ITEM NO. RM1

PUBLIC UTILITY COMMISSION OF OREGON
AHD REPORT
SPECIAL PUBLIC MEETING DATE: March 9, 2023

REGULAR ___ **CONSENT** ___ **RULEMAKING** _X_ **EFFECTIVE DATE** _N/A_

DATE: March 8, 2023

TO: Public Utility Commission

FROM: Katie Mapes

THROUGH: Diane Davis and Nolan Moser **SIGNED**

SUBJECT: OREGON PUBLIC UTILITY COMMISSION ADMINISTRATIVE HEARINGS DIVISION: (Docket No. AR 631) In the Matter of Rulemaking to Address Procedures, Terms, and Conditions Associated with Qualifying Facilities (QF) Standard Contracts

AHD RECOMMENDATION

Adopt the proposed rules as revised in Attachment A to this report.

DISCUSSION:

Issue

Whether the Public Utility Commission of Oregon should adopt the amended and proposed rules addressing procedures, terms, and conditions associated with Qualifying Facility (QF) Standard Contracts.

Applicable Law or Rule

Pursuant to ORS 756.060, the Commission "may adopt and amend reasonable and proper rules and regulations relative to all statutes administered by the commission and may adopt and publish reasonable and proper rules to govern proceedings and to regulate the mode and manner of all investigations and hearings of public utilities and telecommunications utilities and other parties before the commission."

ORS 758.535(2)(a) specifies that "the terms and conditions for the purchase of energy or energy and capacity from a qualifying facility shall * * * [b]e established by rule by the commission if the purchase is by a public utility." The Commission adopted Oregon Administrative Rules (OAR) Chapter 860, Division 29 to implement ORS 758.505 through 758.555 and to implement regulations relating to electric utilities and qualifying cogeneration and small power production facilities as provided under Section 210 of the federal Public Utility Regulatory Policies Act of 1978 (PURPA).

Analysis

Background

On February 19, 2019, the Commission issued Order No. 19-051 which opened an investigation into the Commission's implementation of PURPA. Due to the complexity and scope of the investigation, the Commission separated the major implementation issues into several rulemakings and dockets, including opening a rulemaking to address procedures, terms, and conditions associated with Qualifying Facilities (QFs) standard contracts.

On July 30, 2019, the Commission issued Order No. 19-254, opening the informal rulemaking stage of docket AR 631 to address the standard contract terms and conditions for QFs. The informal rulemaking serves as part of the Commission's PURPA implementation following the Staff investigation in docket UM 2000. Staff proposed opening the rulemaking with the purpose of creating a standardized contract that would simplify the process and eliminate complaints that the definitions and processes differ across the various electric utilities, including PacifiCorp, dba Pacific Power; Portland General Electric Company; and Idaho Power Company (together the Joint Utilities).

Initially, Staff believed that the informal rulemaking process could result in the adoption by rule of a standard draft power purchase agreement (PPA), utilized by the Joint Utilities. Over the course of the informal phase of this rulemaking, Staff concluded that there was insufficient stakeholder support for adopting a standard contract with terms that would be applicable to all three of the Joint Utilities. Instead, Staff proposed draft rules intended to comply with state and federal law, balance the interests of ratepayers and QFs, and minimize the level of resources required to address disagreements between developers and utilities.

Stakeholders and other interested persons participated in workshops and submitted comments throughout the informal phase of this rulemaking. Unable to adopt a consensus on the Commission policies and requirements applicable to standard contracts, Staff recommended that the Commission initiate the formal rulemaking process. Staff believed that initiating the formal rulemaking phase would provide a solid platform on which to work toward improved language and Commission decisions on these important policy questions.

On October 21, 2021, the Commission opened the formal rulemaking phase. To better address the many complex issues presented in the rulemaking, Chief

Administrative Law Judge Nolan Moser issued a ruling separating the issues into two Groups: Group 1 for the overall contract process and timelines, and Group 2 for protections and operational obligations. In the formal phase of the rulemaking and prior to issuing the notice, the Commission held three total workshops, with two led by AHD as well as one Commission workshop, and received extensive public participation through multiple rounds of comments and stakeholders providing redlines of Staff's proposed rules.

As Staff concluded during the informal rulemaking process, various issues continue to divide stakeholders and a consensus appears to be out of reach. On May 18, 2022, the Commission held a Special Public Meeting where the Commission provided direction on the major open issues in Group 1 for Administrative Law Judge Katharine Mapes. Due to the complexity and timeline of the rulemaking process, the Special Public Meeting served as a "check-in" to ensure that both AHD and stakeholders were addressing the issues consistent with the Commission's understanding of the scope of this docket.

On November 23, 2022, the Commission issued a Notice of Proposed Rulemaking and held a rulemaking hearing on January 12, 2023. The Commission requested initial comments by December 16, 2022, and the deadline for final written comments closed February 16, 2023. During the formal comment period, the Commission received comments from the Joint Utilities; the Community Renewable Energy Association, Northwest & Intermountain Power Producers Coalition, and Renewable Energy Coalition (together the QF Trade Associations); the Oregon Solar + Storage Industries Association (OSSIA); the Community Renewable Energy Association (CREA); and the Renewable Energy Coalition (REC).

Proposed Rules

AHD's recommended final rules, redlined against the proposed rules filed with the Secretary of State in the rulemaking notice, are attached as Attachment A to this report. Those issues that have been most controversial during this proceeding are also discussed below.

Commercial Operation Date (OAR 860-029-0120(5))

The proposed OAR 860-029-0120(5) would permit a QF to schedule a commercial operation date (COD) for a standard PPA for anytime within three years of the Effective Date of the standard PPA without any reduction in the fixed price contract term. QFs may also choose an interconnection date up to four years after execution of the contract, but the fourth year will come off the term of the fixed price contract *unless* the QF provides a study showing that interconnection cannot be completed within three years due to no fault of its own.

The Joint Utilities argue that the COD for a standard PPA should be no longer than three years from the PPA effective date. The Joint Utilities maintain that a maximum of three years for the development and construction period is standard industry practice and is consistent with current Oregon requirements, as well as requirements in Idaho, Wyoming, and Utah.[1] The Joint Utilities contend that allowing up to four years to achieve commercial operation will harm customers, violate the customer indifference standard, and risk stale pricing. Additionally, the Joint Utilities contend that most QFs are able to interconnect and come online within three years, including those that begin the interconnection process after executing a PPA.

The QF Trade Associations argue that QFs should be permitted to select a commercial operation date more than three years from the PPA effective date, noting that it provides utilities with the ability to impose unreasonable obstacles to QF development. The QF Trade Associations propose that the Commission adopt the general three-year framework in the existing rules but include the exceptions that are set forth in the rule as well as potentially longer periods.[2] The QF Trade Associations state that they are sympathetic to concerns about stale prices but maintain that the problem is often beyond the QF's control due to a length interconnection process. The QF Trade Associations also argue that the rule should be revised to state that utilities shall not unreasonably withhold consent to a longer development period when justified by the QF without Staff's proposed arbitrary four-year cutoff. The QF Trade Associations maintain that Staff's proposed rules provide unreasonably narrow relief to the QFs in cases where the utility causes the delay and argue that the rules should hod the QF harmless for utility-caused delays.

AHD Recommendation:

AHD recommends adopting Staff's proposed rules as modified in Attachment A to this report, which would permit QFs to schedule a commercial operation date that is within three years of the PPA effective date with the possibility of a two-year extension that comes off the fixed contract term unless there is a study showing that interconnection delays necessitate a COD more than three years from the date of execution. Permitting a two-year extension balances flexibility in the event of interconnection delays with concerns that longer delays will result in stale prices that may harm customers.

Security and Insurance Requirements (OAR 860-029-0120(17)-(18))

Project Development and Default Security

The proposed OAR 860-029-0120(17) establishes the project development security requirements for QFs that do not meet creditworthiness requirements. As proposed, QFs may provide cash escrow security or letter of credit security.

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[1] Joint Utilities' Final Comments Regarding Group 1 at 10 (May 10, 2022).
[2] Joint Comments of the Community Renewable Energy Association, Northwest & Intermountain Power Producers Coalition, and Renewable Energy Coalition on Staff's Proposed Rules Group 1 at 24 (Mar. 11, 2022).

The proposed OAR 860-029-0120(18) establishes the default security requirements for QFs not meeting creditworthiness requirements, including cash escrow, letter of credit security, step-in rights, or senior liens.

Regarding project development security, the Joint Utilities argue that the utilities should be permitted to require project development security of up to $150/kW and maintain that this amount would more closely reflect market-based terms conditions in other PPAs and better protect customers in the event of a default.[3] The Joint Utilities argue that the rules should permit default security of up to $50/kW for similar reasons. In support of project development security, the Joint Utilities contend that while historically contract prices have generally exceeded market prices and that damages will only exist if market prices are higher, market prices vary significantly and can move unexpectedly over the development period.

The QF Trade Associations maintain that liquid security is not necessary, especially for existing QFs renewing contracts, but argue that if such security is required then it should be for a lesser amount than that proposed by the Joint Utilities. The QF Trade Associations contend that the amount propose would unduly burden small QF development in Oregon. Further, the QF Trade Associations maintain that PPAs do not require project development security to cover all potential damages and that typically PPAs requires the seller to replenish default security if the utility draws on it. The QF Trade Associations argue that project development security should not be based on an estimate of all potential damages.

Step-in Rights and Senior Liens

Regarding step-in rights and senior liens, the Joint Utilities argue that the Commission should remove step-in rights and senior liens for default security as set forth in the proposed OAR 860-029-120(18)(c). The Joint Utilities maintain that it is highly unlikely that a facility's lender would allow the utilities to have meaningful step-in rights or liens senior to the lender's rights, nor would they allow the utility to recover sufficient damages to hold customer harmless in the event of default. The Joint Utilities argue that if the Commission does allow a QF to provide in step-in rights as Default Security, the rule should be revised to require QFs to ensure that the utility receives a perfect first-priority security interest through a form agreement acceptable to the utility or approved by the Commission as an attachment to the PPA.

The QF Trade Associations maintain that the Commission's current policy for standard contracts is that QFs that are creditworthy do not need to post security and QFs unable to demonstrate creditworthiness may post security through one of four options: (1) a senior lien, (2) step-in rights, (3) cash escrow, or (4) a letter

[3] Joint Utilities Final Comments on Group 1 at 26.

of credit.[4] The QF Trade Associations argue that the Commission should retain its current policy, noting that the Commission has statutory obligations to foster QF development and reverting away from the current policy would be harmful. The QF Trade Associations further contend that recent QF failure rates are primarily a result of the flawed interconnection process and different understandings of contract provisions. Additionally, the QF Trade Associations note that the Washington Utilities and Transportation Commission recently addressed this issue and generally exempted small QFs from security requirements. The QF Trade Associations maintain that while step-in rights might provide less value than security, step-in rights still provide value and may become more valuable in light of Oregon's relatively restrictive land use requirements.

Insurance

The proposed OAR 860-029-0120(19) proposes to require that the standard PPA specify that a QF with a nameplate capacity rating greater than 200 kW secure and maintain general liability insurance from an insurance provider with an A.M. Best Company rating of at least A-. As proposed, such facilities would be required to maintain umbrella insurance of at least $5 million and general commercial liability insurance coverage of at least $1 million for each occurrence. QFs with nameplate capacity ratings of 200 kW or less would be exempted from the insurance requirement.

The Joint Utilities argue that QFs under 200kW should not be exempted from insurance requirements and that such an exemption inappropriately shifts risks to utility customers. The Joint Utilities recommend that QFs smaller than 200 kW be required to maintain $2 million in insurance rather than $5 million.[5] The Joint Utilities also propose to eliminate the requirement for QFs smaller than 1 MW to maintain general commercial liability insurance in the amount of $1 million.

The QF Trade Associations supports the insurance exemption for projects under 200 kW. Additionally, the QF Trade Associations argue that reasonable insurance requirements from projects above 200 kW would be $1 million per occurrence and $2 million in aggregate insurance.[6]

AHD Recommendation:

[4] Joint Reply Comments of the Community Renewable Energy Association, Northwest & Intermountain Power Producers Coalition, and Renewable Energy Coalition on Staff's Proposed Rules Group 1 at 4 (Mar. 25, 2022); Joint Comments of the Community Renewable Energy Association, Northwest & Intermountain Power Producers Coalition, and Renewable Energy Coalition on Staff's Proposed Rules Group 1 at 35-36 (Mar. 11, 2022).
[5] Joint Utilities Final Comments on Group 1 at 41.
[6] Joint Reply Comments of the Community Renewable Energy Association, Northwest & Intermountain Power Producers Coalition, and Renewable Energy Coalition on Staff's Proposed Rules Group 1 at 5.

AHD recommends that the Commission adopt the rule proposed by Staff and supported by the Joint Utilities permitting project development security of up to $150/kW. Additionally, the Commission should adopt the rule proposed by Staff permitting default security of up to $50/kW. The initial rules presented by Staff to the Commission did not include a cap on damages, but after reviewing the Commission's prior rulings on the matter, the proposed rules were revised to retain the cap the Commission had previously found appropriate.

While the Joint Utilities have argued that the cap does not fully protect customers from breach, at this time we do not believe the record is sufficient to justify departure from the Commission's existing policy.

Additionally, AHD recommends that the Commission adopt the rules as proposed by Staff to permit the use of step-in rights and senior liens as default security but not as project development security.

AHD recommends that the Commission adopt Staff's proposed insurance requirements and not require insurance for QFs under 200 kW.

Creditworthiness Requirements (OAR 860-029-0120(20))

Over the course of the workshops held in this proceeding, it appeared that there was general agreement among participants that a standard for determining creditworthiness should be contained within the rules themselves, rather than in the individual form contracts. If a QF is deemed creditworthy under those standards, then it will not need to tender either default or development security. The Joint Utilities urge the Commission to adopt creditworthiness criteria in the rules.

Both the Joint Utilities and the Qualifying Facility Trade Associations (QFTAs) offer definitions of creditworthiness. The Joint Utilities state that a QF can show creditworthiness through (1) a senior unsecured long-term debt rating of BBB+ or higher from S&P or Baa1 or greater from Moody's, and in the case of a split rating the lowest rating must be at least a BBB+ or Baa1; or (2) financial documentation supporting an equivalent rating to the minimum S&P or Moody's ratings as determined by the purchasing utility utilizing a proprietary credit scoring model. Additionally, the Joint Utilities propose that any letters of credit posted be issued by an institution with a credit rating on its long-term senior unsecured dept of at least A from S&P or A2 from Moody's.

The QFTAs argue that the utilities should be required to use creditworthiness metrics that are relevant to small QF business models as opposed to relying primarily on the S&P or Moody's ratings. The QF Trade Associations propose the following alternatives to the S&P or Moody's ratings: (1) reasonable purchasing utility credit evaluation, or (2) audited financial statements or internal financial statements prepared for the QF's tax return that demonstrate a net position equal to at least one year of projected revenue under the PPA,[7] or (3) a suitable Dun & Bradstreet rating.

The QF Industry Groups did not fill in a particular Dun & Bradstreet rating, instead leaving that to be discussed and filled in by the Commission.

AHD Recommendation:

We recommend that the Commission adopt the Joint Utility proposal and with the addition of a reasonableness criteria in subsection (2) and deletion of the term "proprietary" when referring to the model that the purchasing utility will use for individual credit evaluations. While we understand that QFs often will not have S&P or Moody's ratings, we believe they are the best proxy we have to objectively determine creditworthiness at this time. Dun & Bradstreet ratings, as commenters have pointed out, are not generally used for this purpose. We do not believe the Dun & Bradstreet ratings are irrelevant to creditworthiness, but there is no evidence in the record as to what a suitable rating is to ensure creditworthiness for this purpose, and it is not clear to us that we could easily translate their screening methodology into an objective test.

In addition, while most QFs will not be able to demonstrate creditworthiness through a S&P or Moody's credit rating, they will have the alternative option of requesting a review by the purchasing utility. As noted, we propose adding an explicit requirement that that review be "reasonable." As a result, and since QFs also have the option of obtaining service under the standard form contract by providing default security, we do not believe the creditworthiness definition needs to err on the side of sweeping in every entity that might be considered creditworthy under every circumstance.

Similarly, while we view it as theoretically appealing to develop specific criteria for public entities, such as irrigation districts, who may develop QFs, we do not believe that the concept of a positive "net position" by itself is sufficient to establish creditworthiness, even for a public entity. We therefore recommend against including that provision in the rules as the QF Groups advocate.

Reasonableness Standard

The QF Trade Associations request that the Commission revise the rules to require the utilities to act reasonably at all times in the implementation of these rules related to the contract process and PPA terms.[8] The QF Trade Associations maintain that omitting this requirement from the rules could undermine the Commission's authority to hold utilities accountable for

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[7] While not entirely clear, this proposal appears to apply primarily or solely to public entities such as irrigation districts.

[8] Joint Reply Comments of the Community Renewable Energy Association, Northwest & Intermountain Power Producers Coalition, and Renewable Energy Coalition on Staff's Proposed Rules Group 1 at 29 (Mar. 25, 2022)

unreasonable behavior. The QF Trade Associations contend that rather than trying to impose reasonableness in a piecemeal fashion, the Commission should implement a generic provision that requires the utilities to implement all the rules in the division reasonably.

The Joint Utilities argue that implementing a generic reasonableness provision would inject uncertainty into the contracting process and encourage litigation.[9] The Joint Utilities maintain that the QF Trade Associations' proposal is onside and would allow the QFs to dispute every choice a utility makes without being subject to a similar requirement. The Joint Utilities contend that contracts and the rules give parties certain rights and obligations, some of which may be subject to a reasonableness requirement and some that give a party a clear right or obligation. The Joint Utilities argue that the QF Trade Association's proposed rule would require the parties to comply with the rules as well as an additional nebulous, undefined standard. Instead, the Joint Utilities maintain reasonableness should be addressed on a case-by-case basis.

AHD Recommendation:

AHD recommends that the Commission decline to adopt a general reasonableness standard that could result in less clarity regarding party obligations. AHD recommends that the Commission adopt the revisions in Attachment A that insert a reasonableness requirement into specific portions of the rules. Additionally, AHD has drafted and recommends the language shown in OAR 860-029-0046(10) of Attachment A that clarifies that counterparties operating under these rules have a duty of good faith and fair dealing.

12 x 24 Schedule and 8760 Generation Profile (OAR 860-029-0046(2)(c)(F),(N))

The proposed revisions to rule -0046 require utilities to file a schedule with the Commission that outlines the process for acquiring a standard power purchase agreement consistent with Division 29 and establish the criteria that an eligible QF must provide before a public utility must provide the eligible QF with a draft standard PPA. This includes a proposed requirement for QFs to provide a non-binding estimate of its 12 x 24 delivery schedule and 8760 generation profile when practicable.

The QFTAs argue against a requirement for 12 x 24 power delivery schedules for all QFs to obtain a draft PPA. The QFTAs maintain that seasonal and irrigation hydro QFs are not likely to have this information or the information may not be useful if they do.

The Joint Utilities support the requirement that QFs provide a 12 x 24 delivery schedule and an 8760 generation profile in order to obtain a draft PPA. The Joint Utilities maintain that a 12 x 24 schedule is necessary for resource and system

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[9] Joint Utilities' Final Comments Regarding Group 1 at 10 (May 10, 2022).

balancing and planning, as well as for accurately calculating damages under performance guarantees. The Joint Utilities state that the 12 x 24 delivery schedules are often incorporated into PPAs as an exhibit. The Joint Utilities contend that the requirement is not likely to result in additional work for QFs in most cases because most developers will have already completed the profile for their own purposes.

AHD Recommendation:

We recommend that the Commission adopt Staff's proposed rule requiring non-binding estimates of the 12 x 24 delivery schedule for informational purposes where practicable. As is formulated in the redlines in Attachment A, this is an explicitly non-binding estimate and will not be used for calculation of damages.

Demonstration of Site Ownership or Control
(OAR 860-029-0046(2)(b))

The proposed rules would require a QF facility seeking a draft PPA to provide documentary evidence that the QF has taken meaningful steps to seek site control of the proposed location, including a list of options for providing such a demonstration.

The QFTAs argue that Staff's proposed rules are more onerous than FERC Order No. 872 and, in particular, the QF Trade Associations take issue with the option for QFs to show it has taken meaningful steps to seek site control by obtaining another document that clearly demonstrates the commitment of the grantor to convey sufficient rights to occupy the site necessary for the QF.

The Joint Utilities support Staff's proposed language.

AHD Recommendation:

AHD recommends that the Commission adopt the rules as proposed by Staff. The proposed language is intended to limit speculative contracting by requiring some binding commitment of the landowner to sell or lease the property to the QF and is appropriate in the context of this standard form contract.

Mechanical Availability Guarantee and Minimum Deliverability Guarantee
(OAR 860-029-0120 (12),(14))

The proposed rules require that the standard PPA include a 90 percent mechanical availability guarantee (MAG), beginning one year after COD for existing QFs and three years after COD for new QFs, with a maximum of two-hundred hours of planned maintenance per turbine per year excluded from the availability calculation. MAGs are contractual provisions that ensure the QF is consistently available and prepared to generate the output for which the utility has contracted.

The proposed rule also governs the inclusion of a minimum delivery guarantee (MDG) equal to 90 percent of the solar, geothermal, biomass, and baseload hydro QF's expected energy annually. MDGs are contractual provisions which ensure the QF delivers the output for which the utility has contracted.

The QFTAs argue that solar resources should retain the option of using the MAG. They also argue that the MDG be set at 70 percent rather than 90 percent in order to be a realistic option for solar resources.

The Joint Utilities support requiring use of the MDG for solar resources. On the constitution of the MAG, they oppose the one-year delay for existing QFs and three-year delay for new QFs, instead arguing for 85 percent in the first year and 90 percent in the second year. The Joint Utilities also oppose the exception for planned maintenance, stating that it is unnecessary.

NewSun supports the adoption of changes to the MDG rules proposed by the QFTAs. Additionally, NewSun argues that the MDG requirement should not be inconsistent with facilities natural variability given resource inputs. NewSun recommends that the Commission not include a MDG requirement, as the failure to delivery energy is already a financial penalty, but if one is added, it should not exceed 70 percent of the average expected annually and only be applied on a rolling two-year basis. Lastly, NewSun argues that a utility should not be able to terminate a PPA for a facility from which it has a must-take purchase obligation due to MDG failures.

OSSIA argues that if a MDG requirement becomes mandatory or an option in Oregon, the Commission should consider the components which are out of the QF's control. While OSSIA notes some protection in OAR 860-029-0120(14)(d) which reduced the MDG on a pro rate basis for some potential incidents, OSSIA argues that this does not cover everything including solar QF's potential issues due to weather variability. OSSIA argues if the Commission includes a MDG requirement on solar resources, that the Commission should implement 70 percent threshold over two years to ensure QFs are not penalized for weather variability.

AHD Recommendation:

AHD recommends departing from Staff's proposed rules and instead allowing solar resources to participate using a MAG. Based on the record developed through participant comments and at workshops, it is not clear to AHD that small solar resources can reliably participate at 90 percent of baseline each year given the variability inherent in their operation. While solar resources could choose an artificially low baseline, that could create other disadvantages, such as not allowing those solar resources to be utilized to their fullest potential on years when power generation is higher than the baseline.

As to hydroelectric resources, we do not believe that it is currently clear which projects can be treated as baseload and expected to adhere to an MDG. Given that only relatively small projects can use standard form contracts and given the high variability in operations due to conditions in individual FERC licenses and seasonal hydrologic conditions, among other things, we recommend allowing hydroelectric projects as a whole to use the MAG.

For the constitution of the MAG, we recommend adopting the formulation in the proposed rule—namely, that the MAG starts in Year 3 rather than in Year 1 or 2 and that there be a separate 200-hour allowance for planned maintenance. As to the first, we believe it is reasonable for there to be a ramp-up period and for small QFs, purchasing utilities should be able to plan around that ramp-up period. As to the second, we are concerned that eliminating the 200-hour maintenance carveout, as the Joint Utilities propose, would risk disincentivizing planned maintenance.

Incremental Facility Upgrades (OAR 860-029-0120(16))

This rule details how and when a QF is permitted to increase its Nameplate Capacity or expected annual Net Output, as well as explains when facility modifications require revised pricing or a newly executed PPA entirely.

Staff's proposed Incremental Facility Upgrades provision as drafted and clarified by AHD's changes in the Attachment A redlines, is, in summary, as follows:

1) The purchasing utility must consent to and can reject all proposed modifications that would increase nameplate capacity.

2) The QF can make modifications without the purchasing utility's consent that will increase expected output but not nameplate capacity by up to 10 percent.

3) The QF can make modifications without the purchasing utility's consent that will increase expected output but not nameplate capacity by more than 10 percent, but the increased expected output will be re-priced.

The Joint Utilities believe that all modifications to the project should require prior written approval from the purchasing public utility, particularly those that would cause the expected annual net output to increase by more than 10 percent.

The QFTAs and NewSun seek to significantly expand their rights to upgrade their facilities, both Nameplate Capacity and the expected output, up to the standard contract threshold, without repricing.

AHD Recommendation:

AHD recommends adopting the formulation for incremental modifications proposed by Staff in the proposed rules, as revised for clarity in Attachment A. Those revisions balance the need for utilities to have an ability to plan their systems and to upgrade interconnection and other facilities where necessary while also allowing QFs to make efficiency upgrades to their facilities.

Force Majeure (OAR 860-0122)

This rule details how to define Force Majeure as included in PURPA PPAs and aims to detail the parties' rights and obligations when a Force Majeure occurs. Force Majeure is a common commercial provision aiming to protect both parties, and this rule aims to define the term explicitly as used before the Commission.

The Joint Utilities generally support the provisions of New Rule #5. The Joint Utilities assert that defining Force Majeure in the PPA rules will limit the potential for disputes between utilities and QFs, leading to more efficient development and conserving Commission, utility, and QF resources.

The QFTAs argue that while the PPAs themselves need to contain a Force Majeure provision, the terms of that provision should not be included in the Commission's rules. Instead, that is a standard contract term that is appropriate to be filled in separately in each PPA.

AHD Recommendation:

AHD agrees that Force Majeure is the type of standard contracting term that does not need to be laid out in Commission regulations. Therefore, we recommend deleting New Rule 5 and allowing Force Majeure provisions to be filed separately in each standard form PPA.

Transmission Upgrade Costs for Off-System QFs (OAR 860-029-0044)

Proposed OAR 860-029-0044 contains a reopener provision for network transmission upgrades necessitated by off-system QFs that are not known about at the time the PPA is executed.

The QFTAs argue that this provision should not be included and that it constitutes an illegitimate contract reopener under federal law. To the extent it is included, they argue that it should be revised to make clear that the development period is tolled when this provision is triggered and thus that the time taken to resolve the issue is not taken off the fixed-price contract term.

The Joint Utilities argue that the rule should actually be expanded so that it applies to on-system QFs as well. Unlike the QFTAs, they argue that it should be revised to make clear that the development period is *not* tolled when the provision is triggered as it could lead to stale pricing.

AHD Recommendation:

AHD recommends adopting the proposed rule as drafted and amended in Attachment A, which clarifies that the development period is tolled when the rule is triggered. In our view, it is not reasonable that this reopener take time off the fixed contract term when the QF is not responsible for the delay; and the benefits of ensuring that such projects can viably proceed is likely to outweigh the risk of stale pricing. We do not recommend making the rule applicable to on-system QFs; due to the analytical tools available to the purchasing utilities prior to executing the PPA, we believe the burdens of such an expansion would outweigh any benefits.

Transparency and Sharing of Information

At the February 9, 2023 Special Public Meeting, and in subsequent written comments, the QFTAs raised concerns regarding information known to the purchasing public utility and not to the QFs at the time the QFs applies for a particular point of delivery. In particular, the QFTAs state that the information available on OASIS is incomplete. For instance: "[u]ndersigned counsel was unable to locate any studies related to requests to designate network resources on Portland General Electric Company's ("PGE") OASIS website."[10] Similarly, the QFTAs state that Idaho Power lists only a summary of studies on its OASIS and that PacifiCorp lists only redacted studies.[11]

At the February 9, 2023 Special Public Meeting, counsel for the Joint Utilities stated that the merchant function is supposed to have the same information that is posted on OASIS – no more or less.

In general, public utilities are subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) on this issue. Its Standard of Conduct regulations lay out in detail the requirements placed on jurisdictional utilities regarding separation of transmission and merchant functions, as well as the use of their OASIS sites. Those regulations state, for instance, that "a transmission provider and its employees, contractors, consultants, and agents are prohibited from disclosing, or using a conduit to disclose, non-public transmission function information to the transmission provider's marketing function employees."[12] It also "must provide equal access to non-public transmission function information disclosed to marketing function employees to all its transmission customers, affiliated and non-affiliated."[13]

Those regulations also provide an exception for communications regarding specific transaction information. In particular, they state:

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[10] CREA and NIPPC Comments at 5 (Feb. 16, 2023).
[11] *Id.* at 6.
[12] 18 CFR § 358.2(c).
[13] *Id.* at § 358.2(d).

> A transmission provider's transmission function employee may discuss with its marketing function employee a specific request for transmission service submitted by the marketing function employee. The transmission provider is not required to contemporaneously disclose information otherwise covered by § 358.6 if the information relates solely to a marketing function employee's specific request for transmission service.[14]

Based on the record before us, AHD does not have the ability to confirm whether or not Oregon's purchasing public utilities are properly following FERC's standard of conduct regulations. We do, however, note that contract privity with the transmission arm of the utility is not required to raise these matters with FERC and that FERC maintains an "enforcement hotline" that any entity may contact with concerns that a jurisdictional utility is violating its federal obligations.[15] Those complaints may also be made anonymously.

We do, however, recommend that this Commission clarify in its order in this proceeding that it expects purchasing public utilities to be transparent with QFs and potential QFs, including through updating their OASIS sites contemporaneously, as consistent with their federal obligations. AHD also recommends that the order clarify that purchasing public utilities provide all—or provide clear reference to—all studies relied upon to determine whether or not a point of delivery will be accepted by the purchasing public utility.

OAR 860-029-0121 Coming On-Line Prior to Scheduled COD, Monthly Netting, Price Paid for Excess Energy, and Imbalance Rules

This rule details requirements of the sale and delivery of power and specifies the purchasing public utility's obligation to purchase energy, including surplus energy and Test energy, and the QF's obligation to sell energy beginning on QF's COD.

The Joint Utilities generally support the adoption of this provision, however, they recommend adding language specifying when a QF may deliver imbalance energy, as the draft rules did not address imbalance energy initially. The Joint Utilities do not object to the provision regarding surplus delivery, which is defined as any Net Output that exceeds the QF's Nameplate Capacity Rating but noted several revisions to clearly explain how the surplus deliver will be calculated. The Joint Utilities do not support allowing a QF to come online up to 180 days prior to the Scheduled COD and argue that a QF may come online only 90 days prior withholding transmission capacity further in advance may open the utilities to legal risks related to impermissible hoarding of transmission capacity in contravention of FERC policy. Lastly, the Joint Utilities do not support being required to pay the full Index Rate for Test Energy, and state this is not consistent with currently approved standard PPAs or the utilities' negotiated QF

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[14] 18 CFR § 358.7(b).
[15] https://www.ferc.gov/enforcement-legal/enforcement/enforcement-hotline

and non-QF agreements. The Joint Utilities instead propose that the purchasing utility pay the QF the lower 85 percent of Index Rate or 85 percent of Contract Price for Test 7 Energy delivered prior to the Scheduled COD, as PGE's current RFP PPA pays $0 for Test Energy and if the Test Energy is not delivered as firm energy, accepting it could impose additional costs as the utility would be required to hold 1:1 reserves against the Test Energy.

The QFTAs argue Staff's proposed language in OAR 860-029-0121 fails to provide necessary clarity around imbalance and scheduling provisions for off-systems QFs, and the rule unreasonably allows the utility to receive energy without paying for it. The QFTAs recommend that the Commission mirror the provisions governing monthly netting contained in PacifiCorp's Addendum W with two clarifications. First, the QFTAs believe the Addendum W should include a requirement that the utility must pay the QF for any surplus energy more than the QF's monthly net output that the utility receives over the course of the month. Second, the QFTAs argue any off-system-specific PPA should expressly allow use of commonly available intra-hour scheduling methods and not mandate the use of the hourly block scheduling, as FERC Order No. 764 requires transmission providers to offer 15-minute scheduling, finding that hourly block scheduling imposes unjust and unreasonable imbalance charges on intermittent generators. Lastly, the QFTAs believe a blanket prohibition on QFs from delivering power more than 90 days before scheduled COD is unwarranted and unlawful as it is inconsistent with PURPA's must-purchase obligation. The QFTAs argue they find no facts or proof supporting any such restrictions, additional costs, or harms for the utilities and that the 90-day limitation is inconsistent with PURPA's must-purchase obligation to refuse to purchase a QF's power regardless of when the QF provides that power. The QFTAs propose a QF may come online up to 180 days before the PPA's scheduled commercial operation date without consent of utility by providing advance notice to the utility, and the QF may come online earlier than 180 days early with the utility's consent, with such consent not to be unreasonably withheld.

NewSun argues the PPA may not contain provisions saying utilities do not have to pay for any energy provided, as it goes against PURPA and federal law. NewSun recommends excess energy limits be relative to average production for the month exceeding nameplate capacity, specifically recommending language dictating the price of excess energy till 10 percent over nameplate, then price shifting to the price in then applicable standard PPA rates thereafter. Lastly, NewSun argues for clarification in the rule, that if the QF comes online outside of the 180/90-day time frames, it may do so and get the "as available" pricing.

AHD Recommendation:

AHD Recommends that that the Commission adopt the revised OAR 860-029-0121 provided in Attachment A, which permits a QF to come online 90 days early or 180 days early if the transmission rights are available or can be obtained. This option would balance the concerns of the QFs with the ability of the Joint Utilities to reserve transmission capacity within the appropriate timeframes. Additionally, AHD recommends that the Commission adopt the revised OAR 860-029-0121 that does not compensate for surplus energy but does allow netting on a monthly basis.

Default Damages and Termination OAR 860-029-0123

This rule details events that constitute default of the PPA, the applicable cure periods and damage calculations, and when and how a standard PPA may be terminated.

The Joint Utilities propose decreasing the one-year cure period to 180 days, stating that a one-year period is six to nine months longer than most negotiated cure periods in market-based PPAs and longer than cure periods in other state's PPAs. They also recommend removing the pre-existing cap on damages, which was in accordance with Staff's original proposed draft rules.

Conversely, the QFTAs recommend the damages owed to the utility continue to be capped as it is under current Commission precedent. NewSun also makes this recommendation.

AHD Recommendation:

In a prior proceeding, the Commission found that capping damages was appropriate to "facilitate the development of QF power, versus other power sources." The initial rules presented by Staff to the Commission did not include a cap on damages, but after reviewing the Commission's prior rulings on the matter, Staff agreed that it was appropriate to retain the current cap and the rules in Appendix A have been revised to do so.

While the Joint Utilities have argued that the cap does not fully protect customers from breach, at this time we do not believe the record contains a sufficient showing of hardship caused by that cap to justify departure from the Commission's existing policy at this time.

PROPOSED COMMISSION MOTION

Adopt the rules attached to this Staff Report as Attachment A.

ATTACHMENT A

AMEND: 860-029-0005
RULE TITLE: Applicability of Rules
RULE SUMMARY: to come
RULE TEXT:

(1) These rules apply to all interconnection, purchase, and sale arrangements between a public utility and facilities that are qualifying facilities as defined herein. Provisions of these rules do not supersede contracts existing before the effective date of this rule. At the expiration of such an existing contract between a public utility and a cogenerator or small power producer, any contract extension or new contract must be offered on terms and conditions that comply with these rules.

(2) Nothing in these rules limits the authority of a public utility or a qualifying facility to agree to a rate, terms, or conditions relating to any purchase, which differ from the rate or terms or conditions that would otherwise be provided by these rules, provided such rate, terms, or conditions do not burden the public utility's customers.

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

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

AMEND: 860-029-0010
RULE TITLE: Definitions for Division 029 Rules
RULE SUMMARY: These rule revisions modify definitions of terms in Division 029.
RULE TEXT:

(1) "AC" means alternating current.

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

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

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

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

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

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

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

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

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

(11) "~~“~~Contract Price"~~”~~ means ~~for~~ the fixed price term, the applicable fixed price for On-~~P~~peak~~Peak~~ Hours and Off-peak Hours specified in the purchasing utility’s avoided cost price schedule, and during the subsequent non-fixed price term, the purchasing utility’s applicable Index Price in effect when the energy is generated.

(12) "Costs of interconnection" means the reasonable costs of connection, switching, dispatching, metering, transmission, distribution, equipment necessary for System protection, safety provisions, and

administrative costs incurred by an electric utility directly related to installing and maintaining the physical facilities necessary to permit purchases from a qualifying facility.

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

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

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

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

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

(18) "Energy costs" means:

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

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

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

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

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

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

(23) "Fixed price term" means for qualifying facilities electing to sell firm energy or firm capacity or both, the period of a power purchase agreement during which the public utility pays the qualifying facility avoided cost rates determined either at the time of contracting or at the time of delivery.

~~(24) “Force Majeure” is defined at OAR 860-029-0122.~~

(24~~5~~) ~~“~~"Forced Outage~~”~~" means

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

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

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

(25~~6~~) ~~“~~"Generator Interconnection Agreement~~”~~" means the generator interconnection agreement between the qualifying facility and qualifying facility’s interconnection provider.

(26~~7~~) "Index Rate" means the market index rate approved by the Commission for inclusion in the purchasing public utility's standard power purchase agreement.

(27~~8~~) "Interruptible power" means electric energy or capacity supplied by a public utility to a qualifying facility subject to interruption by the electric utility under certain specified conditions.

(28~~9~~) ~~“~~"Maintenance Outage~~”~~" means s an outage that can be deferred beyond the next weekend~~,~~ but requires that the unit be removed from service before the next Planned Outage. A Maintenance Outage can occur any time during the year, has a flexible start date, may or may not have a predetermined duration and is usually shorter than a Planned Outage.

(29~~30~~) "Maintenance power" means electric energy or capacity supplied by a public utility during scheduled outages of a qualifying facility.

(30~~1~~) ~~“~~"MW~~”~~" means megawatt.

(31~~2~~) ~~“~~"MWh~~”~~" means megawatt-hour.

(32~~3~~) "Nameplate Capacity Rating" means maximum installed instantaneous power production capacity of the completed Facility, expressed in MW (AC), and measured at the Point of Interconnection, when operated in compliance with the Generation Interconnection Agreement and consistent with the recommended power factor and operating parameters provided by the manufacturer of the generator, inverters, energy storage devices, or other equipment within the Facility affecting the Facility’s capability to deliver useful electric energy to the grid at the Point of Interconnection.

(33~~4~~) ~~“~~"NERC~~”~~" means the North American Electric Reliability Corporation.

(34~~5~~) ~~“~~"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.

(35~~6~~) ~~“~~"Network Upgrades~~”~~" means an addition, modification, or upgrade to the transmission system of a purchasing utility required at or beyond the Point of Delivery to accommodate the transmission provider’s receipt of energy from a generation facility to the transmission provider’s System.

(36~~7~~) ~~“~~"New qualifying facility~~”~~" means a qualifying facility that is not an existing qualifying facility.

(37~~8~~) "Nonfirm energy" means energy to be delivered by a qualifying facility to an electric utility on an "as available" basis; or energy delivered by a qualifying facility in excess of its firm energy commitment. The rate for nonfirm energy may contain an element representing the value of aggregate capacity of nonfirm sources.

(38~~9~~) ~~“~~"Non-fixed price term~~”~~" means the portion of the purchase term of a power purchase agreement that begins after the fixed-price ~~period~~ term has ended, during which the qualifying facility receives pricing equal to the purchasing public utility’s Index Rate. The length of the non-fixed price term is selected by the qualifying facility and specified in the power purchase agreement.

(39~~40~~) "Nonregulated utility" means an entity providing retail electric utility service to Oregon customers that is a people’s utility district organized under ORS Chapter 261, a municipal utility operating under ORS Chapter 225, or an electric cooperative organized under ORS Chapter 62.

(40~~1~~) ~~“~~"Off-peak hours~~”~~" means all hours other than On-peak hours.

(41~~2~~) ~~“~~"On-peak hours~~”~~" means the hours designated as such in the purchasing public utility’s avoided cost price schedule.

(42~~3~~) ~~“~~"Permits~~”~~" mean the permits, licenses, approvals, certificates, entitlements and other authorizations issued by governmental authorities required for the construction, ownership or operation of the Facility or occupancy of the site it is located.

(43~~4~~) ~~“~~"Planned Outage~~”~~" means an outage that is scheduled well in advance and is of a predetermined duration. A ~~“~~"Planned Outage~~”~~" is also known as a ~~“~~"Scheduled Outage~~”~~ ".

(44~~5~~) ~~“~~"Point of Delivery~~”~~" means for off-system qualifying facilities, the point on the purchasing public utility’s distribution or transmission system where the qualifying facility and purchasing public utility have agreed the qualifying facility will deliver energy to the purchasing public utility. For on-system qualifying facilities, the Point of Delivery is the Point of Interconnection.

(45~~6~~) ~~“~~"Point of Interconnection~~”~~" means the point where the qualifying facility is electrically connected to an electric utility’s transmission or distribution system.

(46~~7~~) "Primary energy source" means the fuel or fuels used for the generation of electric energy. The term does not include minimum amounts of fuel required for ignition, start-up, testing, flame stabilization, and control uses; the term does not include minimum amounts of fuel required to alleviate or prevent unanticipated equipment outages and emergencies which directly affect the public health, safety, or welfare.

(47~~8~~) "Public utility" means a utility regulated by the Commission under ORS Chapter 757, that provides electric power to customers.

(48~~9~~) "Purchase" means the purchase of electric energy or capacity or both from a qualifying facility by an electric utility.

(49~~50~~) "Purchase period" means the period of a power purchase agreement during which the qualifying facility is required to sell power to the public utility and the public utility is required to purchase power offered for sale.

(50~~1~~) "Qualifying facility" means a cogeneration facility or a small power production facility as defined in 18 C~~.~~F~~.~~R~~.~~ Part 292. Unless otherwise specified, ~~“~~"qualifying facility~~”~~" includes proposed qualifying facilities, (e.g., entities that intend to obtain certification as a qualifying facility but that have not yet done so).

(51~~2~~) "Rate" means any price, charge, or classification made, demanded, observed, or received with respect to the sale or purchase of electric energy or capacity or any rule, regulation, or practice respecting any such price, charge, or classification.

(52~~3~~) ~~“~~"Renewable energy certificate~~”~~" has the meaning given that term in OAR 330-160-0015(17).

(53~~4~~) "Renewable Portfolio Standard" or "RPS" is the standard for large electric utilities in ORS~~-~~ 469A.052(1) or the standard for small electric utilities in ORS 469A.055 in effect as of October~~-~~ 23, 2018.

(54~~5~~) ~~“~~"Renewable qualifying facility~~”~~" means a qualifying facility that generates electricity that may be used for compliance with the RPS.

(55~~6~~) "RPS attributes" means all attributes related to the N~~n~~et O~~o~~utput generated by the qualifying facility that are required to provide the public utility with "qualifying electricity" as that term is defined in Oregon's Renewable Portfolio Standard Act, ORS 469A.010, in effect as of October 23, 2018.~~-~~ RPS attributes do not include environmental attributes that are greenhouse gas offsets from methane capture not associated with the generation of electricity.

(56~~7~~) "Sale" means the sale of electric energy or capacity or both by a public utility to a qualifying facility.

(57~~8~~) ~~“~~"Schedule~~”~~" means the purchasing public utility’s schedule filed with the Commission setting forth terms and ~~prices~~ rates for standard power purchase agreements~~ and prices~~.

(58~~9~~) "Scheduled commercial operation date" means the commercial operation date specified by the qualifying facility and included in the standard power purchase agreement.

(59~~60~~) "Small power production facility" means a facility which produces electric energy using as a primary energy source biomass, waste, solar energy, wind power, water power, geothermal energy, or any combination thereof. Only small power production facilities which, with any other facilities located at the same site, have power production capacities of 80 megawatts or less, are covered by these rules.

(60~~1~~) ~~“~~"Start-~~U~~up~~Up~~ Testing~~”~~" means the start-up testing required by the manufacturer or interconnection provider that establish that the Facility is reliably producing electric energy.

(61~~2~~) ~~“~~"System~~”~~" means the electric transmission and distribution system owned or operated by the purchasing public utility, or where applicable, another electric utility.

(62~~3~~) "System emergency" means a condition on a public utility’s S~~s~~ystem which is likely to result in imminent, significant disruption of service to customers, in imminent danger of life or property, or both.

(63~~4~~) ~~“~~"Test energy~~”~~" means electric energy generated by the Facility during the Test Period, and renewable energy certificates~~RECs~~ and capacity rights associated with such electric energy.

(64~~5~~) ~~“~~"Test period~~”~~" means a period during which Start-~~U~~up~~Up~~ Testing is conducted.

(65~~6~~) "Time of delivery" means:

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

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

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

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

(66~~7~~) "Time the obligation to purchase the energy capacity or energy and capacity is incurred" means the earlier of:

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

(b) The date determined by the Commission.

(67~~8~~) "~~“~~Total output~~”~~" means all energy produced by the Facility.

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

AMEND: 860-029-0043
RULE TITLE: Standard Rates for Purchase
RULE SUMMARY: The proposed revision to this rule removes outdated eligibility requirements for standard avoided cost rates.
RULE TEXT:

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

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

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

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

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

ADOPT: 860-029-0044
RULE TITLE: Allocation of Costs to Related to Deliveries from Off-~~S~~system~~System~~ Qualifying Facilities
RULE SUMMARY: This rule describes the process to allocate costs for a purchasing public utility~~'~~’s transmission-related Network Upgrades necessitated by receipt of Net Output from an off-system standard qualifying facility.
RULE TEXT:

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

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

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

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

(a) Specify in the power purchase agreement that the development period in the standard power purchase agreement does not commence until after the processes in sections (4), (5), and if applicable, section (6), are complete;,~~.~~ ~~A~~and t~~And T~~the scheduled commercial operation date, fixed price term, and purchase term in the power purchase agreement shall each be extended on a day-for-day basis until such processes are complete~~.~~;

(b) No later than 15 business days after the Effective Date of the standard power purchase agreement, submit an application to the appropriate transmission provider requesting designation of the qualifying facility as a network resource and requesting network transmission service for the purpose of transmitting the power purchased from qualifying facility to the purchasing public utility’s load~~.~~;

(c) Request an effective date for commencement of network transmission service for the qualifying facility that is:

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

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

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

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

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

(6) After receipt of notice under subsection (4)(e) of this section that the purchasing public utility is seeking a cost allocation determination, but no later than 1~~5~~4 days after any Commission order allocating costs of transmission~~-~~-service-related Network Upgrades to the qualifying facility, the qualifying facility may terminate the power purchase agreement upon written notice to the purchasing public utility. or may request the public utility agree to an alternate Point of Delivery under subsection (2). ~~-~~The qualifying facility's timely termination of the standard power purchase agreement under this section will not be an event of default, and no damages or other liabilities under the power purchase agreement will be owed by or to either party. If the qualifying facility requests an alternate Point of Delivery, the public utility's response is subject to the requirements in this rule.

(7) Notwithstanding the other sections in this rule, nothing prevents the purchasing public utility and qualifying facility from agreeing to amend the standard power purchase agreement to address transmission-service-related Network Upgrade costs or to substitute a new Point of Delivery. ~~A qualifying facility may request that a public utility agree to an alternate Point of Delivery after execution of the power purchase agreement, and the public utility shall not unreasonably withhold such consent if it concludes that no transmission constraints preclude its ability to accept energy at the alternate Point of Delivery.~~

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

ADOPT: 860-029-0045
RULE TITLE: Eligibility for Standard Avoided Cost Prices and Purchase Agreements
RULE SUMMARY: This rule sets forth eligibility criteria for standard avoided cost prices and standard power purchase agreements.
RULE TEXT:

(1) Solar qualifying facilities with a N~~n~~ameplate C~~c~~apacity R~~r~~ating of 3 MW and less, and all other qualifying facilities with a N~~n~~ameplate C~~c~~apacity R~~r~~ating of 10 MW and less, are eligible for standard avoided cost prices.

(2) All qualifying facilities with a N~~n~~ameplate C~~c~~apacity R~~r~~ating of 10 MW and less are eligible to enter into a standard power purchase agreement.

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

(4) The determination of N~~n~~ameplate C~~c~~apacity R~~r~~ating for purposes of determining whether a qualifying facility meets the size criteria in sections (1) and (2) is based on the cumulative N~~n~~ameplate C~~c~~apacity R~~r~~ating of the qualifying facility seeking the standard avoided cost prices or power purchase agreement and that of any other Facilities owned by the same person(s) or affiliates(s) located on the same site.

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

(b) For purposes of this section:

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

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

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

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

(A) Family-owned. A project will be considered ~~“~~"family owned~~”~~" if, after excluding the ownership interest of those who qualify as passive investor(s) under (4)(c), five or fewer individuals hold at least 50 percent of the project entity, or ~~fifteen~~ 15 or fewer individual entities hold at least 90 percent of the project entity. For purposes of counting the number of individuals holding the remaining share (i.e., determining whether there are ~~five~~5 or fewer individuals or 15 or fewer individuals), an individual is a natural person. Notwithstanding the foregoing, an individual, his or her spouse, and his or her dependent children, will be aggregated and counted as a single individual even if the spouse and/or dependent children also hold equity in the project~~.~~;

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

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

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

(d) Notwithstanding subsections (4)(a) and (b), two or more qualifying facilities that otherwise are not owned or operated by the same person(s) or affiliates(s) will not be determined to be a single qualifying facility based on the fact that they have in place a shared interest or agreement regarding interconnection facilities, interconnection-related system upgrades, or any other infrastructure not providing motive force or fuel. Two or more qualifying facilities will not be held to be owned or controlled by the same person(s) or affiliate(s) solely because they are developed by a single entity so long as they are not owned or operated by the same person(s) or affiliate(s) of the same person(s) at the time each qualifying ~~facility~~facility ~~QF~~ seeks to enter into a power purchase agreement or at any time thereafter~~PPA~~.

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

AMEND: 860-029-0046
RULE TITLE: Process for Procuring Standard Power Purchase Agreement
RULE SUMMARY: This rule summarizes obligations of public utilities and qualifying facilities related to procurement of standard power purchase agreements under Division 029.
RULE TEXT:

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

(2) Upon request, each public utility must provide a draft standard power purchase agreement to an eligible qualifying facility after the qualifying facility has provided the public utility, in written form:

(a) An executed standard form of interconnection study agreement and evidence that all related interconnection study application fees have been paid, or evidence that no study is required; and

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

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

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

(C) Another document that clearly demonstrates the commitment of the grantor to convey sufficient rights to the developer to occupy a site of sufficient size to construct and operate the qualifying facility, such as an executed agreement to negotiate an option to lease or purchase the site.

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

(A) Demonstration of ability to obtain certified qualifying facility status prior to commercial operation; for qualifying facilities ~~QF~~s larger than 1 MW, a Form 556 self-certification of the proposed qualifying facility or a FERC order granting an application for certification of the proposed qualifying facility is required~~.~~;

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

(C) Design capacity (MW)~~,~~;

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

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

(F) Non-binding estimate of 12 x 24 delivery schedule and 8760 generation profile when practicable; estimates of the net amount of power to be delivered to the public utility's electric system and the 12 x 24 delivery schedule are subject to revision until the date the qualifying facility commences commercial operation~~,~~;

(G) Motive force or fuel plan~~,~~;

(H) Proposed scheduled commercial operation date~~,~~;

(I) Proposed contract term~~,~~;

(J) Proposed pricing provisions~~,~~;

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

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

(M) For a qualifying facility with battery storage system, description of the storage design capacity, description of technology used by battery storage system, storage system duration, and net power output~~,~~;

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

(O~~N~~) Other information specified in the utility's avoided cost rates schedule or standard power purchase agreement approved by the Commission. ~~Estimates of the net amount of power to be delivered to the public utility's electric system and the 12 x 24 delivery schedule are subject to revision until the date the qualifying facility commences commercial operation.~~

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

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

(5) If the qualifying facility submits comments to the public utility or asks for revisions to the draft standard power purchase agreement, in writing, the public utility has 10 business days to:

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

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

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

(6) The process outlined in sections (4) and (5) of this rule will continue until both the qualifying facility and public utility agree to the terms of the draft standard power purchase agreement, i.e., neither the qualifying facility nor ~~t~~ the purchasing public utility have outstanding issues, corrections, or comments regarding the draft power purchase agreement.

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

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

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

(10) Both QF parties and purchasing utilities acting pursuant to this rule are obligated to act in good faith when dealing with counterparties.~~. .,~~

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

ADOPT: 860-029-0047
RULE TITLE: Integration Charges
RULE SUMMARY: This rule language was previously located in OAR 860-029-0046 and is being moved to OAR 860-029-0047 in this change. There are no changes to the actual rule language.
RULE TEXT:

(1) Each public utility may assess Commission-approved integration charges on wind and solar qualifying facilities that are located within the public utility's Balancing Authority Area.

(2) The public utility bears the burden to establish the proposed integration charge or charges reflecting the costs of integrating the type of resource that will be subject to the charges.

(3) To the extent they are to be imposed by the public utility, any integration charges must be included in the public utility's avoided cost schedules.

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

AMEND: 860-029-0120
RULE TITLE: Standard Power Purchase Agreements
RULE SUMMARY: The revisions to this rule clarify or modify requirements for standard power purchase agreement terms under Division 029.
RULE TEXT:

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

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

(3) The development period of a standard power purchase agreement begins on the Effective Date, unless the start of the development period is delayed by the initiation of the Network Upgrade cost allocation process in OAR 860-029-0044. The development period ends at 24:00 in the time zone in which the qualifying facility is located on the day before the scheduled commercial operation date specified in the standard power purchase agreement or such earlier date on which the qualifying facility achieves the commercial operation date in compliance with these rules.
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(4) The purchase period of a standard power purchase agreement begins on the earlier of the commercial operation date or the scheduled commercial operation date. The scheduled commercial operation date may be delayed by Force Majeure, extended by agreement of the purchasing public utility and the qualifying facility or modified under subsection 5(b~~d~~) or section (6) of this rule. In these cases, the purchase period and fixed price term commence on the earlier of the commercial operation date or the delayed or extended scheduled operation date.

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

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

(b) ~~Anything~~Anytime within five years from the date of agreement execution~~.~~ i~~I~~f the qualifying facility can 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 ~~process its interconnection queue~~ necessitates a commercial operation date longer than three years from the Effective Date, then the additional time necessitated by the interconnection queue 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; ~~.~~or.

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

~~(A) The qualifying facility has received an interconnection-related system impact study report, cluster study report, or facilities study report indicating interconnection will take longer than three years from the Effective Date of the standard power purchase agreement; or~~

~~(B) The qualifying facility demonstrates to the public utility it cannot reasonably be expected to achieve commercial operation within three years from the Effective Date and the utility consents to a scheduled commercial operation date more than three years from the Effective Date, which consent shall not be unreasonably withheld.~~z

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

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

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

(6) Modification of Scheduled Commercial Operation Date or Termination

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

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

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

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

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

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

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

~~(8) A qualifying facility may specify a scheduled commercial on-line date consistent with the following:~~

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

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

(7~~9~~) Unless otherwise excused under the standard power purchase agreement, the utility is authorized to issue a Notice of Default if the qualifying facility does not meet the scheduled commercial operation date in the standard power purchase agreement. If a Notice of Default is issued for failure to meet the scheduled commercial operation date in the standard power purchase agreement, the qualifying facility has one year in which to cure the default for failure to meet the scheduled commercial operation date, during which the public utility may collect damages for failure to deliver.

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

(b) If the qualifying facility would have been required by the standard power purchase agreement to transfer Renewable Energy Credits to the public utility during the period when the qualifying facility is in default under this subsection, damages owed to the public utility will include the public utility’s cost to acquire replacement Renewable Energy Credits.

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

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

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

(10~~2~~) The standard power purchase agreement must include a mechanical availability guarantee (MAG) for wind, ~~and run-of-river~~ hydroelectric, and solar qualifying facilities as follows:

(a) A 90 percent overall guarantee, measured per turbine, starting three years after the commercial operation date for qualifying facilities with new contracts or one year after the commercial operation date for qualifying facilities that renew contract or enter into a superseding contract, subject to an allowance for 200 hours of planned maintenance per turbine per year that does not count toward calculation of the overall guarantee. ~~The 90 percent availability guarantee will be reduced on a pro rata basis for any portion of the annual period the qualifying facility was prevented from being available for reasons of Force Majeure, a default by the public utility under the power purchase agreement or interconnection agreement, or any interconnection and transmission curtailment initiated by the purchasing utility or the transmitting utility;~~

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

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

(B) Multiplying the “~~"~~shortfall”~~"~~ by the positive difference, if any, obtained by subtracting the Contract Price from the price at which the utility purchased replacement power; and

(C) Additional ancillary service and transmission costs to deliver replacement power to the point of delivery and the cost of replacement r~~R~~enewable e~~E~~nergy c~~C~~ertificates~~redits~~, if any.

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

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

(11~~3~~) A public utility may issue a Notice of Default, and subsequently terminate a standard power purchase agreement pursuant to its terms and limitations, for failure to meet the MAG if the qualifying facility does not meet the MAG for two consecutive years if such failure is not otherwise excused by the power purchase agreement.

(12~~4~~)

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

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

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

(B) Multiplying the "shortfall” by the positive difference, if any, obtained by subtracting the Contract Price from the price at which the utility procured replacement power~~,~~; and

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

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

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

(13~~5~~) A purchasing utility may issue a Notice of Default, and subsequently terminate a standard power purchase agreement pursuant to its terms and limitations, for failure to meet the MDG if the qualifying facility does not meet the MDG for three consecutive years if such failure is not otherwise excused by the standard power purchase agreement.

(14~~6~~) Incremental Facility Upgrades.

(a) During the development period, the qualifying facility may make reasonable modification to the design and components of its facility from the design and components contained in the power purchase agreement. The qualifying facility is obligated to provide the purchasing public utility an as-built supplement describing the Facility within 90 days after the commercial operation date. Except ~~as expressly permitted under subsection(b) of this section~~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 N~~n~~ameplate C~~c~~apacity R~~r~~ating that exceeds the N~~n~~ameplate C~~c~~apacity R~~r~~ating in the power purchase agreement at the time it was executed; or

(B) Result in an~~the~~ expected annual net output that is not greater than 10 percent above that specified in the power purchase agreement at the time it was executed~~ to increase by more than 10 percent. ~~.

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

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

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

(b~~c~~) In the event that the qualifying facility seeks to upgrade the facility during the development period or the term of the power purchase agreement in a manner that does not increase the N~~n~~ameplate C~~c~~apacity R~~r~~ating of the facility in the power purchase agreement, but which is reasonably likely to cause the expected ~~to exceed 10 percent of expected ~~annual net output to exceed that listed in the power purchase agreement by more than 10 percent, such upgrades may be made without the utility's prior approval ~~under this subsection (c) of this section ~~subject to the following requirements:

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

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

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

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

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

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

(15~~7~~) Project Development Security. A new qualifying facility that has executed a standard power purchase agreement that does not meet the creditworthiness requirements in this rule must post Project Development Security for the purchasing public utility's benefit within 60 days of the Effective Date of the standard power purchase agreement. The amount of required Default Security will be set forth in the public utility's form of standard power purchase agreement approved by the Commission. The obligation to maintain the Project Development Security will expire once the qualifying facility commences commercial operation. The qualifying facility may use either of the following options to post Project Development Security:

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

(b) Letter of Credit Security. The qualifying facility shall post and maintain in an amount equal to the Project Development Security either a guaranty from a party that satisfies the ~~purchasing public utility's~~ creditworthiness requirements under Section (18) of this rule~~, in a form acceptable to the public utility in its reasonably-exercised discretion~~, or a Letter of Credit in favor of the purchasing public utility.~~-~~ To the extent the public utility receives payment from the Project Development Security for damages in the event of default, the qualifying facility will, within 15 days, restore the Project Development Security as if no such deduction had occurred.

(16~~8~~) Default Security. A qualifying facility that has executed a standard power purchase agreement that does not meet the public utility's credit-worthiness requirements must post Default Security upon commencing commercial operation. The amount of required Default Security will be set forth in the public utility's form of standard power purchase agreement approved by the Commission. The qualifying facility may use one of the following options to post Default Security:

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

(b) Letter of Credit Security. The qualifying facility shall post and maintain in an amount equal to the Default Security either a guaranty from a party that satisfies ~~the Credit Requirements, in a form acceptable to the public utility in its reasonably-exercised discretion~~the creditworthiness requirements under section (18) of this rule, or a Letter of Credit in favor of the purchasing public utility. To the extent the public utility receives payment from the Default Security for damages in the event of default, the qualifying facility will, within 15 days, restore the Default Security as if no such deduction had occurred.

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

(17~~9~~) Insurance requirements. ~~-~~The standard power purchase agreement must specify that a qualifying facility with a Nameplate Capacity Rating greater than 200 kW must secure and maintain general liability insurance coverage that complies with the following:

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

(b) Insurance coverage will include:

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

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

(18) Creditworthiness requirements under subsections (17) and (18) of OAR 806-029- 10 012 may be satisfied by:

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 Global Ratings~~,~~; or

(b) ‘Baa1’ 13 or greater form Moody’s Investor Services; provided that if such ratings are split, the lower of the two ratings must be at least ‘BBB+’ or ‘Baa1’ from S&P Global Ratings or Moody’s Investor Services.

2. If a rating from S&P Global Ratings or Moody’s Investor Services is not available, the qualifying must provide financial documentation that supports an equivalent rating as determined by the purchasing utility through a reasonable internal process review and utilizing a ~~proprietary~~ credit scoring model. In such case, the purchasing utility will request audited financial statements for the most recent two full years (including balance sheet, income statement, statement of cash flows, and accompanying footnotes), which information is evaluated considering:

(a) the type of generation resource;,

(b) the size of the resource~~,~~;
(c) the expected energy delivery start date~~,~~; and
(d) the term of the power purchase agreement.

The internal review process will evaluate, at minimum, certain profitability, cash flow, liquidity, and financial leverage metrics.

3. If the qualifying facility is required to post a letter of credit, the letter of credit must be issued by an institution, not subject to bail-in regulation, with a credit rating on its long-term senior unsecured debt of at least ‘A’ from S&P Global Ratings and ‘A2’ from Moody’s Investor Services.

(19~~20~~) Except as explicitly provided in these rules, any qualifying facility that has entered into a standard power purchase agreement with a public utility under PURPA will not make any changes in its ownership, control or management that would cause the qualifying facility to fail to satisfy the eligibility requirements for entering into the standard power purchase agreement or receipt of standard pricing reflected in the agreement. ~~-~~No more than once every 24 months, at the request of the public utility, the qualifying facility will provide documentation and information reasonably requested by the public utility to establish the qualifying facility’s continued compliance with eligibility requirements for the standard power purchase agreement executed by the qualifying facility and public utility. The public utility shall take reasonable steps to maintain the confidentiality of any such documentation and information the qualifying facility identifies as confidential, provided that the public utility may provide all such information to the Commission in a proceeding before the Commission.

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

ADOPT: 860-029-0121
RULE TITLE: Delivery and Purchase under Standard Power Purchase Agreement
RULE SUMMARY: This rule sets forth requirements for public utilities and qualifying facilities under standard power purchase agreements.
RULE TEXT:

(1) Commencing on the earlier of the commercial operation date or the scheduled commercial operation date of the standard power purchase agreement and continuing until the end of ~~the total term~~ ~~(~~the ~~"~~purchase period~~")~~, the qualifying facility will be obligated to deliver and sell, and the purchasing public utility will be obligated to receive and purchase, the Net Output delivered to the Point of Delivery or Point of Interconnection, subject to other relevant requirements in this division. ~~For off-system qualifying facilities, the public utility shall offer to receive deliveries made by any form of scheduling offered to the qualifying facility by its transmission provider, including intra-hour scheduling.~~

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

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

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

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

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

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

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

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

(4) Title and risk of loss related to the energy shall transfer from the qualifying facility to the purchasing public utility at the Point of Delivery, except that title to r~~R~~enewable e~~E~~nergy certificates~~Credits~~ transferred under a power purchase agreement shall transfer to the purchasing public utility when generated.

(5) A qualifying facility may not commence commercial operation any sooner than 180 days before

the scheduled commercial operation date of the standard power purchase agreement unless the public utility consents to early operation. The purchasing public utility may require a qualifying facility to wait to commence commercial operation until no sooner than 90 days prior to the scheduled commercial operation if the purchasing public utility is unable to accept delivery from the qualifying facility but is obligated to undertake reasonable efforts to obtain transmission service up to 180 days ahead of the scheduled commercial operation date. The qualifying facility must agree to compensate the purchasing utility for any additional transmission costs associated with commencing operation sooner than 90 days prior to the scheduled commercial operation date.

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

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

~~ADOPT: 860-029-0122~~
~~RULE TITLE: Force Majeure~~
~~RULE SUMMARY: This rule sets forth requirements for Force Majeure provisions in power purchase agreements under Division 029.~~
~~RULE TEXT:~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~provider or interconnection provider,~~

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

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

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

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

~~(a) Provides the other party written notice describing the Force Majeure, no later than two weeks after its occurrence,~~

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

~~(c) Uses its best efforts to remedy its inability to perform.~~

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

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

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

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

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

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

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

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

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

(f) Abandonment of the Facility;~~.;~~

(g) Failure to satisfy applicable ~~Minimum Availability Guarantee~~MAG for two (2) consecutive years;~~.;~~

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

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

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

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

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

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

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

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

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

(4) ~~-~~Cure periods:

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

(b) ~~If a Notice of Default is issued under subsection (1)(b), (1)(c), (1)(d), 1(e), 1(f), or 1(g)~~Except with a respect to a failure to meet the MAG or MDG, which failures are not curable, the non-defaulting party has 30 days following written notice from the non-defaulting party in which to cure the event of default. This 30-day period shall be extended by an additional 90 days if:

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

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

(C) The defaulting Party commences the cure within the original 30-day period. ~~and is at all times thereafter diligently and continuously proceeding to cure the failure.~~

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

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

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

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

(8) Termination of Duty to Buy. If a standard power purchase agreement is terminated because of d~~D~~efault 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 C~~c~~ontract P~~p~~rice, 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.

(9) Termination Damages. If the standard power purchase agreement is terminated by the public utility as a result of an event of default by the qualifying facility, termination damages owed by the qualifying facility to the public utility will be the positive difference, if any, between

(a) The public utility's estimated costs to secure replacement power and Renewable Energy Credits, if applicable, for a perio~~u~~d of 24 months following the date of termination, including any associated transmission necessary to deliver such replacement power; and

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

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

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

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

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

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

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

(2) Planned Outages in standard power purchase agreements~~.~~:

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

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

(3) Maintenance Outages in standard power purchase agreements.

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

Outage, the qualifying facility must notify the purchasing public utility of the proposed Maintenance Outage as soon as practicable but in any event at least five days before the outage begins. The qualifying facility must take all reasonable measures consistent with Prudent Electrical Practices to not schedule any Maintenance Outage during the High Demand Months identified by the purchasing public utility in accordance with subsection (2)(b.).

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

(c) Once the Maintenance Outage has commenced, the qualifying facility must keep the purchasing public utility apprised of any changes in the generation capacity available from the Facility during the Maintenance Outage and any changes in the expected Maintenance Outage completion date and time. As soon as practicable, any notifications given orally must be confirmed in writing. Although the Notice of Proposed Maintenance Outage must include an expected completion date and time of the outage, the outage may be extended when the original scope of work requires more time than originally scheduled subject to notice of at least five days where feasible. The qualifying facility must take all reasonable measures consistent with Prudent Electrical Practices to minimize the frequency and duration of Maintenance Outages.

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

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

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