to any other person or entity the Capacity Rights, if any, and Ancillary Services, if any. During the Term, Seller must not report to any person or entity that the Capacity Rights, if any, and Ancillary Services, if any belong to anyone other than Utility. At Utility's request, Seller must execute such documents and instruments as~~

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Commented [QFs109]: Section 4.7(b) - Ownership of Env. Attributes - The utilities' proposal does not properly implement Oregon policy on REC ownership under renewable rates. Specifically, greenhouse gas offsets and thermal RECs are additional to the RECs associated with electricity generation and the QF is not compensated for transferring those additional attributes to the utility under the standard rates. They have traditionally been carved out from the attributes conveyed to the utility in the standard contracts and nothing changed that in AR 631. The edit we propose clarifies that the QF retains ownership of those additional attributes, which is consistent with the administrative rules, OAR 860-029-0010(52), (55), -0045(3), as well as the distinction between "RECs" and "thermal RECs" as defined in OAR 330-160-0015(17) & (25).

Commented [JU110R109]: The JUs do not object to the QFTGs' added language. JUs also propose adding clarifying language regarding transfer of title and that nothing in this provision should be read to prohibit the utility from counting QF as a non-emitting resource for compliance purposes under HB 2021.

Commented [JU111]: After further review, the JUs propose to revise this sentence to better clarify that regardless of the disposition of Environmental Attributes under the PPA, nothing in the PPA will interfere with or override ORS 469A.435(2).

Commented [QFs112]: Section 4.8 - Purchase and Sale of Capacity Rights and Ancillary Services - As noted above, we recommend deleting the provisions requiring Seller to convey the broadly defined "Capacity Rights" and "Ancillary Services" to the utility for no additional compensation. The avoided cost rates do not, to our knowledge, account for such additional services. For example, a utility is required to pay the QF for certain ancillary services, like voltage support, under the form GIA, and this provision would appear to require QFs to now provide that costly service for free.

Commented [JU113R112]: Per above comments, the JUs do not object to the QFTGs' proposed deletion of this section at this time and will address this issue in docket UM 2000.

~~may be reasonably required to effect recognition and transfer of the Net Output or any Capacity Rights or Ancillary Services to Utility.~~

SECTION 5
CONTRACT PRICE; COSTS

5.1 Contract Price~~. Includes Capacity Rights. Except as may be provided otherwise in this Agreement including as set forth in Exhibit L if applicable,~~ Utility will pay Seller the Contract Price for all deliveries of Net Output ~~and Capacity Rights~~, up to the Maximum Delivery Rate provided that, if Seller delivers any amount of Net Output in excess of the Maximum Delivery Rate, Utility will accept such excess energy but will not be obligated to pay for such energy except as may be provided in this Agreement including as set forth in Exhibit L if applicable; provided that, in the event such excess energy exceeds the amount allocated to Facility as a Network Resource by Utility Transmission, resulting in any charges from Utility Transmission, Seller will defend, indemnify, and hold Utility harmless from and against such charges. . ~~Utility is not required to purchase any Net Output above the Maximum Delivery Rate~~.

5.1.1 Deliveries Prior to the Commercial Operation Date. Beginning no earlier than ninety (90) days before the Scheduled Commercial Operation Date, Utility will pay Seller for Net Output delivered at the Point of Delivery before the Commercial Operation Date, an amount per MWh equal to the lower of (i) eighty five percent (85%) of the Firm Electric Market Pricing for the applicable hour on the applicable day in the applicable month; and (ii) eighty five percent (85%) of the Contract Price; provided, however, that Seller's right to receive payment for energy deliveries under this Section 5.1.1 is subject to Utility's right of offset under Section 10.2 for, among other things, payment by Seller of any Delay Damages owed to Utility by Seller. Notwithstanding the foregoing, if Utility, in exercising commercially reasonable efforts, is able to accept deliveries of Net Output earlier than ninety (90) days before the Scheduled Commercial Operation Date, Utility will pay Seller for Net Output delivered at the Point of Delivery under this Section 5.1.1; provided that under no circumstances shall Utility be obligated to accept deliveries of Net Output earlier than 180 days before the Scheduled Commercial Operation Date.

5.1.2 Commercial Operation. For the period beginning on the Commercial Operation Date and thereafter during the Term, Utility will pay to Seller the Contract Price per MWh of Net Output delivered to the Point of Delivery. The Contract Price will not be adjusted if Schedule XX is modified during the Term of this Agreement. If Utility requests a modification to Schedule XX, including a modification to pricing, neither Seller nor Utility will request that any change in Schedule XX be applicable to this Agreement.

5.2 Costs and Charges. Seller shall be responsible for paying or satisfying when due all costs or charges imposed in connection with the scheduling and delivery of Net Output up to and at the Point of Delivery, including (a) transmission costs, transmission line losses and any costs or charges (including imbalance charges and penalties) imposed in connection with scheduling and delivery of Net Output up to and at the Point of Delivery and (b) transmission costs, transmission line losses, and any operation and maintenance charges imposed by Interconnection Provider or Transmission Provider in connection with scheduling and delivery of Net Output up to and at the Point of Delivery, but excluding such costs or charges that are caused by Utility's acts or omissions in breach of this Agreement. Except as determined otherwise under Section 4.2, Utility shall be responsible for all costs or charges, including transmission costs, transmission line losses and any costs or charges imposed in connection with the receipt of Net Output at the Point of Delivery and the scheduling and delivery of Net Output from the Point of Delivery, other than such costs or charges that are caused by Seller's acts or omissions in breach of this Agreement. ~~Without limiting the generality of the foregoing, Seller, in accordance with the Generation~~

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Commented [QFs114]: Section 5.1 - see our comments on Section 4.1 for explanation of our proposed edits to this section.

Commented [JU115R114]: Per above, the JUs do not object to the QFTGs' revisions. However, the Joint Utilities added language clarifying that if accepting excess energy causes the Utility to incur charges, then Seller will be responsible for them.

Commented [QFs116]: Section 5.2 - Our insertion of the qualifier in the first sentence of this section regarding the QF's cost responsibility mirrors the qualifier in the second sentence of this section regarding the utility's cost responsibility, and is fair.

Commented [JU117R116]: The JUs do not object to the QFTGs' revisions and agree to delete the last sentence in the section to address Staff's concerns.

~~Interconnection Agreement, shall be responsible for all costs and expenses associated with modifications to the Interconnection Facilities or the System (including System upgrades) caused by or related to the Facility, including all costs and expenses associated with the interconnection of the Facility with the System.~~

5.3 Station Service. Seller is responsible for arranging and obtaining, at its sole risk and expense, station service required for the Facility.

5.4 Taxes. Seller must pay, or reimburse Utility for, all existing and any new sales, use, excise, severance, ad valorem, and any other similar taxes, imposed or levied by any Governmental Authority on the Net Output ~~or Capacity Rights~~ up to and including the Point of Delivery and for all Environmental Attributes (if any) up to and including the Point of Interconnection, regardless of whether such taxes are imposed on Utility or Seller under Requirements of Law. Utility must pay, or reimburse Seller for, all such taxes imposed or levied by any Governmental Authority on the Net Output ~~or Capacity Rights~~ beyond the Point of Delivery and for all Environmental Attributes transferred (if any) beyond the Point of Interconnection, regardless of whether such taxes are imposed on Utility or Seller under Requirements of Law. The Contract Price will not be adjusted on the basis of any action of any Governmental Authority with respect to changes to or revocations of sales and use tax benefits, rebates, exception or give back. In the event any taxes are imposed on a Party for which the other Party is responsible in this Agreement, the Party on which the taxes are imposed must promptly provide the other Party notice and such other information as such Party reasonably requests with respect to any such taxes.

5.5 Costs of Ownership and Operation. Without limiting the generality of any other provision of this Agreement and subject to Section 5.4, Seller is solely responsible for paying when due (a) all costs of owning and operating the Facility in compliance with existing and future Requirements of Law and the terms and conditions of this Agreement, and (b) all taxes and charges (however characterized) now existing or later imposed on or with respect to the Facility and its operation~~, including any tax or charge (however characterized) payable by a generator of Environmental Attributes~~.

5.6 Rates Not Subject to Review. The rates for service specified in this Agreement will remain in effect until expiration of the Term, and are not subject to change for any reason, including regulatory review, absent agreement of the Parties or as determined under Section 4.2. Neither Party will petition FERC to amend such prices or terms or support a petition by any other person seeking to amend such prices or terms, absent the agreement in writing of the other Party. ~~Further, absent the agreement in writing by both Parties, the standard of review for changes to this Agreement proposed by a Party, a non-party or FERC acting sua sponte will be the "public interest" application of the "just and reasonable" standard of review as described in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and clarified by *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish*, 554 U.S. 527, 128 S. Ct. 2733 (2008).~~

5.7 Participation in an RTO. If, after the Effective Date, Utility ~~joins~~ becomes subject to the rules of an RTO, then the Parties shall negotiate in good faith any such amendments to this Agreement that may be necessary or appropriate as a result of such RTO membership.

SECTION 6
OPERATION AND CONTROL

(continued)

Commented [JU118]: JUs do not oppose the QFTGs' revisions to this section.

Commented [QFs119]: Sections 5.4 & 5.5 - Section 5.5's last clause appears to suggest the QF would be responsible for any taxes on the Environmental Attributes even if it is a tax that applies after the EAs are transferred to the utility, which is inconsistent with the general treatment of taxes that should govern as set forth in Section 5.4, that is, tax responsibilities prior to point of transfer apply to the Seller and tax responsibilities after the point of transfer belong to the Utility. We made edits to confirm this treatment for EAs too.

Commented [JU120R119]: The JUs do not object to these revisions, but note that they do not agree with the QFTGs' interpretation of the last clause of Section 5.5.

Commented [QFs121]: Section 5.6 - The utilities' proposal to subject the PPA to the Mobile-Sierra doctrine review is inconsistent with federal and state law, as held by the Oregon Court of Appeals in *Or. Trail Elec. Consumers Coop. v. Co.-Gen Co.*, 168 Or. App. 466, 482, 7 P.3d 594, 605 (2000). The reference to Mobile-Sierra review should thus be deleted, as it was when PacifiCorp proposed this same contract form in Washington.

Commented [JU122R121]: While the JUs do not agree with the QFTGs' arguments, the Joint Utilities do not object to this revision.

Commented [JU123]: JUs edited this provision to account for the fact that RTO membership may be required.

6.1 As-Built Supplement; Modifications to Facility. No later than ninety (90) days following the Commercial Operation Date, Seller must provide Utility the As-Built Supplement which will be incorporated into Exhibits B and C of this Agreement. Except with Utility's prior written consent or as permitted under and subject to the requirements of Section 6.8, the Facility, as reflected in the As-Built Supplement to be provided under this Section or subsequently during the Term, may not (a) have a Nameplate Capacity Rating that exceeds that stated in Exhibit B, or (b) result in the ~~expected~~ Expected ~~annual~~ Net Output, as ~~calculated~~ that term is defined ~~in Exhibit A~~ as of the Effective Date, increasing by more than ten percent (10%), except to the extent Seller complies with the requirements of Section 6.8.3.

6.2 Standard of Facility Construction and Operation.

6.2.1 General. Seller will construct and operate all interconnected equipment associated with the Facility within its control in accordance with all applicable federal, state, and local laws and regulations to ensure system safety and reliability of interconnected operations. At Seller's sole cost and expense, Seller must operate, maintain, and repair the Facility in accordance with (a) the applicable and mandatory standards, criteria, and formal guidelines of FERC, NERC, any RTO, and any other Electric System Authority and any successors to the functions thereof; (b) the Permits and Required Facility Documents; ~~(c) the Generation Interconnection Agreement;~~ (~~d~~c) all Requirements of Law; (~~e~~d) the requirements of this Agreement; and (~~f~~e) Prudent Electrical Practice. ~~Except for any claims Seller may have in connection with Utility's obligation under Section 4.6 acting in its merchant function capacity or otherwise as purchaser to take appropriate action and make good faith efforts to pursue applicable remedies on Seller's behalf, Seller acknowledges that it has no claim under this Agreement against Utility acting as in its capacity Transmission Provider or Interconnection Provider or with respect to the provision of station service.~~

~~6.2.2 Qualified Operator. Seller or an Affiliate of Seller must operate and maintain the Facility or cause the Facility to be operated and maintained by an entity (i) that has at least two (2) years of experience in the operation and maintenance of similar facilities of comparable size to the Facility; or (ii) that Seller demonstrates is otherwise qualified to operate the Facility in a manner consistent with Prudent Electrical Practices and has the financial resources and qualified personnel necessary to fulfill obligations under this Agreement. Seller must provide Utility thirty (30) days prior written notice of any change in operator of the Facility.~~

6.2.~~3~~2 Fines and Penalties.

(a) Without limiting a Party's rights under Section 6.2.3(b), each Party must pay all fines and penalties incurred by such Party on account of noncompliance by such Party with Requirements of Law as such fines and penalties relate to the subject matter of this Agreement, except where such fines and penalties are being contested in good faith through appropriate proceedings.

(b) If fines, penalties, or legal costs are assessed against or incurred by either Party (the "Indemnified Party") on account of any action by any Governmental Authority due to noncompliance by the other Party (the "Indemnifying Party") with any Requirements of Law or the provisions of this Agreement, or if the performance of the Indemnifying Party is delayed or stopped by order of any Governmental Authority due to the Indemnifying Party's noncompliance with any Requirements of Law, the Indemnifying Party must indemnify and hold harmless the Indemnified Party against any and all Liabilities suffered or incurred by the Indemnified Party as a result thereof. Without limiting the generality of the foregoing, the Indemnifying Party must reimburse the Indemnified Party for all fees, damages, or penalties imposed on the Indemnified

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Commented [JU124]: Added to clarify dates in OAR 860-029-0120(14)(a)(B) ("Result in an expected annual net output that is greater than 10 percent ***above that specified in the power purchase agreement at the time it was executed***.").

Commented [QFs125]: Section 6.2.1 - This section both creates unreasonable cross default risk for a small QF while simultaneously purporting to completely waive the utility's liability for anything the utility does related to interconnection or transmission. Neither is reasonable and the whole provision should be deleted. See also our comments on Section 1.2.4.

Commented [JU126R125]: The JUs rejected deletion of this entire provision but agree to remove the reference to the GIA and the last sentence. The remaining provisions are basic requirements of operating a generating facility safely and reliably and are reasonable requirements for any generator--small or large.

Commented [QFs127]: Section 6.2.2 - The utilities' proposal to impose a "Qualified Operator" requirement on small QFs is likely illegal since it proposes limits on QF ownership and operation not existing in federal and state law. It's not contained in the administrative rules. It's also unreasonable for small QFs and will discourage development and operation of small renewable energy facilities. We recommend deletion.

Commented [JU128R127]: The JUs do not object to this deletion.

Party by any Governmental Authority, other person or to other utilities for violations to the extent caused by a default by the Indemnifying Party or a failure of performance by the Indemnifying Party under this Agreement.

6.3 Interconnection. Seller is responsible for the costs and expenses associated with obtaining from the Interconnection Provider network resource interconnection service for the Facility at its Nameplate Capacity Rating. ~~Seller has no claims under this Agreement against Utility, acting in its merchant function capacity or otherwise as purchaser, with respect to any requirements imposed by or damages caused by (or allegedly caused by) acts or omissions of the Transmission Provider or Interconnection Provider, acting in such capacities, in connection with the Generation Interconnection Agreement or otherwise.~~

6.4 Coordination with System.[20] Seller's delivery of electricity to Utility under this Agreement must be at a voltage, phase, power factor, and frequency as reasonably specified by Utility. Seller will furnish, install, operate, and maintain in good order and repair, and without cost to Utility, such switching equipment, relays, locks and seals, breakers, automatic synchronizers, and other control and protective apparatus determined by Utility to be reasonably necessary for the safe and reliable operation of the Facility in parallel with the System, or Seller may contract with Utility to do so at the Seller's expense. Utility must at all times have access to all switching equipment capable of isolating the Facility from the System.

6.5 Outages.

6.5.1 Planned Outages. Seller must provide Utility with an annual forecast of Planned Outages for each Contract Year at least one (1) month, but no more than three (3) months, before the first (1st) day of that Contract Year, specifying the applicable number of Off-Peak Hours and On-Peak Hours. Seller may update such Planned Outage schedule as necessary to comply with Prudent Electrical Practices. Although the Planned Outage schedule should include predetermined outage duration, the outage may be extended when the original scope of work requires more time than originally scheduled, subject to notice of at least five (5) days to Utility when feasible. Except as may be required in the Generation Interconnection Agreement, Seller may not schedule a Planned Outage during any portion of the months of [December and July[21]] (the "High Demand Months"), except to the extent reasonably required to enable a vendor to satisfy a guarantee requirement. With twelve (12) months prior notice before the start of any Contract Year, Utility may change these ~~months~~High Demand Months, provided that there may only be two High Demand Months. Nothing in this Section 6.5.1 will preclude Seller from scheduling Planned Outages during times in a High Demand Month when motive force is unavailable to generate and deliver Output, such as nighttime in the case of a solar facility.

6.5.2 Maintenance Outages. If Seller reasonably determines that it is necessary to schedule a Maintenance Outage, Seller must notify Utility of the proposed Maintenance Outage as soon as practicable but in any event at least five (5) days before the outage begins. Although the notice of a Maintenance Outage must include an expected completion date and time of the outage, the outage may be extended when the original scope of work requires more time than originally scheduled, subject to notice of at least five (5) days to Utility when feasible. Seller must take all reasonable measures consistent with Prudent Electrical Practices to not schedule any Maintenance Outage during the ~~months~~

Commented [QFs129]: Section 6.3 - See comments on Section 1.2.4 for explanation of proposed deletion in Section 6.3.

Commented [JU130R129]: For the reasons set forth above regarding the definition of "Utility," the JUs do not oppose deleting this sentence as long as revised Section 4.6 is retained.

Commented [QFs131]: Sections 6.5.1 & 6.5.2 - "Planned Outages" and "Maintenance Outages" - The utilities' draft does not clarify the right in OAR 860-029-0124(2) for the Seller to schedule Planned Outages during the two high demand months at times when no motive force is available, so we added that clarification. We also propose clarifying edits regarding the "High Demand Months" consistent with the rules.

Commented [JU132R131]: As explained in the JUs' responses to questions from the September 12 workshop, the lack of reference to motive force was an oversight. The JUs do not oppose the QFTGs' revisions to this section.

[20] **Note to Form** – This provision to be deleted in case of PPA with Off-System QF.

[21] **Note to Form –** Each utility will identify the two applicable months.

(continued)

~~of [December and July[22]]; provided that with twelve (12) months prior notice before the start of any Contract Year, Utility may change these months~~High Demand Months identified in Section 6.5.1, as may be updated in accordance with Section 6.5.1. Notice of a proposed Maintenance Outage by Seller must include the expected start date and time of the outage, the amount of generation capacity of the Facility that will not be available, and the expected completion date and time of the outage. Utility will promptly respond to such notice and may request reasonable modifications in the schedule for the outage. Seller must use all reasonable efforts to comply with any request to modify the schedule for a Maintenance Outage provided that such change has no substantial impact on Seller. Once the Maintenance Outage has commenced, Seller must keep Utility apprised of any changes in the generation capacity available from the Facility during the Maintenance Outage and any changes in the expected Maintenance Outage completion date and time. As soon as practicable, any notifications given orally or by email must be confirmed in writing. Seller must take all reasonable measures consistent with Prudent Electrical Practices to minimize the frequency and duration of Maintenance Outages.

6.5.3 Forced Outages. Seller must promptly provide to Utility an oral report, via telephone to a number specified by Utility (or other method approved by Utility), of any Forced Outage resulting in more than ten percent (10%) of the Nameplate Capacity Rating of the Facility being unavailable. This report from Seller must include the amount of the generation capacity of the Facility that will not be available because of the Forced Outage and the expected return date of such generation capacity. Seller must promptly update the report as necessary to advise Utility of changed circumstances. As soon as practicable, the oral report must be confirmed in writing to Utility. Seller must take all reasonable measures consistent with Prudent Electrical Practices to avoid Forced Outages and to minimize their duration.

6.5.4 Notice of Deratings and Outages. Without limiting the foregoing, Seller will inform Utility, via telephone to a number specified by Utility (or other method approved by Utility), of any limitations, restrictions, deratings, or outages reasonably predicted by Seller to affect more than five percent (5%) of the Nameplate Capacity Rating of the Facility for the following day and will promptly update such notice to the extent of any material changes in this information.

6.5.5 Effect of Outages on Estimated Output. Seller represents and warrants that the Expected Monthly Net Output provided in Exhibit A takes into account the Planned Outages, Maintenance Outages, and Forced Outages that Seller reasonably expects to encounter in the ordinary course of operating the Facility.

6.6 Scheduling.

6.6.1 Cooperation and Standards. With respect to any and all scheduling requirements, (a) Seller must cooperate with Utility with respect to scheduling Net Output, and (b) each Party will designate authorized representatives to communicate regarding scheduling and related matters arising under this Agreement. Each Party must comply with the applicable variable resource standards and criteria of any applicable Electric System Authority, as applicable.

6.6.2 Schedule Coordination. ~~If, as a result of this Agreement,~~In the event Utility is deemed by an RTO to be ~~financially responsible for Seller's performance under the Generation Interconnection Agreement due to Seller's lack of standing as~~ a "scheduling coordinator" on behalf of Seller~~or other RTO-recognized designation~~, Utility and Seller will endeavor to reach a mutual agreement regarding an amendment to this Agreement, or where such an agreement cannot be reached, will present such matter

[22] **Note to Form –** Each utility will identify the two applicable months.

(continued)

Commented [JU133]: The JUs do not oppose the QFTGs' revisions to this section.

Commented [QFs134]: Section 6.6.2 - The utilities' proposal to require the small QF to contract with a scheduling coordinator in the case of the utility joining an RTO is unreasonable and inadequately explained. There has also been no demonstration that these potential costs are accounted for and included within the compensation paid to the QF by including such costs in the proxy resource or market price forecast used to calculate the avoided costs. Instead, it appears to be a general administrative cost of running a utility and managing a power portfolio. We oppose shifting this cost on the small renewable energy facility, which will discourage development without justification.

Commented [JU135R134]: The JUs propose retaining a modified version of this provision that provides for agreed-upon amendment to the PPA in the event the utility is deemed by an RTO to be a scheduling coordinator. The JUs do not know how such changes will be implemented; however, this issue needs to be addressed in a 20-year agreement.

to the Commissionqualification or otherwise, then Seller must promptly take all actions necessary to acquire such RTO-recognized standing (or must contract with a third party who has such RTO-recognized standing) so that Utility is no longer responsible for Seller's performance under the Generation Interconnection Agreement or RTO requirement.

6.7 Forecasting.

6.7.1 Long-Range Forecasts. Seller must, by [December 1st[23]] of each year during the Term (except for the last year of the Term), provide an annual update to the expected long-term monthly/diurnal mean net energy and net capacity factor estimates (12 X 24 profile). Seller must prepare such forecasts utilizing a renewable energy resource prediction model or service that is satisfactory to Utility in the exercise of its reasonable discretion and comparable in accuracy to models or services commonly used in the industry that reflects updated assumptions relative to the applicable forecast period. The forecasts provided by Seller must comply with all applicable Electric System Authority tariff procedures, protocols, rules, and testing as necessary and as may be modified from time to time.

6.7.2 Day-Ahead Forecasts, Real-Time Forecasting and Updates. At Seller's expense, Utility will either directly provide or solicit and obtain from a qualified renewable energy production forecasting vendor forecast data and information with respect to the Facility, including day-ahead and real-time forecasting services and provision of real-time meteorological data necessary for compliance with applicable Electric System Authority procedures, protocols, rules, and testing. Upon request by Utility, Seller must provide a 24-hour telephone number that Utility may contact to determine the then-current status of the Facility. Utility will present Seller with an invoice for the costs of providing or obtaining, as applicable, such forecasting data. Seller must pay the amount stated on the invoice within fifteen (15) days of receipt. Utility reserves the right to change its pricing, if providing the services directly, or the forecasting vendor, as applicable, in its sole discretion during the Term.[24]

6.8 Increase in Nameplate Capacity Rating; Expansion or New Project; Allowable Facility Upgrades.

6.8.1 No Increase to Nameplate Capacity Rating. During the term of this Agreement, Seller may not (i) increase the Nameplate Capacity Rating of the Facility or cause the Facility to deliver Net Output in quantities in excess of the Maximum Delivery Rate; or (ii) except to the extent Seller complies with the requirements of Section 6.8.3, increase the Expected Net Output of the Facility, as calculated in Exhibit A,that term is defined as of the Effective Date, by more than ten percent (10%); in either case, through any means, including replacement or modification of Facility equipment or related infrastructure.

6.8.2 Expansion or New Project. If Seller elects to build an expansion or additional project such that the Facility and the expansion or additional project would be deemed a single QF or the same site under Commission or FERC regulations, Seller may not require Utility to purchase (and Utility will have no obligation to purchase pursuant to this Agreement) the output of any such expansion or additional facility under the terms, conditions, and prices in this Agreement, but Seller may exercise any rights to enter into a new agreement for the sale of such incremental energy from such expansion or additional facility that is

[23] **Note to Form** – Each utility will identify the applicable date.

[24] **Note to Form** – The language in the above Section 6.7.2 applies only to wind, solar (including solar plus battery storage) and hydro QFs. For any other QF, this provision will be replaced with a provision requiring Seller to provide a monthly delivery schedule that sets forth the expected hourly delivery rate for each day of such month.

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Commented [QFs136]: Section 6.7 - Forecasting Costs - The utilities' proposal to shift the costs of forecasting generation output onto the QF is not supported by the administrative rules, and again is a cost of operating and managing a generation portfolio that is not included within the avoided cost rates paid to QFs. It's an unreasonable cost and/or burden on small QFs. We oppose inclusion of this cost in the standard PPA for small QFs.

Commented [JU137R136]: The JUs do not oppose removing Section 6.7.1. However, the JUs do not agree to remove Section 6.7.2. The JUs require day-ahead and real-time forecasts to reliably and efficiently operate their systems and to participate in the EIM, and the costs for such forecasts are minimal.

Commented [QFs138]: Section 6.7 - Forecasting Costs - The utilities' proposal to shift the costs of forecasting generation output onto the QF is not supported by the administrative rules, and again is a cost of operating and managing a generation portfolio that is not included within the avoided cost rates paid to QFs. It's an unreasonable cost and/or burden on small QFs. We oppose inclusion of this cost in the standard PPA for small QFs.

Commented [JU139R138]: The JUs do not oppose removing Section 6.7.1. However, the JUs do not agree to remove Section 6.7.2. The JUs require day-ahead and real-time forecasts to reliably and efficiently operate their systems and to participate in the Energy Imbalance Market (EIM), and the costs for such forecasts are minimal.

Commented [QFs140]: Section 6.8.1 - See our comments on Section 4.1 for explanation of our edits Section 6.8.1. Deliveries of Net Output in excess of Maximum Delivery Rate should not be a breach of the PPA, especially for an off-system QF.

Commented [JU141R140]: The JUs do not object to the QFTGs' revision to this section.

Commented [JU142]: Added to clarify dates in OAR 860-029-0120(14)(a)(B) ("Result in an expected annual net output that is greater than 10 percent ***above that specified in the power purchase agreement at the time it was executed***.").

a QF under then-applicable laws and regulations. Seller agrees that it will not seek to avoid the obligations in this Section 6.8 through use or establishment of a special purpose entity or other Affiliate. Any such expansion or additional facility may not materially and adversely impact the ability of either Party to fulfill its obligations under this Agreement.

6.8.3 Allowable Upgrades. In the event that Seller seeks to upgrade the Facility in a manner that does not increase the Nameplate Capacity Rating of the Facility, but which is reasonably likely to cause an increase in the Expected Net Output (as such term is defined~~to exceed that listed in Exhibit A~~ as of the Effective Date) by more than ten percent (10%), such upgrades may only be made subject to the following requirements:

(a) The proposed upgrades must not cause Seller to fail to meet the current eligibility requirements for either the standard power purchase agreement or standard prices, to breach its Generation Interconnection Agreement, or necessitate Network Upgrades in order to maintain designated network status.

(b) At least six (6) months in advance of the scheduled installation date for the proposed upgrades, Seller must send written notice to Utility containing a detailed description of the proposed upgrades and their impact on Expected Net Output and a 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 thirty (30) days after receiving such a request, Utility must respond with indicative pricing for the expected incremental additional Net Output to be generated as a result of the upgrades in excess of ten percent (10%) of the Expected Net Output ~~specified in Exhibit A~~(as such term is defined as of the Effective Date).

(d) Within thirty (30) days after receiving indicative pricing, Seller may request a draft amendment to this Agreement to reflect revised pricing for the remainder of the term, 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, 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.

Within ninety (90) days after the date on which upgrades are installed under subsections (a), (b), or (c) of this Section 6.8.3, Seller is obligated to provide Utility with an As-Built Supplement describing in detail Facility, as modified by the allowable upgrades, which As-Built Supplement will be incorporated into Exhibits B and C of this Agreement.

If Seller wishes to install upgrades that would cause the Facility to increase its Nameplate Capacity Rating, Seller may elect to terminate the Agreement and may choose to enter a new standard or new non-standard power purchase agreement, based on applicable eligibility requirements, at the then-current avoided cost pricing; provided that such termination of this Agreement will be treated as a termination for a Seller Event of Default for which Seller will owe Utility termination damages. In such case, notwithstanding any other provision in this Agreement to the contrary, with respect to any portion of the period in which Seller owes Utility termination damages in which Seller is contractually obligated to deliver output under the new agreement, the Cost to Cover will be calculated based on the pricing set forth in the new agreement. If Seller elects under this Section to terminate the Agreement and enter ~~chooses to negotiate~~ a new non-standard power purchase agreement ~~pursuant to this Section 6.8.3, such election~~

Commented [JU143]: Added to clarify dates in OAR 860-029-0120(14)(a)(B) ("Result in an expected annual net output that is greater than 10 percent ***above that specified in the power purchase agreement at the time it was executed***.").

Commented [JU144]: The JUs do not agree with the QFTGs' deletion of the word "only," which was made without explanation, as this is the only allowable process for QFs to unilaterally upgrade the facility as reflected in the rules. The JUs made clarifying revisions regarding where the Expected Net Output is reflected and the point in time at which it should be referenced. The JUs also propose alternate language clarifying the circumstances where the damages provision in OAR 860-029-0120(14)(d) applies and cross-referencing the eligibility requirement in the PPA.

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~~will not constitute a default for failure to maintain eligibility under this Agreement or be a cause for damages owed to Utility for such failure~~Seller will not be liable for damages for any default caused by Seller's failure to maintain eligibility for a standard power purchase agreement, as provided in Section 7.2.

6.9 Telemetering. ~~Seller must provide telemetering equipment and facilities capable of transmitting the following information concerning the Facility pursuant to the Generation Interconnection Agreement and to Utility on a real-time basis, and will operate such equipment when requested by Utility to indicate:~~

~~(a) instantaneous MW output at the Point of Delivery;~~

~~(b) Net Output; and~~

~~(c) the Facility's total instantaneous generation capacity.~~

To the extent Seller is required to install telemetering equipment under its Generation Interconnection Agreement, ~~Commencing~~ commencing on the date of initial deliveries under this Agreement, Seller must ~~also~~ transmit or otherwise make accessible to Utility ~~any other~~ data from the Facility that Seller receives on a real time basis~~, including~~ regarding Net Output ~~data~~. Such real time data must be made available to Utility on the same basis as Seller receives the data (e.g., if Seller receives the data in four second intervals, Utility must also receive the data in four second intervals). If Seller uses a web-based performance monitoring system for the Facility, Seller must provide Utility access to Seller's web-based performance monitoring system.

6.10 Transmission Provider Consent. Within ten (10) days of the Effective Date, Seller must execute and submit to Utility, a consent in the form provided in Exhibit G or as otherwise required by Transmission Provider, that allows Utility to read the meter and receive any and all data from the Transmission Provider relating to transmission of Output or other matters relating to the Facility without the need for further consent from Seller.

6.11 Dedicated Communication Circuit. Seller must install a dedicated direct communication circuit (which may be by common carrier telephone) between Utility and the control center in the Facility's control room or such other communication equipment as the Parties may agree.

6.12 Reports and Records.

6.12.1 Electronic Fault Log.[25] Seller must maintain an electronic fault log of operations of the Facility during each hour of each month of the Term commencing on the Effective Date. Seller must provide Utility with a copy of the any monthly fault log promptly upon Utility's request and shall provide Utility with all twelve (12) monthly electronic fault logs for each Contract Year within thirty (30) days after the end of the applicable Contract Year to which the fault log applies. The fault log must be sufficiently detailed to enable Utility to calculate the Performance Guarantee and in such electronic form as is acceptable to Utility.

~~6.12.2 Other Information to be Provided to Utility. Following the Effective Date until the Commercial Operation Date, Seller must provide to Utility a quarterly progress report stating the percentage~~

[25] **Note to Form** – Section 6.12.1 will be removed in contracts with hydro QFs less than 3 MW that were initially placed in service prior to 1980.

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Commented [QFs145]: Section 6.8.3 - Expansion or New Project - Our edit is consistent with the last sentence of OAR 860-029-0120(d) clarifying no breach of the eligibility cap occurs by requesting to upgrade the facility.

Commented [JU146R145]: The JUs propose alternate language clarifying the circumstances where the damages provision in OAR 860 029-0120(14)(d) applies and cross-referencing the eligibility requirement in the PPA.

Commented [QFs147]: Section 6.9 - The utilities' proposal for telemetry for small QFs and direct, instantaneous communication is beyond the requirements of the administrative rules, and does not appear to be included in any of the currently effective standard contracts. This could impose a significant new cost on small QFs, and there has been no demonstration it is needed, and not already accounted for in the GIA to the extent it is needed. Section 6.10 should provide the utility with the information i ... [31]

Commented [JU148R147]: The JUs do not agree to delete this provision in its entirety and rather propose limiting language so that the PPA is not requiring telemetry equipment not otherwise already requ ... [32]

Commented [QFs149]: Section 6.11 - Dedicated Communication Circuit - See comments on Section 6.9 for explanation of deletion of this section.

Commented [JU150R149]: The JUs rejected deletion of this provision. It is intended to set up standard communication contacts and protocols, and would not impose significant costs on QFs cont ... [33]

Commented [QFs151]: Section 6.12.1 - Electronic Fault Log - We do not agree it is reasonable to require all small QFs to maintain an electronic fault log. Some older facilities and smaller facilities may not ha ... [34]

Commented [JU152R151]: JUs do not agree to remove this provision for all QFs; however, the JUs propose to remove this provision for hydro QFs less than 3 MW initially placed in service prior to 19 ... [35]

Commented [QFs153]: Sections 6.12.2 through 6.12.8 - These new, and one-sided, reporting requirements are very burdensome on a small QF. We question whether the utility would even review ... [36]

~~completion of the Facility and a brief summary of construction activity during the prior quarter and contemplated for the next calendar quarter.~~

6.12.~~3~~2 Information to Governmental Authorities; Data Requests. Seller must, promptly upon written request from Utility, provide Utility with data collected by Seller related to the construction, operation or maintenance of the Facility reasonably required for reports to any Governmental Authority or Electric System Authority or information requests from any Governmental Authority, state or federal agency intervener or any other party achieving intervenor status in any Utility rate proceeding or other proceeding before any Governmental Authority, along with a statement from an officer of Seller certifying that the contents of the submittals are true and accurate to the best of Seller's knowledge. Seller must use best efforts to provide this information to Utility sufficiently in advance to enable Utility to review such information and meet any submission deadlines. Utility will reimburse Seller for all of Seller's reasonable actual costs and expenses in excess of $5,000 per year, if any, incurred in connection with Utility's requests for information under this Section 6.12.3.

~~6.12.4 Data Request. Seller must, promptly upon written request from Utility, provide Utility with data collected by Seller related to the construction, operation or maintenance of the Facility reasonably required for information requests from any Governmental Authorities, state or federal agency intervener or any other party achieving intervenor status in any Utility rate proceeding or other proceeding before any Governmental Authority. Seller must use best efforts to provide this information to Utility sufficiently in advance to enable Utility to review such data and meet any submission deadlines. Utility will reimburse Seller for all of Seller's reasonable actual costs and expenses in excess of $5,000 per year, if any, incurred in connection with Utility's requests for information under this Section 6.12.4.~~

~~6.12.5 Documents to Governmental Authorities. After sending or filing any statement, application, and report or any document with any Governmental Authority or Electric System Authority relating to operation and maintenance of the Facility, Seller must promptly provide to Utility a copy of the same.~~

6.12.~~6~~3 Notice of Material Adverse Events. Seller must promptly notify Utility of receipt of written notice or actual knowledge by Seller or its Affiliates of the occurrence of any event of default under any material agreement to which Seller is a party and of any other development, financial, legal (i.e., litigation or threat or litigation) or otherwise, which would have a material adverse effect on Seller, the Facility, or Seller's ability to develop, construct, operate, maintain or own the Facility, including any material violation of any environmental laws or regulations arising out of the construction or operation of the Facility, or the presence of Environmental Contamination at the Facility or on the Premises.

~~6.12.7 Notice of Litigation. Following its receipt of written notice or knowledge of the commencement of any action, suit, or proceeding before any court or Governmental Authority against Seller, its members, or any Affiliate relating to the Facility or this Agreement, or that could materially and adversely affect Seller's performance of its obligations in this Agreement, Seller must promptly notify Utility.~~

6.12.~~8~~4 Additional Information. Seller must provide to Utility such other information as relevant to Seller's performance of its obligations under this Agreement or the Facility as Utility may, from time to time, reasonably request.

6.12.~~9~~5 Confidential Treatment. The reports and other information provided to Utility under this Section 6.12 will be treated as confidential for a period of two (2) years if such treatment is requested in writing by Seller at the time the information is provided to Utility, subject to Utility's rights to disclose such information pursuant to Section~~s~~ 6.12.~~3~~2 ~~and 6.12.4~~, and pursuant to any applicable Requirements of

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Commented [JU154]: The JUs do not agree that the new rules preclude reasonable notification requirements on the progress of the facility, which is necessary for accurate system planning. The Joint Utilities have agreed to remove Section 6.12.2 and proposed a new Section 2.3.

Commented [JU155]: The JUs rejected deletion of this section and have consolidated previous Sections 6.12.3 and 6.12.4. The Joint Utilities are regulated entities so this section, which requires the QF to provide the utility notice of required information and data requests from governmental authorities, is necessary and reasonable. The JUs will request this information only in limited circumstances (if required by a Governmental Authority or Electric System Authority). This provision provides for compensation to QFs if the utility's request imposes costs.

Commented [JU156]: The JUs do not oppose the deletion of this section, which was consolidated with previous Section 6.12.3 (now Section 6.12.2).

Commented [JU157]: The JUs do not oppose deleting this section.

Commented [JU158]: While Section 6.12.6 (now Section 6.12.3) does put the onus on the QF to provide notice to the utility, such notice is only required in the case of a Material Adverse Event on the project and is not burdensome. Moreover, a requirement to provide notice, which is itself an obligation capable of being cured, does not interfere with a QF's applicable development period to come online. The Material Adverse Event notice obligation in previous Section 6.12.6 ensures that the utility will be aware of the occurrence of the types of "circumstances" the QFTGs contemplate in Section 8.1 by which utilities determine whether a QF no longer meets its creditworthiness requirements. Without any such requirement for notice of such "circumstances," it is unclear how a utility will be able to determine when to make a request un ... [37]

Commented [JU159]: This section was removed and consolidated with now Section 6.12.3.

Commented [JU160]: The JUs rejected the QFTGs' deletion of this section. The JUs believe this provision, which simply requires the QF to respond to a utility's request for information, is reasonable and necessary to incentivize communication. Moreover, the JUs ... [38]

Law. Seller will have the right to seek confidential treatment of any such information from any Governmental Authority entitled to receive such information.

6.13 Financial and Accounting Information. If Utility or one of its Affiliates determines that, under (a) the Accounting Standards Codification ("ASC") 810, Consolidation of Variable Interest Entities, and (b) Requirements of Law that it may hold a variable interest in Seller, but it lacks the information necessary to make a definitive conclusion, Seller agrees to provide, upon Utility's written request, sufficient financial and ownership information so that Utility or its Affiliate may confirm whether a variable interest does exist under ASC 810 and Requirements of Law. If Utility or its Affiliate determines that, under ASC 810, it holds a variable interest in Seller, Seller agrees to provide, upon Utility's written request, sufficient financial and other information to Utility or its Affiliate so that Utility may properly consolidate the entity in which it holds the variable interest or present the disclosures required by ASC 810 and Requirements of Law. Utility will reimburse Seller for Seller's reasonable costs and expenses, if any, incurred in connection with Utility's requests for information under this Section 6.13. Seller will have the right to seek confidential treatment of any such information from any Governmental Authority entitled to receive such information.

6.14 Access Rights. Upon reasonable prior notice and subject to compliance with all written health, safety and security requirements of Seller provided to Utility, and Requirements of Law relating to workplace health and safety, and not interfering with Seller's maintenance or operation of the Facility, Seller must provide Utility and its employees, agents, inspectors and representatives ("Utility Representatives") with reasonable access to the Facility: (a) for the purpose of witnessing the inspection and testing of metering equipment and remote sensing devices; (b) as necessary to witness any acceptance tests; (c) as necessary to witness any testing associated with the Facility, including testing with respect to the Performance Guarantee; and (d) for other reasonable purposes at the reasonable request of Utility. Utility will release Seller and its employees, agents and representatives from and indemnify Seller and its employees, agents and representatives against any and all Liabilities resulting from actions or omissions by any of the Utility Representatives in connection with their access to the Facility (whether pursuant to this Section 6.14 or otherwise), except to the extent such Liabilities are caused by the intentional or negligent act or omission of Seller or its Affiliates or their respective employees, agents and representatives.

6.15 Performance Guarantee. Seller is subject to the terms and conditions set forth in the Performance Guarantee attached as Exhibit F ("Performance Guarantee").[26]

SECTION 7
QUALIFYING FACILITY STATUS; ELIGIBILITY FOR STANDARD PRICING

7.1 Seller's QF Status. Seller must maintain throughout the Term the Facility's status as a QF. Seller must provide Utility with copies of any QF certification or recertification documentation within ten (10) days of its filing with any Governmental Authority. At any time during the Term, Utility may require Seller to provide Utility with evidence satisfactory to Utility in its reasonable discretion that the Facility continues to qualify as a QF under all applicable requirements.

7.2 Seller's Eligibility for a Standard Power Purchase Agreement and Standard Pricing. Seller will not

[26] **Note to Form** – Wind, solar, battery storage, solar + storage, and hydroelectric QFs are subject to a Mechanical Availability Guarantee. Geothermal and biomass QFs are subject to a Minimum Delivery Guarantee.

(continued)

make any changes in its ownership, control or management that would cause the Facility to fail to satisfy the eligibility requirements for entering into the standard power purchase agreement or receipt of standard pricing under Utility's Schedule XX. At Utility's request, but no more than once every twenty-four (24) months, Seller will provide documentation and information reasonably requested by Utility to establish Seller's continued compliance with eligibility requirements for the standard power purchase agreement and standard pricing, as applicable, under Utility's Schedule XX. Utility will take reasonable steps to maintain the confidentiality of any such documentation and information Seller identifies as confidential, provided that Utility may provide all such information to the Commission in a proceeding before the Commission.

SECTION 8
SECURITY AND CREDIT SUPPORT

8.1 Provision of Security. Seller must provide security as provided below if it does not meet the Credit Requirements at any time during the Term of this Agreement. ~~Unless Seller has posted the security provided for below~~If Seller has established it satisfies the Creditworthiness Requirements, Seller must thereafter provide Utility ~~on a quarterly basis all~~ financial information reasonably requested by Utility, that is reasonably necessary for Utility to verify the Seller continues to satisfy the Credit Requirements. The Utility shall make such request for financial information by writing and may make such requests no more frequently than once per Contract Year or upon occurrence of circumstances that provide the Utility with good cause to believe that Seller no longer meets the Creditworthiness Requirements, Seller shall have thirty (30) days after the Utility's written request to provide the financial information.

8.2 Project Development Security.[27] If Seller does not meet the Credit Requirements as of the Effective Date, Seller must post and maintain Project Development Security in favor of Utility within one hundred and twenty (120) days from the Effective Date. If ~~Utility determines~~ at any time after the Effective Date but before the Facility achieves Commercial Operation ~~that~~ Seller (or its guarantor, if applicable) no longer meets the Credit Requirements, Seller must post and maintain Project Development Security in favor of Utility within the latter of thirty (30) days or one hundred and twenty (120) days from the Effective Date. In either case, the Project Development Security must be in the form of either (a) a guaranty from a party that satisfies the Credit Requirements, in a form acceptable to Utility in its reasonable discretion, (b) a Letter of Credit in favor of Utility, in a form acceptable to Utility in its reasonable discretion, or (c) cash escrow with a Qualified Institution. In the event the Project Development Security is provided by a guarantor, Seller or the entity providing the guaranty must provide within ~~five~~ fifteen (15) Business Days from receipt of a written request from Utility all reasonable financial records necessary for Utility to confirm the guarantor satisfies the Credit Requirements. If the Commercial Operation Date occurs after the Scheduled Commercial Operation Date, and Seller has failed to pay any Delay Damages when due under this Agreement and Seller has elected cash escrow or Letter of Credit as the form of Project Development Security, Utility is entitled to draw upon or otherwise exercise rights under the Project Development Security to recover an amount equal to the Delay Damages until the Project Development Security is exhausted~~.~~, and Utility is also entitled to draw upon or otherwise exercise rights under the Project Development Security ~~for~~ to recover any other damages it is entitled to under this Agreement. Seller is no longer required to maintain the Project Development Security after the Commercial Operation Date, if no damages are owed to Utility under this Agreement and, if applicable, Default Security has been provided as required under this Agreement. Seller may elect to apply the Project Development Security toward the Default Security required by Section 8.3. If Seller has elected cash escrow or Letter of Credit as the form of Project Development Security, Utility shall return to Seller the Project Development Security or that

[27] **Note to Form** – This provision to be deleted in PPA with operational QF.

(continued)

Commented [QFs161]: Section 8.1 - The utilities' proposal that a creditworthy QF provide financial information every three months is burdensome and should be phrased in a manner that clearly specifies that the QF's obligation to supply such information is triggered only by a specific request from the utility - not an automatic submittal or blanket request for the information every three months. We propose a one-year interval or anytime circumstances lead the Utility to believe in good faith that the specific QF no longer is Creditworthy.

Commented [JU162R161]: The JUs do not object to the QFTGs' revisions to this section.

Commented [QFs163]: Section 8.2 - Project Dev. Security -
First, the utilities' proposal is phrased in a way that suggests that the utility has unilateral, sole discretion to determine if the QF no longer meets the creditworthiness requirements, and it should be rephrased as a neutral statement as to whether the QF still meets the Creditworthiness Requirements as defined in the PPA.

Second, this Section is drafted such that it shortens the 120-day period in the administrative rules for a QF that ceases to meet creditworthiness requirements shortly after the Effective Date.

Third, there have seen cases where a utility retains a letter of credit or cash security for months after it is no longer required, which has real financial consequences for the Seller. The PPA needs to require the Utility to promptly return the liquid security when no longer required.

Our edits correct these problems.

Commented [JU164R163]: The JUs do not object to the QFTGs' revisions to this section. However, the JUs added clarifying language regarding drawing upon security, because the QFTGs' revisions could have been interpreted to limit the ability to exercise rights under certain types of security. In addition, a five-day timeline for returning cash escrow security is not practicable, so the JUs propose 30 days.

portion Project Development Security that Seller elects not to apply toward Default Security within ~~five~~thirty (~~5~~30) Business Days of a receipt of a written request by Seller made on or after the Commercial Operation Date.

8.3 Default Security. If Seller does not meet the Credit Requirements as of the Commercial Operation Date, on the date specified in Section 2.2, or it is determined at any time after the Facility achieves Commercial Operation that Seller (or its guarantor, if applicable) no longer meets the Credit Requirements, within ten (10) days of notification from Utility, Seller must post and maintain Default Security in favor of Utility in the form of either (a) a guaranty from an entity that satisfies the Credit Requirements, in a form acceptable to Utility in its reasonable discretion, (b) a Letter of Credit in favor of Utility, in a form acceptable to Utility in its reasonable discretion, (c) cash escrow with a Qualified Institution, or (d) ~~a~~ grant of ~~: (i)~~ step-in rights ~~in accordance with Section 8.3.1, or (ii)~~ a senior lien ~~security interest under a security agreement~~ in a form acceptable to Utility in its reasonable~~-~~exercised discretion, subject to the terms of this Section 8.3~~and in accordance with Section 8.3.2~~. If Seller elects a guaranty, cash escrow, or Letter of Credit as the form of Default Security, ~~In the event the Default Security is provided in the form of a guaranty, Seller and any entity providing a guaranty, if applicable, must provide within fifteen~~ve (15) Business Days from receipt of a written request from Utility all reasonable financial records necessary for Utility to confirm the guarantor satisfies the Credit Requirements. ~~If Seller elects cash escrow or Letter of Credit as the form of Default Security,~~ Utility is entitled to draw upon the Default Security for any damages to which it is entitled under this Agreement. If no damages or obligations remain due by Seller to Utility upon termination of the Agreement, Utility must return any remaining Default Security to Seller within ~~sixty five~~thirty (~~530~~60) Business D~~d~~ays following the termination of the Agreement~~, then Utility must return any remaining Default Security to Seller within sixty (60) days following the termination of this Agreement~~.

8.3.1 Guaranty. In the event the Default Security is provided in the form of a guaranty, Seller and any entity providing a guaranty, if applicable, must provide within fifteen (15) Business Days from receipt of a written request from Utility all reasonable financial records necessary for Utility to confirm the guarantor satisfies the Credit Requirements.

8.3.~~1~~2 ~~———~~Step-In Rights. In the event Seller grants Utility step-in rights, on, under and subject to the terms and conditions of the applicable form of agreement between Seller and Utility~~If the Seller elects to grant the Utility step-in rights, the provisions of Section 8.3.1 will govern such step-in rights~~. described in Section 8.3(d) ("Step-In Rights Agreement").

~~8.3.1.1 Prior to any termination of this Agreement due to an Event of Default of Seller, as identified in Section 11,~~ Utility shall have the right, but not the obligation, to possess, assume control of, and operate the Facility as agent for Seller (in accordance with Seller's rights, obligations, and interest under this Agreement)~~-~~, as provided in this Section 8.3.2~~during the period provided for herein~~. Seller shall not grant any other person ~~, other than the lending institution providing financing to the Seller for construction of the Facility ("Facility Lender"),~~ a right to possess, assume control of, and operate the Facility that is equal to or superior to Utility's right under this Section 8.3.~~1~~2.

~~8.3.1.2 Utility shall give Seller ten (10) calendar days notice in advance of the contemplated exercise of Utility's rights under this Section 8.3.1. Upon such notice, Seller shall collect and have available at a convenient, central location at the Facility all documents, contracts, books, manuals, reports, and records required to construct, operate, and maintain the Facility in accordance with Prudent Electrical Practices. Upon such notice, Utility, its~~

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Commented [QFs165]: Section 8.3 - Default Security - In addition to the options for Project Development Security, OAR 860-029-0120(16) includes the following additional options for Default Security: "grant of step-in rights ***or*** a senior lien to the purchasing utility in a form acceptable to the purchasing utility in its reasonable-exercised discretion."

A lien is a different from step-in rights, and these are two distinct options in the rules. A lien is a legal right a creditor has in property (e.g., the right to foreclose and sell the facility or real property); whereas step-in rights are the right to step into the shoes of Seller and operate the plant to deliver power to Utility.

The utilities' draft PPA omits step-in rights in violation of the rules. We added step-in rights as an option consistent with the rules. Additionally, both the step-in rights and the lien option should be more completely described in the standard contract to avoid disputes and/or the utility imposing unreasonable terms to deny the QF's right in the rules to use these options. The description of the step-in rights and senior lien we have proposed in Section 8.3.1 & 8.3.2 mirror the terms of PacifiCorp's existing standard PPA for QFs, section 10.4 and Idaho Power standard PPA Section 4.1.

... [39]

Commented [JU166R165]: The JUs intended the "grant of senior security interest" language in the proposed PPA to encompass step-in rights but do not object to the QFTGs' addition of detail. Both a senior lien and step-in rights would require a separate agreement in a form acceptable to utility in its reasonable discretion, and the JUs revised the proposed language for clarity. In addition, while the Joint Utilities appreciate the QFTGs' effort to add detail regarding how step-in rights and senior lien would work, PacifiCorp's experience has shown that a separate agreement addressing all the details is necessary and PacifiCorp's current PPA language does not necessarily reflect the form of separate agreement that would be acceptable to the Joint Utilities today. Therefore, the Joint Utilities modified now Sections 8.3.2 and 8.3.3 for consistency with current practice. The Joint Utilities also added a new Section 8.3.1 explaining the process if the Seller selects Default Security in the form of a guaranty.

employees, contractors, or designated third parties shall have the unrestricted right to enter the Facility for the purpose of constructing and/or operating the Facility. Seller hereby irrevocably appoints Utility as Seller's attorney-in-fact for the exclusive purpose of executing such documents and taking such other actions as Utility may reasonably deem necessary or appropriate to exercise Utility's step-in rights under this Section 8.3.1the Step-In Rights Agreement.

8.3.1.3 During any period thatin which Utility is in possession and control of and constructing and/or operating the Facility, the financial benefit of any generation shall be for first the account of the Utility and no proceeds or other monies attributed to operation of the Facility shall be remitted to or otherwise provided to the account of Seller until all Events of Default of Seller have been cured and Utility has been reimbursed all of its costs related to exercising its step-in rights, including the costs of possessing, operating and maintaining the Facility. .

8.3.1.4 During any period that Utility is in possession of and operating the Facilityin which Utility exercises step-in rights, Seller shall retain legal title to and ownership of the Facility. and Utility shall have no liability to Seller related to the manner in which Utility operates and maintains the Facility while exercising its step-in rights except in the event of gross negligence or willful misconductshall assume possession, operation, and control solely as agent for Seller.

(a) In the event Utility is in possession and control of the Facility for an interim period, Seller shall resume operation and Utility shall relinquish its right to possess, operate, and maintain the Facility when Seller demonstratesupon demonstration to Utility's reasonable satisfaction that Seller it will remove those grounds that originally gave rise to Utility's right to operate the Facility, as provided above, in that Seller (i) will resume operation of the Facility in accordance with the provisions of this Agreement, and (ii) has fully cured the conditions giving rise to anythe Events of Default of Seller which allowedresulting in the exercise by Utility to exerciseof its step-in rights under this Section 8.3.1.

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

8.3.1.5 Utility's exercise of its rights hereunder to possess and operate the Facility shall not be deemed an assumption by Utility of any liability attributable to Seller. If at any time after exercising its rights to take possession of and operate the Facility Utility elects to return such possession and operation to Seller, Utility shall provide Seller with at least fifteen (15) calendar days advance notice of the date Utility intends to return such possession and operation, and upon receipt of such notice Seller shall take all measures necessary to resume possession and operation of the Facility on such date.

8.3.23 Senior Lien. In the event Seller grants Utility a senior lien, on, under and subject to the terms and conditions of the applicable form of agreement between Seller and Utility described in Section 8.3(d) ("Security Agreement"), If the Seller elects to grant the Utility a

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~~senior lien, the senior lien shall conform to the requirements of this Section 8.3.2. Seller shall grant Utility~~ such lien shall be a senior, unsubordinated, recordable, lien on the Facility and its assets, as provided in this Section 8.3.3. ~~as security for performance of this Agreement by executing, acknowledging and delivering a security agreement and a deed of trust or a mortgage, in a recordable form (each in a form satisfactory to Utility in the reasonable exercise of its discretion). Pending execution and delivery of the senior lien~~Security Agreement and related instruments, such as mortgage, deed of trust and financing statements, etc., to Utility, Seller shall not cause or permit the Facility or its assets to be burdened by liens or other encumbrances that would be superior to Utility's, other than workers', mechanics', suppliers' or similar liens, or tax liens, in each case arising in the ordinary course of business that are either not yet due and payable or that have been released by means of a performance bond posted within eight (8) calendar days of the commencement of any proceeding to foreclose the lien.

~~8.3.3 Additional Provisions for Cash Escrow and Letter of Credit Security.~~

8.4 ~~No~~ Interest on Security. ~~Except for If Seller has elected cash escrow as the form of Project Development Security or Default Security, cash escrow, any interest accrued on the cash held in escrow shall not become part of the Security and shall be paid to Seller each month. Seller shall not earn or be entitled to any interest on any Security provided pursuant to this Section 8. Except for cash escrow,~~ Seller shall not earn or be entitled to any interest on any Security provided pursuant to this Section 8. Cash escrow will earn interest at the rate the applicable Qualified Institution applies to equivalent money market deposits. Any interest accrued on the cash held in escrow shall not become part of the Security and shall be paid to Seller cash escrow when the escrow is returned to Seller under this Agreement unless other arrangements are made by the parties.

8.5 Grant of Security Interest in Security. If Seller has elected cash escrow or Letter of Credit as the form of Project Development Security or Default Security t~~T~~o secure its obligations under this Agreement, Seller hereby grants to Utility, as the secured party, a present and continuing security interest in, lien on (and right of setoff against), and assignment of, all Project Development Security or Default Security, as the case may be, posted with Utility in the form of cash collateral and cash equivalent collateral and any and all proceeds resulting therefrom or the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of, Utility. Seller agrees to take such action as Utility reasonably requires in order to perfect a first-priority security interest in, and lien on (and right of setoff against), such performance assurance and any and all proceeds resulting therefrom or from the liquidation thereof. Upon or any time after the occurrence or deemed occurrence and during the continuation of an Event of Default by Seller, Utility may do any one or more of the following: (a) exercise any of the rights and remedies of a secured party with respect to all the Security, including any such rights and remedies under Requirements of Law then in effect; (b) exercise its right of setoff against any and all property of Seller, as the Defaulting Party, in the possession of Utility or Utility's agent; (c) draw on any outstanding Letter of Credit issued for its benefit; and (d) liquidate all Security then held by or for the benefit of Utility free from any claim or right of any nature whatsoever by Seller, including any equity or right of purchase or redemption by Seller. Utility shall apply the proceeds of the collateral realized upon the exercise of any such rights or remedies to reduce Seller's obligations under this Agreement (Seller remaining liable for any amounts owing to Utility after such application), subject to Utility's obligation to return any surplus proceeds remaining after such obligations are satisfied in full.

Commented [QFs167]: The utilities' proposed Sections 8.4 and 8.5 - These two provisions are relevant only to cash escrow and letter of credit security, so we reformatted and edited to make that more clear.

Regarding proposed 8.4 (renumbered 8.3.3.1), Seller *would* be entitled to interest in a cash escrow scenario and therefore the title of this section should not be titled "No Interest on Security", and it should also expressly state Seller is entitled to interest on the cash escrow. That is all a PPA would normally state regarding interest on security since interest is only relevant to cash. In short, this provision should only apply to cash escrow and it should clearly state Seller *is* entitled to interest.

Regrading proposed Section 8.5 (renumbered 8.3.3.2) - We question the need for this extra provision, but do not necessarily object to it so long as it clearly states it only applies in the case of cash escrow or letter of credit security, which appears to be the utilities' intent as drafted. We propose a further clarification edit on that point.

Commented [JU168R167]: The JUs restored the prior language explaining that only cash escrow security earns interest. The JUs do not object to the QFTGs' proposal to add the concept that interest does not become part of the security but paying interest monthly is an administrative burden. Therefore, the JUs propose that the default under the PPA be that interest is paid when the escrow is returned but the PPA also permits the parties to make other arrangements.

Commented [JU169]: The JUs do not oppose the QFTGs' revisions to this section.

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8.6 Security is Not a Limit on Seller's Liability. The security contemplated under this Section 8 constitutes security for, but is not a limitation of, Seller's obligations and liabilities under this Agreement and is not Utility's exclusive remedy for Seller's failure to perform in accordance with this Agreement. To the extent Utility draws on any Project Development Security or Default Security, Seller must, within fifteen (15) days following such draw, replenish or reinstate the Project Development Security or Default Security, as applicable, to the full amount then required under this Section 8. If any security provided by Seller pursuant to this Section 8 will terminate or expire by its terms within thirty (30) days, and Seller has not delivered to Utility replacement security in such amount and form as is required pursuant to this Section 8, then Utility shall be entitled to draw the full amount of the security and to hold such amount as security until such time as Seller delivers to Utility replacement security in such amount and form as is required pursuant to this Section 8.

SECTION 9
METERING

9.1 Installation of Metering Equipment. At Seller's cost and expense, Seller shall design, furnish, install, own, inspect, test, maintain, and replace all metering equipment as required by the Generation Interconnection Agreement and this Section 9. Seller must use revenue grade metering equipment consistent with American National Standards Institute ("ANSI") standards. In the event Market Operator adopts new meter requirements that are applicable to the Facility, Seller will, at its cost and expense, reasonably cooperate to upgrade any applicable metering equipment. Seller shall reasonably cooperate with Utility in developing any metering protocols necessary for Utility to comply with the requirements of the Market Operator or Utility Transmission.

9.2 Metering. Metering must be performed at the locations specified in Exhibit C and at the locations and in the manner specified in the Generation Interconnection Agreement, and as otherwise may be necessary to perform Seller's obligations under this Agreement. Meters must be capable of recording quantities of Output and Net Output, as the case may be.

9.3 Inspection, Testing, Repair and Replacement of Meters. Utility shall have the right to periodically inspect, test, repair and replace the metering equipment provided for in this Section 9, without Utility assuming any obligations of Seller under this Section 9. If any of the inspections or tests disclose an error exceeding one half of one percent (0.5%), either fast or slow, then the necessary corrections based upon the inaccuracy found, shall be made of previous readings for the actual period during which the metering equipment rendered inaccurate measurements if that period can be ascertained. If the actual period cannot be ascertained, then the proper correction shall be made to the measurements taken during the time the metering equipment was in service since last tested, but not exceeding three (3) months, in the amount the metering equipment shall have been shown to be in error by such test. Any correction in billings or payments resulting from a correction in the meter records shall be made in the next monthly billing or payment rendered. Such correction, when made, shall constitute full adjustment of any claim between Seller and Utility arising out of such inaccuracy of the metering equipment. ~~Nothing in this Agreement shall give rise to Utility, acting in its merchant function capacity or otherwise as purchaser hereunder, having any obligations to Seller, or any other Person, pursuant to or under the Generation Interconnection Agreement.~~

Commented [QFs170]: Section 9.3 - See our comments on Section 1.2.4 for explanation for why we propose deleting the last sentence of Section 9.3

Commented [JU171R170]: For the reasons set forth above regarding the definition of "Utility," the JUs do not oppose deleting this sentence as long as revised Section 4.6 is retained.

9.4 Metering Costs. To the extent not otherwise provided in the Generation Interconnection Agreement, Seller shall be responsible for all costs and expenses relating to all metering equipment installed to accommodate Seller's Facility. The actual expense of any Utility-requested additional inspection or testing shall be borne by Utility, unless upon additional inspection or testing the metering

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equipment is found to register inaccurately by more than the allowable limits established in Section 9.3, in which event the expense of the requested additional inspection or testing shall be borne by Seller.

9.5 SQMD Plan. Prior to commencing Commercial Operation, Seller shall support and reasonably cooperate with Utility in Utility's development and submittal to the Market Operator of its Settlement Quality Meter Data ("SQMD") compliance plan for the Facility. The SQMD compliance plan will detail the metering equipment and any calculation or data validation performed as a part of the data submission process to the Market Operator, consistent with the Market Operator's requirements in the then-current version of the "Business Practice Manual for Metering."

9.6 WREGIS Metering. If Utility owns Environmental Attributes pursuant to Section 4.7, Seller must cause the Facility to implement all necessary generation information communications in WREGIS, and report generation information to WREGIS pursuant to a WREGIS-approved meter dedicated to the Facility and only the Facility.

SECTION 10
BILLINGS, COMPUTATIONS AND PAYMENTS

10.1 Monthly Invoices. On or before the tenth (10^{th}) day following the end of each calendar month, Seller must deliver to Utility an invoice showing Seller's computation of Net Output delivered to the Point of Delivery during such month. When calculating the invoice, Seller must provide computations showing the portion of Net Output that was delivered during On-Peak Hours and the portion of Net Output that was delivered during Off-Peak Hours. If such invoice is delivered by Seller to Utility, then Utility must send to Seller, on or before the later of the twentieth (20^{th}) day following receipt of such invoice or the thirtieth (30^{th}) day following the end of each month, payment for Seller's deliveries of Net Output to Utility.

10.2 Offsets. Either Party may offset any payment due under this Agreement against amounts owed by the other Party pursuant under this Agreement. Either Party's exercise of recoupment and set off rights will not limit the other remedies available to such Party under this Agreement.

10.3 Interest on Late Payments. Any amounts not paid when due under this Agreement will bear interest at the Contract Interest Rate from the date due until paid.

10.4 Disputed Amounts. If either Party, in good faith, disputes any amount due under an invoice provided under this Agreement, such Party must notify the other Party of the specific basis for the dispute and, if the invoice shows an amount due, must pay that portion of the invoice that is undisputed on or before the due date. Any such notice of dispute must be provided within two (2) years of the date of the invoice in which the error first occurred. If any amount disputed by such Party is determined to be due to the other Party, or if the Parties resolve the payment dispute, the amount due must be paid within five (5) Business Days after such determination or resolution, along with interest at the Contract Interest Rate from the date due until the date paid.

10.5 Audit Rights. Each Party, through its authorized representatives, has the right, at its expense upon reasonable notice and during normal business hours, to examine and copy the records of the other Party to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made under this Agreement or to verify the other Party's performance of its obligations under this Agreement. Upon request, each Party must provide to the other Party statements evidencing the quantities of Net Output delivered at the Point of Delivery. If any statement is found to be inaccurate, a corrected statement will be issued and, subject to Section 10.4, any amount due from one Party to the

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other Party as a result of the corrected statement will be promptly paid including the payment of interest at the Contract Interest Rate from the date of the overpayment or underpayment to the date of receipt of the reconciling payment.

SECTION 11
DEFAULTS AND REMEDIES

11.1 Defaults. An event of default ("Event of Default") shall occur with respect to a Party (the "Defaulting Party") upon the occurrence of each of the following events and the expiration of any applicable cure period provided for below:

11.1.1 Defaults by Either Party.

(a) A Party fails to make a payment when due under this Agreement if the failure (i) is not subject to a good faith dispute of the amount due under Section 10.4, and (ii) is not cured within thirty (30) days after the non-defaulting Party gives the Defaulting Party a written notice of the default, provided, however, that the Defaulting Party shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and the Defaulting Party commences the cure within the initial thirty (30)-day period.

(b) The Defaulting Party: (i) (a) makes a general assignment for the benefit of its creditors; (bii) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy or similar law for the protection of creditors, or has such a petition filed against it and such petition is not withdrawn or dismissed within thirty (30) days after such filing; (ciii) becomes insolvent; or (div) is unable to pay its debts when due; and (ii) the Defaulting Party fails to cure such breach within thirty (30) days of written notice from the non-defaulting Party, provided, however, that the Defaulting Party shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and the Defaulting Party commences the cure within the initial thirty (30)-day period.

(c) The Defaulting Party breaches one of its representations or warranties or fails to perform any material obligation in this Agreement for which an exclusive remedy is not provided and which is not otherwise an Event of Default under this Agreement and such breach or failure is not cured within thirty (30) days after the non-defaulting Party gives the Defaulting Party written notice of such breach; provided, however, that the Defaulting Party shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and the Defaulting Party commences the cure within the initial thirty (30)-day period. ~~if such breach is not reasonably capable of being cured within the thirty (30) day cure period but is reasonably capable of being cured within ninety (90) days, then the Defaulting Party will have an additional reasonable period of time to cure the breach, not to exceed ninety (90) days following the date of such notice of breach, provided that the Defaulting Party provides to the other Party a remediation plan within fifteen (15) days following the date of such notice of breach and the Defaulting Party promptly commences and diligently pursues the remediation plan within thirty (30) days following the date of the notice of non-performance~~.

11.1.2 Defaults by Seller.

Commented [QFs172]: Section 11.1 - The Defaults section proposed by the utilities fails to properly include the cure periods specified in OAR 860-029-0123(3)(b) that apply to defaults other than delay default and the MAG/MDG. Our edits include the same cure periods of the administrative rules and without the additional limitations proposed by the utilities that undermine those cure rights (e.g., utilities' proposals that QF supply a "remediation plan", providing just 90 days from the breach rather than an additional 90 days after the initial 30 days as proposed in utilities' proposed Section 11.1.1(c), etc).

Commented [JU173R172]: The JUs do not object to adding the cure period from OAR 860-029-0123(4)(b) throughout Section 11.1.

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(a) Seller fails to post, increase, or maintain the Project Development Security or Default Security as required under this Agreement and such failure is not cured within thirty (30) days after Seller's receipt of written notice from Utility, provided, however, that Seller shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and Seller commences the cure within the initial thirty (30)-day period.

(b) Seller fails to cause the Facility to achieve Commercial Operation ~~[or Initial Delivery Date, in the case of an existing QF]~~ on or before the Scheduled Commercial Operation Date ~~Operation [or scheduled Initial Delivery Date, in the case of an existing QF]~~ and ~~one or more of the following events occur: (i) Seller fails to deliver a draft Schedule Recovery Plan by the Scheduled Commercial Operation Date, as provided in Section 2.4(a); (ii) Seller fails to diligently and continuously finalize and implement its Schedule Recovery Plan and such failure, in either case, is not cured within thirty (30) days from the date of Seller's receipt of notice of such failure from Utility; (iii)~~ Seller fails to achieve Commercial Operation by the Cure Period Deadline.[28]

(c) Seller sells Output ~~or Capacity Rights~~ from the Facility to a party other than Utility in breach of Section 4.3, if Seller does not permanently cease such sale and compensate Utility for the damages arising from the breach within thirty (30) days after Utility gives Seller a notice of default, provided, however, that Seller shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and Seller commences the cure within the initial thirty (30)-day period.

(d) Utility receives notice of foreclosure of the Facility or any part thereof ~~by a Lender, mechanic or materialman, or any other holder,~~ of an unpaid lien or other charge or encumbrance, if the same has not been stayed, paid, or bonded around within thirty (30) days of the date on which Utility provides notice to Seller that Utility has received a notice of foreclosure, provided, however, that Seller shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and Seller commences the cure within the initial thirty (30)-day period. An assignment in lieu of foreclosure as permitted pursuant to Section 20 of this Agreement and occurring prior to the date that is thirty (30) days, ~~of~~r such additional ninety (90)-day cure period (if applicable), after the date on which Utility provides notice to Seller that Utility has received a notice of foreclosure shall cure an Event of Default pursuant to this Section 11.1.2(d).

(e) After the Commercial Operation Date, within thirty (30) days after the loss of the applicable Required Facility Documents, Permits or leases/land grants; provided, however, that Seller shall

[28] **Note to Form** – This provision to be replaced for PPAs with operational QFs with the following language: "Seller fails to achieve Initial Delivery on or before the Scheduled Initial Delivery Date and such failure is not cured ~~within thirty (30) days~~one year ~~by the Cure Period Deadline~~ after Utility gives Seller written notice of such failure~~; provided, however, that if such failure is not reasonably capable of being cured within the thirty (30) day cure period but is reasonably capable of being cured within ninety (90) days, then Seller will have an additional reasonable period of time to cure the breach, not to exceed ninety (90) days following the date of such notice from Utility; provided that Seller provides to Utility a remediation plan within fifteen (15) days following the date of Utility's notice and Seller promptly commences and diligently pursues the remediation plan within thirty (30) days following the date of Utility's notice of non-performance~~."

(continued)

Commented [QFs174]: Section 11.1.2(b) - See comments on definition of "Schedule Recovery Plan" for explanation for our proposed edit. Additionally, we object to footnote 25's proposal to apply a shorter cure period for delay default to operational QFs. OAR 860-029-0123(4)(a) applies a one-year cure period for delay default to all QF standard contracts by its plain terms. Operational QFs could run into an extended delay due to utility failure to timely complete interconnection upgrades or perhaps the QF is repowering the facility, etc. The same cure period in the rules should apply, and our edits implement that change.

Commented [JU175R174]: JUs do not object to QFTGs' proposed revisions removing the Schedule Recovery Plan concept and, as discussed above, the JUs are willing to apply the one-year cure period to all QFs. However, the alternate language in subsection (b) is duplicative of footnote 28, and the JUs have therefore removed such language. The JUs have also replaced "within one year" with "by the Cure Pe ... [40]

Commented [QFs176]: Section 11.1.2(d) - The utilities' proposed default for a mechanic's lien is not reasonable and is not included in the changes to the administrative rules. We recommend deletion of mechanic's liens as a basis for default.

Commented [JU177R176]: The JUs do not agree that a mechanic lien that leads to foreclosure should be exempted as an event of default but are willing to remove specific reference to any type of lien and just generally reference foreclosure.

Commented [QFs178]: Section 11.1.2(e) - The proposed default for any issue arising under "Required Facility Documents" or a Lease is beyond the listed defaults allowed by OAR 860-029-0123((1), and it creates unnecessary and unreasonable cross default risk for the small QF. We recommend deleting this cross default provision. At a minimum, the sam ... [41]

Commented [JU179R178]: The JUs rejected the deletion of the first sentence because it is appropriate that failure to maintain the legal rights to operate the facility should be an event of default. Contrary to the QFTGs' comment, this provision would not lead to default any time there is an issue with a Required Facility Document. The JUs do not object to re ... [42]

be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and Seller commences the cure within the initial thirty (30)-day period~~provided, however, that if such breach is not reasonably capable of being cured within the thirty (30) day cure period but is reasonably capable of being cured within ninety (90) days, then Seller will have an additional reasonable period of time to cure the breach, not to exceed ninety (90) days following the date of such notice of breach, provided that Seller provides Utility with a remediation plan within fifteen (15) days following the date of such notice of breach and Seller promptly commences and diligently pursues the remediation plan within thirty (30) days following the date of the notice of non-performance~~.

(f) Seller's Abandonment of construction or operation of the Facility, such Abandonment continues ~~and no draft Schedule Recovery Plan is implemented within~~for thirty (30) days after Seller's receipt of written notice from Utility, provided, however, that Seller shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and Seller commences the cure within the initial thirty (30)-day period. ~~or, in the event a Schedule Recovery Plan is implemented, Seller fails to diligently and continuously implement said Schedule Recovery Plan and such failure is not cured within thirty (30) days from the date of Seller's receipt of notice of such failure from Utility.~~

(g) Seller fails to satisfy the requirements of the Performance Guarantee for the number of consecutive Contract Years specified in Exhibit F.

(h) Seller fails to satisfy the requirement to maintain QF status under Section 7.1, and such failure is not cured within thirty (30) days from the date of Seller's receipt of written notice of such failure from Utility, provided, however, that Seller shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and Seller commences the cure within the initial thirty (30)-day period.

(i) With respect to an Off-System QF, a Seller Event of Default occurs under Exhibit L with respect to Seller's ~~obligation~~ failure to reserve Firm Delivery for ~~the term of the Agreement~~commencing on the Commercial Operation Date, and such failure is not cured within thirty (30) days of the Seller's receipt of written notice by Utility, provided, however, that Seller shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and Seller commences the cure within the initial thirty (30)-day period.

11.1.3 Utility Failure to Receive or Purchase.¶ Utility fails to receive or purchase all or part of the Net Output required to be purchased under this Agreement and such failure is not excused under this Agreement, including without limitation the provisions of Section 4.5 or Seller's failure to perform, and if Utility does not ~~permanently~~ cure such failure to receive or purchase all or part of the Net Output ~~and compensate Seller for Seller's damages arising from the breach such failure is not cured.~~ within thirty (30) days from the date of Utility's receipt of notice of such failure from Seller.

11.2 Remedies for Events of Default.

11.2.1 Remedy for Seller's Failure to Deliver. ¶ Upon the occurrence and during the continuation of a~~n~~

(continued)

Commented [QFs180]: Section 11.1.2(f) - Abandonment - OAR 860-029-0123(4)(b) provides an additional 90 days to cure if the cure is "commenced" within the first 30 days after notice of default. But the utilities' proposal requires the QF to produce a utility-approved "Schedule Recovery Plan", which goes beyond what is required to obtain the additional 90-day cure period. Our edit brings the draft PPA into alignment with the rules.

Commented [JU181R180]: JUs do not object to the removal of the "Schedule Recovery Plan" concept and do not object to the addition of the 90-day extension to the 30-day cure period.

Commented [QFs182]: Section 11.1.3 & 11.2.2 - Utility Failure to Purchase - The Utilities' proposed language suggested the Utility would have no obligation to pay for the net output it failed to purchase during the period between the initial breach for failure to deliver and day when the 30-day cure period expires, which is unacceptable and unreasonable. The language we have proposed in this section mirrors that in Section 11.1.2(c) for damages owed by Seller to Utility if Seller sells the power to another entity.

Commented [JU183R182]: The JUs accepted some of the QFTGs' added language but made revisions to avoid vague language and eliminate potential redundancy. Specifically, the concept of "permanent cure" is unclear and it is sufficient to simply state "cure," and damages would be a payment obligation that, if unpaid, would be an independent event of default under Section 11.1, so it is not necessary to reference damages in Section 11.1.3. The JUs also revised Section 11.2.2 because damages are triggered by the initial breach of the obligation, Section 4.1—not the event of default under Section 11. Finally, J ... [43]

Commented [QFs184]: Section 11.2.1 - Remedy for Seller's Failure to Deliver - The same qualifications addressed in our comment to Section 2.6 need to be added to this Section 11.2.1 regarding the invoicing and due date. Additionally, as proposed by the utilities, Section 11.2.1 subjects the QF to damages in excess of the contract price cap on damages. Ou ... [44]

Commented [JU185R184]: The JUs do not object to the invoicing and due date revisions and restored language regarding the damages calculation that appears to have been inadvertently deleted.

~~Event of Default of~~breach by Seller ~~under Section 11.1.2(c)~~of Sections 4.1 and 4.3, Seller must pay Utility within thirty (30) days after receipt of invoice, subject to Sections 10.3 and unless subject to a good faith dispute under Section 10.4, an amount equal to the Utility's Cost to Cover ~~sum of (a) Utility's Cost to Cover~~ multiplied by the Net Output delivered to a party other than Utility~~, (b) additional transmission charges, if any, reasonably incurred by Utility in moving replacement energy to the Point of Delivery or if not there, to such points in Utility's control area as determined by Utility, (c) any additional cost or expense incurred as a result of Seller's default, as determined by Utility in a commercially reasonable manner, and (d) to the extent Seller is required to convey Environmental Attributes to Utility under this Agreement associated with the Net Output delivered to a party other than Utility, any additional costs Utility reasonably incurs to acquire replacement Environmental Attributes~~. Notwithstanding the foregoing, total damages under this Section may not exceed the aggregate amount Utility would have incurred to purchase Seller's Net Output and Environmental Attributes had Seller delivered all Net Output to Utility. The invoice for such amount must include a written statement explaining in reasonable detail the calculation of such amount.

11.2.2 Remedy for Utility's Failure to Purchase. ¶ Upon the occurrence and during the continuation of ~~an Event of Default of Utility~~a breach by Utility ~~under Section 11.1.3~~of Section 4.1, Utility must pay Seller, on the earlier of the date payment would otherwise be due in respect of the month in which the failure occurred or within thirty (30) days after receipt of invoice, an amount equal to Seller's Cost to Cover multiplied by the amount of Net Output not purchased. The invoice for such amount must include a written statement explaining in reasonable detail the calculation of such amount.

~~11.2.3 Remedy for Seller's Failure to Provide Capacity Rights, Ancillary Services and Environmental Attributes. ¶ Seller is liable for Utility's actual damages in the event Seller fails to sell or deliver all or any portion of the Capacity Rights, Ancillary Services and, if applicable, Environmental Attributes to Utility.~~

11.2.43 Remedy for Seller's Failure to Satisfy Performance Guarantee. ¶ Upon the occurrence and during the continuation of a~~n Event of Default of~~breach by Seller ~~under of~~ Section ~~11.1.2(g)~~6.15, Seller must pay Utility an amount in damages equal to the sum as calculated pursuant to Exhibit F and in a manner as prescribed by Exhibit F.

11.2.~~5~~4 Remedies Generally. ¶ Except in circumstances in which a remedy provided for in this Agreement is described as a Party's sole or exclusive remedy, the non-defaulting Party may pursue any and all legal or equitable remedies provided by law, equity or this Agreement. Further, in the case of a default by Seller, Utility may offset its damages against any payment due Seller. The rights contemplated by this Section 11 are cumulative such that the exercise of one or more rights does not constitute a waiver of any other rights.

11.3 Termination and Remedies. From and during the continuance of an Event of Default, the non-defaulting Party may terminate this Agreement by notice to the other Party designating the date of termination and delivered to the defaulting Party no less than thirty (30) days before such termination date. The notice required under this Section 11.3 may be provided in the notice of default (and does not have to be a separate notice) before the applicable cure period(s) have lapsed and an Event of Default has occurred provided that the non-defaulting Party complies with the terms of this Section 11.3 and that the stated termination date is no earlier than the first (1st) day following expiration of the fifteen (15) day period or the first (1st) day following the expiration of the applicable cure period(s), whichever occurs last ("Earliest Termination Date"). Where Seller is the non-defaulting Party, Seller must provide copies of such termination notice to the notice addresses of the then-current President and General Counsel of Utility by registered overnight delivery service or by certified or registered mail, return receipt requested.

(continued)

Commented [JU186]: When revising the PPA such that each type of damages provision had a separate contract price cap consistent with the rules, the JUs inadvertently did not include a contract price cap in this provision. The JUs agree that the addition of a damages cap is applicable to Section 11.2.1 and propose the following language.

Commented [JU187]: The JUs revised because damages are triggered by the initial breach of the obligation--not the event of default under Section 11. The JUs have made similar revisions to Sections 11.2.1 and 11.2.4.

Commented [QFs188]: Section 11.2.3 - Section 11.2.3's confusing statement that Seller also owes Utility "actual" damages tied to undelivered capacity and environmental attributes is inconsistent with the contract price cap on damages owed by Seller, as explained in our comments on "Replacement Power Costs". So Section 11.2.3 should be deleted.

Commented [JU189R188]: As per above comments, The JUs do not object to deletion of this section.

A termination notice must state prominently in type font no smaller than 14-point capital letters that "THIS IS A TERMINATION NOTICE UNDER A PPA. YOU MUST CURE A DEFAULT, OR THE PPA WILL BE TERMINATED," must state any amount alleged to be owed, and must include wiring instructions for payment. Notwithstanding any other provision of this Agreement to the contrary, the non-defaulting Party will not have any right to terminate this Agreement if the default that gave rise to the termination right is cured by the Earliest Termination Date.

In the event of a termination of this Agreement:

(a) Each Party must pay to the other all amounts due the other under this Agreement for all periods prior to termination, subject to offset by the non-defaulting Party against damages incurred by such Party.

(b) The amounts due under this Section 11.3 must be paid within thirty (30) days after the billing date for such charges and will bear interest at the Contract Interest Rate from the date of termination until the date paid. The foregoing does not extend the due date of, or provide an interest holiday for, any payments otherwise due under this Agreement.

(c) Without limiting the generality of the foregoing, the provisions of Sections 1, 4.1, 4.4, 4.6, 4.7, 5.4, 5.5, 5.6, 6.2.3, 6.3 6.12.3, 6.12.4, 6.12.4, 6.12.9, 6.13, 10.2, 10.3, 10.4, 10.5, 11.3, 11.4, 11.5, 11.6, 11.7, 11.8, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 survive the termination of this Agreement.

11.4 Termination of Duty to Buy. If this Agreement is terminated because of an Event of Default by Seller, and Seller wishes to again sell Net Output to Utility following such termination, Utility in its sole discretion may require that Seller do so subject to the terms of this Agreement, including but not limited to the Contract Price, until the last day of the Term of this Agreement had it not been earlier terminated. In such case, Utility may require Seller to post Default Security even if it meets the Credit Requirements. Seller agrees that it will not take any action or permit any action to occur the result of which avoids or seeks to avoid the restrictions in this Section 11.4, e.g., through use or establishment of a special purpose entity or other Affiliate.

11.5 Termination Damages. If this Agreement is terminated by Utility as a result of an Event of Default by Seller, termination damages owed by Seller to Utility will be the positive difference, if any, between (a) Utility's estimated costs to secure replacement power and Environmental Attributes, if applicable, for a period of twenty-four (24) months following the date of termination, including any associated transmission necessary to deliver such replacement power; and (b) the Contract Price for such twenty-four- (24) month period ("Termination Damages"). Utility must calculate the Termination Damages on a monthly basis in a commercially reasonable manner and will be deemed to have done so if it calculates such damages for each day of the twenty-four- (24) month period by multiplying (a) the forecasted Net Output for such day as provided in the 12x24 forecast provided by Seller, ~~under Section 6.7~~if available, or if such forecast is not available, the Expected Monthly Net Output for the applicable month, expressed in MWhs per month, divided by the number of days of the applicable month, by (b) the Utility's Cost to Cover for such day. ~~To the extent Utility reasonably incurs additional costs to purchase replacement power, including, for example, transmission charges to deliver replacement energy to the Point of Delivery, and, to the extent Seller is required to convey Environmental Attributes to Utility under this Agreement during any portion of the twenty-four- (24) month period, and Utility reasonably incurs additional costs to acquire replacement Environmental Attributes, such sums, in each case as applicable, shall be added to the Termination Damages.~~ Utility will provide to Seller a written statement explaining in reasonable detail the calculation of

(continued)

Commented [QFs190]: Section 11.4 - Termination of Duty to Buy - First, the section should not be titled "Termination of Duty to Buy" because utility's duty to buy is limited or modified in this scenario but is not terminated altogether. Second, we have deleted the use of the term "sole discretion" proposed by the utilities because it is not included in the administrative rules. The utility's conduct should still be subject to the doctrine of good faith and fair dealing in evaluating whether to exercise the right to impose the terminated contract's provisions in a replacement contract.

Commented [JU191R190]: The JUs rejected the QFTGs' revisions to this section. First, the JUs prefer to retain "Termination" because that is the word used in OAR 860-029-0123(8). Second, the Utility's ability to require Seller to sell under the terms of the original PPA is not qualified or limited in any way in the rule and making it subject to such requirements will likely lead to disputes. Further, PGE's current PPA uses the "sole discretion" language.

Commented [JU192]: Revised as the JUs agreed to remove Section 6.7.1.

Commented [JU193]: In response to the QFTGs' comments regarding the application of the damages cap and revisions to add any transmission charges to deliver replacement energy and any RECs to the definition of Replacement Cost, which is used to determine the Utility's Cost to Cover, the JUs deleted language that is now redundant from this section.

Termination Damages.

Notwithstanding the foregoing, Termination Damages for the twenty-four- (24) month term may not exceed the aggregate amount Utility would have incurred to purchase Seller's Net Output and Environmental Attributes had the Agreement not been terminated. Termination Damages are due by Seller within thirty (30) days after receipt of the written statement of Termination Damages from Utility. Each Party agrees and acknowledges that the damages that Utility would incur due to Seller's Event of Default would be difficult or impossible to predict with certainty, it is impractical and difficult to assess actual damages in the circumstances stated, and therefore the Termination Damages as agreed to in this Section 11.5 are a fair and reasonable calculation of such damages.

11.6 Duty/Right to Mitigate. Each Party agrees that it has a duty to mitigate damages and will use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance of its obligations under this Agreement to the extent mitigation is relevant to the calculation of damages. In furtherance of the immediately preceding sentence, (a) with respect to Seller and to the extent permitted by Requirements of Law and the Generation Interconnection Agreement, Seller must use commercially reasonable efforts to maximize the price received by Seller from third parties for Net Output and Environmental Attributes not purchased and accepted by Utility. The duty to mitigate described in this subsection shall not impact or affect the method of determining liquidated damages, including termination damages under Section 11.5 and Delay Damages under Section 2.4.

11.7 Security. If this Agreement is terminated because of an Event of Default by Seller, then Utility may, in addition to pursuing any and all other remedies available at law or in equity (except where otherwise limited herein), proceed against any Security held by Utility in whatever form to reduce the amounts that Seller owes Utility arising from such Event of Default.

11.8 Cumulative Remedies. Except in circumstances in which a remedy provided for in this Agreement is described as a sole or exclusive remedy, the rights and remedies provided to the Parties in this Agreement are cumulative and not exclusive of any rights or remedies of the Parties, and the exercise of one or more rights or remedies does not constitute a waiver of any other rights or remedies.

SECTION 12
INDEMNIFICATION AND LIABILITY

12.1 Indemnities.

12.1.1 Indemnity by Seller. ¶ To the extent permitted by Requirements of Law and subject to Section 12.1.5, Seller shall indemnify, defend and hold harmless Utility and its Affiliates and each of its and their respective directors, officers, employees, agents, and representatives (collectively, the "Utility Indemnitees") from and against any and all losses, fines, penalties, claims, demands, damages, liabilities, actions or suits of any nature whatsoever (including legal costs and attorneys' fees, both at trial and on appeal, whether or not suit is brought) (collectively, "Liabilities") resulting from, arising out of, or in any way connected with, the breach, performance or non-performance by Seller of its obligations or covenants under this Agreement, or relating to the Facility or the Premises, for or on account of injury, bodily or otherwise, to, or death of, or damage to, or destruction or economic loss of property of, any third party Person, except to the extent such Liabilities are caused by the negligence or willful misconduct of any Utility Indemnitee. Seller is solely responsible for and will indemnify, defend and hold harmless the Utility Indemnitees from and against any and all Liabilities resulting from, arising out of, or in any way

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connected with the breach by Seller of the Generation Interconnection Agreement.

12.1.2 Indemnity by Utility. ¶ To the extent permitted by Requirements of Law and subject to Section 12.1.5, Utility shall indemnify, defend and hold harmless Seller and its Affiliates and each of its and their respective directors, officers, employees, agents, and representatives (collectively, the "Seller Indemnitees") from and against any and all Liabilities resulting from, arising out of, or in any way connected with, the breach, performance or non-performance by Utility of its obligations or covenants under this Agreement for or on account of injury, bodily or otherwise, to, or death of, or damage to, or destruction or economic loss of property of, any third party Person, except to the extent such Liabilities are caused by the negligence or willful misconduct of any Seller Indemnitee.

12.1.3 Additional Cross Indemnity. ¶ Without limiting Section 12.1.1 and Section 12.1.2,

(a) Seller shall indemnify, defend and hold harmless the Utility Indemnitees from and against all Liabilities resulting from, arising out of, or in any way connected with: (i) the Net Output prior to its delivery by Seller at the Point of Delivery; or (ii) any action by any Governmental Authority due to noncompliance by Seller with any Requirements of Law or the provisions of this Agreement; ~~(iii) Utility being deemed by an RTO to be operationally or financially responsible for Seller's performance under the Generation Interconnection Agreement due to Seller's lack of standing as a "scheduling coordinator" or other RTO-recognized designation, qualification, or otherwise; and (iv) Seller's failure to comply with applicable dispatch instructions;~~ except in each case to the extent such Liabilities are caused by the gross negligence, willful misconduct or a breach of this Agreement by any Utility Indemnitee; and

(b) Utility shall indemnify, defend and hold harmless the Seller Indemnitees from and against all Liabilities resulting from, arising out of, or in any way connected with: (i) the Net Output at and after its delivery to Utility at the Point of Delivery in accordance with this Agreement; and (ii) any action by any Governmental Authority due to noncompliance by Utility with any Requirements of Law or the provisions of this Agreement, except in each case to the extent such Liabilities are caused by the gross negligence, willful misconduct, or a breach of this Agreement by any Seller Indemnitees.

12.1.4 Indemnification Procedures. ¶ Any indemnified party seeking indemnification under this Agreement for any Liabilities shall give the Indemnifying Party notice of such Liabilities promptly but in any event on or before thirty (30) days after the Indemnified Party's actual knowledge of the claim or action giving rise to the Liabilities. Such notice shall describe the Liability in reasonable detail and shall indicate the amount (estimated if necessary) of the Liability that has been, or may be sustained by, the Indemnified Party. To the extent that the indemnifying party will have been actually and materially prejudiced as a result of the failure to provide such notice within such thirty (30) day period, the indemnified party shall bear all responsibility for any additional costs or expenses incurred by the indemnifying party as a result of such failure to provide timely notice. The indemnifying party shall assume the defense of the claim or action giving rise to the Liabilities with counsel designated by the indemnifying party; provided, however, that if the defendants in any such action include both the indemnified party and the indemnifying party and the indemnified party reasonably concludes that there may be legal defenses available to it that are different from or additional to, or inconsistent with, those available to the indemnifying party, the indemnified party shall have the right to select and be represented by separate counsel, at the expense of the indemnifying party. Notwithstanding anything to the contrary contained herein, an indemnified party shall in all cases be entitled to control its own defense, at the expense of the indemnifying party, in any claim or action if it: (a) may result in injunctions or other

Commented [QFs194]: Section 12.1.3 - Subsection (a)(iii) unreasonably shifts costs of dealing with scheduling within an RTO to the Seller, see our comments on Section 6.6.2; and (a)(iv) confusingly suggests that Seller has "dispatch" obligations under the PPA when it does not and is not paid for such obligations. Our edits correct these problems.

Commented [JU195R194]: The JUs do not object to this revision.

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equitable remedies with respect to the indemnified party; (b) may result in material liabilities which may not be fully indemnified hereunder; or (c) may have a material and adverse effect on the indemnified party (including a material and adverse effect on the tax liabilities, earnings, ongoing business relationships or regulation of the indemnified party) even if the indemnifying party pays all indemnification amounts in full. If the indemnifying party fails to assume the defense of a claim or action, the indemnification of which is required under this Agreement, the indemnified party may, at the expense of the indemnifying party, contest, settle, or pay such claim; provided, however, that settlement or full payment of any such claim or action may be made only with the indemnifying party's consent, which consent will not be unreasonably withheld, conditioned or delayed, or, absent such consent, written opinion of the indemnified party's counsel that such claim is meritorious or warrants settlement.

12.1.5 No Dedication. ¶ Nothing in this Agreement will be construed to create any duty to, any standard of care with reference to, or any liability to any person not a Party. No undertaking by one Party to the other under any provision of this Agreement will constitute the dedication of Utility's facilities or any portion thereof to Seller or to the public, nor affect the status of Utility as an independent public utility corporation or Seller as an independent individual or entity.

12.1.6 Consequential Damages. ¶ **EXCEPT AS PROVIDED IN SECTION 12.1.1, SECTION 12.1.2 AND SECTION 12.1.3, NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY FOR SPECIAL, PUNITIVE, INDIRECT, EXEMPLARY OR CONSEQUENTIAL DAMAGES, WHETHER SUCH DAMAGES ARE ALLOWED OR PROVIDED BY CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, STATUTE OR OTHERWISE. THE PARTIES AGREE THAT ANY LIQUIDATED DAMAGES, INCLUDING DELAY DAMAGES, TERMINATION DAMAGES AND PERFORMANCE GUARANTEE DAMAGES, UTILITY'S COST TO COVER DAMAGES AND SELLER'S COST TO COVER DAMAGES, OR OTHER SPECIFIED MEASURE OF DAMAGES EXPRESSLY PROVIDED FOR IN THIS AGREEMENT DO NOT REPRESENT SPECIAL, PUNITIVE, INDIRECT, EXEMPLARY OR CONSEQUENTIAL DAMAGES AS CONTEMPLATED IN THIS PARAGRAPH.**

12.2 Survival. The provisions of this Section 12 shall survive the termination or expiration of this Agreement.

SECTION 13
INSURANCE

Without limiting any Liabilities or any other obligations of Seller, unless the Facility has a Nameplate Capacity Rating of less than or equal to 200 kW, Seller must secure and continuously carry the insurance coverage specified on Exhibit H commencing with the start of construction activities at the Premises and continuing thereafter during the Term or such longer period as is specified in Exhibit H.

SECTION 14
FORCE MAJEURE

~~14.1 As used in this Agreement, "Force Majeure" or "an event of Force Majeure" means any cause beyond the reasonable control of the Seller or Utility which, despite the exercise of due diligence, such Party is unable to prevent or overcome. By way of example, Force Majeure may include but is not limited to acts of God, fire, flood, storms, wars, hostilities, civil strife, strikes, and other labor disturbances, earthquakes, fires, lightning, epidemics, sabotage, restraint by court order or other delay or failure in the performance as a result of any action or inaction on behalf of a public authority which by the exercise of reasonable foresight such Party could not reasonably have been expected to~~

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Commented [QFs196]: Section 14- Force Majeure - The utilities' proposed force majeure section is very long and includes many utility-favorable provisions not typically included in an arms-length commercial agreement where both parties have equal bargaining power. The purpose of the utilities' proposal appears to be to basically undermine for the QF the normal contractual excuses of uncontrollable force and impracticality that would apply under common law of contracts. We propose deletion of the utilities' lengthy proposal and replacement with a force majeure provision typical of those in the existing standard contracts. Our proposal is based on PGE's existing standard contract's provision with only minimal revisions to improve it.

Commented [JU197R196]: The JUs do not agree with the QFTGs' proposed revisions and have rejected them completely. The Force Majeure provisions proposed by the JUs are reflective of modern contracting terms and conditions included in both PacifiCorp's 2020 and 2022 All-Source pro forma RFP PPAs, as well as included in executed market PPAs over the last five years. Similarly, PacifiCorp's Washington PPA, which is a QF standard contract, includes these same provisions. Accordingly, contrary to the QFTGs' claims, these provisions are commonly found in bilateral agreements where both parties have equal bargaining power, as well as in the standard QF agreement in Washington. The JUs note that the QFTGs' proposal relies on existing Oregon standard PPA provisions that are outdated and have led to multiple claims and disputes. There is no reason that the contract cannot clarify events that do and do not constitute Force Majeure in more detail, especially where such detail is used to prevent abuse of Force Majeure that would help avoid and limit future litigation. For example, PGE and numerous developers have had disputes regarding what is and what is not a Force Majeure event; some off-system QF developers have claimed that interconnection issues with other utilities that are not the purchasing utility are Force Majeure events that should extend the Scheduled COD to seven or eight years after execution of the PPA and as long as four years after the original Scheduled COD. It is therefore essential, for example, for the Force Majeure provision to the clarify that any delay, alleged breach of contract, or failure by the transmission provider or interconnection provider does not qualify as an event of Force Majeure unless ... [45]

avoid and by the exercise of due diligence, it shall be unable to overcome, subject, in each case, to the requirements of the first sentence of this paragraph. However, except when independently caused by an event of Force Majeure, the following circumstances do not qualify as an event of Force Majeure: the cost or availability of resources to operate the Facility, changes in market conditions that affect the price of energy or transmission, wind or water droughts, and obligations for the payment of money when due.

14.2 If either Party is rendered wholly or in part unable to perform its obligation under this Agreement because of an event of Force Majeure, that Party shall be excused from whatever performance is affected by the event of Force Majeure to the extent and for the duration of the Force Majeure, after which such Party shall re-commence performance of such obligation, provided that:

14.2.1 The non-performing Party, shall, promptly, but in any case within one (1) week after the occurrence of the Force Majeure, give the other Party written notice describing the particulars of the occurrence; and

14.2.2 The suspension of performance shall be of no greater scope and of no longer duration than is required by the Force Majeure; and

14.2.3 The non-performing Party uses its best efforts to remedy its inability to perform its obligations under this Agreement.

14.3 No obligations of either Party which arose before the Force Majeure causing the suspension of performance shall be excused as a result of the Force Majeure.

14.4 Neither Party shall be required to settle any strike, walkout, lockout or other labor dispute on terms which, in the sole judgment of the Party involved in the dispute, are contrary to the Party's best interests.

(continued)

14.1 Definition of Force Majeure. "Force Majeure" or an "event of Force Majeure" means an event or circumstance that prevents a Party (the "Affected Party") from performing, in whole or in part, an obligation under this Agreement and that: (a) is not reasonably anticipated by the Affected Party as of the Execution Date; (b) is not within the reasonable control of the Affected Party or its Affiliates; (c) is not the result of the negligence or fault or the failure to act by the Affected Party or its Affiliates; and (d) could not be overcome or its effects mitigated by the use of due diligence by the Affected Party or its Affiliates. Force Majeure includes the following types of events and circumstances (but only to the extent that such events or circumstances satisfy the requirements in the preceding sentence): tornado, hurricane, tsunami, flood, earthquake and other acts of God; fire; explosion; invasion, acts of terrorism, war (declared or undeclared) or other armed conflict; riot, revolution, insurrection or similar civil disturbance; global pandemic (except as excluded below); sabotage; strikes, walkouts, lock-outs, work stoppages, or other labor disputes; and action or restraint by Governmental Authority (except as excluded below); provided that the Affected Party has not applied for or assisted in the application for, and has opposed to the extent reasonable, such action or restraint. Notwithstanding the foregoing, none of the following shall constitute Force Majeure: (i) Seller's ability to sell, or Utility's ability to purchase, energy, Capacity, Ancillary Services or Environmental Attributes at a more advantageous price than is provided under this Agreement; (ii) inability to obtain any supply of goods or services, unless due to an independent event of Force Majeure; (iii) economic hardship, including lack of money or the increased cost of electricity, steel, labor, or transportation; (iv) any breakdown or malfunction of the Facility's equipment (including any serial equipment defect) that is not caused by an independent event of Force Majeure; (v) the imposition upon a Party of costs or taxes; (vi) delay or failure of Seller to obtain or perform any Required Facility Document unless due to an independent event of Force Majeure; (vii) any delay, alleged breach of contract, or failure by Transmission Provider or Interconnection Provider unless due to an independent event of Force Majeure; (viii) maintenance upgrade or repair of any facilities or right of way corridors constituting part of or involving the Interconnection Facilities, whether performed by or for Seller, or other third parties (except for repairs made necessary as a result of an independent event of Force Majeure); (ix) Seller's failure to obtain, or perform under, the Generation Interconnection Agreement, or its other contracts and obligations to Transmission Provider or Interconnection Provider, unless due to an independent event of Force Majeure; (x) any event attributable to the use of Interconnection Facilities for deliveries of Net Output to any party other than Utility; (xi) any delays or other problems associated with the issuance, suspension, renewal, administration or withdrawal of, or any other problem directly or indirectly relating to, any Permit or the applications therefor where such delays or problems are within the Affected Party's reasonable control; (xii) delays in customs clearance, unless due to an independent event of Force Majeure; (xiii) the imposition of tariffs, anti-dumping or countervailing duties that may apply to any products or equipment or any other fines, penalties or other actions as a result of violation of Requirements of Law regarding unfair trade practices; and (xiv) the occurrence after the Execution Date, of an enactment, promulgation, modification or repeal of one or more Requirements of Law, including regulations or national defense requirements that affects the cost or ability of either Party to perform under this Agreement.

(continued)

14.2 Suspension of Performance. Neither Party will be liable for any delay in or failure to perform its obligations under this Agreement nor will any such delay or failure become an Event of Default, to the extent such delay or failure is substantially caused by Force Majeure, provided that the Affected Party: (a) provides prompt (and, in any event, not more than five (5) days' notice of such event of Force Majeure to the other Party, describing the particulars of the event of Force Majeure and giving an estimate of its expected duration and the probable impact on the performance of its obligations under this Agreement; (b) exercises all reasonable efforts to continue to perform its obligations under this Agreement; (c) expeditiously takes action to correct or cure the event of Force Majeure so that the suspension of performance is no greater in scope and no longer in duration than is dictated by the event of Force Majeure; (d) exercises all reasonable efforts to mitigate or limit damages to the other Party resulting from the event of Force Majeure; and (e) provides prompt notice to the other Party of the cessation of the event of Force Majeure.

14.3 Force Majeure Does Not Affect Other Obligations. No obligations of either Party that arose before the event of Force Majeure causing the suspension of performance or that arise after the cessation of such event of Force Majeure is excused by such event of Force Majeure.

14.4 Strikes. Notwithstanding any other provision of this Agreement, neither Party will be required to settle any strike, walkout, lockout or other labor dispute on terms which, in the sole judgment of the Party involved in the dispute, are contrary to the Party's best interests.

14.5 Right to Terminate. If a Force Majeure event prevents a Party from substantially performing its obligations under this Agreement for a period exceeding 180 consecutive days, then the Party not affected by the Force Majeure event may terminate this Agreement by giving ten (10) days prior notice to the other Party. Upon such termination, neither Party will have any liability to the other with respect to the period following the effective date of such termination; provided, however, that this Agreement will remain in effect to the extent necessary to facilitate the settlement of all liabilities and obligations arising under this Agreement before the effective date of such termination.

SECTION 15
SEVERAL OBLIGATIONS

Nothing in this Agreement will be construed to create an association, trust, partnership or joint venture or to impose a trust, partnership or fiduciary duty, obligation or Liability on or between the Parties.

SECTION 16
CHOICE OF LAW

This Agreement will be interpreted and enforced in accordance with the laws of the State of Oregon, applying any choice of law rules that may direct the application of the laws of another jurisdiction.

SECTION 17
PARTIAL INVALIDITY AND PURPA REPEAL~~AND PURPA REPEAL~~

If any term, provision or condition of this Agreement is held to be invalid, void or unenforceable by a Governmental Authority and such holding is subject to no further appeal or judicial review, then such invalid, void, or unenforceable term, provision or condition shall be deemed severed from this Agreement and all remaining terms, provisions and conditions of this Agreement shall continue in full force and effect. The Parties shall endeavor in good faith to replace such invalid, void or unenforceable terms, provisions

(continued)

Commented [QFs198]: Section 17 - We propose inclusion of the PURPA repeal provision that has been a part of Oregon standard contracts as required in UM 1129 Order No. 05-584 (p. 57), and nothing in the administrative rules changed that requirement. The utilities' omission of this statement would be detrimental to QF financing of renewable energy facilities, and we propose it be included in this section.

Commented [JU199R198]: The JUs do not object to the addition of this provision from the existing PPAs.

or conditions with valid and enforceable terms, provisions or conditions which achieve the purpose intended by the Parties to the greatest extent permitted by law and preserve the balance of the economics and equities contemplated by this Agreement in all material respects.

In the event ~~the Public Utility Regulatory Policies Act (~~PURPA~~)~~, related state law, and/or state or federal regulations and rules giving rise to this Agreement are repealed, this Agreement shall not terminate prior to the Termination Date, unless such termination is mandated by state o~~f~~r federal law.

SECTION 18
NON-WAIVER

No waiver of any provision of this Agreement will be effective unless the waiver is provided in writing that (a) expressly identifies the provision being waived, and (b) is executed by the Party waiving the provision. A Party's waiver of one or more failures by the other Party in the performance of any of the provisions of this Agreement will not be construed as a waiver of any other failure or failures, whether of a like kind or different nature.

SECTION 19
GOVERNMENTAL JURISDICTION
~~AND AUTHORIZATIONS~~

This Agreement is subject to the jurisdiction of those Governmental Authorities having jurisdiction over either Party or this Agreement.

SECTION 20
SUCCESSORS AND ASSIGNS

20.1 Restriction on Assignments. Except as provided in this Section 20, neither Party may transfer, sell, pledge, encumber or assign (collectively, "Assign") this Agreement nor any of its rights or obligations under this Agreement without the prior written consent of the other Party, such consent not to be unreasonably withheld, conditioned or delayed.

20.2 Permitted Assignments.

20.2.1 Assignments to Affiliates. Notwithstanding Section 20.1, either Party may, without the need for consent from the other Party (but with prior notice to the other Party, including the name of the Affiliate), Assign this Agreement to an Affiliate; provided, however, that it shall be a condition precedent to such Assignment that such Affiliate enters into an assignment and assumption agreement pursuant to which such Affiliate assumes all of the assigning Party's obligations under this Agreement and otherwise agrees to be bound by the terms of this Agreement; provided, further that: (a) in the case of Assignment by Utility, such Affiliate must have the same or better credit rating from S&P and Moody's as Utility as of the effective date of such assignment (or if such Affiliate is not rated by S&P and Moody's, the same or better creditworthiness as Utility, as reasonably determined by Seller and (b) in the case of Assignment by Seller: (i) such Affiliate must (A) possess the same or similar experience as Seller (as reasonably determined by Utility) ~~or have engaged the services of a Qualified Operator~~ and (B) possess the same or better credit rating from S&P and Moody's as Seller as of the Execution Date (or if Seller or such Affiliate

(continued)

Commented [JU200]: JUs revised as "PURPA" is defined in Section 1.1.

Commented [QFs201]: Section 19 - The former provision of the administrative rules requiring inclusion of this "Governmental Authorities" section was removed in AR 631 and not included in the rules approved by Order No. 23-152. See ALJ Memorandum, Attachment, p. 19 (June 24, 2022) (comment "MK*P25", stating: "Deleting jurisdiction clause based on guidance from the Commission"). So it should be deleted from the standard PPA consistent with the Commission's directive, and because it would be an in impermissible attempt to influence jurisdiction that is to be established by statute and court decisions, as those might exist now or change of the term of the agreement.

Commented [JU202R201]: While the Commission decided not to include ***a new jurisdictional provision in the rules*** for fear of that language creating new Commission jurisdiction where it did not exist or overstepping where exclusive jurisdiction was committed to another tribunal, it did not repeal OAR 860-029-0020(2)(a) or otherwise call into question the existing contracting term subjecting an agreement to the jurisdiction of governmental authorities having jurisdiction over the parties to the agreement at question here. In fact, the Commission recently referenced a similar provision from PGE's existing contract when noting that it had jurisdiction over complaints regarding a PPA, and the Oregon Court of Appeals affirmed the Commission's interpretation of its jurisdiction. Such a provision, which is mandated by the Commission's rules, in existing contracts, and interpreted by Commission and Oregon Court of Appeals precedent, does not implicate the concerns that the Commission noted when it rejected including in rules language that would provide the Comm ... [46]

Commented [QFs203]: Section 20.2.1 - Assignments to Affiliates - If the proposed assignee affiliate will agree to the security provisions, e.g. posting cash or letter of credit, it should not matter whether it has lower credit rating than the assignor QF and we propose an edit that clarifies that option.

Commented [JU204R203]: The JUs do not object to the revisions to this section, although the JUs note that the Qualified Operator provision was intended to give QFs flexibility.

is not rated by S&P and Moody's, the same or better creditworthiness as Seller, as reasonably determined by Utility, or otherwise agrees, in lieu of demonstrating creditworthiness, to be bound by the Security requirements of Section 8); and (ii) any Security required pursuant to Section 8 must be provided, replaced or remain in full force and effect.

20.2.2 Assignments by Utility ~~to Other Persons~~~~Pursuant to Utility Merger or Acquisition~~. In addition, Utility may without the need for consent from Seller (but with prior notice to Seller, including the name of the assignee) Assign this Agreement in whole or in part to ~~any Person~~any person~~to~~ ~~a~~nor entity ~~that acquires all or substantially all of the business or assets of Utility to which this Agreement pertains, whether by merger, reorganization, acquisition, sale, or otherwise~~; provided, however, that it shall be a condition precedent to such Assignment that such assignee: (a) enters into an assignment and assumption agreement pursuant to which such assignee assumes all of Utility's obligations under this Agreement and otherwise agrees to be bound by the terms of this Agreement; (b) has the same or better credit rating from S&P and Moody's as Utility as of the Execution Date (or if such assignee is not rated by S&P and Moody's, the same or better creditworthiness as Utility, as reasonably determined by Seller); (c) if required by applicable Requirements of Law, has received approval from any applicable public utility commission or equivalent or any other applicable Governmental Authority.

20.2.3 Seller's Assignment for Purposes of Financing. Without Utility's consent, Seller may, upon notice to Utility, collaterally assign, transfer, pledge or encumber this Agreement or any of its rights or obligations hereunder to any lender as collateral for financing with respect to the development, construction and/or operation of the Facility without the assignee being required to execute an agreement in the form of this Agreement in order to make such collateral assignment, transfer, pledge or encumbrance legally effective; provided that no such assignment will relieve Seller of its liability to Utility hereunder.

Upon receiving a request by Seller, Utility will execute a collateral assignment and consent agreement in a form acceptable to Utility in its reasonable-exercised discretion~~reasonably proposed by Utility~~. If ~~Seller's~~ ~~l~~Lender or Seller requests that Utility make changes to Utility's collateral assignment and consent agreement form or review any other proposed agreement or documents related to financing of the construction or operation of the Facility, Utility will take commercially reasonable efforts to review and, subject to its reasonably exercised discretion, ~~agree to~~may accept or decline such proposed changes. Seller shall be responsible for all reasonable cost and expense associated with Utility's review and activities reasonably required under this Section 20.2.3, including but not limited to the use of outside counsel; provided that no costs shall be charged in the event~~, and excluding~~ the execution of ed documents ~~that~~ are unchanged from the original form proposed by Utility. No later than twenty (20) calendar days after receiving an invoice for such cost and expense, Seller shall pay to Utility the amount set forth as due in such invoice.

20.2.~~3~~4 Release from Liability. If the foregoing requirements for Assignment in ~~this~~ Sections 20.2.1 or 20.~~3~~2.2 have been satisfied, then effective as of the date of such Assignment Utility and Seller, as applicable, will be released from all liability under this Agreement. Any Party seeking to Assign this Agreement shall be solely responsible for paying all costs and expenses of Assignment, including any costs and expenses incurred by the other Party in connection with the review and/or execution and delivery of the assignment and assumption agreement and any other documents required in connection with the Assignment.

SECTION 21
ENTIRE AGREEMENT

This Agreement supersedes all prior agreements, proposals, representations, negotiations, discussions

(continued)

Commented [QFs205]: Section 20.2.2 - Assignments to Other Persons - This proposed assignment right of the utility is written far too broadly. The language we added makes this clause more consistent with the existing standard contracts, and we are not aware of any reason the utility needs a more broad automatic assignment than the narrow circumstance of a sale or merger of the utility itself. Aside from that circumstance, assignment of the agreement to some other entity should require the QF's consent.

Commented [JU206R205]: The JUs object to most of the added language because there might be broader circumstances under which utility could sell off a portion of its assets or make a change in connection to its service territory. So long as the utility ensures that the assignee is creditworthy and assumes the utility's obligations, QFs are protected.

Commented [QFs207]: QF's Proposed Section 20.2.3 - We have proposed a provision clarifying what we understand to be the utilities' normal practice with respect to collateral assignments for financing purposes. The language proposed here is consistent with PGE's proposal in its Revised PPA proposed in UM 1987 filed Oct. 1, 2019 (see Revised Application, p. 4 and, e.g., On-System Non-variable PPA Section 13.8 & 13.9). We did not include the form consent agreement included as an appendix to the UM 1987 PPA, but would be willing to include such an exhibit if that is the utilities' preference.

Commented [JU208R207]: The JUs do not object to the QFTGs' addition of this new provision but have made some revisions to conform with the PPA's defined terms and clarify Seller's liability and Utility's discretion.

or letters, whether oral or in writing, regarding the subject matter of this Agreement. No modification of this Agreement is effective unless it is in writing and executed by both Parties.

SECTION 22
NOTICES

All notices, requests, demands, submittals, waivers and other communications required or permitted to be given under this Agreement (each, a "Notice") shall, unless expressly specified otherwise, be in writing and shall be addressed, except as otherwise stated herein, to the addressees and addresses set out in Exhibit K, as the same may be modified from time to time by Notice from the respective Party to the other Party. All Notices required by this Agreement shall be sent by regular first-class U.S. mail, registered or certified U.S. mail (postage paid return receipt requested), overnight courier delivery, or electronic mail. Such Notices will be deemed effective and given upon receipt by the addressee, except that Notices transmitted by electronic mail shall be deemed effective and given on the day (if a Business Day and, if not, on the next following Business Day) on which it is transmitted if transmitted before 16:00 [PPT/MPT], and if transmitted after that time, on the following Business Day, provided that Notices transmitted by electronic mail must be followed up by Notice by other means as provided for in this Section to be effective. If any Notice sent by regular first class U.S. mail, registered or certified U.S. mail postage paid return receipt requested, or overnight courier delivery is tendered to an addressee set out in Exhibit K, as the same may be modified from time to time by Notice from the respective Party to the other Party, and the delivery thereof is refused by such addressee, then such Notice shall be deemed given and effective upon such tender. In addition, Notice of termination of this Agreement under Section 11.3 must contain the information required by Section 11.3 and, where Utility is the Defaulting Party, must be sent to the attention of the then-current President and General Counsel of Utility as required by (and subject to the terms of) Section 11.3, and where Seller is the Defaulting Party, must be sent to the attention of the then-current President and General Counsel of Seller subject to the terms of Section 11.3.

SECTION 23
PUBLICITY

Before ~~Seller~~ either Party issues any news release or publicly distributed promotional material regarding this Agreement, ~~Seller~~ such Party must first provide a copy thereof to ~~Utility~~ other Party for its review and approval. Any use of any tradename of ~~Utility~~ the other Party or any of its affiliates requires ~~Utility's~~ the other Party's prior written consent.

SECTION 24
~~**DISAGREEMENTS**~~
DISPUTES AND JURY WAIVER

~~24.1 Negotiations. Prior to proceeding with formal dispute resolution, the Parties must first attempt in good faith to resolve informally all disputes arising out of, related to, or in connection with this Agreement. Any Party may give the other Party notice of any dispute not resolved in the normal course of business. Executives of both Parties at levels one level above those employees who have previously been involved in the dispute must meet at a mutually acceptable time and place within ten (10) days after delivery of such notice, and thereafter as often as they reasonably deem necessary, to exchange relevant information and to attempt to resolve the dispute. If the matter has not been resolved within thirty (30) days after the referral of the dispute to such executives, or if no meeting of such executives has taken place within fifteen (15) days after such referral, then, subject to Section 24.2, either Party may initiate~~

Commented [QFs209]: Section 23 - Publicity - If there will be a requirement to get preapproval for publicity and marketing, then it needs to apply to both parties in order to be fair. Alternatively, we'd be happy to just delete this provision as well.

Commented [JU210R209]: The JUs do not object to the QFTGs' proposed revisions to this section.

Commented [QFs211]: Sections 24 & 25 - These proposed sections unreasonably limit the rights of the small QF to bring an action to enforce the agreement to the extent that a dispute might arise, and, at best, impose extensive additional process and cost on the small QF before it can actually have its complaint adjudicated before a forum with jurisdiction, through forced dispute resolution and ADR before the PUC. Section 24.3's venue provision is also confusing and somewhat contradictory, and appears to attempt to steer jurisdiction to the PUC, which we object to as noted in comments on Section 19. The jury trial waiver in Section 25 is likely also illegal in many cases where a constitutional jury right exists, such as a claim for damages. We recommend deleting these provisions.

(continued)

any legal remedies available to the Party. No statements of position or offers of settlement made in the course of the dispute process described in this Section 24.1 will: (a) be offered into evidence for any purpose in any litigation between the Parties; (b) be used in any manner against either Party in any such litigation; or (c) constitute an admission or waiver of rights by either Party in connection with any such litigation. At the request of either Party, any such statements and offers of settlement, and all copies thereof, will be promptly returned to the Party providing the same.

24.21 Alternative Dispute Resolution. If the Parties are not able to resolve anythe dispute is not resolved under the procedures provided in Section 24.1, then either Party may initiatethe Parties nay mutually agree to pursue an alternative dispute resolution process under Oregon Administrative Rules Chapter 860, Division 2. The costs of any alternative dispute resolution process, including fees and expenses, will be borne equally by the Parties.

24.3 Choice of Forum. To the extent the dispute is not resolved under the procedures provided in Section 24.1 or 24.2, any complaint, claim or action to resolve such dispute shall be brought exclusively in a court in the state of Oregon or governmental agency with jurisdiction over the dispute, including but not limited to any governmental agency having control over either party or this Agreement. By execution and delivery of this Agreement, each Party: (a) accepts the exclusive jurisdiction of such courts or governmental agencies and waives any objection that it may now or hereafter have to the exercise of personal jurisdiction by such courts or governmental agencies over each Party for the purpose of the Proceedings; (b) irrevocably agrees to be bound by any final judgment (after any and all appeals) of any such courts or governmental agencies arising out of the Proceedings; (c) irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to the laying of venue of any of the Proceedings brought in such courts or governmental agencies (including any claim that any such Proceeding has been brought in an inconvenient forum) in connection herewith; (d) agrees that service of process in any such Proceeding may be effected by mailing a copy thereof by registered or certified mail, postage prepaid, to such Party at its address stated in this Agreement; and (e) agrees that nothing in this Agreement affects the right to effect service of process in any other manner permitted by law.

24.42 WAIVER OF JURY TRIAL. EACH PARTY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVES THE RIGHT TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT AND ANY AGREEMENT EXECUTED OR CONTEMPLATED TO BE EXECUTED IN CONJUNCTION WITH THIS AGREEMENT, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO EACH OF THE PARTIES TO ENTER INTO THIS AGREEMENT. EACH PARTY HEREBY WAIVES ANY RIGHT TO CONSOLIDATE ANY ACTION, PROCEEDING OR COUNTERCLAIM BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY OTHER AGREEMENT EXECUTED OR CONTEMPLATED TO BE EXECUTED IN CONJUNCTION WITH THIS AGREEMENT, OR ANY MATTER ARISING HEREUNDER OR THEREUNDER, WITH ANY PROCEEDING IN WHICH A JURY TRIAL HAS NOT OR CANNOT BE WAIVED. THIS PARAGRAPH WILL SURVIVE THE EXPIRATION OR TERMINATION OF THIS AGREEMENT.

Commented [JU212]: The JUs do not object to removing this section.

Commented [JU213]: To address Staff's and the QFTGs' concerns, the JUs have revised Section 24.2 to better clarify that the parties to the agreement may mutually agree to pursue ADR under Oregon Administrative Rules Chapter 860, Division 2, which was the original intent of the provision. ADR is not mandatory under this provision.

Commented [JU214]: Staff's and the QFTGs' comments on this provision directly conflict. The JUs do not object to removing this provision in the interest of narrowing issues in dispute.

Commented [JU215]: JUs rejected deletion of this section because a bench trial is more appropriate to review a complicated contract in a regulated environment and any dispute that may arise under the contract. "Waiver of Jury Trial" provisions are common in contracts and do not implicate constitutional concerns as the QFTGs' argue. In sum, such a provision is appropriate, and a jury trial can be waived if the waiver is knowing, voluntary, and intelligent.

(continued)

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed in their respective names as of the date last written below.

SELLER:	**UTILITY**:
[_____]	[_____]
By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____
Date: _____	Date: _____

(continued)

EXHIBIT A
EXPECTED MONTHLY NET OUTPUT[29]

Month	On-Peak Net Output (MWh)	Off-Peak Net Output (MWh)	Total Net Output (MWh)
January			
February			
March			
April			
May			
June			
July			
August			
September			
October			
November			
December			
First Contract Year Total			

[The values above may be updated by Seller prior to the Commercial Operation Date, or in the case of an existing QF the Initial Delivery Date, as permitted under Section 6.1 and Section 6.8 of the Agreement.]

[The values above will be reduced [__]% each Contract Year following the Commercial Operation Date] **OR**

[The energy values above will be reduced each Contract Year following the Commercial Operation Date in accordance with the following Expected Annual Degradation Schedule]

MAXIMUM DELIVERY RATE (MWh or kWh)

[_____]

Commented [QFs216]: Ex. A - OAR 860-029-0046(2)(c)(F) allows Seller to update its expected net output up until COD, so the PPA should state so.

Commented [JU217R216]: The JUs do not oppose the QFTGs' revisions to Exhibit A, but have added references to the sections of the PPA which allow for changes to the Expected Monthly Net Output amounts in Exhibit A.

[29] **Note to Form** – Prior to executing the Agreement, Seller will be required to provide Utility information sufficient to allow Utility to reasonably verify the output estimates stated in Exhibit A.

(continued)

EXHIBIT B
DESCRIPTION OF SELLER'S FACILITY

[Provide a detailed description of the Facility, including the following, as applicable:]

Type (synchronous or inductive):
Facility Nameplate Capacity Rating (as stated in Seller's FERC Form 556):
Number of Generating Units:
Model:
Number of Phases:
Power factor requirements:
Rated Power Factor (PF) or reactive load (kVAR):
Rated Output (kW):
Rated Output (kVA):
Rated Voltage (line to line):
Rated Current (A): Stator: ____ A; Rotor: _____ A
Maximum kW Output: _____ kW as measured at the Point of Delivery (Facility)
Maximum kVA Output: _____kVA (Facility)
Minimum kW Output: _____ kW (Facility)
Number of Phases:
Power factor requirements: ____ Leading and Lagging
Rated Power Factor (PF) or reactive load (kVAR):
Controlled Ramp Rate: ____

The following is a layout of the Facility, including site boundaries of the Premises:

Station service requirements, and other loads served by the Facility, if any:

Location of the Facility: *[Please include city and county, and legal description of parcel*]

(continued)

EXHIBIT C
SELLER'S INTERCONNECTION FACILITIES

[Instructions to Seller:
1. Include description of point of metering, and Point of Delivery
2. Provide interconnection single line drawing of Facility including any transmission facilities on Seller's side of the Point of Delivery.]

(continued)

EXHIBIT D
REQUIRED FACILITY DOCUMENTS

1. *QF Certification*

2. *Interconnection Agreement or, if applicable, the following studies and study agreements completed as of the Effective Date:*

   [INSERT DESCRIPTION]

3. *Real property documents listed in Exhibit E to the Agreement with respect to the Premises.*

4. *Licenses, Permits and Authorizations, including:*

   [INSERT DESCRIPTION]

5. *Other Required Facility Documents:*

   [INSERT DESCRIPTION]

[Depending upon the type of Facility and its specific characteristics, additional Required Facility Documents may be added.]

(continued)

EXHIBIT E

LEASES AND REAL ESTATE DOCUMENTS

(continued)

EXHIBIT F

MECHANICAL AVAILABILITY GUARANTEE – WIND, SOLAR AND HYDRO RESOURCES

1. Availability Guarantee. ~~Beginning after completion of one year after the Initial Delivery Date for existing QFs and three years after the Commercial Operation Date for new QFs,~~ Seller guarantees that the Facility will achieve an Actual Availability Percentage (as defined below) of at least ninety percent (90%) during each covered Contract Year ("Availability Guarantee") as provided in this Exhibit F. The Actual Availability Percentage will be calculated annually, commencing with the first (1st) day of the second ~~f~~Full Contract Year after Initial Delivery Date for existing QFs and with the first (1st) day of the fourth ~~f~~Full Contract Year after Commercial Operation for new QFs and ending with the last ~~f~~Full Contract Year in the Term. For example, for an existing QF that achieves an Initial Delivery Date of ~~January~~ July 1, 2026, the Actual Availability Percentage will be calculated on or after January 1, 2028~~7~~, based on Facility data from the previous Contract Year. For a new QF that achieves Commercial Operation on ~~January~~ July 1, 2026, the Actual Availability Percentage will be calculated on or after January 1, 2030~~29~~, based on Facility data from the previous Contract Year.

"Actual Availability Percentage" for a particular Contract Year is calculated as follows:

Actual Availability Percentage = 100 x (Operational Hours in the Contract Year) / (Number of Hours in the Contract Year x Number of Generating Units in the Facility)

"Operational Hours" means the total across all of the Facility's Generating Units of (i) the number of hours each of the Generating Units was capable of producing power regardless of actual weather, season and time of day or night, without any mechanical operating constraint or restriction, and potentially capable of delivering such power to the Delivery Point; (ii) the number of hours during which each Generating Unit was not available to generate due to a Force Majeure event, a default by Utility under this Agreement, or a default by Utility under the Generation Interconnection Agreement; and (iii) the number of hours during which each Generating Unit was not available to generate due to a Planned Outage, but only to the extent such hours ~~were not already assumed in Seller's calculation of Expected Net Output and~~ do not exceed 200 hours per Generating Unit per Contract Year~~; and (iv) in the case of a solar facility, the number of hours Planned Outages, Maintenance Outages, and Forced Outages occurring between sunset and sunrise~~. However, if any of the events described in items (i) through (iii) occur simultaneously, then the relevant period of time will only be counted once in order to prevent double counting. Operational Hours do not include hours when (i) the Facility or any portion thereof was unavailable solely due to Seller's non-conformance with the Generation Interconnection Agreement or (ii) the Facility or any portion thereof was paused or withdrawn from use by Seller for reasons other than those covered in this definition.

"Generating Unit" means a complete electrical generation system within the Facility that is able to generate and deliver energy to the Point of Interconnection independent of other Generating Units within the Facility. For example, for a solar facility, a Generating Unit is an inverter and the panels associated with such inverter. The number of Generating Unit's for the Facility shall be identified in Exhibit B.

If the Actual Availability Percentage in any Contract Year commencing with the first ~~full~~ Full Contract Year that is subject to this Availability Guarantee falls below ninety percent (90%), the resulting shortfall will be expressed in MWh as the "On-Peak Availability Shortfall" or the "Off-Peak Availability Shortfall," as applicable, or together, the "Availability Shortfalls." In order to determine the damages associated with any such failure to meet the Availability Guarantee, which is determined on an annual basis, the resulting Availability Shortfalls are allocated pro rata to~~F~~or each calendar month in the Contract Year~~, the Availability~~

(continued)

Commented [JU218]: Exhibit F is current with the Exhibit F Errata filed on November 21, 2023.

Commented [QFs219]: "Availability Guarantee" - OAR 860-029-0120(10(a) clearly states that the MAG does not apply for three years after COD for new QFs or one year after initial delivery for existing QFs. There is no unambiguous statement to that effect in the utilities' draft proposal, and the dates used in the example were one year too early for the calculation. Our edits correct those issues. Also, the utilities' draft did not properly give the QF the full one year or three years after COD/Initial Delivery Date before the MAG applies. We redefined "Contract Year" to simplify doing so correctly.

Commented [JU220R219]: It is the JUs' understanding that the rules adopted in docket AR 631 were not intended to depart from existing Commission rules and policy concerning when the MAG takes effect for new and existing QFs as the language in the new rules mirrors that in the previous rules. The previous MAG rules were intended to codify existing Commission policy. When the Commission first implemented the MAG in standard contracts in Order No. 14-058 using the same language as in the existing and previous rules, the Commission explicitly noted that:

We adopt Pacific Power's proposal to institute a 90 percent overall guarantee for wind QF contracts ... [47]

Commented [JU221]: Added to address the QFTGs' concerns at the November 7 Workshop regarding the last partial Contract Year.

Commented [QFs222]: "Operational Hours" - OAR 860-029-0120(10)(a) gives the QF 200 hours of planned outage, without the added qualification that the QF not have built any planned maintenance into its expected net output figures. So we propose deleting that limiting clause from the PPA because it is inconsistent with the administrative rules. ... [48]

Commented [JU223R222]: The JUs do not object to the QFTGs' deletion of the provision regarding Planned Outages hours already assumed in the calculation of Expected Net Output. However, the Joint Utilities reject the QFTGs' proposal to add additional hours "between sunset and sunrise" to the definition of "Operational Hours" for purposes ... [49]

~~Shortfalls~~and will equal the mathematical difference between the Availability Guarantee and the Actual Availability Percentage, multiplied by the monthly Expected Net Output for the applicable calendar month in the Contract Year, expressed in the formula below:

On-Peak Availability Shortfall (MWh) = (90 (%) minus Actual Availability Percentage (%)) multiplied by the ~~total~~ applicable monthly ~~On-Peak~~ Expected Net Output (MWh) ~~as defined in Exhibit A~~for On-Peak Hours as specified in Exhibit A

Off-Peak Availability Shortfall (MWh) = (90 (%) minus Actual Availability Percentage (%)) multiplied by the ~~total~~ applicable monthly ~~Off-Peak~~ Expected Net Output (MWh) ~~as defined in Exhibit A~~for Off-Peak Hours as specified in Exhibit A

2. Damages Calculation for Availability Shortfall. If an Availability Shortfall occurs in any calendar month in ~~the~~any Contract Year in which the Availability Guarantee is not met, Seller will ~~compensate~~ pay Utility damages ("Availability Shortfall Damages"), if any, for such calendar month based on the following equation: ~~for both Energy Shortfall (as defined below) REC Shortfall (as defined below) the On-Peak Utility's Cost to Cover associated multiplied bywith the On-Peak Availability Shortfall, *plus* . the Off-Peak Utility's Cost to Cover multiplied by the Off-Peak Availability Shortfall.~~

On-Peak Availability Shortfall x the positive difference between the applicable calendar month's On-Peak Average Firm Electric Market Price and the applicable calendar month's On-Peak Contract Price;

Plus

Off-Peak Availability Shortfall x the positive difference between the applicable calendar month's Off-Peak Average Firm Electric Market Price and the applicable calendar month's Off-Peak Contract Price;

Where

"On-Peak Average Firm Electric Market Price" means the average Firm Electric Market Pricing~~,~~ for all On-Peak Hours of the applicable calendar month in the Contract Year, and

"Off-Peak Average Firm Electric Market Price" means the average Firm Electric Market Pricing~~,~~ for all Off-Peak Hours of the applicable calendar month in the Contract Year;

Plus

In the event the replacement energy procured by Utility as a result of Seller's failure to deliver the Availability Shortfall results in incremental ancillary services and transmission costs, an amount equal to such costs incurred by Utility, provided however that Utility shall provide commercially reasonable evidence that it incurred such costs as a result of Seller's failure to deliver in accordance with the Availability Guarantee.

Plus

The Replacement Bundled REC Price x REC Shortfall, if applicable

Where

(continued)

Commented [JU224]: Revised to add clarity that Availability Guarantee is assessed on an annual basis as QFTGs noted possible ambiguity.

"REC Shortfall" means the number of renewable energy certificates ("RECs") Seller would have delivered to Utility had Seller met the Availability Guarantee.

"Replacement Bundled REC" means a REC bundled and simultaneously delivered with the associated qualifying energy generated by an Oregon Renewable Portfolio Standard eligible renewable energy resource and delivered bundled to Utility.

"Replacement Bundled REC Price" means the price determined by Utility by taking the lower of two dealer quotes representing a live offer to sell Replacement Bundled RECs in a quantity sufficient to cover the REC Shortfall.

Notwithstanding the foregoing, the total Availability Shortfall Damages in a given Contract Year may not exceed the aggregate amount Utility would have incurred to purchase Seller's Net Output and RECs during the Contract Year if Seller had met the Availability Guarantee, which amount shall be the sum of (i) the product of the monthly On-Peak Availability Shortfall and the applicable monthly On-Peak Contract Price ~~for all On-Peak Hours~~ during ~~the applicable~~each calendar month~~s~~ of the Contract Year and (ii) the product of the monthly Off-Peak Availability Shortfall and the applicable monthly Off-Peak Contract Price ~~for all Off-Peak Hours~~ during ~~the applicable~~each calendar month~~s~~ of the Contract Year~~)~~.

~~(a) Energy Shortfall. The "Energy Shortfall" is comprised of the following cost components:~~

~~i. Replacement Energy Cost. Seller shall pay Utility an amount for such deficiency equal to:~~
~~a. The On-Peak Availability Shortfall for the Contract Year, multiplied by the average On-Peak Utility's Cost to Cover for such Contract Year; plus~~
~~b. The Off-Peak Availability Shortfall for the Contract Year, multiplied by the average Off-Peak Utility's Cost to Cover for such Contract Year.~~

~~ii. Potential Transmission Adjustment. In the event the replacement energy procured by Utility as a result of Seller's failure to deliver the Availability Shortfall results in incremental ancillary services and transmission costs, Seller shall pay Utility an amount equal to such costs incurred by Utility, provided however that Utility shall provide commercially reasonable evidence that it incurred such costs as a result of Seller's failure to deliver in accordance with the Availability Guarantee.~~

~~(b) REC Shortfall. The "REC Shortfall" is equal to the number of renewable energy certificates ("RECs") Seller would have delivered to Utility had Seller met the Availability Guarantee. In the case of a REC Shortfall, Seller shall owe Utility the Replacement Bundled REC price, identified by Utility, multiplied by the REC Shortfall. Utility shall use commercially reasonable efforts to mitigate the amount owed by Seller under this Section 2. For purposes of this Exhibit F, "Replacement Bundled REC" shall mean a REC bundled and simultaneously delivered with the associated qualifying energy generated by an Oregon Renewable Portfolio Standard eligible renewable energy resource and delivered bundled to Utility. The Replacement Bundled REC price shall be determined by Utility taking the lower of two dealer quotes representing a live offer to sell bundled RECs in a quantity sufficient to cover the REC Shortfall.~~

Each Party agrees and acknowledges that (i) the damages that Utility would incur due to the Facility's failure to achieve the Availability Guarantee would be difficult or impossible to predict with certainty and (ii) the damages calculation methodology contemplated by this provision are a fair and reasonable calculation of

Commented [QFs225]: Damages Calculation - The utilities' proposed damages calculation does not really work for a variety of reasons, most significantly that the contract price cap on damages in OAR 860-029-0120(10)(d) is violated by adding REC and transmission costs as potential additional damages after the contract price cap is reached with replacement energy costs. We recommend simplifying the calculation as we have done with our edits.

Commented [JU226R225]: JUs have proposed revisions to the damages calculations for clarity and administrative ease.

(continued)

such damages.

~~2.~~3. Invoicing for Availability Shortfall. Following the end of each Contract Year, Utility will deliver to Seller an invoice showing in reasonable detail the Utility's computation of Availability Shortfall, if any, for the prior Contract Year and any amount due to Utility for damages calculated pursuant to this Exhibit F. In preparing such invoices, Utility will utilize the fault log provided to Utility for the applicable Contract Year under Section 6.12.1, provided that if the fault log for any portion of such Contract Year is then incomplete or otherwise not available, Utility may rely other information as may be available to Utility at the time of invoice preparation. Utility shall have the right to offset any payment due under this Exhibit F in accordance with Section 10.2 of the Agreement. Seller must pay to Utility on or before the ~~twentieth (20th)~~ thirtieth (30th) day following the receipt of such invoice, except with respect to any invoiced amounts that are ~~unless the invoice is~~ subject to a good faith dispute under Section 10.4 of this Agreement. Any amounts due under this Exhibit F are subject to Section 10.3, and all disputes regarding such invoices are subject to Section 10.4. ~~Objections not made by Seller within the twenty (20) day period will be deemed waived.~~

~~3.~~4. Event of Default. The occurrence of an Availability Shortfall for two (2) consecutive Contract Years shall be a Seller Event of Default, and Utility shall be entitled to the rights and remedies set forth in Section 11 of the Agreement.

Commented [QFs227]: Invoicing for Output Shortfall - The utilities' proposed invoicing and due dates are inconsistent with the administrative rules, OAR 860-029-0123(5), which require reasonable explanation of the utilities' damage calculation, give the QF 30 days to pay damages, unless subject to dispute. The last sentence in this proposed Section 3. is also inconsistent with Section 10.4 which gives parties up to 2 years to potentially raise an issue with an invoice they have already paid. It is not uncommon for a party to pay an invoice and then discovery some time later there was an error, and Section 10.4 allows such issues to be addressed up to two years after the invoice, so the last sentence here should be deleted as undermining that two year period. Our edits correct these issues.

Commented [JU228R227]: JUs do not object to the QFTGs' revisions to this provision.

(continued)

MINIMUM DELIVERY GUARANTEE – GEOTHERMAL, BIOMASS AND OTHER BASELOAD RENEWABLE RESOURCES

1. Output Guarantee. Seller is obligated to deliver a quantity of Net Output during each covered Contract Year which is equal to the Output Guarantee. Seller's compliance with the Output Guarantee will be calculated annually, commencing with the first (1st) day of the second Contract Year after the Commercial Operation Date or Initial Delivery Date, as applicable, based on Facility data from the previous Contract Year and ending with the last fFull Contract Year in the Term.

"Output Guarantee" for any Contract Year means ninety percent (90%) of the Expected Net Output of the Facility for such Contract Year, which shall be adjusted for Seller Uncontrollable Minutes.

"Seller Uncontrollable Minutes" means, for the Facility in any Contract Year, the total number of minutes during such Contract Year during which the Facility was unable to deliver Net Output to Utility (or during which Utility failed to accept such delivery) due to one or more of the following events, each as recorded by Seller's Supervisory Control and Data Acquisition ("SCADA") System (where available) and indicated by Seller's ~~electronic~~ fault log (electronic where available): (a) a Force Majeure event; (b) to the extent not caused by Seller's actions or omissions, ~~a curtailment in accordance with Section 4.5~~any interconnection or transmission curtailment initiated by Utility, Interconnection Provider, or the Transmission Provider; and (c) a default by Utility under this Agreement or the Generator Interconnection Agreement; provided, however, that if any of the events described above in items (a) through (c) occur simultaneously, then the relevant period of time will only be counted once in order to prevent double counting. Seller Uncontrollable Minutes do not include minutes when (i) the Facility or any portion thereof was unavailable solely due to Seller's non-conformance with the Generation Interconnection Agreement or (ii) the Facility or any portion thereof was paused or withdrawn from use by Seller for reasons other than those covered in this definition.

"Actual Output ~~Shortfall~~Percentage" for ~~any~~ a particular Contract Year is calculated as follows: ~~will be the~~

Actual Output ~~Guarantee, less the amount equal to the sum of the~~Percentage = 100 x (actual Net Output received at the Point of Delivery ~~(or accepted by Utility) plus the~~+ Net Output Seller was unable to deliver due to Seller Uncontrollable Minutes in such Contract Year) / Expected Net Output~~. ~~The Output Shortfall cannot be less than zero (0).~~

If the Actual Output Percentage in any ~~Contract Year commencing with the first~~ fFull Contract Year that is subject to this Guarantee falls below ninety percent (90%), the resulting shortfall will be expressed in MWh as the "On-Peak Output Shortfall" or the "Off-Peak Output Shortfall," as applicable, or together, the "Output Shortfalls." In order to determine the damages associated with any such failure to meet the Output Guarantee, which is determined on an annual basis, the resulting Output Shortfalls are allocated pro rata to~~For~~ each calendar month in the Contract Year and~~, the Output Shortfalls~~ will equal the mathematical difference between the Output Guarantee and the Actual Output Percentage, multiplied by the ~~M~~monthly Expected Net Output for the applicable calendar month in the Contract Year, expressed in the formula below:

On-Peak Output Shortfall (MWh) = (90 (%) minus Actual Output Percentage (%)) multiplied by the ~~total~~ applicable ~~M~~monthly Expected Net Output (MWh) for On-Peak Hours as specified in Exhibit A

(continued)

Commented [JU229]: Added to address the QFTGs' concerns at the November 7 Workshop regarding the last partial Contract Year.

Commented [QFs230]: "Seller Uncontrollable Minutes" - OAR 860-029-0120(12(d) excuses "***any*** interconnection and transmission curtailment initiated by the purchasing utility or the transmitting utility" from the MDG. Thus the utilities' proposed additional qualification that it be a curtailment meeting the description in Section 4.5 should not be used. The rule also includes default under the PPA *or the GIA*. Our edits correct these issues.

Additionally, as noted earlier in our comment on Section 6.12.1, not all small QFs will necessarily have SCADA and an electronic fault log that will track and distinguish all of these types of events (e.g., force majeure, interconnection curtailment, default by utility, etc.), so we find this additional SCADA reporting hurdle confusing and prefer deleting it. None of the utilities' current PPAs require small QFs to rely solely on SCADA to record this type of data and distinguish types of outages.

Commented [JU231R230]: The JUs do not object to the QFTGs' revisions regarding curtailment but restored the clause providing "to the extent not caused by Seller's actions or omission." The JUs restored this language deleted by the QFTGs because if the curtailment is the Seller's fault, then it should not constitute "Seller Uncontrollable Minutes" under the plain meaning of that term.

... [50]

Commented [QFs232]: "Output Shortfall" - This definition needs to add in the Net Output that Seller could not deliver due to Seller Uncontrollable Minutes. Nothing else in the PPA clarifies how that will work, other than the vague reference to an "adjustment" in the definition of "Output Guarantee", so we have proposed a clarifying edit. Additionally, as wit

... [51]

Commented [JU233R232]: The JUs revised this section to align with their changes to the damages calculations.

Commented [JU234]: Revised to add clarity that Output Guarantee is assessed on an annual basis as QFTGs noted possible ambiguity.

Off-Peak Output Shortfall (MWh) = (90 (%) minus Actual Output Percentage (%)) multiplied by the ~~total~~ applicable ~~M~~monthly ~~Off-Peak~~ Expected Net Output (MWh) for Off-Peak Hours as specified in Exhibit A
~~The Output Shortfall shall not be calculated until the completion of the first Contract Year after Commercial Operation and will be calculated as follows:~~

~~*On-Peak Output Shortfall (MWh) = Output Guarantee, applied to Expected Net Output for On-Peak Hours, minus the amount equal to the sum of the total actual On-Peak Net Output delivered to the Point of Delivery plus the Net Output Seller was unable to deliver due to Seller Uncontrollable Minutes during On-Peak Hours*~~

~~*Off-Peak Output Shortfall (MWh) = Output Guarantee, applied to Expected Net Output for Off-Peak Hours, minus the amount equal to the sum of the total actual Off-Peak Net Output delivered to the Point of Delivery plus the Net Output Seller was unable to deliver due to Seller Uncontrollable Minutes during Off-Peak Hours*~~

~~2.~~ Damages Calculation for Output Shortfall. If ~~the product of either of the~~an Output Shortfall occurs in any calendar month in any Contract Year in which the Output Guarantee ~~calculations provided above~~ is ~~a positive number~~not met, Seller will ~~compensate~~ pay Utility damages ("Output Shortfall Damages"), if any, for such calendar month based on the following equation:~~as follows:~~ ~~for the On-Peak Utility's Cost to Cover multiplied by the On-Peak Output Shortfall, *plus* the Off-Peak Utility's Cost to Cover multiplied by the Off-Peak Output Shortfall. both Energy Shortfall (as defined below) and REC Shortfall (as defined below) associated with the Output Shortfall.~~

Commented [JU235]: JUs have proposed revisions to the damages calculations for clarity and administrative ease.

2.

On-Peak Output Shortfall x the positive difference between the applicable calendar month's ~~in the Contract Year's~~ On-Peak Average Firm Electric Market Price and the applicable calendar month's On-Peak Contract Price;

Plus

Off-Peak Output Shortfall x the positive difference between the applicable calendar month's ~~in the Contract Year's~~ Off-Peak Average Firm Electric Market Price and the applicable calendar month's Off-Peak Contract Price;

Where

"On-Peak Average Firm Electric Market Price" means the average Firm Electric Market Pricing~~,~~ for all On-Peak Hours of the applicable calendar month in the Contract Year, and

"Off-Peak Average Firm Electric Market Price" means the average Firm Electric Market Pricing~~,~~ for all Off-Peak Hours of the applicable calendar month in the Contract Year;

Plus

In the event the replacement energy procured by Utility as a result of Seller's failure to deliver the Output Shortfall results in incremental ancillary services and transmission costs, an amount equal to such costs incurred by Utility, provided however that Utility shall provide commercially

(continued)

reasonable evidence that it incurred such costs as a result of Seller's failure to deliver in accordance with the Output Guarantee.

Plus

The Replacement Bundled REC Price x REC Shortfall, if applicable

Where

"REC Shortfall" means the number of renewable energy certificates ("RECs") Seller would have delivered to Utility had Seller met the Output Guarantee.

"Replacement Bundled REC" means a REC bundled and simultaneously delivered with the associated qualifying energy generated by an Oregon Renewable Portfolio Standard eligible renewable energy resource and delivered bundled to Utility.

"Replacement Bundled REC Price" means the price determined by Utility by taking the lower of two dealer quotes representing a live offer to sell Replacement Bundled RECs in a quantity sufficient to cover the REC Shortfall.

Notwithstanding the foregoing, the total Output Shortfall Damages in a given Contract Year may not exceed the aggregate amount Utility would have incurred to purchase Seller's Net Output and RECs during the Contract Year if Seller had met the Output Guarantee, which amount shall be the sum of (i) the ~~produce~~product of the monthly On-Peak Output Shortfall and the applicable monthly On-Peak Contract Price for ~~all On-Peak Hours during applicable~~each calendar month~~s~~ of the Contract Year and (ii) the product of the monthly Off-Peak Output Shortfall and the applicable Off-Peak~~average~~ Contract Price for ~~all Off-Peak Hours during applicable~~each calendar month~~s~~ of the Contract Year~~)~~. ~~Energy Shortfall. The "Energy Shortfall" is comprised of the following cost components:~~

~~Replacement Energy Cost. Seller shall pay Utility an amount for such deficiency equal to:~~

~~The On-Peak Output Shortfall for the Contract Year, multiplied by the average On-Peak Utility's Cost to Cover for such Contract Year; plus~~

~~The Off-Peak Output Shortfall for the Contract Year, multiplied by the average Off-Peak Utility's Cost to Cover for such Contract Year.~~

~~Potential Transmission Adjustment. In the event the replacement energy procured by Utility as a result of Seller's failure to deliver the Output Shortfall results in incremental ancillary services and transmission costs, Seller shall pay Utility an amount equal to such costs incurred by Utility, provided however that Utility shall provide commercially reasonable evidence that it incurred such costs as a result of Seller's failure to deliver in accordance with the Output Guarantee.~~

(continued)

~~REC Shortfall. The "REC Shortfall" is equal to the number of renewable energy certificates ("RECs") Seller would have delivered to Utility had Seller met the Output Guaranty. Seller shall owe Utility the Replacement Bundled REC price, identified by Utility, multiplied by the REC Shortfall. Utility shall use commercially reasonable efforts to mitigate the amount owed by Seller under this Section 2. For purposes of this Exhibit F, "Replacement Bundled REC" shall mean a REC bundled and simultaneously delivered with the associated qualifying energy generated by an Oregon Renewable Portfolio Standard eligible renewable energy resource and delivered bundled to Utility. The Replacement Bundled REC price shall be determined by Utility taking the lower of two dealer quotes representing a live offer to sell bundled RECs in a quantity sufficient to cover the REC Shortfall.~~

Each Party agrees and acknowledges that (i) the damages that Utility would incur due to the Facility's failure to achieve the Output Guaranty would be difficult or impossible to predict with certainty and (ii) the damages calculation methodology contemplated by this provision are a fair and reasonable calculation of such damages.

3. Invoicing for Output Shortfall. Following the end of each Contract Year, Utility will deliver to Seller an invoice showing in reasonable detail the Utility's computation of Output Shortfall, if any, for the prior Contract Year and any amount due to Utility for damages calculated pursuant to this Exhibit F. In preparing such invoices, Utility will utilize the meter data provided to Utility for the applicable Contract Year, provided that if the meter data for any portion of such Contract Year is then incomplete or otherwise not available, Utility may also rely on historical averages and other information as may be available to Utility at the time of invoice preparation. Utility shall have the right to offset any payment due under this Exhibit F in accordance with Section 10.2., Seller must pay to Utility on or before the thirtieth (30th) ~~twentieth (20th)~~ day following the receipt of such invoice except with respect to any invoiced amounts that are~~unless such invoice is~~ subject to a good faith dispute under Section 10.4. Any amounts due under this Exhibit F are subject to Section 10.3, and all disputes regarding such invoices are subject to Section 10.4. ~~Objections not made by Seller within the twenty (20)-day period will be deemed waived.~~

4. Event of Default. The occurrence of an Output Shortfall for three (3) consecutive Contract Years shall be a Seller Event of Default, and Utility shall be entitled to the rights and remedies set forth in Section 11 of the Agreement.

Commented [QFs236]: Invoicing for Output Shortfall. - See our comments on the MAG Invoicing for Output Shortfall section for explanation of our edits to this section.

Commented [JU237R236]: JUs do not object to the QFTGs' revisions to this provision.

(continued)

EXHIBIT G
SELLER AUTHORIZATION TO RELEASE GENERATION DATA TO UTILITY

[DATE]

Director, Transmission Services
Utility
[Utility Address]

RE: Queue Number (if available): _____

To Whom it May Concern:

_____ ("Seller") hereby voluntarily authorizes Utility's Transmission business unit to share Seller's interconnection information with marketing function employees of Utility. Seller acknowledges that Utility did not provide it any preferences, either operational or rate-related, in exchange for this voluntary consent.

_____

(continued)

EXHIBIT H
REQUIRED INSURANCE

1.1 Required Policies and Coverages. Without limiting any liabilities or any other obligations of Seller under this Agreement, Seller must secure and continuously carry with an insurance company or companies rated not lower than "A-/VII" by the A.M. Best Company the insurance coverage specified below:

~~1.1.1 Workers' Compensation to cover claims under applicable State or Federal workers' compensation laws.~~

~~1.1.2 Employers' Liability with limits not less than $1,000,000 policy limit.~~

1.1.~~3~~1 Commercial General Liability with a limit of not less than $1,000,000 each occurrence/ combined single limit.

~~1.1.4 Business Automobile Liability to cover liability arising out of any auto (including owned, hired, and non-owned autos) used in connection with the Facility with a limit of not less than $1,000,000 combined single limit.~~

1.1.~~5~~2 Umbrella/excess Liability with a limit of not less than $5,000.000.

1.1.~~6~~3 From and after Commercial Operation, ~~All~~all-risk property insurance providing coverage in an amount at least equal to the full replacement value of the Facility against "all risks" of physical loss or damage, including coverage for earth movement, flood, and boiler and machinery. The All-Risk Policy may contain separate sub-limits and deductibles subject to insurance company underwriting guidelines. The All-Risk Policy will be maintained in accordance with terms available in the insurance market for similar facilities.

1.2 Additional Provisions or Endorsements.

1.2.1 Except for workers' compensation, employer's liability, and property insurance, the policies required must include provisions or endorsements as follows:

(a) naming Utility, parent, divisions, officers, directors and employees as additional insureds;

(b) include provisions that such insurance is primary insurance with respect to the interests of Utility and that any other insurance maintained by Utility is excess and not contributory insurance with the insurance required under this schedule; and

(c) cross liability coverage or severability of interest.

1.2.2 Unless prohibited by applicable law, all required insurance policies must contain provisions that the insurer will have no right of recovery or subrogation against Utility.

1.3 Certificates of Insurance. Seller must provide Utility with certificates of insurance within ten (10) days after the date by which such policies are required to be obtained, in ACORD or similar industry form. The certificates must indicate that the insurer will provide thirty (30) days prior written notice of cancellation. If any coverage is written on a "claims-made" basis, the certification accompanying the policy must conspicuously state that the policy is "claims made."

1.4 Term of Commercial General Liability Coverage. Commercial general liability coverage must be maintained by Seller for a minimum period of five (5) years after the completion of this Agreement and for such other length of time necessary to cover liabilities arising out of the activities under this Agreement.

~~1.5 Periodic Review. Utility may review this schedule of insurance as often as once every two (2)~~

(continued)

Commented [QFs238]: Exhibit H, Section 1.1 - Required Insurance Policies - OAR 860-029-0120(17)(a) only requires the types of commercial general liability and umbrella insurance listed in Sections 1.1.3 and 1.1.5, and with a $5 million umbrella policy, this is reasonably sufficient to insure the facility. The other requirements proposed by the utilities should be deleted.

Commented [JU239R238]: The JUs do not interpret OAR 860-029-0120(17)(b) as precluding other types of insurance from being required in the contract, Rather, the rules state which types of insurance ***must*** be included in the contract. Nevertheless, in an effort to compromise and reduce the number of issues in dispute, the JUs agree to remove Worker's Compensation (Section 1.1.1), Employer's Liability (Section 1.1.2), and Business Automobile Liability (Section 1.14). However, "all risk" property insurance providing coverage in amount at least equal to the full replacement value of the facility is reasonable and necessary to backstop the QF's obligations under the PPA.

Commented [JU240]: The JUs do not interpret OAR 860-029-0120(17)(b) as precluding other types of insurance from being required in the contract. Rather, the rules state which types of insurance ***must*** be included in the contract. The JUs continue to support inclusion of "all risk" property insurance providing coverage in an amount at least equal to the full replacement value of the facility as reasonable and necessary to backstop the QF's obligations under the PPA. However, in an effort to compromise, the JUs propose to limit the "all risk" insurance to after the development period, which the lender to the QF should already require.

Commented [QFs241]: Ex. H , Section 1.5 - We do not agree that the utility should be allowed to unilaterally update the insurance requirements every two years, so we have deleted that provision.

Commented [JU242R241]: The JUs do not object to the removal of this section.

~~years. Subject to applicable regulations and limitations established by the Commission from time to time, Utility may in its discretion require Seller to make reasonable changes to the policies and coverages described in this Exhibit to the extent reasonably necessary to cause such policies and coverages to conform to the insurance policies and coverages typically obtained or required for power generation facilities comparable to the Facility at the time Utility's review takes place.~~

(continued)

EXHIBIT I

NERC EVENT TYPES[30]

Event Type	Description of Outages
U1	Unplanned (Forced) Outage—Immediate – An outage that requires immediate removal of a unit from service, another outage state or a Reserve Shutdown state. This type of outage results from immediate mechanical/electrical/hydraulic control systems trips and operator-initiated trips in response to unit alarms.
U2	Unplanned (Forced) Outage—Delayed – An outage that does not require immediate removal of a unit from the in-service state but requires removal within six (6) hours. This type of outage can only occur while the unit is in service.
U3	Unplanned (Forced) Outage—Postponed – An outage that can be postponed beyond six hours but requires that a unit be removed from the in-service state before the end of the next weekend. This type of outage can only occur while the unit is in service.
SF	Startup Failure – An outage that results from the inability to synchronize a unit within a specified startup time period following an outage or Reserve Shutdown. A startup period begins with the command to start and ends when the unit is synchronized. An SF begins when the problem preventing the unit from synchronizing occurs. The SF ends when the unit is synchronized or another SF occurs.
MO	Maintenance Outage – An outage that can be deferred beyond the end of the next weekend, but requires that the unit be removed from service before the next planned outage. (Characteristically, a MO can occur any time during the year, has a flexible start date, may or may not have a predetermined duration and is usually much shorter than a PO.)
ME	Maintenance Outage Extension – An extension of a maintenance outage (MO) beyond its estimated completion date. This is typically used where the original scope of work requires more time to complete than originally scheduled. Do not use this where unexpected problems or delays render the unit out of service beyond the estimated end date of the MO.
PO	Planned Outage – An outage that is scheduled well in advance and is of a predetermined duration, lasts for several weeks and occurs only once or twice a year.
PE	Planned Outage Extension – An extension of a planned outage (PO) beyond its estimated completion date. This is typically used where the original scope of work requires more time to complete than originally scheduled. Do not use this where unexpected problems or delays render the unit out of service beyond the estimated end date of the PO.

Commented [QFs243]: Exhibit I - The relevant types of outages (Planned Outage, Forced Outage, and Maintenance Outage) are defined in the administrative rules and in the applicable definitions in the PPA. We see no need for this exhibit listing all sorts of other types of outages, none of which are referenced in the PPA. We recommend deleting this exhibit.

Commented [JU244R243]: The Joint Utilities included this Exhibit I to provide clarity for QFs so that they need not reference NERC definitions from an external source, and therefore propose to retain the exhibit for the time being.

[30] **Note to Form** – This table will be adjusted as necessary to conform with NERC requirements as they exist at the time of PPA execution.

(continued)

EXHIBIT J
SCHEDULE XX AND PRICING SUMMARY TABLE

(continued)

EXHIBIT K
PARTY NOTICE INFORMATION

Notices	Utility	Seller
All Notices:		
All Invoices:		
Scheduling:		
Payments:		
Wire Transfer:		
Credit and Collections:		
Notices of an Event of Default or Potential Event of Default:		

(continued)

EXHIBIT L

OFF-SYSTEM ADDENDUM

WHEREAS, Seller's Facility will not interconnect directly to Utility's System;

WHEREAS, Seller and Utility have not executed, and will not execute, a Generation Interconnection Agreement in conjunction with the Power Purchase Agreement;

WHEREAS, Seller has elected to exercise its right under PURPA to deliver Net Output from its Facility to Utility via one (or more) third-party Transmission Providers;

WHEREAS, Utility desires that Seller schedule delivery of Net Output on a firm, hourly basis; and

WHEREAS, Utility does not intend to buy, and Seller does not intend to deliver, more or less than the Net Output of the Facility (except as expressly provided, below);

THEREFORE, Seller and Utility do hereby agree to the following, which shall become part of their Power Purchase Agreement:

DEFINITIONS

Capitalized terms in this Exhibit L are defined in the Agreement or this Exhibit L:

"Day" means 0:00 hours to 24:00 hours, prevailing local time at the Point of Delivery, or any other mutually agreeable 24-hour period.

"Delivery Deficit" means any increment of the Facility's hourly Net Output, expressed in MWh, that is generated in excess of the scheduled hourly energy or capacity delivered to the Point of Delivery during that same hour.

"Firm Delivery" means uninterruptible transmission service (i.e., NERC priority level ~~6 or~~ 7) that is reserved and/or scheduled between the Point of Interconnection and the Point of Delivery pursuant to Seller's Transmission Agreement(s).

"Off-Peak Surplus Delivery" means any positive difference, expressed in MWh, in a given calendar month between the total energy delivered in Off-Peak Hours by the Facility to Utility and the Facility's total Net Output in Off-Peak Hours for the calendar month, i.e., the positive difference between the aggregate Supplemented Delivery for the calendar month and the aggregate Delivery Deficit for the same calendar month, in each case, during Off-Peak Hours.

"On-Peak Surplus Delivery" means any positive difference, expressed in MWh, in a given calendar month between the total energy delivered in On-Peak Hours by the Facility to Utility and the Facility's total Net Output in On-Peak hours for the calendar month, i.e., the positive difference between the aggregate Supplemented Delivery for the calendar month and the aggregate Delivery Deficit for the same calendar month, in each case, during Off-Peak Hours.

(continued)

Commented [QFs245]: Ex L, Off-System Addendum, Recitals - The recitals should not suggest that the QF must use "hourly" scheduling. The administrative rules do not require that and do not bar use of intra-hour scheduling that may be available from certain transmission providers, so the suggestion for hourly deliveries in the fourth recital should be deleted. See OAR 860-029-0121(2).

Commented [JU246R245]: The Joint Utilities restored the "firm, hourly" language, which is consistent with their current approach. Implementing less than hourly scheduling would require adjusting the avoided cost price and may pose administrative challenges. Therefore, such a change should be explored in docket UM 2000 and not adopted in this docket.

Commented [QFs247]: Ex. L , "Firm Delivery" - The region has moved to accepting use of "conditional firm"/NERC Priority 6 as a firm product. For example, the WRAP Tariff (Section 16.3) allows use of NERC Priority 6 or 7 as valid forms of firm transmission in the Forward Showing program. We recommend QFs be allowed to use conditional firm, and have made a corresponding edit.

Commented [JU248R247]: As noted above, firm delivery is the Joint Utilities' current requirement, and any change should be considered in docket UM 2000 so that pricing implications can be considered. Level 7 is assumed in current avoided cost pricing.

"Supplemented Delivery" means any increment of scheduled hourly energy or capacity, expressed in MWh, delivered to the Point of Delivery in excess of the Facility's Net Output during that same hour.

"Surplus Delivery" means collectively, Off-Peak Surplus Delivery and On-Peak Surplus Delivery.

SUPPLEMENTAL PROVISIONS

1. Seller's Responsibility to Arrange for Delivery of Net Output to Point of Delivery. Seller shall comply with the terms and conditions of the Transmission Agreement(s) between the Seller and the third-party Transmission Provider(s) and shall at all times on and after the Commercial Operation Date [or Initial Delivery Date, in the case of an existing QF] during the term of the Agreement hold rights sufficient to reserve Firm Delivery of Net Output up to the Maximum Delivery Rate to the Point of Delivery for the Term of the Agreement (i.e., such as through rollover rights). In the event Seller breaches the foregoing obligation and fails to cure such breach within thirty (30) days written notice from Utility, a Seller Event of Default shall have occurred, provided, however, that Seller shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and Seller commences the cure within the initial thirty (30)-day period. In addition, with respect to any deliveries of Net Output for which Firm Delivery is not secured, Seller will be paid in the manner described in Section 5.1.1. of the Agreement in lieu of the Contract Price.

2. Seller's Responsibility to Schedule Delivery. Seller shall schedule energy with NERC E-tags, pursuant to the most current NERC and WECC scheduling rules and practices, for all deliveries of energy hereunder to the Point of Delivery, by 6:00:00 [PPT/MPT] of the customary WECC pre-scheduling day for each day during the Term when Seller is delivering Net Output. Seller shall schedule the Facility as the identified e-Tag source. Seller may not net or otherwise combine schedules from resources other than the Facility. Seller shall not schedule any energy to be delivered to Utility pursuant to this Agreement using a Dynamic or Pseudo-Tie e-Tag as such terms are defined and used by NERC. Seller and Utility shall maintain records of hourly energy schedules for accounting and operating purposes. The final e-Tag shall be the controlling evidence of the Parties' schedule. Seller shall make commercially reasonable efforts to schedule in any hour an amount equal to its expected Net Output for such hour, or to the extent the Facility does not produce Net Output in whole MW increments, Seller shall make commercially reasonable efforts to schedule amounts intended to reasonably minimizinge Supplemental Delivery and Surplus Delivery in each month.

3. Seller's Responsibility to Maintain Interconnection Facilities. Utility shall have no obligation to install or maintain any interconnection facilities on Seller's side of the Point of Interconnection. Utility shall not pay any costs arising from Seller interconnecting its Facility with the Interconnection Provider.

4. Seller's Responsibility to Pay Transmission Costs. Seller shall make all arrangements for, and pay all costs associated with, delivering Net Output to the Point of Delivery, including without limitation costs to schedule energy into Utility's System.

5. Energy Reserve Requirements. Seller is responsible for obtaining all generation

(continued)

Commented [QFs249]: Ex. L, Supplemental Provisions 1. - The Seller should have the same cure rights as provided in the administrative rules, per the comments we made on Section 11.1.2(i).

Commented [JU250R249]: The Joint Utilities do not object to the QF Trade Groups' revisions to this provision.

Commented [QFs251]: Ex. L, Supplemental Provisions 2. - The utilities' proposed additional express limitations against dynamic scheduling and combining schedules from nearby facilities are not included in the administrative rules and not necessarily reasonable to include in the standard PPA. So we propose deletion of that extraneous addition.

Commented [JU252R251]: The Joint Utilities restored this deleted language regarding dynamic scheduling, which is in their current PPAs and has been confirmed through litigation at the Federal Energy Regulatory Commission. The Joint Utilities do not object to the QF Trade Groups' added language at the end of the provision.

reserves as required by the third-party Transmission Provider(s) and WECC and/or as required by any other governing agency or industry standard to deliver the Net Output to the Point of Delivery, at no cost to Utility.

6. Seller's Responsibility to Report Net Output and Supplemented Delivery. On or before the tenth (10th) day following the end of each calendar month, Seller shall send a report containing the information in **Example 1** below from the previous calendar month, in columnar format substantially similar to **Example 1** below. If requested, Seller shall provide an electronic copy of the data used to calculate Net Output, in a standard format specified by Utility. For each day Seller is late delivering the certified report, Utility shall be entitled to postpone its payment deadline in Section 10 of this Agreement by one (1) Business Day. Seller hereby grants Utility the right to audit its certified reports of hourly Net Output and agrees to allow Utility to have access to imbalance information kept by the Transmission Provider(s). In the event of discovery of a billing error resulting in underpayment or overpayment, the Parties agree to limit recovery to a period of three (3) years from the date of discovery.

7. Seller's Supplemental Representations, Warranties and Covenants. In addition to the Seller's representations and warranties contained in Section 3 of this Agreement, Seller represents, warrants, and covenants with respect to each delivery of energy to the Point of Delivery that:

(a) Seller's Surplus Delivery, if any, results from Seller's purchase of some form of energy imbalance ancillary service;

(b) The third-party Transmission Provider(s) requires Seller to procure energy imbalance ancillary service, as a condition of providing transmission service;

(c) The third-party Transmission Provider(s) requires Seller to schedule deliveries of Net Output in increments of no less than one (1) MW;

(d) Seller is not attempting to sell Utility energy or capacity in excess of the Facility's Net Output; and

(e) The energy imbalance ancillary service is designed to correct a mismatch between energy scheduled by the Seller and the actual real-time production by the Facility.

8. Acceptance of Supplemented Delivery. In reliance upon Seller's warranties in Section 7, above, Utility agrees to accept deliveries of imbalance ancillary service energy from Seller in the form of Supplemented Delivery, and Utility will pay Seller the Contract Price for such Supplemental Delivery; provided, however, that Utility is not obligated to pay for Surplus Delivery.

Example 1:

Day	Hour Ending (HE)	Net Output at POI	Maximum Delivery Rate	Net Output in Excess of Maximum Delivery	Scheduled/ Delivered Energy (per e-Tag)	On-Peak Supplemented Delivery/ Delivery Deficit	Off-Peak Supplemented Delivery/ Delivery Deficit
1	1	-	1.50	-	-		-

Commented [QFs253]: Ex. L, Supplemental Provisions 8. This section as drafted by the utilities contains no affirmative statement that the Utility will pay for the Supplemental Delivery; it is only implied by negative implication through the statement Utility will not pay for Surplus Delivery. There should be an affirmative statement that the Utility must pay for the Supplemental Delivery, so we have added that.

Commented [JU254R253]: The Joint Utilities do not object to the QF Trade Groups' revisions to this provision.

(continued)

1	2	(0.01)	1.50	-	-		-
1	3	(0.01)	1.50	-	-		-
1	4	(0.01)	1.50	-	-		-
1	5	(0.01)	1.50	-	-		-
1	6	0.64	1.50	-	1.00		0.36
1	7	0.83	1.50	-	1.00	0.17	
1	8	0.89	1.50	-	1.00	0.11	
1	9	0.99	1.50	-	1.00	0.01	
1	10	1.19	1.50	-	1.00	(0.19)	
1	11	1.29	1.50	-	1.00	(0.29)	
1	12	1.34	1.50	-	1.00	(0.34)	
1	13	1.44	1.50	-	1.00	(0.44)	
1	14	1.49	1.50	-	1.00	(0.49)	
1	15	1.48	1.50	-	1.00	(0.48)	
1	16	1.54	1.50	0.04	2.00	0.50	
1	17	1.59	1.50	0.09	2.00	0.50	
1	18	1.59	1.50	0.09	2.00	0.50	
1	19	0.99	1.50	-	1.00	0.01	
1	20	0.75	1.50	-	1.00	0.25	
1	21	0.58	1.50	-	1.00	0.42	
1	22	(0.01)	1.50	-	-	-	
1	23	(0.01)	1.50	-	-		-
1	24	(0.01)	1.50	-	-		-
…	…						
Total		18.55	36.00	0.22	19.00	0.24 (On-Peak Surplus Delivery*)	0.36 (Off-Peak Surplus Delivery*)

On-Peak Scheduled/Delivered Energy (MWhs): 18.00
Off-Peak Scheduled/Delivered Energy (MWhs): 1.00

Total MWhs Utility will pay for:

On-Peak MWhs: 18.00 – 0.24 = 17.76 MWhs
Off-Peak MWhs: 1.00 – 0.36 = 0.64 MWhs

Total MWhs: 18.40 MWhs

*Utility will accept but will not be obligated to pay for Surplus Delivery, per the terms of this Exhibit L and OAR 860-029-0121.

(continued)

Page 2: [1] Commented [QFs3] QF Trade Groups 9/19/2023 6:55:00 AM

"Abandonment" - The administrative rules do not define "abandonment" so we have proposed an edit using the word's normal meaning, i.e., a *permanent* setting aside, should apply. https://www.dictionary.com/browse/abandonment. For example, the utilities' proposed 90-day cessation of construction is not an "abandonment" of a project, so the utilities' proposed definition is not consistent with the rules or reasonable. Alternatively, if the Commission chooses to apply a period of cessation of construction activity, a period of significantly longer than 90 days is needed because 90 days does not even allow for cessation of construction during the normal period of winter when it is too cold to perform construction in many parts of Oregon. If used, the construction cessation would need to be at least 180 days with the opportunity to demonstrate that a longer period is for a reason other than abandonment.

Page 2: [2] Commented [QFs5] QF Trade Groups 9/19/2023 10:18:00 AM

"Ancillary Service" should be deleted. The utilities appear to have included this new defined term in the PPA along with "Capacity Rights" with the intent of requiring the QF to provide more than its entire net output, which is all QFs are currently compensated for under the OPUC avoided cost rates. See, e.g., Sections 4.8 and 11.2.3.

Page 2: [3] Commented [JU6R5] Joint Utilities 10/16/2023 6:23:00 AM

In the JUs' view, avoided cost pricing compensates a QF for providing ancillary services, reactive power, and capacity rights. These are attributes that would be provided by the utility-owned resource, which the QF is being compensated to help the utility avoid. However, in the interest of narrowing issues for this docket and because this issue relates to avoided cost pricing, the JUs agree to remain silent on this topic in the contract and to address this issue in docket UM 2000. Depending on how this issue is resolved in docket UM 2000, "net output" should be interpreted to include or exclude these attributes.

Page 2: [4] Commented [QFs7] QF Trade Groups 9/19/2023 10:04:00 AM

"Capacity Rights" should be deleted. The utilities appear to have included this new defined term in the PPA along with "Ancillary Services" with the intent of requiring the QF to provide more than its entire net output, which is all QFs are currently compensated for under the OPUC avoided cost rates. See, e.g., Sections 4.8 and 11.2.3.

Page 2: [5] Commented [JU8R7] Joint Utilities 10/16/2023 6:23:00 AM

In the JUs' view, avoided cost pricing compensates a QF for providing ancillary services, reactive power, and capacity rights. These are attributes that would be provided by the utility-owned resource, which the QF is being compensated to help the utility avoid. However, in the interest of narrowing issues for this docket and because this issue relates to avoided cost pricing, the JUs agree to remain silent on this topic in the contract and to address this issue in docket UM 2000. Depending on how this issue is resolved in docket UM 2000, "net output" should be interpreted to include or exclude these attributes.

Page 3: [6] Commented [QFs9] QF Trade Groups 9/25/2023 4:54:00 PM

"Commercial Operation" - Our edits to the first sentence mirror the language of OAR 860-029-0010(9).

Additionally -

(iv) Is far too broad and unnecessary given the other requirements, so it should be deleted. A Seller's facility could have arguable permitting issues it is working out, or a dispute over payment to a vendor, etc., which do not necessarily preclude the ability to operate the facility safely and reliably.

(v) The proposed requirement to pay network upgrade costs prior to COD is not possible in most cases because the final invoice under the GIA is not due from the utility until *after* the facility is placed in service. Additionally, a dispute over the proper amount of the invoices for those costs should not preclude COD under the PPA; as proposed here by the utilities in the PPA, the utility could charge whatever it wanted under the GIA and the QF would have to agree to pay whatever the utility charges, even far in excess of cost estimates in interconnection studies, to avoid default under the PPA. So (v) should be deleted.

Page 3: [7] Commented [JU11] Joint Utilities 10/16/2023 6:24:00 AM

Taking into consideration Staff's concerns, the JUs propose consolidating this subsection (iii) with subsection (iv) and requiring certification from an officer or authorized agent of Seller rather than a Licensed Professional Engineer, which is a reasonable and appropriate compromise. For context, PGE's currently approved PPA requires that a Licensed Professional Engineer certify that the QF has obtained all Required Facility Documents by COD, and PacifiCorp's existing contract also includes the same requirement but with certification by an attorney in good standing in the State of Oregon as opposed to a Licensed Professional Engineer.

Page 5: [8] Commented [QFs16] QF Trade Groups 9/25/2023 11:56:00 AM

"Contract Year" - The utilities' proposal to start Contract Years on Jan. 1 results in the first contract year being shorter than a full year, which makes it very difficult to implement the requirements of the administrative rules for the MAG and MDG. It results in the QF having less than a full year for the first "Contract Year" of the MDG, and it complicates correctly implementing the one-year and three-year grace period (for existing and new QFs, respectively) before the MAG being applicable. The easiest fix is just use a Contract Year that starts on COD. We are open to other proposals, but the utilities' initial proposal for the MDG and MAG did not properly implement the rules due to way the Contract Year was defined.

Page 5: [9] Commented [JU17R16] Joint Utilities 10/16/2023 6:31:00 AM

The JUs object to the QFTGs' proposed changes and propose to retain the definition of a Contract Year as a calendar year starting on January 1st for ease of contract administration as the utilities would otherwise have to separately track the contract year for each individual contract. However, to address the QFTGs' concerns regarding the first partial year in calculating the MAG and MDG, the JUs propose that only full Contract Years be counted for purposes of Exhibit F.

Page 5: [10] Commented [JU18] Joint Utilities 12.12.2023 12/11/2023 7:06:00 PM

The JUs revised the definition to make clear that the first Contract Year commences on the Effective Date and ends on December 31 “of the same calendar year.”

Page 5: [11] Commented [JU19] Joint Utilities 12.12.2023 12/11/2023 7:07:00 PM

With respect to the QFTGs’ concerns regarding the term “full Contract Year” not being defined, the JUs propose the following language for purposes of the PPA and Exhibit F.

Page 5: [12] Commented [QFs20] QF Trade Groups 9/25/2023 5:08:00 PM

"Credit Requirements" - the word "reasonable" from the administrative rules is missing so we added it. See OAR 860-029-0120(180(b).

Page 5: [13] Commented [JU21R20] Joint Utilities 10/16/2023 9:28:00 AM

As indicated in the JUs' responses to questions from the September 12 workshop, absence of the word "reasonable" was an oversight and the JUs do not oppose inclusion of the term.

Page 5: [14] Commented [QFs22] QF Trade Groups 9/19/2023 10:53:00 AM

"Cure Period Deadline" - Footnote 9 - We object to limiting the cure period for an operational QF to just 30 days. This limitation is not included in the rules, and the most likely cause of delay - the utility's need to upgrade interconnection facilities in a new GIA upon PPA expiration - is often beyond the control of the QF.

Page 5: [15] Commented [JU23R22] Joint Utilities 10/16/2023 9:28:00 AM

The JUs’ original proposal is consistent with Commission-approved practice: compare Section 11 in each of PacifiCorp’s Commission-approved PPAs for new and existing non-intermittent resources. The JUs did not interpret the new rules regarding the cure period for failure to achieve Scheduled COD as requiring deviation from current Commission practice. However, in the interest of narrowing the issues in dispute, the JUs are willing to apply the one-year cure period to all QFs by deleting the footnote.

Page 5: [16] Commented [QFs24] QF Trade Groups 9/19/2023 10:40:00 AM

"Delay Damages" - OAR 860-029-0120(7)(c) caps delay damages at the Contract Price, but the utilities' draft PPA adds transmission and EA costs as an additional amount, which is inconsistent with the rules. We made edits to include these potential costs related to transmission and EAs in the "Replacement Power Costs" and "Utility's Cost to Cover" definitions, subject to the Contract Price cap.

Page 5: [17] Commented [JU25R24] Joint Utilities 10/16/2023 6:35:00 AM

As reflected in the response to questions from the September 12 workshop, the JUs acknowledge after further review of the new rules that the new rules cap the total amount of damages at the contract price. Therefore, the JUs accept the QFTGs' revisions to add any transmission charges to deliver replacement energy and any replacement RECs to the definition of Replacement Cost, which is used to determine the Utility's Cost to Cover. However, rather than applying the damages cap through the "Utility's Cost to Cover" definition, as the QFTGs propose, the JUs propose clarifying application of the damages cap separately for each type of damages because each type of damages is governed by a separate rule that has slightly different terms. For delay damages, the JUs revised the definition to make clear that the aggregate cap is calculated on a monthly or partial monthly basis, which is consistent with OAR 860-029-0120(7)(a) and the PPA provision stating that delay damages are invoiced on a monthly basis.

Page 10: [18] Commented [JU42] Joint Utilities 12.12.2023 12/11/2023 7:11:00 PM

The JUS do not oppose removing the reference to "Seller's load other than station use." However, the JUs still propose using "measured at" rather than "flowing though" in the definition for clarity because "flowing through" the Point of Interconnection could be subject to different interpretations. Furthermore, the JUs continue to support use of the phrase "transformation and transmission losses" to describe the losses that are subtracted from Net Output. The term losses in and of itself is inherently vague, and as far as the JUs are aware, transformation and transmission losses are precisely the types of losses that the rule intends to cover—and so the inclusion of that phrase constitutes a helpful clarification.

Page 11: [19] Commented [JU49R48] Joint Utilities 10/16/2023 6:58:00 AM

JUs do not agree with the QFTGs' proposed changes to this definition. This definition is reasonable as it is substantively the same as the definitions of "Required Facility Documents" in both PacifiCorp's and PGE's existing contracts. Note that Section 3.2.3 requires that all Required Facility Documents as of the Effective Date be listed in Exhibit D and requires the Seller to notify the Utility of additional Required Facility Documents during the Term. Therefore, this provision is not overly broad and is unlikely to cause disputes, and the QFTGs have not provided any evidence that this definition has led to disputes in the nearly 20 years that it has been in use. It is customary and appropriate for a seller to warrant that it has obtained all legal rights and permits that are required for it to construct, own, operate and maintain the project. This requirement is standard and assures the purchasing utility that the project is completed and ready to commence deliveries. Minor agreements that are not "necessary" for the construction ownership, operation, and maintenance of the facility are excluded by definition, so the JUs disagree that this provision is overly broad. Further, disputes are only likely in cases where a breach of this warranty causes the utility damages, which is exactly the scenario in which the utility and its customers need the protection of this warranty. Accordingly, the JUs have reinstated the original language.

Page 13: [20] Commented [JU53R52] Joint Utilities 10/17/2023 12:40:00 PM

While the JUs do not agree to remove this concept from the contract entirely, the JUs have reviewed and consolidated provisions addressing this topic in order to respond to the concerns of Staff and the QF Trade Groups. The JUs included this clarification and related provisions in the PPA to reflect the fact that utilities' transmission and merchant/purchasing groups function independently under long-standing federal regulation. It is not appropriate for interconnection issues (handled by the transmission function in a separate contract) to be raised in connection with the PPA. Any generator interconnection issues QFs have must be taken up with the transmission function under the GIA. In sum, these provisions are needed to ensure that it is clear that the GIA and PPA are separate agreements with separate rights, obligations, and remedies. Disputes under one should not have bearing on the other. These provisions simply clarify the legal relationship between the parties with respect to the agreements and between the agreements themselves.

Transmission service arrangements to deliver the QF power on the utility's transmission system, on the other hand, are addressed in the PPA directly because the utility, acting as the purchaser under the PPA, is the transmission customer of the utility's transmission function, and in that role has certain obligations to the QF.

Page 15: [21] Commented [QFs63] QF Trade Groups 9/20/2023 4:25:00 PM

Section 2.2 & footnote 13 - The QF Trade Groups agree that a QF should generally have an effective GIA and Transmission Agreement to deliver their net output. However, the utility should be required to pay for all net output in the circumstance in which the utility is at fault for not providing an effective GIA.

Subpart (a) - For new QFs, the proposal to require an executed and effective GIA and Transmission Agreement by the Scheduled Commercial Operation Date is a new potential default that undermines the one-year delay default cure period, and should be deleted.

Footnote 13 - The Milestones for existing QFs are not all reasonable as proposed. For example, a renewing QF will often need a new GIA and this can be delayed just the same as it can be delayed for a new QF; there is no basis in the administrative rules to require a replacement GIA, much less a new wheeling agreement, to be executed *before* the PPA for an existing QF renewing its PPA.

Likewise, there is no basis in the rules to require the existing QF to post Default Security under the replacement PPA 30 days after it signs that PPA, which could be up to 3 years prior to the COD in that replacement PPA.

Page 17: [22] Commented [JU68] Joint Utilities 10/16/2023 8:02:00 AM

JUs do not object to the QFTGs' proposal to remove the previous Sections 2.3, 2.7, and 6.12.2; provided, however, that the JUs propose a new Section 2.3 that requires that Seller provide the Utility updates concerning the facility's progress in coming online by the Scheduled COD in writing on a quarterly basis to help inform the utility's system planning and to ensure good communication between the parties during the development period. The JUs must have updated information about whether QFs will meet their Scheduled COD for inclusion in the utility's power cost filings and in utility planning documents. The obligation simply to report on the facility's progress in this new section—not to achieve specific milestones by date certain or provide a remedial plan to cure such milestones if not met—is not in conflict with the one-year cure period and is not burdensome. If Seller fails to report, Seller will get a notice and opportunity to cure. Thus, Seller has full and complete control over compliance and can easily avoid being in default under this provision.

Page 17: [23] Commented [QFs69] QF Trade Groups 9/22/2023 11:10:00 AM

Section 2.3 - Similar to the proposed "Schedule Recovery Plan", the utilities proposal to report on pre-COD milestones and to develop a cure to any such milestones not met creates a new risk of pre-COD default and termination that undermines the QF's right to a one-year cure period of a delay default provided in the 860-029-0123(4)(a). As the utilities agreed at the workshop, a QF that misses a milestone and failure to provide suitable

remedial action plan to the utility could result in default and termination under the PPA's catch-all provision for defaults, Section 11.1.1(c). We object to this new provision, which was not included in the rules.

Page 17: [24] Commented [QFs71] QF Trade Groups 9/19/2023 12:10:00 PM

Section 2.4 - "Schedule Recovery Plan" - See comments on definition of "Schedule Recovery Plan" for explanation of basis for proposed edits.

Additionally, the requirement to pay delay damages during delay and potential termination after a one-year delay in achieving COD may be excused under this Agreement for a variety of reasons, including Excused Delay, Force Majeure, and other equitable defenses, and such possibility needs to be stated, as proposed in our edit.

Page 18: [25] Commented [JU74R73] Joint Utilities 10/16/2023 8:10:00 AM

As explained in the JUs' responses to questions from the September 12 workshop, the 10-day timeline was an oversight, and the JUs agree the timeline should be 30 days. The JUs also do not object to the QFTGs' other added language but revised it slightly to clarify that the deadline to pay damages will not apply to an "amount" invoiced that is subject to good faith dispute.

Page 18: [26] Commented [QFs75] QF Trade Groups 9/22/2023 1:05:00 PM

Section 2.7 - Utility Right to Monitor - This section imposes new and unreasonable monthly reporting requirements on QFs beyond anything required in the administrative rules. Combined with the catch-all default provision in the PPA, Section 11.1.1(c), it also creates new and unreasonable default for failing to provide such burdensome monthly updates. We recommend deletion of this requirement for small QF PPAs.

Page 18: [27] Commented [JU78R77] Joint Utilities 10/16/2023 8:16:00 AM

The JUs rejected the QFTGs' revisions. The Commission chose not to address Force Majeure in the rules, so the absence of a 180-day limit in OAR 860-029-0120(6)(d) is not dispositive. It is unreasonable for the PPA to allow an event of Force Majeure to extend the Scheduled COD indefinitely. This is particularly true given that QF can under the new rules select a Scheduled COD of five years after execution and enjoy another one year after Scheduled COD to come online. Given the extremely long timelines permitted under the terms of the PPA and the rules, an extended period due to Force Majeure events is not warranted and unjustifiably transfers additional project risk and the costs of stale pricing onto utility customers. Providing a right to terminate after a limited period deferring contractual obligation because of a Force Majeure event is a standard PPA term and is included in other QF PPAs.

Page 21: [28] Commented [QFs86] QF Trade Groups 9/22/2023 1:34:00 PM

Section 3.2.6 - Litigation - The utilities' proposal would create a cross default risk under the PPA's catch-all default provision in Section 11.1.1 (c), any time the QF initiates or defends against, or is even aware of the possibility of, any form of litigation related to the facility, which could include a myriad of issues. This is unreasonable and should be deleted. QFs can and do end up in litigation related to their facilities and the consequence cannot be

default and loss of right to sell power and operate under a PPA solely due to an exercise of the right to initiate or defend against some litigation. The utilities' carve out limiting the provision to litigation that "would materially and adversely affect Seller's performance of its obligations under this Agreement" is vague and does not remove the unreasonable risk inherent in this type of PPA requirement - which has no analogue for utility-owned facilities, which also frequently encounter litigation without automatic risk of termination of rate recovery rights.

Page 21: [29] Commented [QFs88] QF Trade Groups 9/22/2023 1:39:00 PM

Section 3.2.10(b)-(c) - The utilities' proposed Seller representations that the Seller and its equity owners have never defaulted on any payment obligation to the utility, and the requirement to be current on all financial obligations create unreasonable cross default risk combined with Section 11.1.1(a), and should be deleted. There could any number of minor payment defaults or oversights for a variety of excusable reasons. Such oversights should not forever bar an entity from entering into a QF PPA under PURPA or create unreasonable cross default risk. Under PURPA, there is no restriction on a QF entering into a contract because the equity owners defaulted under a separate contract. The utilities' proposal to impose a such requirement is likely illegal since it proposes limits on QF ownership and operation not existing in federal and state law. It's not contained in the administrative rules.

(d) The warranty that Seller owns the facility needs to be qualified by Seller's right to sell the facility and assign the PPA, so we added an edit to that effect.

Page 23: [30] Commented [JU98R97] Joint Utilities 10/16/2023 10:54:00 AM

JUs do not agree with the QFTGs' deletion in subsection (a). The Commission elected to apply OAR 860-029-0044(3) only to off-system QFs because network upgrades necessary to deliver an on-system standard QF's output to load should be identified in the network resource interconnection service study process, and the costs would be allocated pursuant to the Commission's interconnection cost-allocation policies. However, if an on-system QF has not yet gone through the interconnection process and received an interconnection study, then the process of designating the QF as a network resource to obtain transmission service could identify network upgrades that should have been addressed in the interconnection process and for which cost responsibility may have been assigned to the QF under the Commission's interconnection cost-allocation policies.

Page 33: [31] Commented [QFs147] QF Trade Groups 9/22/2023 4:29:00 PM

Section 6.9 - The utilities' proposal for telemetry for small QFs and direct, instantaneous communication is beyond the requirements of the administrative rules, and does not appear to be included in any of the currently effective standard contracts. This could impose a significant new cost on small QFs, and there has been no demonstration it is needed, and not already accounted for in the GIA to the extent it is needed. Section 6.10 should provide the utility with the information it needs without the added expense of a direct communication line. We oppose this PPA telemetry proposal.

Page 33: [32] Commented [JU148R147] Joint Utilities 10/16/2023 11:58:00 AM

The JUs do not agree to delete this provision in its entirety and rather propose limiting language so that the PPA is not requiring telemetry equipment not otherwise already required under the GIA. Where a QF is required to install

telemetry equipment under its GIA, the QF should also provide such information to the utility. This provision simply explains these requirements and is therefore reasonable.

Page 33: [33] Commented [JU150R149] Joint Utilities 10/16/2023 12:35:00 PM

The JUs rejected deletion of this provision. It is intended to set up standard communication contacts and protocols, and would not impose significant costs on QFs contrary to the QFTGs' claims. The GIA already sets forth a number of communications requirements, including voice and data. Moreover, the dedicated communication circuit can include, but is not limited to, a voice/common landline telephone line. However, a dedicated communication circuit may be another form of communication as long it is dedicated to communications with the utility and available. In some circumstances, QFs are located in areas without cell service and the utilities are simply requesting a reliable form of communication, which is inherently reasonable.

Page 33: [34] Commented [QFs151] QF Trade Groups 9/25/2023 10:48:00 AM

Section 6.12.1 - Electronic Fault Log - We do not agree it is reasonable to require all small QFs to maintain an electronic fault log. Some older facilities and smaller facilities may not have such equipment and we don't see why it is necessary in all cases, so we recommend deleting this requirement, which is not required in the administrative rules or any of the three utilities' current standard PPAs.

Page 33: [35] Commented [JU152R151] Joint Utilities 10/16/2023 12:38:00 PM

JUs do not agree to remove this provision for all QFs; however, the JUs propose to remove this provision for hydro QFs less than 3 MW initially placed in service prior to 1980 to address the QFTGs' concern that such QFs may not have an electronic fault log. This section is necessary because if a QF does not meet the MAG, provision of electronic fault logs is necessary to determine damages. Moreover, modern QFs of a certain size should have these logs readily available, so this requirement is not unreasonable.

Page 33: [36] Commented [QFs153] QF Trade Groups 9/22/2023 4:36:00 PM

Sections 6.12.2 through 6.12.8 - These new, and one-sided, reporting requirements are very burdensome on a small QF. We question whether the utility would even review or use this information and object to its application to a small QF. We recommend deletion of these provisions.

Page 34: [37] Commented [JU158] Joint Utilities 10/16/2023 1:11:00 PM

While Section 6.12.6 (now Section 6.12.3) does put the onus on the QF to provide notice to the utility, such notice is only required in the case of a Material Adverse Event on the project and is not burdensome. Moreover, a requirement to provide notice, which is itself an obligation capable of being cured, does not interfere with a QF's applicable development period to come online. The Material Adverse Event notice obligation in previous Section 6.12.6 ensures that the utility will be aware of the occurrence of the types of "circumstances" the QFTGs contemplate in Section 8.1 by which utilities determine whether a QF no longer meets its creditworthiness requirements. Without any such requirement for notice of such "circumstances," it is unclear how a utility will be able to determine when to make a request under Section 8.1. Furthermore, this provision is thematically consistent with provisions in existing contracts.

Page 34: [38] Commented [JU160] Joint Utilities 10/16/2023 1:12:00 PM

The JUs rejected the QFTGs' deletion of this section. The JUs believe this provision, which simply requires the QF to respond to a utility's request for information, is reasonable and necessary to incentivize communication. Moreover, the JUs note that a utility's request for additional information must itself be reasonable.

Page 37: [39] Commented [QFs165] QF Trade Groups 9/23/2023 7:32:00 AM

Section 8.3 - Default Security - In addition to the options for Project Development Security, OAR 860-029-0120(16) includes the following additional options for Default Security: "grant of step-in rights ***or*** a senior lien to the purchasing utility in a form acceptable to the purchasing utility in its reasonable-exercised discretion."

A lien is a different from step-in rights, and these are two distinct options in the rules. A lien is a legal right a creditor has in property (e.g., the right to foreclose and sell the facility or real property); whereas step-in rights are the right to step into the shoes of Seller and operate the plant to deliver power to Utility.

The utilities' draft PPA omits step-in rights in violation of the rules. We added step-in rights as an option consistent with the rules. Additionally, both the step-in rights and the lien option should be more completely described in the standard contract to avoid disputes and/or the utility imposing unreasonable terms to deny the QF's right in the rules to use these options. The description of the step-in rights and senior lien we have proposed in Section 8.3.1 & 8.3.2 mirror the terms of PacifiCorp's existing standard PPA for QFs, section 10.4 and Idaho Power standard PPA Section 4.1.

Finally, similar to comments on Section 8.2, the utility should return cash/letter of credit security much sooner than 60 days. We recommend five business days.

Page 43: [40] Commented [JU175R174] Joint Utilities 10/16/2023 2:07:00 PM

JUs do not object to QFTGs' proposed revisions removing the Schedule Recovery Plan concept and, as discussed above, the JUs are willing to apply the one-year cure period to all QFs. However, the alternate language in subsection (b) is duplicative of footnote 28, and the JUs have therefore removed such language. The JUs have also replaced "within one year" with "by the Cure Period Deadline" as the "Cure Period Deadline" now applies to all QFs.

Page 43: [41] Commented [QFs178] QF Trade Groups 9/19/2023 12:04:00 PM

Section 11.1.2(e) - The proposed default for any issue arising under "Required Facility Documents" or a Lease is beyond the listed defaults allowed by OAR 860-029-0123((1), and it creates unnecessary and unreasonable cross default risk for the small QF. We recommend deleting this cross default provision. At a minimum, the same "additional 90-day cure period" language we've proposed in all other default sections should be used instead of the

utilities more limited language requiring a remediation plan and running the 90-day cure from the breach instead of from the end of the initial 30-day period as the rules state.

Page 43: [42] Commented [JU179R178] Joint Utilities 10/16/2023 2:17:00 PM

The JUs rejected the deletion of the first sentence because it is appropriate that failure to maintain the legal rights to operate the facility should be an event of default. Contrary to the QFTGs' comment, this provision would not lead to default any time there is an issue with a Required Facility Document. The JUs do not object to removal of the remediation plan concept or to the addition of the same cure period language as is used in the other provisions.

Page 44: [43] Commented [JU183R182] Joint Utilities 10/16/2023 2:21:00 PM

The JUs accepted some of the QFTGs' added language but made revisions to avoid vague language and eliminate potential redundancy. Specifically, the concept of "permanent cure" is unclear and it is sufficient to simply state "cure," and damages would be a payment obligation that, if unpaid, would be an independent event of default under Section 11.1, so it is not necessary to reference damages in Section 11.1.3. The JUs also revised Section 11.2.2 because damages are triggered by the initial breach of the obligation, Section 4.1—not the event of default under Section 11. Finally, JUs restored a portion of the damages calculation in Section 11.2.1 that appears to have been inadvertently deleted.

Page 44: [44] Commented [QFs184] QF Trade Groups 9/22/2023 11:38:00 AM

Section 11.2.1 - Remedy for Seller's Failure to Deliver - The same qualifications addressed in our comment to Section 2.6 need to be added to this Section 11.2.1 regarding the invoicing and due date. Additionally, as proposed by the utilities, Section 11.2.1 subjects the QF to damages in excess of the contract price cap on damages. Our edit cures this issue by relying on the definition of "Utility Cost to Cover" which properly incorporates the contract cap price on damages.

Page 49: [45] Commented [JU197R196] Joint Utilities 10/16/2023 2:31:00 PM

The JUs do not agree with the QFTGs' proposed revisions and have rejected them completely. The Force Majeure provisions proposed by the JUs are reflective of modern contracting terms and conditions included in both PacifiCorp's 2020 and 2022 All-Source pro forma RFP PPAs, as well as included in executed market PPAs over the last five years. Similarly, PacifiCorp's Washington PPA, which is a QF standard contract, includes these same provisions. Accordingly, contrary to the QFTGs' claims, these provisions are commonly found in bilateral agreements where both parties have equal bargaining power, as well as in the standard QF agreement in Washington. The JUs note that the QFTGs' proposal relies on existing Oregon standard PPA provisions that are outdated and have led to multiple claims and disputes. There is no reason that the contract cannot clarify events that do and do not constitute Force Majeure in more detail, especially where such detail is used to prevent abuse of Force Majeure that would help avoid and limit future litigation. For example, PGE and numerous developers have had disputes regarding what is and what is not a Force Majeure event; some off-system QF developers have claimed that interconnection issues with other utilities that are not the purchasing utility are Force Majeure events that should extend the Scheduled COD to seven or eight years after execution of the PPA and as long as four years after the original Scheduled COD. It is therefore essential, for example, for the Force Majeure provision to the clarify that any delay, alleged breach of contract, or failure by the transmission provider or interconnection provider does not qualify as an event of Force Majeure unless that delay, breach, or failure is due to an independent Force Majeure event. For these reasons, the JUs continue to support their proposed provisions to provide more clarity, not less

regarding which events constitute Force Majeure and to explicitly allow either party to terminate the agreement should an event of Force Majeure extend beyond 180 consecutive days.

Page 53: [46] Commented [JU202R201] Joint Utilities 10/16/2023 2:37:00 PM

While the Commission decided not to include ***a new jurisdictional provision in the rules*** for fear of that language creating new Commission jurisdiction where it did not exist or overstepping where exclusive jurisdiction was committed to another tribunal, it did not repeal OAR 860-029-0020(2)(a) or otherwise call into question the existing contracting term subjecting an agreement to the jurisdiction of governmental authorities having jurisdiction over the parties to the agreement at question here. In fact, the Commission recently referenced a similar provision from PGE's existing contract when noting that it had jurisdiction over complaints regarding a PPA, and the Oregon Court of Appeals affirmed the Commission's interpretation of its jurisdiction. Such a provision, which is mandated by the Commission's rules, in existing contracts, and interpreted by Commission and Oregon Court of Appeals precedent, does not implicate the concerns that the Commission noted when it rejected including in rules language that would provide the Commission with jurisdiction to "resolve any action or claim relating to this Agreement[.]" Therefore, the JUs oppose the QFTGs' proposal to remove this provision.

Page 63: [47] Commented [JU220R219] Joint Utilities 10/16/2023 8:03:00 PM

It is the JUs' understanding that the rules adopted in docket AR 631 were not intended to depart from existing Commission rules and policy concerning when the MAG takes effect for new and existing QFs as the language in the new rules mirrors that in the previous rules. The previous MAG rules were intended to codify existing Commission policy. When the Commission first implemented the MAG in standard contracts in Order No. 14-058 using the same language as in the existing and previous rules, the Commission explicitly noted that:

We adopt Pacific Power's proposal to institute a 90 percent overall guarantee for wind QF contracts, ***starting in contract year three for new contracts***, and ***starting in year one for contracts that are renewed or supersede a contract with another utility***. We are persuaded by Pacific Power's representation that experience demonstrates the ability of wind QFs to meet these levels of guaranteed availability, and CREA's concurrence that the requirements are reasonable.

The JUs' proposal aligns with both PacifiCorp's and the Commission's understanding of when the MAG should go into effect for new and existing QFs as detailed in Order No. 14-058.

Page 63: [48] Commented [QFs222] QF Trade Groups 9/25/2023 2:11:00 PM

"Operational Hours" - OAR 860-029-0120(10)(a) gives the QF 200 hours of planned outage, without the added qualification that the QF not have built any planned maintenance into its expected net output figures. So we propose deleting that limiting clause from the PPA because it is inconsistent with the administrative rules. Additionally, we propose subpart (iv) which recognizes that solar QFs will not be penalized for being unavailable to deliver energy at nighttime, which is consistent with the Commission's treatment of the High Demand Months for outages and will incent solar QFs to conduct outages and maintenance at nighttime.

Page 63: [49] Commented [JU223R222] Joint Utilities 10/17/2023 11:01:00 AM

The JUs do not object to the QFTGs' deletion of the provision regarding Planned Outages hours already assumed in the calculation of Expected Net Output. However, the Joint Utilities reject the QFTGs' proposal to add additional hours "between sunset and sunrise" to the definition of "Operational Hours" for purposes of the MAG. Contrary to the QFTGs' assertions, this proposal is not consistent with OAR 860-029-0124(2)(b), which simply provides:

Nothing in the power purchase agreement's provisions limiting Planned Outages during High Demand Months may prohibit a qualifying facility from conducting Planned Outages during High Demand Months at times when motive force is unavailable to generate and deliver energy.

While solar facilities are not prohibited from conducting Planned Outages during High Demand Months at times when motive force is unavailable to generate and deliver energy, this does not mean that the facility is allowed additional Planned Outages hours in the MAG calculation when motive force is not available beyond the 200 hours already specified in subsection (iii) and specifically referenced in the rule.

Page 67: [50] Commented [JU231R230] Joint Utilities 10/16/2023 8:26:00 PM

The JUs do not object to the QFTGs' revisions regarding curtailment but restored the clause providing "to the extent not caused by Seller's actions or omission." The JUs restored this language deleted by the QFTGs because if the curtailment is the Seller's fault, then it should not constitute "Seller Uncontrollable Minutes" under the plain meaning of that term.

The JUs restored the language deleted by QFTGs but added caveats so this exhibit is not imposing new requirements. Specifically, SCADA and electronic fault logs are now only required where available.

Page 67: [51] Commented [QFs232] QF Trade Groups 9/25/2023 2:29:00 PM

"Output Shortfall" - This definition needs to add in the Net Output that Seller could not deliver due to Seller Uncontrollable Minutes. Nothing else in the PPA clarifies how that will work, other than the vague reference to an "adjustment" in the definition of "Output Guarantee", so we have proposed a clarifying edit. Additionally, as with the MAG, the damages calculation does not properly implement the contract price cap on damages for the MDG, see OAR 860-029-0120(c), so we made the same edit as to the MAG.