

POWER PURCHASE AGREEMENT

BETWEEN

AND

UTILITY

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

(continued)

TABLE OF CONTENTS

RECITALS 1

AGREEMENT 1

SECTION 1 DEFINITIONS, RULES OF INTERPRETATION 2

1.1 Defined Terms. 2

1.2 Rules of Interpretation.14

SECTION 2 TERM; MILESTONES 15

2.1 Term.....15

2.2 Milestones..... ~~1615~~

2.3 Obligation to Report on Certain Project Milestones17

2.4 Delay Damages; Schedule Recovery Plan.17

2.5 Damages Calculation.18

2.6 Damages Invoicing.....18

2.7 Utility’s Right to Monitor.....18

2.8 Excused Delay..... ~~1918~~

2.9 Option to Extend Scheduled Commercial Operation Date or Terminate.....19

SECTION 3 REPRESENTATIONS AND WARRANTIES 19

3.1 Mutual Representations and Warranties.....19

3.2 Seller’s Further Representations, Warranties and Covenants.....20

3.3 No Other Representations or Warranties22

(continued)

3.4 Continuing Nature of Representations and Warranties; Notice.....22

SECTION 4 DELIVERIES OF NET OUTPUT.....22

4.1 Purchase and Sale.....22

4.2 Designation as Network Resource.....23

4.3 No Sales to Third Parties.....24

4.4 Title and Risk of Loss of Net Output.....24

4.5 Curtailment.....24

4.6 Utility as Merchant or Otherwise as Purchaser.....~~25~~²⁴

4.7 Ownership of Environmental Attributes; RPS Certification.....25

4.8 Purchase and Sale of Capacity Rights; Ancillary Services.....~~26~~²⁵

SECTION 5 CONTRACT PRICE; COSTS26

5.1 Contract Price; Includes Capacity Rights.....26

5.2 Costs and Charges.....~~27~~²⁶

5.3 Station Service.....27

5.4 Taxes.....27

5.5 Costs of Ownership and Operation.....~~28~~²⁷

5.6 Rates Not Subject to Review.....~~28~~²⁷

5.7 Participation in an RTO.....~~28~~²⁷

SECTION 6 OPERATION AND CONTROL.....~~28~~²⁷

(continued)

6.1 As-Built Supplement; Modifications to Facility.	28
6.2 Standard of Facility Construction and Operation.	29 ²⁸
6.3 Interconnection.	29
6.4 Coordination with System.	30 ²⁹
6.5 Outages.	30 ²⁹
6.6 Scheduling.	31 ³⁰
6.7 Forecasting.	32 ³¹
6.8 Increase in Nameplate Capacity Rating; Expansion or New Project; Allowable Facility Upgrades.	32 ³¹
6.9 Telemetry.	34 ³³
6.10 Transmission Provider Consent.	34 ³³
6.11 Dedicated Communication Circuit.	34 ³³
6.12 Reports and Records.	34 ³³
6.13 Financial and Accounting Information.	36 ³⁵
6.14 Access Rights.	36 ³⁵
6.15 Performance Guarantee.	37 ³⁵
SECTION 7 QUALIFYING FACILITY STATUS; ELIGIBILITY FOR STANDARD PRICING	37 ³⁵
7.1 Seller's QF Status.	37 ³⁵
7.2 Seller's Eligibility for a Standard Power Purchase Agreement and Standard Pricing.....	37 ³⁶

(continued)

SECTION 8 SECURITY AND CREDIT SUPPORT	3736
8.1 Provision of Security.....	3736
8.2 Project Development Security.	3836
8.3 Default Security.....	3837
8.4 No Interest on Security.	4039
8.5 Grant of Security Interest in Security.....	4139
8.6 Security is Not a Limit on Seller's Liability.	4140
SECTION 9 METERING	4140
9.1 Installation of Metering Equipment.	4240
9.2 Metering.	4240
9.3 Inspection, Testing, Repair and Replacement of Meters.	4240
9.4 Metering Costs.	4241
9.5 SQMD Plan.	4241
9.6 WREGIS Metering.	4241
SECTION 10 BILLINGS, COMPUTATIONS AND PAYMENTS	4341
10.1 Monthly Invoices.....	4341
10.2 Offsets.....	4341
10.3 Interest on Late Payments.....	4341
10.4 Disputed Amounts.....	4341

(continued)

10.5 Audit Rights.....	<u>4341</u>
SECTION 11 DEFAULTS AND REMEDIES	<u>4342</u>
11.1 Defaults.....	<u>4342</u>
11.2 Remedies for Events of Default.....	<u>4645</u>
11.3 Termination and Remedies.....	<u>4745</u>
11.4 Termination of Duty to Buy.....	<u>4846</u>
11.5 Termination Damages.....	<u>4846</u>
11.6 Duty/Right to Mitigate.....	<u>4947</u>
11.7 Security.....	<u>4947</u>
11.8 Cumulative Remedies.....	<u>4947</u>
SECTION 12 INDEMNIFICATION AND LIABILITY.....	<u>4947</u>
12.1 Indemnities.....	<u>4947</u>
12.2 Survival.....	<u>5149</u>
SECTION 13 INSURANCE.....	<u>5149</u>
SECTION 14 FORCE MAJEURE.....	<u>5149</u>
14.1 Definition of Force Majeure.....	<u>5149</u>
14.2 Suspension of Performance.....	<u>5352</u>
14.3 Force Majeure Does Not Affect Other Obligations.....	<u>5352</u>
14.4 Strikes.....	<u>5352</u>

(continued)

14.5 Right to Terminate.....	5352
SECTION 15 SEVERAL OBLIGATIONS.....	5352
SECTION 16 CHOICE OF LAW.....	5452
SECTION 17 PARTIAL INVALIDITY.....	5452
SECTION 18 NON-WAIVER.....	5453
SECTION 19 GOVERNMENTAL JURISDICTION AND AUTHORIZATIONS.....	5453
SECTION 20 SUCCESSORS AND ASSIGNS.....	5453
20.1 Restriction on Assignments.....	5453
20.2 Permitted Assignments.....	5553
SECTION 21 ENTIRE AGREEMENT.....	5654
SECTION 22 NOTICES.....	5655
SECTION 23 PUBLICITY.....	5655
SECTION 24 DISAGREEMENTS.....	5755
24.1 Negotiations.....	5755
24.2 Alternative Dispute Resolution.....	5756
24.3 Choice of Forum.....	5756
24.4 WAIVER OF JURY TRIAL.....	5856
EXHIBIT A.....	6058
EXHIBIT B.....	6159
EXHIBIT C.....	6260
EXHIBIT D.....	6361
EXHIBIT E.....	6462
EXHIBIT F.....	6563

(continued)

FORM OF STANDARD QF PPA (10MW OR LESS)
Small Power Production Facility – FIRM
Attachment X to Oregon Schedule XX

EXHIBIT G	7371
EXHIBIT H.....	7472
EXHIBIT I	7674
EXHIBIT J	7775
EXHIBIT K.....	7876
EXHIBIT L	7977

(continued)

EXHIBITS

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

(continued)

POWER PURCHASE AGREEMENT

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

RECITALS¹

- A. Seller intends to construct, own, operate and maintain a []-powered generating facility for the generation of electric energy located in [] County, Oregon, with a nameplate capacity rating of []² MW (the "Facility"); and
- B. Seller will operate the Facility as a Qualifying Facility ("QF"); and
- C. Seller desires to sell, and Utility agrees to purchase, the Net Output delivered by the Facility in accordance with the terms and conditions of this Agreement; and
- D. The rates, terms, and conditions in this Agreement are in accordance with the rates, terms, and conditions approved by the Commission for purchases from QFs.

AGREEMENT

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

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

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

(continued)

Commented [A1]: Introductory statement. Bucket 2(1) Not contemplated by rules/Should be excluded because inappropriate. FERC precedent does not distinguish between Merchant and Transmission functions for purposes of PURPA compliance. For at least one specific circumstance (the off-system QF transmission study process) it may be necessary to distinguish between the utility's Merchant and Transmission to describe which tasks each side is responsible for. But, it is not warranted to treat the two functions as separate for other PURPA purposes, including liability.

SECTION 1
DEFINITIONS, RULES OF INTERPRETATION

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

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

Commented [A2]: "Abandonment" Bucket 0 (B0) JU/QFTG Compromise .
The JUs and QFTG have agreed to two circumstances that would be abandonment. Staff supports agreement.

“AC” means alternating current.

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

“Agreement” is defined in the introductory paragraph above.

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

Commented [A3]: "Ancillary Services" Bucket 0 (B0) QFTG/JU agreement.
Agree issues related to ancillary services should be addressed in UM 2000.

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

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

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

Commented [A4]: "Capacity Rights" B0 QFTG/JU agreement
Agree capacity rights should be addressed in UM 2000.

(continued)

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

~~"Commercial Operation" means that the date after start-up testing is complete on which the total Nameplate Capacity Rating of the Facility is fully operational and reliable and the Facility is fully interconnected, fully integrated, and synchronized with the System, all of which are Seller's responsibility to receive or obtain, and which occurs when Seller has achieved the Milestones set forth in Section 2.2 and all of the following events (a) have occurred, and (b) remain simultaneously true and accurate as of the date and moment on which Seller gives Utility notice that Commercial Operation has occurred:~~

- ~~(i) Utility has received a letter addressed to Utility from a Licensed Professional Engineer licensed in the state of Oregon certifying: (1) the Nameplate Capacity Rating of the Facility at the anticipated time of Commercial Operation, and (2) that the Facility is able to generate electric energy in amounts expected by and consistent with the terms and conditions of this Agreement;~~
- ~~(ii) Utility has received a letter addressed to Utility from a Licensed Professional Engineer certifying that, in conformance with the requirements of the Generation Interconnection Agreement: (1) all required Interconnection Facilities have been constructed, (2) all required interconnection tests have been completed, and (3) the Facility is physically interconnected with the System in conformance with the Generation Interconnection Agreement;~~

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

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

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

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

(continued)

Commented [A5]: "Commercial Operation" (Opening Sentence)
B0 - QFTG/JU agreement.

Commented [A6]: "Commercial Operation (iii)" Licensed Professional Engineer to certify documents.
B0 QFTG/JU Agreement
Staff agrees requirement to have LPE do certification is burdensome and should be deleted.

Commented [A7]: "Commercial Operation (iii)": Required Facility Documents
B0 JU/QF Compromise
JU/QFTG compromise re: the language in the first two lines.

B2(1) Statement QF not in violation of law. Not contemplated by Rules/Should be excluded
Re: required statement neither Seller or Facility are in violation of law -- Staff agrees with QFTG's concerns re: increased litigation risk associated with language (iv) re: stating not in violation of law proposed by JUs and believes risk does not outweigh benefit. Ultimately, if liability leave QF unable to perform obligations, QF will be in default and utility will have remedy.

Commented [A8]: "Commercial Operation(v)": Seller has agreed to pay for Network Upgrades.
B0 QFTG/JU agreement.
Parties agree to omit provision.

Commented [A9]: "Commercial Operation (iv)": Certificate regarding Expected Net Output.
B3 - Commission Interpretation
(1) Staff agrees QF must notify Utility of Expected Net Output (ENO) but the proposed process for updating ENO is confusing and the complexity is not warranted. Staff recommends that the QF should be required to submit the ENO with the As-Built Supplement, within 90 days of COD. Like the As-Built Supplement, the updated ENO will become a part of the PPA. (Part of Exhibit A).

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

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

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

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

"Commission" means the Public Utility Commission of Oregon.

"Conditional DNR Notice" is defined in Section 4.2.

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

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

(continued)

FORM OF STANDARD QF PPA (10MW OR LESS)
Small Power Production Facility – FIRM
Attachment X to Oregon Schedule XX

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

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

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

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

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

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

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

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

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

(continued)

Commented [A10]: "Contract Price" B0- QFTG/JU Agreement.

Commented [A11]: "Contract Year" B0 - QFTG/JU Agreement

Staff agrees with compromise language incorporating concept of "Full Contract Year" for MDG and MAG purposes. Agrees with QFTG that terms must be used consistently throughout contract.

Commented [A12]: "Credit Requirement" B0 QFTG/JU Agreement

Original deletion of word "reasonable" was inadvertent and JUs have no objection to its inclusion.

Commented [A13]: "Cure Period Deadline" B0 -QFTG/JU Agreement

JU and QFTGs initially disagreed on inclusion of footnote 6 and JUs have agreed to delete it.

Commented [A14]: QFTG Comment: "Delay Damages"

- OAR 860-029-0120(7)(c) caps delay damages at the Contract Price, but the utilities' draft PPA adds transmission and EA costs as an additional amount, which is inconsistent with the rules. We made edits to include these potential costs related to transmission and EAs in the "Replacement Power Costs" and "Utility's Cost to Cover" definitions, subject to the Contract Price cap.

Commented [A15R14]: JU Comment:

As reflected in the response to questions from the September 12 workshop, the JUs acknowledge after further review of the new rules that the new rules cap the total amount of damages at the contract price. Therefore, the JUs accept the QFTGs' revisions to add any transmission charges to deliver replacement energy and any replacement RECs to the definition of Replacement Cost, which is used to determine the Utility's Cost to Cover. However, rather than applying the damages cap through the "Utility's Cost to Cover" definition, as the QFTGs propose, the JUs propose clarifying application of the damages cap separately for each type of damages because each type of damages is governed by a separate rule that has slightly differ... [1]

Commented [A16]: Delay Damages B3 -- Commission Interpretation

Staff believes the JUs have revised definitions of terms used in connection with calculation of damages, such as Utility Cost to Cover and Replacement Power... [2]

FORM OF STANDARD QF PPA (10MW OR LESS)
Small Power Production Facility – FIRM
Attachment X to Oregon Schedule XX

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

"Effective Date" is defined in Section 2.1.

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

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

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

"Event of Default" is defined in Section 11.1.

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

~~"Expected Monthly Net Output" means the estimated monthly Net Output as determined in Exhibit A, as updated by Seller prior to the Commercial Operation Date and certified pursuant to the definition of "Commercial Operation" in Section 1.1.~~

Commented [A17]: "Excused Delay" B2 - Not contemplated by rules/Should be excluded
JUs included language distinguishing between TX and Merchant functions.
Staff disagrees that it is appropriate to distinguish between a utility's Transmission and Merchant Functions for purposes of compliance with PURPA.

Commented [A18]: "Expected Net Output" B0-
Current language, as modified, represents compromise language.

(continued)

"Expected Net Output" means [] MWh of Net Output in the first full Full Contract Year, as may be updated by Seller prior to the Commercial Operation Date and certified pursuant to the definition of "Commercial Operation" in Section 1.1, reduced, as applicable, by an annual degradation factor of [] per Contract Year, measured at the Point of Delivery/Interconnection. Seller estimates that the Net Output will be delivered during each Contract Year according to the Expected Monthly Net Output provided in Exhibit A, as reduced each Contract Year, as applicable, by the annual degradation factor. Expected Net Output assumes a reduction of [] MWh of Net Output for Planned Outages.

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

"FERC" means the Federal Energy Regulatory Commission.

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

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

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

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

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

(continued)

Commented [A19]: Fixed Price Period End Date B-1 QFTG Proposed addition (not in current version of PPA) is Inconsistent with AR 631 Rules

- (1) Commission rule provides fixed price term can begin later than three years after contract execution if Purchasing Utility cannot interconnect within three years. QFTG proposal to expand this treatment to circumstance when any IX provider cannot interconnect QF within three years is inconsistent with rule and balance between risk to ratepayers and QF interests that underlies it.
- (2) Staff added "Purchasing" to modify utility to clarify that it is only when IX provider is Purchasing Utility that fixed period start date is delayed.
- (3) Staff removed language distinguishing Utility Transmission function from Merchant Function.

shall be extended on a day-for-day basis for each day that the Scheduled Commercial Operation Date is extended for Excused Delay under Section 2.8.

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

“Force Majeure” is defined in Section 14.1.

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

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

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

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

“Indemnified Party” is defined in Section 6.2.3(b).

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

“Interconnection Provider” means the interconnection provider specified in Exhibit C.

“KW” means kilowatt.

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

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

(continued)

Commented [A20]: Forced Outage. B1 Inconsistent with Rules

The QFTG oppose including references to NERC standards in the definitions of Forced and other types of Outages defined in rules and this contract when these references are not included in definitions in OARs and add unnecessary complexity to the PPA. JUs note that fact the OARs do not include the standards does not mean it is inappropriate to include them in the contract.

Staff believes the definition of Forced Outage in the OAR stands on its own. If the Commission had wanted to further refine/limit it with references to NERC standards, it could have done so. And, it is unnecessary to add complexity to this contract for QFs (most of which will be 3 MW and smaller) executing standard PPAs.

- (1) is issued by a [Qualified Qualifying](#) Institution;
- (2) by its terms, permits Utility to draw up to the face amount thereof for the purpose of paying any and all amounts owing by Seller under this Agreement;
- (3) permits Utility to draw the entire amount available if such letter of credit is not renewed or replaced at least thirty (30) Business Days prior to its stated expiration date;
- (4) permits Utility to draw the entire amount available if such letter of credit is not increased or replaced as and when provided in Section 8;
- (5) is transferable by Utility to any party to which Utility may assign this Agreement; and
- (6) remains in effect for at least ninety (90) days after the end of the Term.

"Liabilities" is defined in Section 12.1.1.

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

"Maintenance Outage" means an outage that can be deferred beyond the next weekend but requires that the unit be removed from service before the next Planned Outage. A Maintenance Outage can occur any time during the year, has a flexible start date, may or may not have a predetermined duration and is usually shorter than a Planned Outage. ~~Maintenance Outages include NERC Event Type MO, as provided in attached Exhibit 1, and include any outage involving ten percent (10%) of the Facility's Net Output that is not a Forced Outage or a Planned Outage.~~

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

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

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

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

"MW" means megawatt.

(continued)

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Commented [A21]: Maintenance Outage B1 - Inconsistent with Rules (1) Reference to NERC Standards - See explanation above for "Forced Outage"

(2) "and include any outage involving ten percent (10%) of the Facility's Net Output that is not a Forced Outage or Planned Outage." B4 JU/QFTG Agreement
The JU and QFTG agree this ten percent language can be omitted from the definition and Staff supports omission.

Commented [A22]: Maximum Delivery Rate B0 - QFTG/JU Agreement.
QFTG/JU agree measurement should be at POI

"MWh" means megawatt-hour.

"Nameplate Capacity Rating" means the maximum installed instantaneous power production capacity of the completed Facility, expressed in MW (AC), measured at the Point of Interconnection, when operated in compliance with the Generation Interconnection Agreement and consistent with the recommended power factor and operating parameters provided by the manufacturer of the generator, inverters, and energy storage devices where relevant. The Nameplate Capacity Rating of the Facility is MW, ~~as reflected in the Seller's FERC Form 556, if applicable.~~

"NERC" means the North American Electric Reliability Corporation.

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

"

"Network Resource" is defined in the Tariff.

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

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

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

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

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

"Output" means all energy produced by the Facility.

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

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

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

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

(continued)

Commented [A23]: Nameplate Capacity Rating B2(1) Not contemplated by AR 631 Rules/Should be excluded

QFTG oppose adding reference to FERC Form 556 in definition of Nameplate Capacity Rating. Staff agrees the reference is inappropriate in this definition. The definition is a technical one and not dependent on the FERC Form 556. To the extent the JUs want to ensure consistency between the QFs' nameplate capacity rating in PPA and FERC Form 556, the definition of nameplate capacity rating is not the place to do so.

Commented [A24]: Net Output B1 Inconsistent with Rules

The definition proposed the JU is slightly different than the definition in OAR 860-029-0010. The QFTG propose the definition from the rule be used and Staff agrees with the QFTG.

“Permits” means the permits, licenses, approvals, certificates, entitlements, and other authorizations issued by Governmental Authorities required for the construction, ownership, or operation of the Facility or occupancy of the Premises.

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

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

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

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

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

“PURPA” means the Public Utility Regulatory Policies Act of 1978.

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

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

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

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

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

“Replacement Power Costs” means for each day for which the Utility’s Cost to Cover is calculated, stated as an amount per MWh, the Firm Electric Market Pricing; ~~plus, To To the extent Utility reasonably incurs additional costs to purchase replacement power, including, for example, transmission charges to deliver~~

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

(continued)

Commented [A25]: Planned Outage B1 - Inconsistent with Rules
See explanation for "Forced Outage" above.

Commented [A26]: Qualified Institution
No dispute on this language change by JUs.

Commented [A27]: QFTG “Comments: Replacement Power Costs” - The Replacement Power Costs owed for Seller breach of delayed COD, MAG, MDG, and other breaches is supposed to be capped at the contract price in the administrative rules. As we have noted throughout the PPA, the utilities' proposal has failed to properly implement that contract price cap. So we have used "Utility's Cost to Cover" which includes such contract price cap in those sections on damages in the PPA, and added these additional costs for Environmental Attributes and transmission into the term "Replacement Power Costs" which is used in Utility's Cost to Cover, subject to the contract price cap. We note that the utilities have proposed a contract price cap on their own damages owed to Seller for failure to purchase Seller's output under Section 11.2.2 and the definition of "Seller's Cost to Cover", even though Seller would normally experience additional damages in the form of lost REC sales, lost tax credits, additional transmission costs to resell power elsewhere, etc. So our edit is also consistent with the utilities' own proposed treatment of the Seller.

Commented [A28R27]: JU Comment: JUs do not oppose the QFTGs’ revisions to the definition of “Replacement Power Costs,” but provide some minor clarifying edits.

Commented [A29]: "Replacement Power Costs" Bucket 0 or Bucket 3 Commission Interpretation
JUs accept QFTG modifications to definition of Replacement Power Costs. It is unclear whether there continues to be a dispute on this definition.

In any event, Staff supports the JU revised definition of "Replacement Power Costs."

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~~replacement energy to the Point of Delivery, and, to the extent Seller is required to convey Environmental Attributes to Utility under this Agreement during any portion of the delay period the day for which the Utility's Cost to Cover is calculated, and Utility reasonably incurs additional costs for transmission charges or to acquire replacement Environmental Attributes, such additional sums so incurred, in each case as applicable, shall be added to the Delay Damages Replacement Power Costs.~~

~~"Required Facility Documents" means these Permits and other authorizations, rights, and agreements necessary for construction, ownership, operation, and maintenance of the Facility, and to deliver the Net Output to Utility in accordance with this Agreement and Requirements of Law, including those necessary for construction, ownership, operation, and maintenance of the Facility, and to deliver the Net Output to Utility in accordance with this Agreement and Requirements of Law, including those listed in Exhibit D.~~

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

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

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

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

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

"Scheduled Commercial Operation Date" means [____], subject to extension for Excused Delay as provided in Section 2.8, in the event Seller exercises its option under Section 2.9 and as provided in Section 4.2. The Scheduled Commercial Operation Date must be a date that occurs ninety (90) days or

(continued)

Commented [A30]: Required Facility Documents B2 - Not contemplated by AR 631 Rules/Should be modified

JUs proposed an open-ended requirement for Required Facilities Documents to allow utilities to add to list of documents required. QFTG oppose giving utilities' this discretion. Staff agrees with QFTG that open-ended nature of JU's proposal increases litigation risk and risk of default for QFs that is not warranted. If additional document becomes necessary, JUs can seek authority to modify the list of required documents in Exhibit D.

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Commented [A31]: Schedule Recovery Plan B0 - Compromise

JUs have agreed to omit their proposal for QFs to submit Schedule Recovery Plans when QF has missed COD in exchange for imposition of requirement for QFs to file quarterly reports on project status during development period.

Staff believes omitting Schedule Recovery Plan language is appropriate. The AR 631 rules do not contemplate this significant requirement. Staff believes implementation policies adopted by Commission allow for hands-off approach during QFs development of QF, and scheme which allows for close oversight by utility is inconsistent with this hands-off approach. For similar reasons, Staff does not agree with a quarterly reporting requirement.

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more after the Effective Date but no later than the last day of the five-year period following the Effective Date (except to the extent extended for Excused Delay or under Section 4.2).¹¹

"Seller" is defined in the Recitals.

"Seller Indemnitees" is defined in Section 12.1.2.

"Seller's Cost to Cover" means the positive difference, if any, between (a) the Contract Price per MWh, and (b) the net proceeds per MWh actually realized by Seller from the sale to a third party of Net Output not purchased by Utility as required under this Agreement.

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

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

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

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

"Term" is defined in Section 2.1.

"Termination Damages" is defined in Section 11.5.

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

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

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

"Utility Indemnitees" is defined in Section 12.1.1.

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

(continued)

**Commented [A32]: "Utility"
Bucket 2(1) - Not contemplated by rules;
inappropriate**

For reasons discussed above, Staff believes it is inappropriate to distinguish between Utility's Merchant and Transmission functions.

“Utility Representatives” is defined in Section 6.14.

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

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

Commented [A33]: Utility's Cost to Cover B3 - Commission Interpretation. JUs definition is consistent with rules. Appropriate to exclude references to on-peak and off-peak for purposes of calculating MAG and MDG damages, because these are separately calculated under Exhibit F.

“WECC” means the Western Electricity Coordinating Council.

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

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

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

1.2 Rules of Interpretation.

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

Commented [A34]: 1.2.2. Terms not to be construed for or against either party. B2(1) - Not Contemplated by Rules/Should be excluded QFTG oppose inclusion of this provision, arguing this contract was mostly drafted by JUs and therefore is inappropriate. JUs disagree, noting input of QFTG and Commission's process and approval. Staff agrees with QFTG that the JUs role in creating this contract is too significant to warrant this language.

~~1.2.2 Terms Not to be Construed For or Against Either Party.~~

~~—Each term in this Agreement must be construed according to its fair meaning and not strictly for or against either Party.~~

Commented [A35]: 1.2.3 Interpretation with FERC Orders B0 JU/QFTG Agreement or B2(1)

The JU agrees to the QFTG proposal to omit Section 1.2.3., provided the JU proposed Section 4.6 clarifying the distinction between a utility's Merchant and Transmission Functions remains in the PPA.

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

~~1.2.4 Interpretation with FERC Orders.~~

Staff supports removal of this provision and disagrees that the PPA should reflect a distinction between the JU Merchant and Transmission Functions and accordingly this provision should be removed in any event.

(continued)

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

- ~~(a) The Parties acknowledge and agree that the Generation Interconnection Agreement is a separate and free-standing contract and that the terms of this Agreement are not binding upon the Interconnection Provider.~~
- ~~(b) Notwithstanding any other provision in this Agreement, except as expressly provided herein, nothing in the Generation Interconnection Agreement, nor any other agreement between Seller on the one hand and Transmission Provider or Interconnection Provider on the other hand, nor any alleged event of default under the Generation Interconnection Agreement, will alter or modify the Parties' rights, duties, and obligations in this Agreement. This Agreement will not be construed to create any rights between Seller and the Interconnection Provider or between Seller and the Transmission Provider.~~

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

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

SECTION 2 TERM; MILESTONES

2.1 Term.

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

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

(continued)

Commented [A36]: 1.3 Parties Good Faith B0 QFTG/JU Agreement and B1 Inconsistent with Rules

The QFTG propose to add a general provision regarding good faith and reasonableness. The JUs agree to the inclusion of the first sentence of the QFTG proposed language re: good faith but oppose inclusion of the second sentence imposing a broadly-applicable reasonableness standard.

Staff supports inclusion of the agreed-upon language re: good faith.

Staff supports deleting remaining non-agreed upon language imposing a broadly-applicable reasonableness standard should be omitted because it is similar to the reasonableness standard language the Commission considered in the rulemaking but rejected.

Commented [A37]: 2.1 Term B0 QFTG/JU Agreement

The parties agree to revisions to language.

2.2 Milestones.¹³

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

(a) ~~Seller must provide a fully executed and effective Generation Interconnection Agreement and Transmission Agreement, if applicable, to Utility before the Scheduled Commercial Operation Date.~~

Commented [A38]: 2.2 Milestones (A) GIA and TX Agreement
B0 - JU/QFTG Compromise.

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

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

Commented [A39]: 2.2 (B) Leases and property rights for Exhibit E
B0- JU/QF Compromise
Appears to be no disagreement on this.

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

Commented [A40]: Milestones - Default Security
B0 QFTG/JU Agreement
JU agree to eliminate milestone re: default security because covered elsewhere in agreement.

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

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

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

- (a) ~~Before the Initial Delivery Date, as may be extended for Excused Delay as provided in Section 2.8~~By the Effective Date, Seller shall provide Utility with (i) a copy of an executed Generation Interconnection Agreement, or wheeling agreement, as applicable, which shall be consistent with all material terms and requirements of this Agreement, (ii) the Required Facility Documents, and (iii) an executed copy of Exhibit G – Seller's Authorization to Release Generation Data to Utility.
- (b) ~~By the date that occurs thirty (30) days after the Effective Date~~On or before the Initial Delivery Date in this Agreement, if and to the extent required by this Agreement, Seller shall provide Default Security if required under this Agreement.
- (c) In the case of an Off-System QF, on or before the Initial Delivery Date in this Agreement, Seller shall demonstrate that it has made arrangements sufficient to reserve Firm Delivery (as defined in Exhibit L) of Net Output up to the Maximum Delivery Rate to the Point of Delivery for the full term of the Agreement, which may be demonstrated by obtaining Firm Delivery or rights to obtain Firm Delivery (i.e. rollover rights) under the third-party Transmission Provider(s) tariff for the period covering the Term.
- (d) Seller must cause Initial Delivery to occur on or before the Scheduled Initial Delivery Date.

(continued)

2.3 Obligation to Report on Progress.¹⁴ ~~During the eighteen (18)-month period before the Scheduled Commercial Operation Date Beginning on the Effective Date, Seller will provide quarterly updates in writing to Utility concerning (a) the progress of Seller regarding the acquisition, design, financing, engineering, construction, and installation of the Facility, (b) the contractors' performance of tests required to achieve Commercial Operation, and (c) an estimate of the percentage completion of the Facility. Seller's obligation to report on progress ends upon the Commercial Operation Date. Notwithstanding the foregoing, nothing in this Agreement will be construed to require Utility to monitor Seller's development of the Facility or to review, comment on, or approve any contract between Seller and a third party. Failure to submit reports under Section 2.3 for two or more quarters shall be considered a material breach of this Agreement. No later than 30 days after receipt of written request from Utility, Seller will provide the Utility a Progress Report regarding design and installation of the Facility, provided the Utility can request such a report no more than once every six months after contract execution and before the Commercial Online Date.~~

2.3 Obligation to Report on Certain Project Milestones.¹⁵

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

- ~~(a) If Seller has not received an interconnection study as of the Effective Date, receipt of an interconnection study by [_____].~~
- ~~(b) If Seller does not have a signed Generation Interconnection Agreement as of the Effective Date, receipt of a Generation Interconnection Agreement by [_____].~~
- ~~(c) If Seller has not issued a notice to proceed with construction of the Facility as of the Effective Date, issuance of a notice to proceed with construction (or its equivalent) of the Facility by [_____].~~

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

- (a) If Commercial Operation is not achieved on or before the Scheduled Commercial Operation Date, as may be adjusted for Excused Delay, as applicable and such failure is not excused under this Agreement or applicable law, Seller must (i) pay to Utility Delay Damages from and after the Scheduled Commercial Operation Date up to, but not including, the earlier to occur of the date that

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

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

(continued)

Commented [A41]: 2.3 Obligation to Report on Progress

B3 - Commission Interpretation.
The JUs propose this quarterly reporting provision as a compromise related to their agreement to omit the originally proposed Section 2.3., which required the QF to meet milestones during the development period such as signed IX Agreement. The QFTG oppose a quarterly reporting provision, offering instead for a provision that requires the QF to provide a progress report, on request from utility, no more than annually. Staff believes the originally drafted milestone requirements are inconsistent with the AR 631 rules that did not have milestones and that most of the Development Period Milestone language in the PPA should be omitted regardless of whether a reporting requirement replaces it.

As to the reporting requirement, Staff believes a quarterly reporting requirement that begins 18 months into the development period poses default risk to the QF and that a quarterly report is not necessary for the utility's planning needs. Staff proposes to replace the quarterly reporting period with a requirement that the QF must provide a status report upon request by the Utility, but no more than twice per each 12 months of the development period. Staff believes this reporting requirement will not result in an inadvertent default by a QF that forgets to file reports after the 21st and 24th months of the Development Period and provides sufficient information to the Utility for planning needs.

Commented [A42]:

2.4(A) Delay Damages (QF proposed language) B1 - Inconsistent with AR 631 Rules.

The QFTG proposed language that a failure to meet COD will not result in Delay Damages when "such failure is not excused under this Agreement or applicable Law." Staff agrees with the JUs that reasons for excused delay are included in definition of "Excused Delay," and it is better to use the defined term as the JUs have done, rather than the more ambiguous "not excused under this Agreement or applicable law" proposed by QFTG.

2.4(A) - last sentence.

1) The QFTG and JU agree to removal of Schedule Recovery Plan requirement.

the Facility achieves Commercial Operation or the date of termination as provided in Sections 11.1.2(b) and 11.3, if applicable, ~~and (ii) deliver a Schedule Recovery Plan to Utility no later than the Scheduled Commercial Operation Date.~~¹⁶

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

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

2.6 **Damages Invoicing.**

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

Commented [A43]: 2.6 Damages Invoicing B0 JU/QFTG Compromise

Staff is not aware of a continuing dispute about the language in 2.6.

2.7 ~~Utility's Right to Monitor.~~¹⁸

~~During the Term, Seller will allow Utility to monitor and will provide monthly updates to Utility concerning (a) the progress of Seller regarding the acquisition, design, financing, engineering, construction, and installation of the Facility, and (b) the contractors' performance of tests required to achieve Commercial Operation. Seller must provide Utility at least one hundred and twenty (120) days prior notice of each such performance test. Notwithstanding the foregoing, nothing in this Agreement will be construed to~~

Commented [A44]: Utility Right to Monitor B0 QFTG/JU Agreement

The QFTG and JU have agreed to omit this provision.

¹⁶ **Note to Form** – For PPAs with operational QFs, Section 2.4(a) to be deleted and replaced with the following provision: "If Initial Delivery is not achieved on or before the Scheduled Initial Delivery Date, Seller must (i) pay to Utility Delay Damages from and after the Scheduled Initial Delivery Date up to, but not including, the earlier to occur of the date that the Facility achieves Initial Delivery or the date of termination as provided in Section 11.1.2(b) and 11.3, if applicable."

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

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

(continued)

~~require Utility to monitor Seller's development of the Facility or to review, comment on, or approve any contract between Seller and a third party.~~

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

2.9 Option to Extend Scheduled Commercial Operation Date or Terminate.⁴⁹

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

- (a) To extend the Scheduled Commercial Operation Date if the estimated completion date for the construction of Interconnection Facilities described in such study occurs after the then-current Scheduled Commercial Operation Date; provided that the extended Scheduled Commercial Operation may not occur after the last day of the five-year period following the Effective Date; or
- (b) To terminate this Agreement if Seller determines in its reasonable judgment that the estimated costs to interconnect the Facility to the Interconnection Provider's System renders the project uneconomic; provided that Seller shall be liable to Utility for damages incurred by Utility up until the date of termination, which damages may be taken from the Project Development Security posted by Seller.

SECTION 3
REPRESENTATIONS AND WARRANTIES

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

- 3.1.1 Organization. It is duly organized and validly exists under the laws of the State of its organization.
- 3.1.2 Authority. It has the requisite power and authority to enter this Agreement and to perform according to the Agreement's terms.
- 3.1.3 Corporate Actions. It has taken all corporate actions required to be taken by it to authorize the execution, delivery, and performance of this Agreement and the consummation of the transactions contemplated.

⁴⁹ ~~Note to Form – To be deleted in case of PPA with operational QF.~~

(continued)

Commented [A45]: 2.8 Excused Delay "Subject to right to terminate for Force Majeure event" B3 Commission Interpretation

The JUs and QF agree on 2.8, except for the JU's inclusion of the right of the JU to terminate a PPA under Section 14.5 in the event that the Excused Delay is caused by a Force Majeure Event. Section 14.5 says the Utility can terminate the PPA after a Force Majeure event if the QF is not able to proceed after 6 months

Staff disagrees that it is appropriate to include this reference to Section 14.5 in Section 2.9. And, as explained later, disagrees the right to terminate in Section 14.5 is appropriate.

B0 - JU/QFTG Agreement

1) The QFTG and JU agree to removal of Schedule Recovery Plan requirement.

Commented [A46]: 2.9 Option to Extend Scheduled Commercial Operation Date or Terminate QF Proposed modification -- B1 Inconsistent with rules.

(Note: The QFTG and JU agree to the language changes in the proposed PPA, but disagree on whether there should be an addition.)

The QFTG believe this provision should apply even when interconnection provider is not host utility. This QFTG proposal is inconsistent with AR 631. The Commission limited this special provision to circumstances when the purchasing utility is the interconnection provider to help ensure the purchasing utility could not avoid its PURPA obligations by delaying the interconnection process. The Commission did not adopt this special provision for other interconnection providers because it is ratepayers that bear the associated cost risk if the Commission were to allow delays in scheduled CODs.

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

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

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

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

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

- (a) contravene, conflict with, or violate any provision of any material Requirements of Law presently in effect having applicability to either Seller or any owner of Seller;
- (b) require the consent or approval of or material filing or registration with any Governmental Authority or other person other than consents and approvals which are (i) provided in Exhibit D or (ii) required in connection with the construction or operation of the Facility and expected to be obtained in due course; or
- (c) result in a breach of or constitute a default under any provision of (i) any security issued by Seller or any owner of Seller, the effect of which would materially and adversely affect Seller's performance of, or ability to perform, its obligations in this Agreement, or (ii) any material agreement, instrument or undertaking to which either Seller or any owner or other Affiliate of Seller is a party or by which the property of either Seller or any owner or other Affiliate of Seller is bound, the effect of which would materially and adversely affect Seller's performance of, or ability to perform, its obligations in this Agreement.

3.2.3 Required Facility Documents

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

(continued)

Commented [A47]: 3.2.3 Required Facility Documents B2(1)

The QFTG disagree that it is appropriate to include as a warranty or representation a requirement for the Seller to hold the Required Facility Documents in Exhibit D as of COD and maintain the all Required Facility Documents through the term of the PPA. The QFTG argue this requirement is duplicative of the requirement to have the documents as a condition of Commercial Operation and creates a a new risk of default for a requirement that may not be material.

Staff agrees with the QFTG. The Commission allows utility to issue a Notice of Default when the QF has failed to do one of a specific list of enumerated things or breached any warranty or representation in the power purchase agreement; or failed to comply with any material obligation under the power purchase agreement.

Staff believes it is inappropriate to make requirements that are not necessarily material to the operation of the facility into warranties or representations, the breach of which can result in the loss of the PPA.

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

3.2.5 Reasonable Meaningful Steps Towards Control of Premises.

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

Commented [A48]: 3.2.5 Steps toward Control of Premises
B0 QFTG/JU Agreement
The QFTG and JU have agreed to the modifications to this provision.

Commented [A49]: Moved to Section 2.2 for clarity and organization.

3.2.6 Litigation.

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

Commented [A50]: Section 3.2.6. Litigation B2(1). Not contemplated by rules
The JUs proposed this language and the QFTG oppose it, even with the modifications proposed by the JUs. Staff agrees the provision increases risk of default to QF with relatively little benefit to utility. If QF is unable to perform obligations under PPA, the JU can issue a Notice of Default if and when that occurs. While a provision like this may make sense when the purchase is with a large facility, Staff does not think it is necessary the JUs have advance notice of circumstances that could, at some point, interfere with a small QF's ability to perform the obligations of the PPA. w
Further, Staff believes it is inappropriate to make this disclosure requirement a warranty or representation, the breach of which can result in termination of the PPA.

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

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

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

3.2.10 Credit Representations and Warranties.

Commented [A51]: Section 3.2.10 Credit Representations and Warranties
B0 - QFTG/JU agreement.

(a) Neither the Seller nor any of its principal equity owners is or has within the past two (2) years been the debtor in any bankruptcy proceeding, is unable to pay its bills in the ordinary course of its

(continued)

business, or is the subject of any legal or regulatory action, the result of which could reasonably be expected to impair Seller's ability to own and operate the Facility in accordance with the terms of this Agreement.

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

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

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

3.2.11 Seller's QF Status.

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

3.2.12 Seller's Eligibility for a Standard Power Purchase Agreement and Standard Pricing. As of the Effective Date and the Commercial Operation Date, Seller has not made any changes in its ownership, control or management that would cause the Facility to fail to satisfy the eligibility requirements for entering into the standard power purchase agreement or receipt of standard pricing under Utility's Schedule XX, as applicable.

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

~~3.4 Continuing Nature of Representations and Warranties: Notice.~~

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

SECTION 4
DELIVERIES OF NET OUTPUT

4.1 Purchase and Sale.

Subject to the provisions of this Agreement, Seller must sell and make available to Utility, and Utility must purchase and receive the entire Net Output from the Facility at the Point of Delivery; provided that,

(continued)

Commented [A52]: Section 3.2.11 Seller's QF Status
B0 QFTG/JU Agreement

Commented [A53]: 3.4 Continuing Nature of Representations and Warranties: Notice.
B2(1) Not contemplated by rules. Should be eliminated.
QFTG oppose this section, arguing it creates a cross-default risk.
Staff agrees this provision creates cross-default risk and unfairly burdens QFs, because most of the warranties are by the QF.
The warranties themselves impose lasting requirements on the QFs, i.e., to maintain QF status and to retain leases and other documents for production upon request utility.
Staff does not think the benefit of this notice provision outweighs the potential burden to QFs.

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

4.2 Designation as Network Resource.

- (a) Within fifteen (15) Business Days following the Effective Date, or, in the event the Facility is an On-system QF and there is no interconnection study for the Facility as of the Effective Date, within fifteen (15) days of the date Seller delivers Utility a copy of the interconnection study, Utility will submit an application to Utility Transmission requesting designation of the Facility as a Network Resource, effective as of ninety (90) days before the Scheduled Commercial Operation Date or as soon as practicable after the Effective Date of the Agreement if the Scheduled Commercial Operation Date occurs less than ninety (90) days following the Effective Date, thereby, in either case, authorizing transmission service under Utility's Network Integration Transmission Service Agreement with Utility Transmission. Utility Transmission may respond that the designation is granted without a study or may require a study to be performed.
- (b) If the Facility is an Off-System QF and Utility Transmission requires a study to be performed, Utility will notify Seller of the results of the study within five (5) Business Days after Utility's receipt of the results from Utility Transmission. If Utility is notified in writing by Utility Transmission that designation of the Off-System QF as a Network Resource requires the construction of network upgrades or otherwise requires potential redispach of other Network Resources of Utility (the "Conditional DNR Notice"), within fifteen (15) Business Days after receiving the Conditional DNR Notice, Utility will notify Seller in writing whether Utility has determined that associated costs should be allocated to Seller and, if so, the amount of the costs ("Cost Allocation Notice"). Seller must notify Utility within fifteen (15) Business Days of receiving the Cost Allocation Notice if it objects to the allocation of the costs in the Cost Allocation Notice ("Cost Allocation Objection Notice").
- (c) If Utility timely receives a Cost Allocation Objection Notice under Section 4.2(b), Utility shall initiate a proceeding with the Commission within fifteen (15) Business Days of its receipt of the Cost Allocation Objection Notice by filing its proposed cost allocation determination. The Parties reserve the right to present their respective positions to the Commission as to whether and how the Contract Price or other non-rate terms and conditions of this Agreement should be adjusted in light of the Conditional DNR Notice.
- (d) Any time between Seller's receipt of the Cost Allocation Notice and the last day of the fifteen (15)-

(continued)

Commented [A54]: 4.2(A) Designation as Network Resource B2(3) Consistent with Other Commission order

The JUs propose language in subsection A that would require that an on-system QF have received at least one interconnection study before the utility submits a Transmission Study Request to the Transmission Function. The JUs explain this requirement is necessary to ensure costs to build Network Upgrades needed for QF output are not shifted to the utility and ratepayers. If the TSR request is processed before the QF's interconnection study, the TSR may pick up the Network Upgrades that would have been required had the IX study been first.

Staff believes the Commission's order in UM 2032 makes clear the Commission's position that QFs are responsible for costs of Network Upgrades needed to interconnect to the system. The JUs proposal regarding on-system QFs is consistent with the Commission's position, even if it is not contemplated by the AR 631 rules and also, protects customers from unwarranted cost shifts.

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

4.3 No Sales to Third Parties.

During the Term, Seller will not sell any Net Output, energy, capacity Capacity Rights, Ancillary Services or Environmental Attributes from the Facility to any party other than Utility; provided, however, that this restriction does not apply during periods when Utility is in default under this Agreement because it has failed to accept or purchase Net Output as required under this Agreement or, with respect to Environmental Attributes, to the extent title to such Environmental Attributes does not pass to Utility under this Agreement.

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

~~4.5 Curtailment~~ **4.5 Curtailment.** During any system emergency, Utility may curtail Seller's deliveries and discontinue purchases from Seller if such purchases would contribute to such emergency. For purposes of this section, a system emergency is a condition on Utility's system which is likely to result in imminent and significant disruption of service to customers or is imminently likely to endanger life or property.

~~Utility is not obligated to purchase, receive, pay for, or pay any damages associated with Net Output not delivered to the Point of Delivery due to any of the following: (a) the interconnection between the Facility and the System is disconnected, suspended or interrupted, in whole or in part, consistent with the terms of the Generation Interconnection Agreement; (b) the Market Operator (including acting in its capacity as the reliability coordinator) or Transmission Provider (including any associated balancing authority) directs a general curtailment, reduction, or redispatch of generation in the area (which would include the Net Output) for any reason required or as permitted under applicable Federal laws and regulations, NERC standards or directives, and/or tariffs of the Market Operator, Transmission Provider, or Interconnection Provider, even if and no matter how such curtailment or redispatch directive is carried out by Utility, which~~

(continued)

Commented [A55]: 4.2(D) Designation of Network Resource B0 QFTG/JU Agreement
QFTG and JU agree to changes to subsection 4.2(D).

Commented [A56]: 4.3 and 4.4 No Sales to Third Parties and Title and Risk of Loss of Net Output B0 QFTG/JU agreement
QFTG and JU agree to delete references to capacity rights and ancillary services from 4.3 and 4.4, because will be addressed in UM 2000.

Commented [A57]: 4.5 Curtailment B2(1)
JU proposed language goes beyond limited circumstances in which utility can curtail Language proposed by QFTG is consistent with PURPA.

Commented [A58]: Staff February 7 Addition:
This language is taken from QF's December 12 comments. As noted by Staff in its PMM, the JU's proposal allows curtailment in circumstances that Staff believes exceed what is permissible under PURPA. The QF's language matches more closely the circumstances in which the utility can curtail the QF.

may fulfill such directive by acting in its sole discretion; or if Utility curtails or otherwise reduces the Net Output in any way in order to meet its obligations to the Market Operator or Transmission Provider to operate within System limitations; (c) the Facility's Output is not received because the Facility is not fully integrated or synchronized with the System; or (d) an event of Force Majeure prevents either Party from delivering or receiving Net Output. Seller will reasonably determine the MWh amount of Net Output curtailed under this Section 4.5 based on the amount of energy that could have been generated at the Facility and delivered to Utility as Net Output but that was not generated and delivered because of the curtailment. Seller must promptly provide Utility with access to such information and data as Utility may reasonably require to confirm to its reasonable satisfaction the amount of energy that was not generated or delivered because of a curtailment described in this Section 4.5.

4.6 ~~Utility as Merchant or Otherwise as Purchaser.~~

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

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

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

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

4.7 Ownership of Environmental Attributes: RPS Certification.

- (a) If the Contract Price is based on Standard Fixed Pricing, the Seller shall own any Environmental Attributes associated with the Output of the Facility;
- (b) If the Contract Price is based on Renewable Fixed Pricing, (i) Seller shall own all Environmental Attributes associated with the Output of the Facility during the Renewable Resource Sufficiency Period; and (ii) Utility shall own all Environmental Attributes associated with the Output of the Facility during the Renewal Resource Deficiency Period and, in such case, title of the Environmental Attributes, including renewable energy credits, associated with the Output of the Facility, shall transfer from Seller must transfer to Utility immediately upon the generation of the Output of the Facility at no further cost to Utility the Environmental

(continued)

Commented [A59]: Utility as Merchant or Otherwise as Purchaser B2(1) - Not contemplated by rules

As discussed above, FERC precedent regarding PURPA does not support concept that a utility's liability for FERC violations depends on whether the violation was by the utility operating in its Merchant Function or its Transmission Function. Staff disagrees with JUs that such a distinction is warranted. The separation of the Merchant and TX functions is a functional separation, not a legal separation.

~~Attributes, including renewable energy credits, associated with the Output of the Facility. Provided however, the Environmental Attributes transferred to Utility during the Renewable Deficiency Period are limited to those Environmental Attributes directly created by generation of the electric energy produced by the Facility and required to provide Utility with "qualifying electricity" as that term is defined in ORS 469A.010, and the Seller will retain ownership of Environmental Attributes (if any) related to upstream production of fuel, such as greenhouse gas offsets from methane capture not associated with generation of electricity, or the sequential production of steam or thermal energy associated with the Facility, such as thermal renewable energy certificates, as defined in ORS 469A.132. Output of the Facility has the greenhouse gas emission attributes of the generating resource regardless of the disposition of the Environmental Attributes under this Agreement and such greenhouse gas emissions shall be excluded from, and may not be imputed in, the Utility's total greenhouse gas emissions for purposes of compliance with the clean energy targets in ORS 469A.410 pursuant to ORS 469A.435(2). Notwithstanding the above, nothing in this Section should be read to prohibit Utility from counting the Facility as a resource generating "nonemitting electricity" as that term is defined in ORS 469A.400 for determining Utility's compliance with the clean energy targets set forth in ORS 469A.410.~~

- (c) Seller represents, warrants, and covenants that, as of the Commercial Operation Date and continuously thereafter during the Term, Seller has obtained and will continue to maintain RPS certification from the Oregon Department of Energy with respect to the Output of the Facility.

4.8 ~~Purchase and Sale of Capacity Rights; Ancillary Services.~~

~~Seller transfers to Utility, and Utility accepts from Seller, any right, title, and interest that Seller may have in and to Capacity Rights, if any, and Ancillary Services, if any, existing during the Term, with respect to the Net Output. Seller represents that it has not sold, and covenants that during the Term it will not sell or attempt to sell to any other person or entity the Capacity Rights, if any, and Ancillary Services, if any. During the Term, Seller must not report to any person or entity that the Capacity Rights, if any, and Ancillary Services, if any belong to anyone other than Utility. At Utility's request, Seller must execute such documents and instruments as may be reasonably required to effect recognition and transfer of the Net Output or any Capacity Rights or Ancillary Services to Utility.~~

**SECTION 5
CONTRACT PRICE; COSTS**

5.1 ~~Contract Price; Includes Capacity Rights.~~

~~Except as may be provided otherwise in this Agreement including as set forth in Exhibit L if applicable, Utility will pay Seller the Contract Price for all deliveries of Net Output and Capacity Rights, up to the Maximum Delivery Rate provided that, if Seller delivers any amount of Net Output in excess of the Maximum Delivery Rate, Utility will accept such excess energy but will not be obligated to pay for such energy except as may be provided in this Agreement including as set forth in Exhibit L if applicable; provided that, in the event such excess energy exceeds the amount allocated to Facility as a Network Resource by Utility Transmission, resulting in any charges from Utility Transmission, Seller will defend, indemnify, and hold Utility harmless from and against such charges. Utility is not required to purchase any Net Output above the Maximum Delivery Rate.~~

- 5.1.1 Deliveries Prior to the Commercial Operation Date. Beginning no earlier than ninety (90) days

(continued)

Commented [A60]: 4.7(b) Ownership of Environmental Attributes: RPS Certification B0 -QFTG/JU Agreement

The QFTG and JU agree to the language in 4.7(b), up to "as defined in ORS 469A.132"

B2(1) - Last two sentences

The QFTG object to inclusion of the last two sentences specifying that emissions of QF output do not count toward 469A.410 compliance targets as specified in ORS 469A.435(2)., arguing it is unnecessary and could be misconstrued.

Staff agrees with QFTG the statement is unnecessary because ORS 469A.435(2) is clear QF emissions do not count.

Commented [A61]: 4.8 Purchase and Sale of Capacity Rights; Ancillary Services B0 - QFTG/JU Agreement.

Parties agree this will be addressed in UM 2000.

Commented [A62]: 5.1 Contract Price B0 QFTG/JU Agreement and B2(1)

QFTG and JU have agreed QF will not be prohibited from delivering excess energy, but Utility need not pay for it.

QFTG and JU do not agree that if delivery causes Utility to incur costs, QF is liable for those costs. Staff agrees this with QFTG that this requirement goes beyond the rules. There is little support for what type of risk this exposes QFs to, or the utility's obligation to take mitigating efforts to avoid incurring costs.

Staff recommends deleting language re: payment for incurred costs.

before the Scheduled Commercial Operation Date, Utility will pay Seller for Net Output delivered at the Point of Delivery before the Commercial Operation Date, an amount per MWh equal to the lower of (i) eighty five percent (85%) of the Firm Electric Market Pricing for the applicable hour on the applicable day in the applicable month; and (ii) eighty five percent (85%) of the Contract Price; provided, however, that Seller's right to receive payment for energy deliveries under this Section 5.1.1 is subject to Utility's right of offset under Section 10.2 for, among other things, payment by Seller of any Delay Damages owed to Utility by Seller. Notwithstanding the foregoing, if Utility, in exercising commercially reasonable efforts, is able to accept deliveries of Net Output earlier than ninety (90) days before the Scheduled Commercial Operation Date, Utility will pay Seller for Net Output delivered at the Point of Delivery under this Section 5.1.1; provided that under no circumstances shall Utility be obligated to accept deliveries of Net Output earlier than 180 days before the Scheduled Commercial Operation Date.

5.1.2 Commercial Operation. For the period beginning on the Commercial Operation Date and thereafter during the Term, Utility will pay to Seller the Contract Price per MWh of Net Output delivered to the Point of Delivery. The Contract Price will not be adjusted if Schedule XX is modified during the Term of this Agreement. If Utility requests a modification to Schedule XX, including a modification to pricing, neither Seller nor Utility will request that any change in Schedule XX be applicable to this Agreement.

5.2 Costs and Charges.

Seller shall be responsible for paying or satisfying when due all costs or charges imposed in connection with the scheduling and delivery of Net Output up to and at the Point of Delivery, including (a) transmission costs, transmission line losses and any costs or charges (including imbalance charges and penalties) imposed in connection with scheduling and delivery of Net Output up to and at the Point of Delivery and (b) transmission costs, transmission line losses, and any operation and maintenance charges imposed by Interconnection Provider or Transmission Provider in connection with scheduling and delivery of Net Output up to and at the Point of Delivery, but excluding such costs or charges that are caused by Utility's acts or omissions in breach of this Agreement. Except as determined otherwise under Section 4.2, Utility shall be responsible for all costs or charges, including transmission costs, transmission line losses and any costs or charges imposed in connection with the receipt of Net Output at the Point of Delivery and the scheduling and delivery of Net Output from the Point of Delivery, other than such costs or charges that are caused by Seller's acts or omissions in breach of this Agreement. Without limiting the generality of the foregoing, Seller, in accordance with the Generation Interconnection Agreement, shall be responsible for all costs and expenses associated with modifications to the Interconnection Facilities or the System (including System upgrades) caused by or related to the Facility, including all costs and expenses associated with the interconnection of the Facility with the System.

Commented [A63]: 5.2 Costs and Charges B0 - QFTG/JU Agreement

5.3 Station Service. Seller is responsible for arranging and obtaining, at its sole risk and expense, station service required for the Facility.

5.4 Taxes.

Seller must pay, or reimburse Utility for, all existing and any new sales, use, excise, severance, ad valorem, and any other similar taxes, imposed or levied by any Governmental Authority on the Net Output or Capacity Rights up to and including the Point of Delivery and for all Environmental Attributes (if any) up to and including the Point of Interconnection, regardless of whether such taxes are imposed on Utility or Seller under Requirements of Law. Utility must pay, or reimburse Seller for, all such taxes imposed or levied by any Governmental Authority on the Net Output or Capacity Rights beyond the Point of Delivery and for all Environmental Attributes transferred (if any) beyond the Point of Interconnection, regardless of

Commented [A64]: 5.4 Taxes B0 - QFTG/JU Agreement.

(continued)

whether such taxes are imposed on Utility or Seller under Requirements of Law. The Contract Price will not be adjusted on the basis of any action of any Governmental Authority with respect to changes to or revocations of sales and use tax benefits, rebates, exception or give back. In the event any taxes are imposed on a Party for which the other Party is responsible in this Agreement, the Party on which the taxes are imposed must promptly provide the other Party notice and such other information as such Party reasonably requests with respect to any such taxes.

5.5 Costs of Ownership and Operation. Without limiting the generality of any other provision of this Agreement and subject to Section 5.4, Seller is solely responsible for paying when due (a) all costs of owning and operating the Facility in compliance with existing and future Requirements of Law and the terms and conditions of this Agreement, and (b) all taxes and charges (however characterized) now existing or later imposed on or with respect to the Facility and its operation, ~~including any tax or charge (however characterized) payable by a generator of Environmental Attributes.~~

5.6 Rates Not Subject to Review.

The rates for service specified in this Agreement will remain in effect until expiration of the Term, and are not subject to change for any reason, including regulatory review, absent agreement of the Parties or as determined under Section 4.2. Neither Party will petition FERC to amend such prices or terms or support a petition by any other person seeking to amend such prices or terms, absent the agreement in writing of the other Party. ~~Further, absent the agreement in writing by both Parties, the standard of review for changes to this Agreement proposed by a Party, a non-party or FERC acting sua sponte will be the "public interest" application of the "just and reasonable" standard of review as described in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and clarified by *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish*, 554 U.S. 527, 128 S. Ct. 2733 (2008).~~

5.7 Participation in an RTO.

~~If, after the Effective Date, Utility joins becomes subject to the rules of an RTO, then the Parties shall negotiate in good faith any such amendments to this Agreement that may be necessary or appropriate as a result of such RTO membership.~~

SECTION 6
OPERATION AND CONTROL

6.1 As-Built Supplement: Modifications to Facility.

No later than ninety (90) days following the Commercial Operation Date, Seller must provide Utility the As-Built Supplement which will be incorporated into Exhibits B and C of this Agreement ~~and if applicable, an updated statement of Expected Net Output that will be incorporated in Exhibit A of this Agreement.~~ Except with Utility's prior written consent or as permitted under and subject to the requirements of Section 6.8, the Facility, as reflected in the As-Built Supplement to be provided under this Section or subsequently during the Term, may not (a) have a Nameplate Capacity Rating that exceeds that stated in Exhibit B, or (b) result in the ~~expected Expected annual~~ Net Output, ~~as shown in Exhibit A, as calculated that term is defined in Exhibit A as of the Effective Date,~~ increasing by more than ten percent (10%), except to the extent Seller complies with the requirements of Section 6.8.3.

(continued)

Commented [A65]: 5.6 Rates No Subject to Review
Bucket 0 - JU/QFTG Compromise
The JU do not oppose deletion of this provision.

Commented [A66]: 5.7 Participation in an RTO B2(1) - Not contemplated by rules
Including a contract re-opener is an extraordinary measure and the benefit is not worth the risk of creating a Standard PPA that appears to violate the PURPA requirement of prices fixed at the time of contacting.

Commented [A67]: 6.1 As-Built Supplement; Modifications to Facility
B0 - All changes other than Staff's proposed addition re: submitting updated Expected Net Output for Exhibit A.

B3 - Commission interpretation.
Staff proposed language on lines 2 and 3 requiring QF to file an updated statement of Expected Net Output to incorporate into Exhibit A, if applicable, within 90 days of COD.
(Proposed as an alternative to JU-proposed process under conditions for "Commercial Operation" in definitions.)

6.2 Standard of Facility Construction and Operation.

6.2.1 General.

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

Commented [A68]: 6.2.1 General B2(1) - Beyond Scope of AR 631 and burdensome

The QFTG oppose this provision, arguing it creates a cross-risk of default. Staff agrees. The QF is obliged to follow the law and it is not necessary for the QF to contractually commit itself to do so. If the QF's failure to comply with the requirements in 6.2.1 make it so the QF cannot perform its obligations under the PPA (generate and deliver power), the utility has the opportunity to find the QF in default at that point.

~~6.2.2 Qualified Operator.~~

~~—Seller or an Affiliate of Seller must operate and maintain the Facility or cause the Facility to be operated and maintained by an entity (i) that has at least two (2) years of experience in the operation and maintenance of similar facilities of comparable size to the Facility; or (ii) that Seller demonstrates is otherwise qualified to operate the Facility in a manner consistent with Prudent Electrical Practices and has the financial resources and qualified personnel necessary to fulfill obligations under this Agreement. Seller must provide Utility thirty (30) days prior written notice of any change in operator of the Facility.~~

Commented [A69]: 6.2 Qualified Operator B0 QFTG/ JU Agreement

Have agreed to deletion of this provision.

6.2.3 Fines and Penalties.

- (a) Without limiting a Party's rights under Section 6.2.3(b), each Party must pay all fines and penalties incurred by such Party on account of noncompliance by such Party with Requirements of Law as such fines and penalties relate to the subject matter of this Agreement, except where such fines and penalties are being contested in good faith through appropriate proceedings.
- (b) If fines, penalties, or legal costs are assessed against or incurred by either Party (the "Indemnified Party") on account of any action by any Governmental Authority due to noncompliance by the other Party (the "Indemnifying Party") with any Requirements of Law or the provisions of this Agreement, or if the performance of the Indemnifying Party is delayed or stopped by order of any Governmental Authority due to the Indemnifying Party's noncompliance with any Requirements of Law, the Indemnifying Party must indemnify and hold harmless the Indemnified Party against any and all Liabilities suffered or incurred by the Indemnified Party as a result thereof. Without limiting the generality of the foregoing, the Indemnifying Party must reimburse the Indemnified Party for all fees, damages, or penalties imposed on the Indemnified Party by any Governmental Authority, other person or to other utilities for violations to the extent caused by a default by the Indemnifying Party or a failure of performance by the Indemnifying Party under this Agreement.

Commented [A70]: 6.3 Interconnection B0 and B2(1).

QFTG, JU and Staff agree on the inclusion of the first sentence as modified.

The JU/QFTG agree to omit the second sentence, though the JUs agreement is contingent on the inclusion of Section 4.6 regarding the distinction between the Utility's Merchant and Transmission Functions.

Staff believes exclusion of distinction between Transmission and Merchant Functions is inappropriate and should be removed from contract. Accordingly, it should be omitted whether or not JUs agree to omit it.

6.3 Interconnection.

Except as otherwise provided in the Generation Interconnection Agreement and subject to applicable

(continued)

Commission rules and orders. Seller is responsible for the costs and expenses associated with obtaining from the Interconnection Provider network resource interconnection service for the Facility at its Nameplate Capacity Rating. ~~Seller has no claims under this Agreement against Utility, acting in its merchant function capacity or otherwise as purchaser, with respect to any requirements imposed by or damages caused by (or allegedly caused by) acts or omissions of the Transmission Provider or Interconnection Provider, acting in such capacities, in connection with the Generation Interconnection Agreement or otherwise.~~

6.4 Coordination with System.²⁰ Seller's delivery of electricity to Utility under this Agreement must be at a voltage, phase, power factor, and frequency as reasonably specified by Utility. Seller will furnish, install, operate, and maintain in good order and repair, and without cost to Utility, such switching equipment, relays, locks and seals, breakers, automatic synchronizers, and other control and protective apparatus determined by Utility to be reasonably necessary for the safe and reliable operation of the Facility in parallel with the System, or Seller may contract with Utility to do so at the Seller's expense. Utility must at all times have access to all switching equipment capable of isolating the Facility from the System.

6.5 Outages.

6.5.1 Planned Outages.

Seller must provide Utility with an annual forecast of Planned Outages for each Contract Year at least one (1) month, but no more than three (3) months, before the first (1st) day of that Contract Year, specifying the applicable number of Off-Peak Hours and On-Peak Hours. Seller may update such Planned Outage schedule as necessary to comply with Prudent Electrical Practices. Although the Planned Outage schedule should include predetermined outage duration, the outage may be extended when the original scope of work requires more time than originally scheduled, subject to notice of at least five (5) days to Utility when feasible. Except as may be required in the Generation Interconnection Agreement, Seller may not schedule a Planned Outage during any portion of the months of [December and July²¹] (the "High Demand Months"), except to the extent reasonably required to enable a vendor to satisfy a guarantee requirement. With twelve (12) months prior notice before the start of any Contract Year, Utility may change these ~~months~~High Demand Months, provided that there may only be two High Demand Months. Nothing in this Section 6.5.1 will preclude Seller from scheduling Planned Outages during times in a High Demand Month when motive force is unavailable to generate and deliver Output, such as nighttime in the case of a solar facility.

Commented [A71]: 6.5.1 Planned Outages B0 - JU/QFTG Agreement
The JU and QFs agree to the language as modified.

6.5.2 Maintenance Outages.

If Seller reasonably determines that it is necessary to schedule a Maintenance Outage, Seller must notify Utility of the proposed Maintenance Outage as soon as practicable but in any event at least five (5) days before the outage begins. Although the notice of a Maintenance Outage must include an expected completion date and time of the outage, the outage may be extended when the original scope of work requires more time than originally scheduled, subject to notice of at least five (5) days to Utility when feasible. Seller must take all reasonable measures consistent with Prudent Electrical Practices to not

Commented [A72]: 6.5.1 Maintenance Outages B0 JU/QFTG Agreement
JUs and QFTG agree to modified language.

²⁰ Note to Form – This provision to be deleted in case of PPA with Off-System QF.

²¹ **Note to Form** – Each utility will identify the two applicable months.

(continued)

schedule any Maintenance Outage during the ~~months of [December and July²²]; provided that with twelve (12) months prior notice before the start of any Contract Year, Utility may change these months~~ High Demand Months identified in Section 6.5.1, as may be updated in accordance with Section 6.5.1. Notice of a proposed Maintenance Outage by Seller must include the expected start date and time of the outage, the amount of generation capacity of the Facility that will not be available, and the expected completion date and time of the outage. Utility will promptly respond to such notice and may request reasonable modifications in the schedule for the outage. Seller must use all reasonable efforts to comply with any request to modify the schedule for a Maintenance Outage provided that such change has no substantial impact on Seller. Once the Maintenance Outage has commenced, Seller must keep Utility apprised of any changes in the generation capacity available from the Facility during the Maintenance Outage and any changes in the expected Maintenance Outage completion date and time. As soon as practicable, any notifications given orally or by email must be confirmed in writing. Seller must take all reasonable measures consistent with Prudent Electrical Practices to minimize the frequency and duration of Maintenance Outages.

6.5.3 Forced Outages. Seller must promptly provide to Utility an oral report, via telephone to a number specified by Utility (or other method approved by Utility), of any Forced Outage resulting in more than ten percent (10%) of the Nameplate Capacity Rating of the Facility being unavailable. This report from Seller must include the amount of the generation capacity of the Facility that will not be available because of the Forced Outage and the expected return date of such generation capacity. Seller must promptly update the report as necessary to advise Utility of changed circumstances. As soon as practicable, the oral report must be confirmed in writing to Utility. Seller must take all reasonable measures consistent with Prudent Electrical Practices to avoid Forced Outages and to minimize their duration.

6.5.4 Notice of Deratings and Outages. Without limiting the foregoing, Seller will inform Utility, via telephone to a number specified by Utility (or other method approved by Utility), of any limitations, restrictions, deratings, or outages reasonably predicted by Seller to affect more than five percent (5%) of the Nameplate Capacity Rating of the Facility for the following day and will promptly update such notice to the extent of any material changes in this information.

6.5.5 Effect of Outages on Estimated Output. Seller represents and warrants that the Expected Monthly Net Output provided in Exhibit A takes into account the Planned Outages, Maintenance Outages, and Forced Outages that Seller reasonably expects to encounter in the ordinary course of operating the Facility.

6.6 Scheduling.

6.6.1 Cooperation and Standards. With respect to any and all scheduling requirements, (a) Seller must cooperate with Utility with respect to scheduling Net Output, and (b) each Party will designate authorized representatives to communicate regarding scheduling and related matters arising under this Agreement. Each Party must comply with the applicable variable resource standards and criteria of any applicable Electric System Authority, as applicable.

6.6.2 Schedule Coordination.

~~If, as a result of this Agreement, in the event~~ Utility is deemed by an RTO to be ~~financially responsible~~

²² **Note to Form** – Each utility will identify the two applicable months.

(continued)

Commented [A73]: 6.6.2 Schedule Coordination B2(2) Not contemplated by rules.

The QFTG oppose this provision as originally because JUs have not demonstrated the appropriateness of this provision. JU changed original proposal to create a contract re-opener in the event Utility joins RTO and is deemed financially responsible for QF.

Staff agrees with QFTG that there is no factual support for this provision and does not support including this provision without further investigation, either as originally written or as contract re-opener.

Staff recommends removing this provision. Staff notes this provision could be moved to Appendix for future review.

~~for Seller's performance under the Generation Interconnection Agreement due to Seller's lack of standing as a "scheduling coordinator" on behalf of Seller or other RTO-recognized designation, Utility and Seller will endeavor to reach a mutual agreement regarding an amendment to this Agreement, or where such an agreement cannot be reached, will present such matter to the Commission qualification or otherwise, then Seller must promptly take all actions necessary to acquire such RTO-recognized standing (or must contract with a third party who has such RTO-recognized standing) so that Utility is no longer responsible for Seller's performance under the Generation Interconnection Agreement or RTO requirement.~~

6.7 Forecasting

~~6.7.1 Long Range Forecasts – Seller must, by [December 1st23] of each year during the Term (except for the last year of the Term), provide an annual update to the expected long-term monthly/diurnal mean net energy and net capacity factor estimates (12 X 24 profile). Seller must prepare such forecasts utilizing a renewable energy resource prediction model or service that is satisfactory to Utility in the exercise of its reasonable discretion and comparable in accuracy to models or services commonly used in the industry that reflects updated assumptions relative to the applicable forecast period. The forecasts provided by Seller must comply with all applicable Electric System Authority tariff procedures, protocols, rules, and testing as necessary and as may be modified from time to time.~~

6.7.2 Day-Ahead Forecasts, Real-Time Forecasting and Updates

At Seller's expense, Utility will either directly provide or solicit and obtain from a qualified renewable energy production forecasting vendor forecast data and information with respect to the Facility, including day-ahead and real-time forecasting services and provision of real-time meteorological data necessary for compliance with applicable Electric System Authority procedures, protocols, rules, and testing. Upon request by Utility, Seller must provide a 24-hour telephone number that Utility may contact to determine the then-current status of the Facility. Utility will present Seller with an invoice for the costs of providing or obtaining, as applicable, such forecasting data. Seller must pay the amount stated on the invoice within fifteen (15) days of receipt. Utility reserves the right to change its pricing, if providing the services directly, or the forecasting vendor, as applicable, in its sole discretion during the Term.²⁴

6.8 Increase in Nameplate Capacity Rating; Expansion or New Project; Allowable Facility Upgrades

6.8.1 No Increase to Nameplate Capacity Rating

During the term of this Agreement, Seller may not (i) increase the Nameplate Capacity Rating of the Facility ~~or cause the Facility to deliver Net Output in quantities in excess of the Maximum Delivery Rate~~; or (ii) except to the extent Seller complies with the requirements of Section 6.8.3, increase the Expected Net Output of the Facility, as ~~calculated in Exhibit A, that term is defined as of the Effective Date~~, by more than ten percent (10%); in either case, through any means, including replacement or

²³ **Note to Form** – Each utility will identify the applicable date.

²⁴ **Note to Form** – The language in the above Section 6.7.2 applies only to wind, solar (including solar plus battery storage) and hydro QFs. For any other QF, this provision will be replaced with a provision requiring Seller to provide a monthly delivery schedule that sets forth the expected hourly delivery rate for each day of such month.

(continued)

Commented [A74]: 6.7.1 Long Range Forecasts B0 - QFTG/JU Agreement

QFTG and JU agree to omit this provision. It may be that JU agreement to omit 6.7.1. is contingent on keeping 6.7.2 in PPA. If this is the case, Staff notes this provision is not factually supported and should not be included in PPA without further investigation.

Staff recommends the Commission either omit the provision or move to Appendix for further investigation.

Commented [A75]: 6.7.2 Day-Ahead Forecasts, Real-Time Forecasting and Updates B2(2)

QFTG oppose this provision, arguing there is insufficient support for this provision.

Staff believes this provision is not factually supported. Staff recommends deleting.

Staff notes this provision could be moved to Appendix for future review.

Commented [A76]: 6.8.1 No Increase to Nameplate Capacity Rating B0 JU/QFTG Agreement

JUs and QFTG agree to language modifications.

modification of Facility equipment or related infrastructure.

6.8.2 Expansion or New Project. If Seller elects to build an expansion or additional project such that the Facility and the expansion or additional project would be deemed a single QF or the same site under Commission or FERC regulations, Seller may not require Utility to purchase (and Utility will have no obligation to purchase pursuant to this Agreement) the output of any such expansion or additional facility under the terms, conditions, and prices in this Agreement, but Seller may exercise any rights to enter into a new agreement for the sale of such incremental energy from such expansion or additional facility that is a QF under then-applicable laws and regulations. Seller agrees that it will not seek to avoid the obligations in this Section 6.8 through use or establishment of a special purpose entity or other Affiliate. Any such expansion or additional facility may not materially and adversely impact the ability of either Party to fulfill its obligations under this Agreement.

6.8.3 Allowable Upgrades.

In the event that Seller seeks to upgrade the Facility in a manner that does not increase the Nameplate Capacity Rating of the Facility, but which is reasonably likely to cause an increase in the Expected Net Output (as such term is defined to exceed that listed in Exhibit A as of the Effective Date) by more than ten percent (10%), such upgrades may only be made subject to the following requirements:

- (a) The proposed upgrades must not cause Seller to fail to meet the current eligibility requirements for either the standard power purchase agreement or standard prices, to breach its Generation Interconnection Agreement, or necessitate Network Upgrades in order to maintain designated network status.
- (b) At least six (6) months in advance of the scheduled installation date for the proposed upgrades, Seller must send written notice to Utility containing a detailed description of the proposed upgrades and their impact on Expected Net Output and a revised 12 x 24 delivery schedule and requesting indicative pricing for the incremental additional Net Output expected to be generated as a result of the upgrades.
- (c) Within thirty (30) days after receiving such a request, Utility must respond with indicative pricing for the expected incremental additional Net Output to be generated as a result of the upgrades in excess of ten percent (10%) of the Expected Net Output specified in Exhibit A (as such term is defined as of the Effective Date).
- (d) Within thirty (30) days after receiving indicative pricing, Seller may request a draft amendment to this Agreement to reflect revised pricing for the remainder of the term, effective upon completion of the upgrades. If it is not reasonably feasible to separately meter the incremental additional Net Output resulting from the proposed upgrades, Utility may create a blended rate based on the proportion the expected incremental additional Net Output bears to the expected total Net Output following the installation of the upgrades.

Within ninety (90) days after the date on which upgrades are installed under subsections (a), (b), or (c) of this Section 6.8.3, Seller is obligated to provide Utility with an As-Built Supplement describing in detail Facility, as modified by the allowable upgrades, which As-Built Supplement will be incorporated into Exhibits B and C of this Agreement and to submit an updated estimate of net output to be incorporated into Exhibit A of this Agreement.

(continued)

Commented [A77]: 6.8.3(A)-(D) Allowable Upgrades B0 and B3

B0 QFTG/JU Agreement

JU/QFs agree to edits in first sentence of provision and subsection (C) clarifying that any increase in Net Output throughout the term of the contract is measured against the ENO in the contract.

B1 - QF proposed edit inconsistent with Commission rules.

JU/QFTG do not agree on whether the qualifier "only" should be included in last line of first sentence of provision. Including "only" would clarify that the only way a QF can increase the ENO of a facility is to follow the process in the rule. JUs are concerned that omitting only would create ambiguity as to whether QF could increase net capacity another way.

Staff agrees with JUs that omitting qualifier "only" could create ambiguity and recommends the word "only" be included.

Commented [A78]: Staff February 7 Addition: Staff adding a requirement to file an updated ENO within 90 after upgrades are installed to update Exhibit A.

If Seller wishes to install upgrades that would cause the Facility to increase its Nameplate Capacity Rating, Seller may elect to terminate the Agreement and may choose to enter a new standard or new non-standard power purchase agreement, based on applicable eligibility requirements, at the then-current avoided cost pricing; provided that such termination of this Agreement will be treated as a termination for a Seller Event of Default for which Seller will owe Utility termination damages. In such case, notwithstanding any other provision in this Agreement to the contrary, with respect to any portion of the period in which Seller owes Utility termination damages in which Seller is contractually obligated to deliver output under the new agreement, the Cost to Cover will be calculated based on the pricing set forth in the new agreement. ~~If Seller elects under this Section to terminate the Agreement and enter chooses to negotiate a new non-standard power purchase agreement pursuant to this Section 6.8.3, such election will not constitute a default for failure to maintain eligibility under this Agreement or be a cause for damages owed to Utility for such failure. Seller will not be liable for damages for any default caused by Seller's failure to maintain eligibility for a standard power purchase agreement, as provided in Section 7.2.~~

6.9 Telemetering.

~~Seller must provide telemetering equipment and facilities capable of transmitting the following information concerning the Facility pursuant to the Generation Interconnection Agreement and to Utility on a real-time basis, and will operate such equipment when requested by Utility to indicate:~~

- ~~(a) instantaneous MW output at the Point of Delivery;~~
- ~~(b) Net Output; and~~
- ~~(c) the Facility's total instantaneous generation capacity.~~

~~To the extent Seller is required to install telemetering equipment under its Generation Interconnection Agreement, Commencing commencing on the date of initial deliveries under this Agreement, Seller must also transmit or otherwise make accessible to Utility any other data from the Facility that Seller receives on a real time basis, including regarding Net Output data. Such real time data must be made available to Utility on the same basis as Seller receives the data (e.g., if Seller receives the data in four second intervals, Utility must also receive the data in four second intervals). If Seller uses a web-based performance monitoring system for the Facility, Seller must provide Utility access to Seller's web-based performance monitoring system.~~

6.10 Transmission Provider Consent. Within ten (10) days of the Effective Date, Seller must execute and submit to Utility, a consent in the form provided in **Exhibit G** or as otherwise required by Transmission Provider, that allows Utility to read the meter and receive any and all data from the Transmission Provider relating to transmission of Output or other matters relating to the Facility without the need for further consent from Seller.

6.11 Dedicated Communication Circuit.

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

6.12 Reports and Records.

(continued)

Commented [A79]: 6.8.3. Upgrades to Nameplate Capacity B3 - Interpretation of Contract

QFTG/JU disagree on meaning of OAR 860-029-0120(14)(d). Question is whether a QF that terminates a contract early because the QF increased Nameplate Capacity is in "default" for early termination.

Staff believes there is some ambiguity, because generally, there is no other provision that allows a QF to terminate a contract. Instead, the rules and contracts contemplate that if the QF stops performing its obligations under the PPA, the utility can issue a Notice of Default, and then, if default is not cured, the utility can issue a notice of termination.

Because the idea of a QF terminating a contract is unique, Staff believes it is correct to treat the QF ... [3]

Commented [A80]: QFTG Comment: Section 6.8.3 - Expansion or New Project - Our edit is consistent with the last sentence of OAR 860-029-0120(d) clarifying no breach of the eligibility cap occurs by requesting to upgrade the facility.

Commented [A81R80]: JU Comments: The JUs propose alternate language clarifying the circumstances where the damages provision in OAR 860 029-0120(14)(d) applies and cross-referencing the eligibility requirement in the PPA.

Commented [A82R80]: Staff Comment : See above for resolution of this dispute. Staff does not think Commission said there is no default.

Commented [A83]: 6.9 Telemetering B2(2)

The QFTG recommend deleting this provision in its entirety on because it is not supported and its cost impact is unknown. The JUs have proposed modifications to limit impact and tie telemetering requirements in PPA to those already in GIA. ... [4]

Commented [A84]: 6.11 Dedicated Communication Circuit B2(2)

The QFTG object to this provision as unsupported and posing cost risk to QFs. Staff agrees with QFTG. ... [5]

6.12.1 Electronic Fault Log.

~~25 Seller must maintain an electronic fault log of operations of the Facility during each hour of each month of the Term commencing on the Effective Date. Seller must provide Utility with a copy of the any monthly fault log promptly upon Utility's request and shall provide Utility with all twelve (12) monthly electronic fault logs for each Contract Year within thirty (30) days after the end of the applicable Contract Year to which the fault log applies. The fault log must be sufficiently detailed to enable Utility to calculate the Performance Guarantee and in such electronic form as is acceptable to Utility.~~

Commented [A85]: 6.12.1 Electronic Fault Log B2(2)

QFTG oppose this provision, arguing there is inadequate support for it and that it poses unknown price risk to QFs. Staff agrees with QFs. This provision should be removed. Staff notes this provision could be moved to Appendix for future review.

~~6.12.2 Other Information to be Provided to Utility. Following the Effective Date until the Commercial Operation Date, Seller must provide to Utility a quarterly progress report stating the percentage completion of the Facility and a brief summary of construction activity during the prior quarter and contemplated for the next calendar quarter.~~

Commented [A86]: 6.12.2 Other Information to be Provided to Utility B2(1) Not contemplated by rules and burdensome.

As discussed above, Staff recommends a twice annual reporting requirement, on request by utility, rather than automatic quarterly reporting requirement.

6.12.32 Information to Governmental Authorities; Data Requests.

Seller must, promptly upon written request from Utility, provide Utility with data collected by Seller related to the construction, operation or maintenance of the Facility reasonably required for reports to any Governmental Authority or Electric System Authority or information requests from any Governmental Authority, state or federal agency intervenor or any other party achieving intervenor status in any Utility rate proceeding or other proceeding before any Governmental Authority, along with a statement from an officer of Seller certifying that the contents of the submittals are true and accurate to the best of Seller's knowledge. Seller must use best efforts to provide this information to Utility sufficiently in advance to enable Utility to review such information and meet any submission deadlines. Utility will reimburse Seller for all of Seller's reasonable actual costs and expenses in excess of \$5,000 per year, if any, incurred in connection with Utility's requests for information under this Section 6.12.3.

Commented [A87]: 6.12.3 Information to Governmental Authorities; Data Request. B2(3)

The QFTG oppose this provision. The JUs argue it is necessary because they have reporting and other obligations to governmental entities. Staff supports inclusion of provision because it is beneficial to ensure some utility access to QF information for purposes of compliance with government requests and regulations. The provision is narrowly tailored and will compensate the QF for costs to provide information.

6.12.4 Data Request.

~~—Seller must, promptly upon written request from Utility, provide Utility with data collected by Seller related to the construction, operation or maintenance of the Facility reasonably required for information requests from any Governmental Authorities, state or federal agency intervenor or any other party achieving intervenor status in any Utility rate proceeding or other proceeding before any Governmental Authority. Seller must use best efforts to provide this information to Utility sufficiently in advance to enable Utility to review such data and meet any submission deadlines. Utility will reimburse Seller for all of Seller's reasonable actual costs and expenses in excess of \$5,000 per year, if any, incurred in connection with Utility's requests for information under this Section 6.12.4.~~

Commented [A88]: 6.12.4 Data Request B0

The JUs and QFTG agree to delete this provision. The JUs agreement to delete this provision is contingent on inclusion of 6.12.3. Staff supports including 6.12.3.

6.12.5 Documents to Governmental Authorities.

~~—After sending or filing any statement, application, and report or any document with any Governmental Authority or Electric System Authority relating to operation and maintenance of the Facility, Seller must promptly provide to Utility a copy of the same.~~

Commented [A89]: 6.12.5 Documents to Governmental Authorities B0 Compromise between JU and QFTG

The JUs do not object to deleting this provision.

²⁵ Note to Form – Section 6.12.1 will be removed in contracts with hydro QFs less than 3 MW that were initially placed in service prior to 1980.

(continued)

~~6.12.63 Notice of Material Adverse Events.~~

~~—Seller must promptly notify Utility of receipt of written notice or actual knowledge by Seller or its Affiliates of the occurrence of any event of default under any material agreement to which Seller is a party and of any other development, financial, legal (i.e., litigation or threat of litigation) or otherwise, which would have a material adverse effect on Seller, the Facility, or Seller's ability to develop, construct, operate, maintain or own the Facility, including any material violation of any environmental laws or regulations arising out of the construction or operation of the Facility, or the presence of Environmental Contamination at the Facility or on the Premises.~~

~~6.12.7 Notice of Litigation.~~

~~—Following its receipt of written notice or knowledge of the commencement of any action, suit, or proceeding before any court or Governmental Authority against Seller, its members, or any Affiliate relating to the Facility or this Agreement, or that could materially and adversely affect Seller's performance of its obligations in this Agreement, Seller must promptly notify Utility.~~

~~6.12.84 Additional Information.~~

~~—Seller must provide to Utility such other information as relevant to Seller's performance of its obligations under this Agreement or the Facility as Utility may, from time to time, reasonably request.~~

6.12.95 Confidential Treatment. The reports and other information provided to Utility under this Section 6.12 will be treated as confidential for a period of two (2) years if such treatment is requested in writing by Seller at the time the information is provided to Utility, subject to Utility's rights to disclose such information pursuant to Sections 6.12.32 and 6.12.4, and pursuant to any applicable Requirements of Law. Seller will have the right to seek confidential treatment of any such information from any Governmental Authority entitled to receive such information.

6.13 Financial and Accounting Information. If Utility or one of its Affiliates determines that, under (a) the Accounting Standards Codification ("ASC") 810, Consolidation of Variable Interest Entities, and (b) Requirements of Law that it may hold a variable interest in Seller, but it lacks the information necessary to make a definitive conclusion, Seller agrees to provide, upon Utility's written request, sufficient financial and ownership information so that Utility or its Affiliate may confirm whether a variable interest does exist under ASC 810 and Requirements of Law. If Utility or its Affiliate determines that, under ASC 810, it holds a variable interest in Seller, Seller agrees to provide, upon Utility's written request, sufficient financial and other information to Utility or its Affiliate so that Utility may properly consolidate the entity in which it holds the variable interest or present the disclosures required by ASC 810 and Requirements of Law. Utility will reimburse Seller for Seller's reasonable costs and expenses, if any, incurred in connection with Utility's requests for information under this Section 6.13. Seller will have the right to seek confidential treatment of any such information from any Governmental Authority entitled to receive such information.

6.14 Access Rights. Upon reasonable prior notice and subject to compliance with all written health, safety and security requirements of Seller provided to Utility, and Requirements of Law relating to workplace health and safety, and not interfering with Seller's maintenance or operation of the Facility, Seller must provide Utility and its employees, agents, inspectors and representatives ("Utility Representatives") with reasonable access to the Facility: (a) for the purpose of witnessing the inspection and testing of metering equipment and remote sensing devices; (b) as necessary to witness any

(continued)

Commented [A90]: 6.12.3 Notice of Material Adverse Event

B2(1) - Not contemplated by Rules

The JUs Propose this provision requiring QF to notify utility of events that have material adverse effect on QF. This type of reporting provision is not contemplated by rules. Staff agrees with QFs that this provision creates risk of cross-default that is burdensome and that this provision should be omitted.

Commented [A91]: Notice of Litigation B0 - Compromise

B2(1)

JUs have combined this provision with 6.12.3 Notice of Material Adverse Events. No dispute about deleting the separate Notice of Litigation provision, but dispute about whether Notice of Material Adverse Events should remain.

Staff believes Notice of Litigation should be removed no matter the resolution of Notice of Material Adverse Event because including creates a burdensome risk of default.

Commented [A92]: 6.12.8 Additional Information B2(1) - Not contemplated by rules and not reasonable

The QFTG oppose this more general information request provision.

Staff agrees the provision appears to provide more burden to QFs than benefit. If information is required for compliance with governmental agency, QF must provide it under 6.12.2. Information for Governmental Authorities. If providing information is a necessary part of QF performing obligations under the PPA, the QF would have to provide information or be in default. Requiring QF to provide other information to utility simply because utility wants it does not seem warranted. Staff recognizes the provision is limited to "reasonable requests," but believes this limitation does little more than invite litigation over what is reasonable.

acceptance tests; (c) as necessary to witness any testing associated with the Facility, including testing with respect to the Performance Guarantee; and (d) for other reasonable purposes at the reasonable request of Utility. Utility will release Seller and its employees, agents and representatives from and indemnify Seller and its employees, agents and representatives against any and all Liabilities resulting from actions or omissions by any of the Utility Representatives in connection with their access to the Facility (whether pursuant to this Section 6.14 or otherwise), except to the extent such Liabilities are caused by the intentional or negligent act or omission of Seller or its Affiliates or their respective employees, agents and representatives.

6.15 Performance Guarantee. Seller is subject to the terms and conditions set forth in the Performance Guarantee attached as Exhibit F (“Performance Guarantee”).²⁶

SECTION 7
QUALIFYING FACILITY STATUS; ELIGIBILITY FOR STANDARD PRICING

7.1 Seller’s QF Status. Seller must maintain throughout the Term the Facility’s status as a QF. Seller must provide Utility with copies of any QF certification or recertification documentation within ten (10) days of its filing with any Governmental Authority. At any time during the Term, Utility may require Seller to provide Utility with evidence satisfactory to Utility in its reasonable discretion that the Facility continues to qualify as a QF under all applicable requirements.

7.2 Seller’s Eligibility for a Standard Power Purchase Agreement and Standard Pricing. Seller will not make any changes in its ownership, control or management that would cause the Facility to fail to satisfy the eligibility requirements for entering into the standard power purchase agreement or receipt of standard pricing under Utility’s Schedule XX. At Utility’s request, but no more than once every twenty-four (24) months, Seller will provide documentation and information reasonably requested by Utility to establish Seller’s continued compliance with eligibility requirements for the standard power purchase agreement and standard pricing, as applicable, under Utility’s Schedule XX. Utility will take reasonable steps to maintain the confidentiality of any such documentation and information Seller identifies as confidential, provided that Utility may provide all such information to the Commission in a proceeding before the Commission.

SECTION 8
SECURITY AND CREDIT SUPPORT

8.1 Provision of Security

Seller must provide security as provided below if it does not meet the Credit Requirements at any time during the Term of this Agreement. ~~Unless Seller has posted the security provided for below~~if Seller has established it satisfies the Creditworthiness Requirements, Seller must ~~thereafter~~ provide Utility ~~on a quarterly basis all~~ financial information reasonably requested by Utility, ~~that is reasonably necessary for Utility to verify the Seller continues to satisfy the Credit Requirements.~~ The Utility shall make such request for financial information by writing and may make such requests no more frequently than once per Contract Year or upon occurrence of circumstances that provide the Utility with good cause to believe that Seller no longer meets the Creditworthiness Requirements. ~~Seller shall have thirty (30) days after~~

Commented [A93]: 8.1 Provision of Security B0 JU/QFTG compromise

It is Staff’s understanding the QFTG and JUs have agreed to this provision as revised. Even if there is not agreement as to whether this provision, as revised, should be included, Staff supports its inclusion. As revised, it is a reasonable compromise between the utility’s interest in determining whether default security is needed and imposing a burden on QFs to provide information.

²⁶ **Note to Form** – Wind, solar, battery storage, solar + storage, and hydroelectric QFs are subject to a Mechanical Availability Guarantee. Geothermal and biomass QFs are subject to a Minimum Delivery Guarantee.

(continued)

[the Utility's written request to provide the financial information.](#)

8.2 Project Development Security.²⁷

If Seller does not meet the Credit Requirements as of the Effective Date, Seller must post and maintain Project Development Security in favor of Utility within one hundred and twenty (120) days from the Effective Date. If ~~Utility determines~~ at any time after the Effective Date but before the Facility achieves Commercial Operation ~~that Seller (or its guarantor, if applicable) no longer meets the Credit Requirements~~, Seller must post and maintain Project Development Security in favor of Utility within ~~the latter of thirty (30) days or one hundred and twenty (120) days from the Effective Date~~. In either case, the Project Development Security must be in the form of either (a) a guaranty from a party that satisfies the Credit Requirements, in a form acceptable to Utility in its reasonable discretion, (b) a Letter of Credit in favor of Utility, in a form acceptable to Utility in its reasonable discretion, or (c) cash escrow with a Qualified Institution. In the event the Project Development Security is provided by a guarantor, Seller or the entity providing the guaranty must provide within ~~five-fifteen (15) Business Days~~ from receipt of a written request from Utility all reasonable financial records necessary for Utility to confirm the guarantor satisfies the Credit Requirements. If the Commercial Operation Date occurs after the Scheduled Commercial Operation Date, and Seller has failed to pay any Delay Damages when due under this Agreement ~~and Seller has elected cash escrow or Letter of Credit as the form of Project Development Security~~, Utility is entitled to draw upon ~~or otherwise exercise rights under~~ the Project Development Security ~~to recover~~ an amount equal to the Delay Damages until the Project Development Security is exhausted~~—, and Utility is also entitled to draw upon or otherwise exercise rights under~~ the Project Development Security ~~for to recover~~ any other damages it is entitled to under this Agreement. Seller is no longer required to maintain the Project Development Security after the Commercial Operation Date, if no damages are owed to Utility under this Agreement and, if applicable, Default Security has been provided as required under this Agreement. Seller may elect to apply the Project Development Security toward the Default Security required by Section 8.3. ~~If Seller has elected cash escrow or Letter of Credit as the form of Project Development Security, Utility shall return to Seller the Project Development Security or that portion Project Development Security that Seller elects not to apply toward Default Security within fivethirty twenty(5320) Business Days of a receipt of a written request by Seller made on or after the Commercial Operation Date.~~

8.3 Default Security.

If Seller does not meet the Credit Requirements as of the Commercial Operation Date, on the date specified in Section 2.2, or it is determined at any time after the Facility achieves Commercial Operation that Seller (or its guarantor, if applicable) no longer meets the Credit Requirements, within ten (10) days of notification from Utility, Seller must post and maintain Default Security in favor of Utility in the form of either (a) a guaranty from an entity that satisfies the Credit Requirements, in a form acceptable to Utility in its reasonable discretion, (b) a Letter of Credit in favor of Utility, in a form acceptable to Utility in its reasonable discretion, (c) cash escrow with a Qualified Institution, or (d) ~~a grant of -(i) step-in rights in accordance with Section 8.3.1, or (ii) a senior lien security interest under a security agreement~~ in a form acceptable to Utility in its reasonable ~~exercised~~ discretion, ~~subject to the terms of this Section 8.3 and in accordance with Section 8.3.2. If Seller elects a guaranty, cash escrow, or Letter of Credit as the form of Default Security, in the event the Default Security is provided in the form of a guaranty, Seller and any entity providing a guaranty, if applicable, must provide within fifteenve (15) Business Days from receipt of a written request from Utility all reasonable financial records necessary for Utility to confirm the guarantor~~

²⁷ **Note to Form** – This provision to be deleted in PPA with operational QF.

(continued)

Commented [A94]: 8.2 Project Development Security

B0- Compromise and B3 Interpretation

JUs and QFTG have agreed on all modifications to provision except provisions regarding time JU has to return Project Development Security. JUs originally proposed 30 Business Days and QFTG propose 5 Business days.

JUs now propose 20 days as concession. Staff believes 20 Business Days is a reasonable period.

~~satisfies the Credit Requirements. If Seller elects cash escrow or Letter of Credit as the form of Default Security, Utility is entitled to draw upon the Default Security for any damages to which it is entitled under this Agreement. If no damages or obligations remain due by Seller to Utility upon termination of the Agreement, Utility must return any remaining Default Security to Seller within ~~sixty five~~ twentythree (532060) Business Days following the termination of the Agreement, ~~then Utility must return any remaining Default Security to Seller within sixty (60) days following the termination of this Agreement.~~~~

~~8.3.1 Guaranty. In the event the Default Security is provided in the form of a guaranty, Seller and any entity providing a guaranty, if applicable, must provide within fifteen (15) Business Days from receipt of a written request from Utility all reasonable financial records necessary for Utility to confirm the guarantor satisfies the Credit Requirements.~~

~~8.3.42 Step-In Rights. In the event Seller grants Utility step-in rights, on, under and subject to the terms and conditions of the applicable form of agreement between Seller and Utility. If the Seller elects to grant the Utility step-in rights, the provisions of Section 8.3.4 will govern such step-in rights, described in Section 8.3(d) ("Step-In Rights Agreement").~~

~~8.3.1.1 Prior to any termination of this Agreement due to an Event of Default of Seller, as identified in Section 11, Utility shall have the right, but not the obligation, to possess, assume control of, and operate the Facility as agent for Seller (in accordance with Seller's rights, obligations, and interest under this Agreement), as provided in this Section 8.3.2 during the period provided for herein. Seller shall not grant any other person, other than the lending institution providing financing to the Seller for construction of the Facility ("Facility Lender"), a right to possess, assume control of, and operate the Facility that is equal to or superior to Utility's right under this Section 8.3.42.~~

~~8.3.1.2 Utility shall give Seller ten (10) calendar days notice in advance of the contemplated exercise of Utility's rights under this Section 8.3.1. Upon such notice, Seller shall collect and have available at a convenient, central location at the Facility all documents, contracts, books, manuals, reports, and records required to construct, operate, and maintain the Facility in accordance with Prudent Electrical Practices. Upon such notice, Utility, its employees, contractors, or designated third parties shall have the unrestricted right to enter the Facility for the purpose of constructing and/or operating the Facility. Seller hereby irrevocably appoints Utility as Seller's attorney-in-fact for the exclusive purpose of executing such documents and taking such other actions as Utility may reasonably deem necessary or appropriate to exercise Utility's step-in rights under this Section 8.3.4 the Step-In Rights Agreement.~~

~~8.3.1.3 During any period that in which Utility is in possession and control of and constructing and/or operating the Facility, the financial benefit of any generation shall be for first the account of the Utility and no proceeds or other monies attributed to operation of the Facility shall be remitted to or otherwise provided to the account of Seller until all Events of Default of Seller have been cured and Utility has been reimbursed all of its costs related to exercising its step-in rights, including the costs of possessing, operating and maintaining the Facility. ;~~

~~8.3.1.4 During any period that Utility is in possession of and operating the Facility in which Utility exercises step-in rights, Seller shall retain legal title to and ownership of the Facility. and Utility shall have no liability to Seller related to the manner in which Utility operates and~~

(continued)

Commented [A95]: 8.3.2 Step-in Rights B3 - Interpretation of Commission Rules OAR 860-0120(16)(c) provides:

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

The JU assert the requirements for Step-in Rights are too complex and project dependent to put in the standard PPA and propose that the PPA specify that "Seller hereby irrevocably appoints Utility as Seller's attorney-in-fact for the exclusive purpose of executing such documents and taking other such actions as Utility may reasonably deem necessary to or appropriate to exercise Utility's step-in rights under Step-in Rights Agreement."

~~maintains the Facility while exercising its step-in rights except in the event of gross negligence or willful misconduct shall assume possession, operation, and control solely as agent for Seller.~~

~~(a) In the event Utility is in possession and control of the Facility for an interim period, Seller shall resume operation and Utility shall relinquish its right to possess, operate, and maintain the Facility when Seller demonstrates upon demonstration to Utility's reasonable satisfaction that Seller it will remove those grounds that originally gave rise to Utility's right to operate the Facility, as provided above, in that Seller (i) will resume operation of the Facility in accordance with the provisions of this Agreement, and (ii) has fully cured the conditions giving rise to any the Events of Default of Seller which allowed resulting in the exercise by Utility to exercise of its step-in rights under this Section 8.3.1.~~

~~(b) In the event that Utility is in possession and control of the Facility for an interim period, the Facility Lender, or any nominee or transferee thereof, may foreclose and take possession of and operate the Facility and Utility shall relinquish its right to operate when the Facility Lender or any nominee or transferee thereof, requests such relinquishment.~~

~~8.3.1.5 Utility's exercise of its rights hereunder to possess and operate the Facility shall not be deemed an assumption by Utility of any liability attributable to Seller. If at any time after exercising its rights to take possession of and operate the Facility Utility elects to return such possession and operation to Seller, Utility shall provide Seller with at least fifteen (15) calendar days advance notice of the date Utility intends to return such possession and operation, and upon receipt of such notice Seller shall take all measures necessary to resume possession and operation of the Facility on such date.~~

~~8.3.23 Senior Lien. In the event Seller grants Utility a senior lien, on, under and subject to the terms and conditions of the applicable form of agreement between Seller and Utility described in Section 8.3(d) ("Security Agreement"). If the Seller elects to grant the Utility a senior lien, the senior lien shall conform to the requirements of this Section 8.3.2. Seller shall grant Utility such lien shall be a senior, unsecured, recordable, lien on the Facility and its assets, as provided in this Section 8.3.3. as security for performance of this Agreement by executing, acknowledging and delivering a security agreement and a deed of trust or a mortgage, in a recordable form (each in a form satisfactory to Utility in the reasonable exercise of its discretion). Pending execution and delivery of the senior lien Security Agreement and related instruments, such as mortgage, deed of trust and financing statements, etc., to Utility, Seller shall not cause or permit the Facility or its assets to be burdened by liens or other encumbrances that would be superior to Utility's, other than workers', mechanics', suppliers' or similar liens, or tax liens, in each case arising in the ordinary course of business that are either not yet due and payable or that have been released by means of a performance bond posted within eight (8) calendar days of the commencement of any proceeding to foreclose the lien.~~

~~8.3.3 Additional Provisions for Cash Escrow and Letter of Credit Security.~~

~~8.4 No Interest on Security. Except for If Seller has elected cash escrow as the form of Project Development Security or Default Security, cash escrow, any interest accrued on the cash held in escrow~~

(continued)

Commented [A96]: The utilities' proposed Sections 8.4 and 8.5 - These two provisions are relevant only to cash escrow and letter of credit security, so we reformatted and edited to make that more clear.

Regarding proposed 8.4 (renumbered 8.3.3.1), Seller *would* be entitled to interest in a cash escrow scenario and therefore the title of this section should not be titled "No Interest on Security", and it should also expressly state Seller is entitled to interest on the cash escrow. That is all a PPA would normally state regarding interest on security since interest is only relevant to cash. In short, this provision should only apply to cash escrow and it should clearly state Seller *is* entitled to interest.

Regarding proposed Section 8.5 (renumbered 8.3.3.2) - We question the need for this extra provision, but do not necessarily object to it so long as it clearly states it only applies in the case of cash escrow or letter of credit security, which appears to be the utilities' intent as drafted. We propose a further clarification edit on that point.

Commented [A97R96]: The JUs restored the prior language explaining that only cash escrow security earns interest. The JUs do not object to the QFTGs' proposal to add the concept that interest does not become part of the security but paying interest monthly is an administrative burden. Therefore, the JUs propose that the default under the PPA be that interest is paid when the escrow is returned but the PPA also permits the parties to make other arrangements.

~~shall not become part of the Security and shall be paid to Seller each month. Seller shall not earn or be entitled to any interest on any Security provided pursuant to this Section 8. Except for cash escrow, Seller shall not earn or be entitled to any interest on any Security provided pursuant to this Section 8.~~
Cash escrow will earn interest at the rate the applicable Qualified Institution applies to equivalent money market deposits. ~~Any interest accrued on the cash held in escrow shall not become part of the Security and shall be paid to Seller cash escrow when the escrow is returned to Seller under this Agreement unless other arrangements are made by the parties.~~

8.5 Grant of Security Interest in Security.

If Seller has elected cash escrow or Letter of Credit as the form of Project Development Security or Default Security To secure its obligations under this Agreement, Seller hereby grants to Utility, as the secured party, a present and continuing security interest in, lien on (and right of setoff against), and assignment of, all Project Development Security or Default Security, as the case may be, posted with Utility in the form of cash collateral and cash equivalent collateral and any and all proceeds resulting therefrom or the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of, Utility. Seller agrees to take such action as Utility reasonably requires in order to perfect a first-priority security interest in, and lien on (and right of setoff against), such performance assurance and any and all proceeds resulting therefrom or from the liquidation thereof. Upon or any time after the occurrence or deemed occurrence and during the continuation of an Event of Default by Seller, Utility may do any one or more of the following: (a) exercise any of the rights and remedies of a secured party with respect to all the Security, including any such rights and remedies under Requirements of Law then in effect; (b) exercise its right of setoff against any and all property of Seller, as the Defaulting Party, in the possession of Utility or Utility's agent; (c) draw on any outstanding Letter of Credit issued for its benefit; and (d) liquidate all Security then held by or for the benefit of Utility free from any claim or right of any nature whatsoever by Seller, including any equity or right of purchase or redemption by Seller. Utility shall apply the proceeds of the collateral realized upon the exercise of any such rights or remedies to reduce Seller's obligations under this Agreement (Seller remaining liable for any amounts owing to Utility after such application), subject to Utility's obligation to return any surplus proceeds remaining after such obligations are satisfied in full.

Commented [A98]: 8.5 Grant of Security Interest in Security
B0 - JU and QFTG agree to modifications to language.

8.6 Security is Not a Limit on Seller's Liability. The security contemplated under this Section 8 constitutes security for, but is not a limitation of, Seller's obligations and liabilities under this Agreement and is not Utility's exclusive remedy for Seller's failure to perform in accordance with this Agreement. To the extent Utility draws on any Project Development Security or Default Security, Seller must, within fifteen (15) days following such draw, replenish or reinstate the Project Development Security or Default Security, as applicable, to the full amount then required under this Section 8. If any security provided by Seller pursuant to this Section 8 will terminate or expire by its terms within thirty (30) days, and Seller has not delivered to Utility replacement security in such amount and form as is required pursuant to this Section 8, then Utility shall be entitled to draw the full amount of the security and to hold such amount as security until such time as Seller delivers to Utility replacement security in such amount and form as is required pursuant to this Section 8.

**SECTION 9
METERING**

(continued)

9.1 Installation of Metering Equipment. At Seller's cost and expense, Seller shall design, furnish, install, own, inspect, test, maintain, and replace all metering equipment as required by the Generation Interconnection Agreement and this Section 9. Seller must use revenue grade metering equipment consistent with American National Standards Institute ("ANSI") standards. In the event Market Operator adopts new meter requirements that are applicable to the Facility, Seller will, at its cost and expense, reasonably cooperate to upgrade any applicable metering equipment. Seller shall reasonably cooperate with Utility in developing any metering protocols necessary for Utility to comply with the requirements of the Market Operator or Utility Transmission.

9.2 Metering. Metering must be performed at the locations specified in Exhibit C and at the locations and in the manner specified in the Generation Interconnection Agreement, and as otherwise may be necessary to perform Seller's obligations under this Agreement. Meters must be capable of recording quantities of Output and Net Output, as the case may be.

9.3 Inspection, Testing, Repair and Replacement of Meters.

Utility shall have the right to periodically inspect, test, repair and replace the metering equipment provided for in this Section 9, without Utility assuming any obligations of Seller under this Section 9. If any of the inspections or tests disclose an error exceeding one half of one percent (0.5%), either fast or slow, then the necessary corrections based upon the inaccuracy found, shall be made of previous readings for the actual period during which the metering equipment rendered inaccurate measurements if that period can be ascertained. If the actual period cannot be ascertained, then the proper correction shall be made to the measurements taken during the time the metering equipment was in service since last tested, but not exceeding three (3) months, in the amount the metering equipment shall have been shown to be in error by such test. Any correction in billings or payments resulting from a correction in the meter records shall be made in the next monthly billing or payment rendered. Such correction, when made, shall constitute full adjustment of any claim between Seller and Utility arising out of such inaccuracy of the metering equipment. Nothing in this Agreement shall give rise to Utility, acting in its merchant function capacity or otherwise as purchaser hereunder, having any obligations to Seller, or any other Person, pursuant to or under the Generation Interconnection Agreement.

9.4 Metering Costs. To the extent not otherwise provided in the Generation Interconnection Agreement, Seller shall be responsible for all costs and expenses relating to all metering equipment installed to accommodate Seller's Facility. The actual expense of any Utility-requested additional inspection or testing shall be borne by Utility, unless upon additional inspection or testing the metering equipment is found to register inaccurately by more than the allowable limits established in Section 9.3, in which event the expense of the requested additional inspection or testing shall be borne by Seller.

9.5 SQMD Plan. Prior to commencing Commercial Operation, Seller shall support and reasonably cooperate with Utility in Utility's development and submittal to the Market Operator of its Settlement Quality Meter Data ("SQMD") compliance plan for the Facility. The SQMD compliance plan will detail the metering equipment and any calculation or data validation performed as a part of the data submission process to the Market Operator, consistent with the Market Operator's requirements in the then-current version of the "Business Practice Manual for Metering."

9.6 WREGIS Metering. If Utility owns Environmental Attributes pursuant to Section 4.7, Seller must cause the Facility to implement all necessary generation information communications in WREGIS, and report generation information to WREGIS pursuant to a WREGIS-approved meter dedicated to the Facility and only the Facility.

(continued)

Commented [A99]: 9.3 Inspection, Testing, Repair and Replacement of Meters B0 and B2(1)

The JUs agreement to omit last line of 9.3 is contingent on keeping Section 4.6 re: separation of Merchant and TX Functions.

For reasons stated above, Staff believes distinction between Merchant and TX functions should be removed from PPA so last line of 9.3 should be removed whether JUs agree or not.

SECTION 10
BILLINGS, COMPUTATIONS AND PAYMENTS

10.1 Monthly Invoices. On or before the tenth (10th) day following the end of each calendar month, Seller must deliver to Utility an invoice showing Seller's computation of Net Output delivered to the Point of Delivery during such month. When calculating the invoice, Seller must provide computations showing the portion of Net Output that was delivered during On-Peak Hours and the portion of Net Output that was delivered during Off-Peak Hours. If such invoice is delivered by Seller to Utility, then Utility must send to Seller, on or before the later of the twentieth (20th) day following receipt of such invoice or the thirtieth (30th) day following the end of each month, payment for Seller's deliveries of Net Output to Utility.

10.2 Offsets. Either Party may offset any payment due under this Agreement against amounts owed by the other Party pursuant under this Agreement. Either Party's exercise of recoupment and set off rights will not limit the other remedies available to such Party under this Agreement.

10.3 Interest on Late Payments. Any amounts not paid when due under this Agreement will bear interest at the Contract Interest Rate from the date due until paid.

10.4 Disputed Amounts. If either Party, in good faith, disputes any amount due under an invoice provided under this Agreement, such Party must notify the other Party of the specific basis for the dispute and, if the invoice shows an amount due, must pay that portion of the invoice that is undisputed on or before the due date. Any such notice of dispute must be provided within two (2) years of the date of the invoice in which the error first occurred. If any amount disputed by such Party is determined to be due to the other Party, or if the Parties resolve the payment dispute, the amount due must be paid within five (5) Business Days after such determination or resolution, along with interest at the Contract Interest Rate from the date due until the date paid.

10.5 Audit Rights. Each Party, through its authorized representatives, has the right, at its expense upon reasonable notice and during normal business hours, to examine and copy the records of the other Party to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made under this Agreement or to verify the other Party's performance of its obligations under this Agreement. Upon request, each Party must provide to the other Party statements evidencing the quantities of Net Output delivered at the Point of Delivery. If any statement is found to be inaccurate, a corrected statement will be issued and, subject to Section 10.4, any amount due from one Party to the other Party as a result of the corrected statement will be promptly paid including the payment of interest at the Contract Interest Rate from the date of the overpayment or underpayment to the date of receipt of the reconciling payment.

SECTION 11
DEFAULTS AND REMEDIES

11.1 Defaults. An event of default ("Event of Default") shall occur with respect to a Party (the "Defaulting Party") upon the occurrence of each of the following events and the expiration of any applicable cure period provided for below:

11.1.1 Defaults by Either Party.

**Commented [A100]: 11.1.1(A) Defaults by Either Party
B0 - JUs and QFTG agree to modifications to language in subsection (A).**

(continued)

- (a) A Party fails to make a payment when due under this Agreement if the failure (i) is not subject to a good faith dispute of the amount due under Section 10.4, and (ii) is not cured within thirty (30) days after the non-defaulting Party gives the Defaulting Party a written notice of the default, provided, however, that the Defaulting Party shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and the Defaulting Party commences the cure within the initial thirty (30)-day period.
- (b) The Defaulting Party: (i) (a) makes a general assignment for the benefit of its creditors; (bii) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy or similar law for the protection of creditors, or has such a petition filed against it and such petition is not withdrawn or dismissed within thirty (30) days after such filing; (ciii) becomes insolvent; or (div) is unable to pay its debts when due; and (ii) the Defaulting Party fails to cure such breach within thirty (30) days of written notice from the non-defaulting Party, provided, however, that the Defaulting Party shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and the Defaulting Party commences the cure within the initial thirty (30)-day period.
- (c) The Defaulting Party breaches one of its representations or warranties or fails to perform any material obligation in this Agreement for which an exclusive remedy is not provided and which is not otherwise an Event of Default under this Agreement and such breach or failure is not cured within thirty (30) days after the non-defaulting Party gives the Defaulting Party written notice of such breach; provided, however, that the Defaulting Party shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and the Defaulting Party commences the cure within the initial thirty (30)-day period. if such breach is not reasonably capable of being cured within the thirty (30)-day cure period but is reasonably capable of being cured within ninety (90) days, then the Defaulting Party will have an additional reasonable period of time to cure the breach, not to exceed ninety (90) days following the date of such notice of breach, provided that the Defaulting Party provides to the other Party a remediation plan within fifteen (15) days following the date of such notice of breach and the Defaulting Party promptly commences and diligently pursues the remediation plan within thirty (30) days following the date of the notice of non-performance.

11.1.2 Defaults by Seller.

- (a) Seller fails to post, increase, or maintain the Project Development Security or Default Security as required under this Agreement and such failure is not cured within thirty (30) days after Seller's receipt of written notice from Utility, provided, however, that Seller shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and Seller commences the cure within the initial thirty (30)-day period.
- (b) Seller fails to cause the Facility to achieve Commercial Operation for Initial Delivery Date, in the case of an existing QF on or before the Scheduled Commercial Operation Date Operation for scheduled Initial Delivery Date, in the case of an existing QF and one or more of the following

(continued)

Commented [A101]: 11.1.1(B) Defaults by Either Party

B0 - QFTG/JU Compromise
QFTG and JU have agreed one-year default period applies when existing QF misses COD.

Commented [A102]: 11.1.2 (A) and (B) Defaults by Seller

B0 Agreement between JU and QFTG
It is Staff's understanding that the QFTG and JU have agreed on revised language in 11.1.2(A) and (B).

Even if JUs and QFTG have not come to agreement, Staff supports adoption of sections as revised in this PPA.

events occur: (i) Seller fails to deliver a draft Schedule Recovery Plan by the Scheduled Commercial Operation Date, as provided in Section 2.4(a); (ii) Seller fails to diligently and continuously finalize and implement its Schedule Recovery Plan and such failure, in either case, is not cured within thirty (30) days from the date of Seller's receipt of notice of such failure from Utility; (iii) Seller fails to achieve Commercial Operation by the Cure Period Deadline.²⁸

- (c) Seller sells Output ~~or Capacity Rights~~ from the Facility to a party other than Utility in breach of Section 4.3, if Seller does not permanently cease such sale and compensate Utility for the damages arising from the breach within thirty (30) days after Utility gives Seller a notice of default, provided, however, that Seller shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and Seller commences the cure within the initial thirty (30)-day period.
- (d) ~~Utility receives notice of foreclosure of the Facility or any part thereof by a Lender, mechanic or materialman, or any other holder, of an unpaid lien or other charge or encumbrance, if the same has not been stayed, paid, or bonded around within thirty (30) days of the date on which Utility provides notice to Seller that Utility has received a notice of foreclosure, provided, however, that Seller shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and Seller commences the cure within the initial thirty (30)-day period. An assignment in lieu of foreclosure as permitted pursuant to Section 20 of this Agreement and occurring prior to the date that is thirty (30) days, of such additional ninety (90)-day cure period (if applicable), after the date on which Utility provides notice to Seller that Utility has received a notice of foreclosure shall cure an Event of Default pursuant to this Section 11.1.2(d).~~
- (e) ~~After the Commercial Operation Date, within thirty (30) days after the loss of the applicable Required Facility Documents, Permits or leases/land grants; provided, however, that Seller shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and Seller commences the cure within the initial thirty (30)-day period provided, however, that if such breach is not reasonably capable of being cured within the thirty (30)-day cure period but is reasonably capable of being cured within ninety (90) days, then Seller will have an additional reasonable period of time to cure the breach, not to exceed ninety (90) days following the date of such notice of breach, provided that Seller provides Utility with a remediation plan within fifteen (15) days following the date of such notice of breach and Seller promptly commences and diligently pursues the remediation plan within thirty (30) days following the date~~

²⁸ **Note to Form** – This provision to be replaced for PPAs with operational QFs with the following language: "Seller fails to achieve Initial Delivery on or before the Scheduled Initial Delivery Date and such failure is not cured within thirty (30) days one year by the Cure Period Deadline after Utility gives Seller written notice of such failure; provided, however, that if such failure is not reasonably capable of being cured within the thirty (30)-day cure period but is reasonably capable of being cured within ninety (90) days, then Seller will have an additional reasonable period of time to cure the breach, not to exceed ninety (90) days following the date of such notice from Utility; provided that Seller provides to Utility a remediation plan within fifteen (15) days following the date of Utility's notice and Seller promptly commences and diligently pursues the remediation plan within thirty (30) days following the date of Utility's notice of non-performance."

(continued)

Commented [A103]:

**11.1.2(D) Defaults by Seller
B1 - Inconsistent with Rules**

QFTG oppose making receipt of a "Notice of Foreclosure" a default event. QFTG note that a Notice of Foreclosure is the not the final step in a legal process to collect a lien or other charge and that is unwarranted to make receipt of notice of the start of a legal process an event of default.

Staff agrees with QFTG. It is not appropriate to make receipt of notice of a legal process as an event of default. Events of default are set out in rules. Staff does not think the JUs are entitled to create additional events of default.

In addition, the utility's receipt of a Notice of Foreclosure does not establish any breach of an obligation by QF and it is inappropriate to make this an event of default.

**Commented [A104]: 11.1.2(E) Defaults by Seller -
After COD, loss of applicable Required Facility Documents.**

B1 - Inconsistent with Rules.

OAR 860-029-0123 sets out events of default, and includes failure to perform material obligation is an event of default. Staff believes it is inconsistent for utility to cull out a select few obligations such as this and make failure to perform them an event of default. Under this proposal, a QF could be in default for failing to maintain an applicable required, but not necessarily "material" document.

of the notice of non-performance.

- (f) ~~Seller's Abandonment of construction or operation of the Facility, such Abandonment continues and no draft Schedule Recovery Plan is implemented within~~ thirty (30) days after Seller's receipt of written notice from Utility, provided, however, that Seller shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and Seller commences the cure within the initial thirty (30)-day period, or, in the event a Schedule Recovery Plan is implemented, Seller fails to diligently and continuously implement said Schedule Recovery Plan and such failure is not cured within thirty (30) days from the date of Seller's receipt of notice of such failure from Utility.
- (g) Seller fails to satisfy the requirements of the Performance Guarantee for the number of consecutive Contract Years specified in Exhibit E.
- (h) ~~Seller fails to satisfy the requirement to maintain QF status under Section 7.1, and such failure is not cured within thirty (30) days from the date of Seller's receipt of written notice of such failure from Utility, provided, however, that Seller shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and Seller commences the cure within the initial thirty (30)-day period.~~
- (i) ~~With respect to an Off-System QF, a Seller Event of Default occurs under Exhibit L with respect to Seller's obligation failure to reserve Firm Delivery for the term of the Agreement commencing on the Commercial Operation Date, and such failure is not cured within thirty (30) days of the Seller's receipt of written notice by Utility, provided, however, that Seller shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and Seller commences the cure within the initial thirty (30)-day period.~~

11.1.3 Utility Failure to Receive or Purchase. ¶ Utility fails to receive or purchase all or part of the Net Output required to be purchased under this Agreement and such failure is not excused under this Agreement, including without limitation the provisions of Section 4.5 or Seller's failure to perform, and if Utility does not permanently cure such failure to receive or purchase all or part of the Net Output and compensate Seller for Seller's damages arising from the breach such failure is not cured within thirty (30) days from the date of Utility's receipt of notice of such failure from Seller.

11.2 Remedies for Events of Default.

11.2.1 Remedy for Seller's Failure to Deliver. ¶ Upon the occurrence and during the continuation of an ~~Event of Default of breach by Seller under Section 11.1.2(c) of Sections 4.1 and 4.3~~, Seller must pay Utility within thirty (30) days after receipt of invoice, subject to Sections 10.3 and unless subject to a good faith dispute under Section 10.4, an amount equal to the Utility's Cost to Cover ~~sum of (a) Utility's Cost to Cover multiplied by the Net Output delivered to a party other than Utility, (b) additional transmission charges, if any, reasonably incurred by Utility in moving replacement energy to the Point of Delivery or if not there, to such points in Utility's control area as determined by Utility, (c) any additional cost or expense incurred as a result of Seller's default, as determined by Utility in a commercially reasonable manner, and (d) to the extent Seller is required to convey Environmental Attributes to Utility under this Agreement associated with the Net Output delivered to a party other than Utility, any additional costs~~

(continued)

Commented [A105]: 11.1.2(F) Seller's Abandonment
B0 JU/QFTG Agreement
JU and QFTG agree on language modifications to this provision.

Commented [A106]: 11.1.1(H) Default by Seller
Seller fails to maintain QF status
B0 - No dispute over modified language.

Commented [A107]: 11.1.2(I) Default by Seller -
Failure to reserve Firm Delivery.
B0 - No dispute over modified language.

Commented [A108]: 11.2.1 Remedies for Events of Default
B0 JU/QFTG Agreement or
B3 Commission interpretation

The JUs and QFTG have agreed to revisions to provision. It is not clear to Staff whether the QFTG and JUs are in agreement on language of the 11.2.1.

Staff believes the JU has accepted reasonable changes to 11.2.1. Staff proposes one more change to clarify the Damages Cap does include the cost of Environmental Attributes if the utility is not purchase EAs from the QF.

Staff believes 11.2.1 is reasonable as revised and should be adopted.

Utility reasonably incurs to acquire replacement Environmental Attributes. Notwithstanding the foregoing, total damages under this Section may not exceed the aggregate amount Utility would have incurred to purchase Seller's Net Output and Environmental Attributes if purchasing Environmental Attributes from Seller, had Seller delivered all Net Output to Utility. The invoice for such amount must include a written statement explaining in reasonable detail the calculation of such amount.

11.2.2 Remedy for Utility's Failure to Purchase. ¶ Upon the occurrence and during the continuation of an Event of Default of Utility a breach by Utility under Section 11.1.3 of Section 4.1, Utility must pay Seller, on the earlier of the date payment would otherwise be due in respect of the month in which the failure occurred or within thirty (30) days after receipt of invoice, an amount equal to Seller's Cost to Cover multiplied by the amount of Net Output not purchased. The invoice for such amount must include a written statement explaining in reasonable detail the calculation of such amount.

11.2.3 Remedy for Seller's Failure to Provide Capacity Rights, Ancillary Services and Environmental Attributes. ¶ Seller is liable for Utility's actual damages in the event Seller fails to sell or deliver all or any portion of the Capacity Rights, Ancillary Services and, if applicable, Environmental Attributes to Utility.

11.2.43 Remedy for Seller's Failure to Satisfy Performance Guarantee. ¶ Upon the occurrence and during the continuation of an Event of Default of breach by Seller under of Section 11.1.2(g) 6.15, Seller must pay Utility an amount in damages equal to the sum as calculated pursuant to Exhibit F and in a manner as prescribed by Exhibit F.

11.2.54 Remedies Generally. ¶ Except in circumstances in which a remedy provided for in this Agreement is described as a Party's sole or exclusive remedy, the non-defaulting Party may pursue any and all legal or equitable remedies provided by law, equity or this Agreement. Further, in the case of a default by Seller, Utility may offset its damages against any payment due Seller. The rights contemplated by this Section 11 are cumulative such that the exercise of one or more rights does not constitute a waiver of any other rights.

11.3 Termination and Remedies. From and during the continuance of an Event of Default, the non-defaulting Party may terminate this Agreement by notice to the other Party designating the date of termination and delivered to the defaulting Party no less than thirty (30) days before such termination date. The notice required under this Section 11.3 may be provided in the notice of default (and does not have to be a separate notice) before the applicable cure period(s) have lapsed and an Event of Default has occurred provided that the non-defaulting Party complies with the terms of this Section 11.3 and that the stated termination date is no earlier than the first (1st) day following expiration of the fifteen (15) day period or the first (1st) day following the expiration of the applicable cure period(s), whichever occurs last ("Earliest Termination Date"). Where Seller is the non-defaulting Party, Seller must provide copies of such termination notice to the notice addresses of the then-current President and General Counsel of Utility by registered overnight delivery service or by certified or registered mail, return receipt requested. A termination notice must state prominently in type font no smaller than 14-point capital letters that "THIS IS A TERMINATION NOTICE UNDER A PPA. YOU MUST CURE A DEFAULT, OR THE PPA WILL BE TERMINATED," must state any amount alleged to be owed, and must include wiring instructions for payment. Notwithstanding any other provision of this Agreement to the contrary, the non-defaulting Party will not have any right to terminate this Agreement if the default that gave rise to the termination right is cured by the Earliest Termination Date.

In the event of a termination of this Agreement:

(continued)

Commented [A109]: 11.2.2. Remedy for Utility's Failure to Purchase
B0 - JU/QFTG Compromise

Commented [A110]: 11.2.3 Remedy for Seller's Failure to Provide Capacity Rights
B0 - QFTG/JU Agreement
The QFs and JU agree to this omit this provision.

Commented [A111]: New 11.2.3 Remedy for Seller's Failure to Satisfy Performance Guarantee
B0 or B3

Staff is unaware of any dispute regarding the language as revised in 11.2.3. However, Staff supports the language and believes the JUs reasonably interpreted the Commission's rules on damages.

- (a) Each Party must pay to the other all amounts due the other under this Agreement for all periods prior to termination, subject to offset by the non-defaulting Party against damages incurred by such Party.
- (b) The amounts due under this Section 11.3 must be paid within thirty (30) days after the billing date for such charges and will bear interest at the Contract Interest Rate from the date of termination until the date paid. The foregoing does not extend the due date of, or provide an interest holiday for, any payments otherwise due under this Agreement.
- (c) Without limiting the generality of the foregoing, the provisions of Sections 1, 4.1, 4.4, 4.6, 4.7, 5.4, 5.5, 5.6, 6.2.3, 6.3, 6.12.3, 6.12.4, 6.12.4, 6.12.9, 6.13, 10.2, 10.3, 10.4, 10.5, 11.3, 11.4, 11.5, 11.6, 11.7, 11.8, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 survive the termination of this Agreement.

11.4 Termination of Duty to Buy After Termination.

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

11.5 Termination Damages.

If this Agreement is terminated by Utility as a result of an Event of Default by Seller, termination damages owed by Seller to Utility will be the positive difference, if any, between (a) Utility's estimated costs to secure replacement power and Environmental Attributes, if applicable, for a period of twenty-four (24) months following the date of termination, including any associated transmission necessary to deliver such replacement power; and (b) the Contract Price for such twenty-four- (24) month period ("Termination Damages"). Utility must calculate the Termination Damages on a monthly basis in a commercially reasonable manner and will be deemed to have done so if it calculates such damages for each day of the twenty-four- (24) month period by multiplying (a) the forecasted Net Output for such day as provided in the 12x24 forecast provided by Seller, ~~under Section 6.7 if available~~, or if such forecast is not available, the Expected Monthly Net Output for the applicable month, expressed in MWhs per month, divided by the number of days of the applicable month, by (b) the Utility's Cost to Cover for such day. ~~To the extent Utility reasonably incurs additional costs to purchase replacement power, including, for example, transmission charges to deliver replacement energy to the Point of Delivery, and, to the extent Seller is required to convey Environmental Attributes to Utility under this Agreement during any portion of the twenty-four- (24) month period, and Utility reasonably incurs additional costs to acquire replacement Environmental Attributes, such sums, in each case as applicable, shall be added to the Termination Damages.~~ Utility will provide to Seller a written statement explaining in reasonable detail the calculation of Termination Damages.

Notwithstanding the foregoing, Termination Damages for the twenty-four- (24) month term may not exceed the aggregate amount Utility would have incurred to purchase Seller's Net Output and Environmental Attributes had the Agreement not been terminated. Termination Damages are due by Seller within thirty (30) days after receipt of the written statement of Termination Damages from Utility.

(continued)

Commented [A112]: 11.4 Termination of Duty to Buy B1 - Inconsistent with Rule.

The JUs/QFTG disagree on appropriate title for this provision and inclusion of language "at sole discretion" of utility.

The resolution of neither issue is particularly material, but Staff agrees the title is more accurately stated as Duty to Buy after Termination and that "in its sole discretion" language is unnecessary and its inclusion could create ambiguity.

Commented [A113]: 11.5 Termination Damages B3 Commission Interpretation-

Staff is not aware of dispute with how the JUs propose to calculate Termination Damages, but the QFTG do object to the JUs proposed Damages Cap.

Staff agrees with the JUs' proposed damages cap.

Each Party agrees and acknowledges that the damages that Utility would incur due to Seller's Event of Default would be difficult or impossible to predict with certainty, it is impractical and difficult to assess actual damages in the circumstances stated, and therefore the Termination Damages as agreed to in this Section 11.5 are a fair and reasonable calculation of such damages.

11.6 Duty/Right to Mitigate. Each Party agrees that it has a duty to mitigate damages and will use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance of its obligations under this Agreement to the extent mitigation is relevant to the calculation of damages. In furtherance of the immediately preceding sentence, (a) with respect to Seller and to the extent permitted by Requirements of Law and the Generation Interconnection Agreement, Seller must use commercially reasonable efforts to maximize the price received by Seller from third parties for Net Output and Environmental Attributes not purchased and accepted by Utility. The duty to mitigate described in this subsection shall not impact or affect the method of determining liquidated damages, including termination damages under Section 11.5 and Delay Damages under Section 2.4.

11.7 Security. If this Agreement is terminated because of an Event of Default by Seller, then Utility may, in addition to pursuing any and all other remedies available at law or in equity (except where otherwise limited herein), proceed against any Security held by Utility in whatever form to reduce the amounts that Seller owes Utility arising from such Event of Default.

11.8 Cumulative Remedies. Except in circumstances in which a remedy provided for in this Agreement is described as a sole or exclusive remedy, the rights and remedies provided to the Parties in this Agreement are cumulative and not exclusive of any rights or remedies of the Parties, and the exercise of one or more rights or remedies does not constitute a waiver of any other rights or remedies.

SECTION 12

INDEMNIFICATION AND LIABILITY

12.1 Indemnities.

12.1.1 Indemnity by Seller. ¶ To the extent permitted by Requirements of Law and subject to Section 12.1.5, Seller shall indemnify, defend and hold harmless Utility and its Affiliates and each of its and their respective directors, officers, employees, agents, and representatives (collectively, the "Utility Indemnitees") from and against any and all losses, fines, penalties, claims, demands, damages, liabilities, actions or suits of any nature whatsoever (including legal costs and attorneys' fees, both at trial and on appeal, whether or not suit is brought) (collectively, "Liabilities") resulting from, arising out of, or in any way connected with, the breach, performance or non-performance by Seller of its obligations or covenants under this Agreement, or relating to the Facility or the Premises, for or on account of injury, bodily or otherwise, to, or death of, or damage to, or destruction or economic loss of property of, any third party Person, except to the extent such Liabilities are caused by the negligence or willful misconduct of any Utility Indemnitee. Seller is solely responsible for and will indemnify, defend and hold harmless the Utility Indemnitees from and against any and all Liabilities resulting from, arising out of, or in any way connected with the breach by Seller of the Generation Interconnection Agreement.

12.1.2 Indemnity by Utility. ¶ To the extent permitted by Requirements of Law and subject to Section 12.1.5, Utility shall indemnify, defend and hold harmless Seller and its Affiliates and each of its and their respective directors, officers, employees, agents, and representatives (collectively, the "Seller Indemnitees") from and against any and all Liabilities resulting from, arising out of, or in any way

(continued)

connected with, the breach, performance or non-performance by Utility of its obligations or covenants under this Agreement for or on account of injury, bodily or otherwise, to, or death of, or damage to, or destruction or economic loss of property of, any third party Person, except to the extent such Liabilities are caused by the negligence or willful misconduct of any Seller Indemnitee.

12.1.3 Additional Cross Indemnity. ¶ Without limiting Section 12.1.1 and Section 12.1.2,

- (a) Seller shall indemnify, defend and hold harmless the Utility Indemnitees from and against all Liabilities resulting from, arising out of, or in any way connected with: (i) the Net Output prior to its delivery by Seller at the Point of Delivery; ~~or (ii) any action by any Governmental Authority due to noncompliance by Seller with any Requirements of Law or the provisions of this Agreement; (iii) Utility being deemed by an RTO to be operationally or financially responsible for Seller's performance under the Generation Interconnection Agreement due to Seller's lack of standing as a "scheduling coordinator" or other RTO-recognized designation, qualification, or otherwise; and (iv) Seller's failure to comply with applicable dispatch instructions;~~ except in each case to the extent such Liabilities are caused by the gross negligence, willful misconduct or a breach of this Agreement by any Utility Indemnitee; and
- (b) Utility shall indemnify, defend and hold harmless the Seller Indemnitees from and against all Liabilities resulting from, arising out of, or in any way connected with: (i) the Net Output at and after its delivery to Utility at the Point of Delivery in accordance with this Agreement; and (ii) any action by any Governmental Authority due to noncompliance by Utility with any Requirements of Law or the provisions of this Agreement, except in each case to the extent such Liabilities are caused by the gross negligence, willful misconduct, or a breach of this Agreement by any Seller Indemnitees.

12.1.4 Indemnification Procedures. ¶ Any indemnified party seeking indemnification under this Agreement for any Liabilities shall give the Indemnifying Party notice of such Liabilities promptly but in any event on or before thirty (30) days after the Indemnified Party's actual knowledge of the claim or action giving rise to the Liabilities. Such notice shall describe the Liability in reasonable detail and shall indicate the amount (estimated if necessary) of the Liability that has been, or may be sustained by, the Indemnified Party. To the extent that the indemnifying party will have been actually and materially prejudiced as a result of the failure to provide such notice within such thirty (30) day period, the indemnified party shall bear all responsibility for any additional costs or expenses incurred by the indemnifying party as a result of such failure to provide timely notice. The indemnifying party shall assume the defense of the claim or action giving rise to the Liabilities with counsel designated by the indemnifying party; provided, however, that if the defendants in any such action include both the indemnified party and the indemnifying party and the indemnified party reasonably concludes that there may be legal defenses available to it that are different from or additional to, or inconsistent with, those available to the indemnifying party, the indemnified party shall have the right to select and be represented by separate counsel, at the expense of the indemnifying party. Notwithstanding anything to the contrary contained herein, an indemnified party shall in all cases be entitled to control its own defense, at the expense of the indemnifying party, in any claim or action if it: (a) may result in injunctions or other equitable remedies with respect to the indemnified party; (b) may result in material liabilities which may not be fully indemnified hereunder; or (c) may have a material and adverse effect on the indemnified party (including a material and adverse effect on the tax liabilities, earnings, ongoing business relationships or regulation of the indemnified party) even if the indemnifying party pays all indemnification amounts in full. If the indemnifying party fails to assume the defense of a claim or action, the indemnification of which is required under this Agreement, the indemnified party may, at the expense of the indemnifying party,

(continued)

Commented [A114]: 12.1.3 Additional Cross Indemnity
B0 - JU/QFTG Agreement
JU and QFTG agree to revision to language.

contest, settle, or pay such claim; provided, however, that settlement or full payment of any such claim or action may be made only with the indemnifying party's consent, which consent will not be unreasonably withheld, conditioned or delayed, or, absent such consent, written opinion of the indemnified party's counsel that such claim is meritorious or warrants settlement.

12.1.5 No Dedication. ¶ Nothing in this Agreement will be construed to create any duty to, any standard of care with reference to, or any liability to any person not a Party. No undertaking by one Party to the other under any provision of this Agreement will constitute the dedication of Utility's facilities or any portion thereof to Seller or to the public, nor affect the status of Utility as an independent public utility corporation or Seller as an independent individual or entity.

12.1.6 Consequential Damages. ¶ **EXCEPT AS PROVIDED IN SECTION 12.1.1, SECTION 12.1.2 AND SECTION 12.1.3, NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY FOR SPECIAL, PUNITIVE, INDIRECT, EXEMPLARY OR CONSEQUENTIAL DAMAGES, WHETHER SUCH DAMAGES ARE ALLOWED OR PROVIDED BY CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, STATUTE OR OTHERWISE. THE PARTIES AGREE THAT ANY LIQUIDATED DAMAGES, INCLUDING DELAY DAMAGES, TERMINATION DAMAGES AND PERFORMANCE GUARANTEE DAMAGES, UTILITY'S COST TO COVER DAMAGES AND SELLER'S COST TO COVER DAMAGES, OR OTHER SPECIFIED MEASURE OF DAMAGES EXPRESSLY PROVIDED FOR IN THIS AGREEMENT DO NOT REPRESENT SPECIAL, PUNITIVE, INDIRECT, EXEMPLARY OR CONSEQUENTIAL DAMAGES AS CONTEMPLATED IN THIS PARAGRAPH.**

12.2 Survival. The provisions of this Section 12 shall survive the termination or expiration of this Agreement.

SECTION 13 INSURANCE

Without limiting any Liabilities or any other obligations of Seller, unless the Facility has a Nameplate Capacity Rating of less than or equal to 200 kW, Seller must secure and continuously carry the insurance coverage specified on Exhibit H commencing with the start of construction activities at the Premises and continuing thereafter during the Term or such longer period as is specified in Exhibit H.

SECTION 14 FORCE MAJEURE

14.1—As used in this Agreement, "Force Majeure" or "an event of Force Majeure" means any cause beyond the reasonable control of the Seller or Utility which, despite the exercise of due diligence, such Party is unable to prevent or overcome. By way of example, Force Majeure may include but is not limited to acts of God, fire, flood, storms, wars, hostilities, civil strife, strikes, and other labor disturbances, earthquakes, fires, lightning, epidemics, sabotage, restraint by court order or other delay or failure in the performance as a result of any action or inaction on behalf of a public authority which by the exercise of reasonable foresight such Party could not reasonably have been expected to avoid and by the exercise of due diligence, it shall be unable to overcome, subject, in each case, to the requirements of the first sentence of this paragraph. However, except when independently caused by an event of Force Majeure, the following circumstances do not qualify as an event of Force Majeure: the cost or availability of resources to operate the Facility, changes in market conditions that affect the price of energy or transmission, wind or water droughts, and obligations for the payment of money when due.

(continued)

~~14.2 If either Party is rendered wholly or in part unable to perform its obligation under this Agreement because of an event of Force Majeure, that Party shall be excused from whatever performance is affected by the event of Force Majeure to the extent and for the duration of the Force Majeure, after which such Party shall re-commence performance of such obligation, provided that:~~

~~14.2.1 The non-performing Party shall, promptly, but in any case within one (1) week after the occurrence of the Force Majeure, give the other Party written notice describing the particulars of the occurrence; and~~

~~14.2.2 The suspension of performance shall be of no greater scope and of no longer duration than is required by the Force Majeure; and~~

~~14.2.3 The non-performing Party uses its best efforts to remedy its inability to perform its obligations under this Agreement.~~

~~14.3 No obligations of either Party which arose before the Force Majeure causing the suspension of performance shall be excused as a result of the Force Majeure.~~

~~14.4 Neither Party shall be required to settle any strike, walkout, lockout or other labor dispute on terms which, in the sole judgment of the Party involved in the dispute, are contrary to the Party's best interests.~~

~~14.1 Definition of Force Majeure.~~

"Force Majeure" or an "event of Force Majeure" means an event or circumstance that prevents a Party (the "Affected Party") from performing, in whole or in part, an obligation under this Agreement and that: (a) is not reasonably anticipated by the Affected Party as of the Execution Date; (b) is not within the reasonable control of the Affected Party or its Affiliates; (c) is not the result of the negligence or fault or the failure to act by the Affected Party or its Affiliates; and (d) could not be overcome or its effects mitigated by the use of due diligence by the Affected Party or its Affiliates. Force Majeure includes the following types of events and circumstances (but only to the extent that such events or circumstances satisfy the requirements in the preceding sentence): tornado, hurricane, tsunami, flood, earthquake and other acts of God; fire; explosion; invasion, acts of terrorism, war (declared or undeclared) or other armed conflict; riot, revolution, insurrection or similar civil disturbance; global pandemic (except as excluded below); sabotage; strikes, walkouts, lock-outs, work stoppages, or other labor disputes; and action or restraint by Governmental Authority (except as excluded below); provided that the Affected Party has not applied for or assisted in the application for, and has opposed to the extent reasonable, such action or restraint. Notwithstanding the foregoing, none of the following shall constitute Force Majeure: (i) Seller's ability to sell, or Utility's ability to purchase, energy, Capacity, Ancillary Services or Environmental Attributes at a more advantageous price than is provided under this Agreement; (ii) inability to obtain any supply of goods or services, unless due to an independent event of Force Majeure; (iii) economic hardship, including lack of money or the increased cost of electricity, steel, labor, or transportation; (iv) any breakdown or malfunction of the Facility's equipment (including any serial equipment defect) that is not caused by an independent event of Force Majeure; (v) the imposition upon a Party of costs or taxes; (vi) delay or failure of Seller to obtain or perform any Required Facility Document unless due to an independent event of Force Majeure; (vii) any delay, alleged breach of contract, or failure by Transmission Provider or Interconnection Provider unless due to an independent event of Force Majeure; (viii) maintenance upgrade or repair of any facilities or right of way corridors constituting part of or involving the Interconnection Facilities, whether performed by or for Seller, or other third parties (except

(continued)

**Commented [A115]: 14.1 Definition of Force Majeure
B3 - Commission interpretation**

The JUs and QFTG have proposed competing definitions of Force Majeure. Staff believes the JU definition is reasonable, clear and consistent with Staff's proposed definition of Force Majeure in AR 631, with one exception.

The JUs definition includes a right for a party to terminate the PPA if a Force Majeure prevents the other party from performing obligations under the PPA for over 180 days. Staff disagrees that termination is inappropriate for for a delay of 180 days. For example, a QF has a one-year cure period for failure to come on line by the Scheduled COD. If the QF's delay is due to a Force Majeure event, the utility could terminate the PPA 180 days after the delay started. This makes no sense and is out-of-place in a standard PPA for small QFs.

for repairs made necessary as a result of an independent event of Force Majeure); (ix) Seller's failure to obtain, or perform under, the Generation Interconnection Agreement, or its other contracts and obligations to Transmission Provider or Interconnection Provider, unless due to an independent event of Force Majeure; (x) any event attributable to the use of Interconnection Facilities for deliveries of Net Output to any party other than Utility; (xi) any delays or other problems associated with the issuance, suspension, renewal, administration or withdrawal of, or any other problem directly or indirectly relating to, any Permit or the applications therefor where such delays or problems are within the Affected Party's reasonable control; (xii) delays in customs clearance, unless due to an independent event of Force Majeure; (xiii) the imposition of tariffs, anti-dumping or countervailing duties that may apply to any products or equipment or any other fines, penalties or other actions as a result of violation of Requirements of Law regarding unfair trade practices; and (xiv) the occurrence after the Execution Date, of an enactment, promulgation, modification or repeal of one or more Requirements of Law, including regulations or national defense requirements that affects the cost or ability of either Party to perform under this Agreement.

14.2 Suspension of Performance. Neither Party will be liable for any delay in or failure to perform its obligations under this Agreement nor will any such delay or failure become an Event of Default, to the extent such delay or failure is substantially caused by Force Majeure, provided that the Affected Party: (a) provides prompt (and, in any event, not more than five (5) days' notice of such event of Force Majeure to the other Party, describing the particulars of the event of Force Majeure and giving an estimate of its expected duration and the probable impact on the performance of its obligations under this Agreement; (b) exercises all reasonable efforts to continue to perform its obligations under this Agreement; (c) expeditiously takes action to correct or cure the event of Force Majeure so that the suspension of performance is no greater in scope and no longer in duration than is dictated by the event of Force Majeure; (d) exercises all reasonable efforts to mitigate or limit damages to the other Party resulting from the event of Force Majeure; and (e) provides prompt notice to the other Party of the cessation of the event of Force Majeure.

14.3 Force Majeure Does Not Affect Other Obligations. No obligations of either Party that arose before the event of Force Majeure causing the suspension of performance or that arise after the cessation of such event of Force Majeure is excused by such event of Force Majeure.

14.4 Strikes. Notwithstanding any other provision of this Agreement, neither Party will be required to settle any strike, walkout, lockout or other labor dispute on terms which, in the sole judgment of the Party involved in the dispute, are contrary to the Party's best interests.

14.5 ~~Right to Terminate~~

~~–If a Force Majeure event prevents a Party from substantially performing its obligations under this Agreement for a period exceeding 180 consecutive days, then the Party not affected by the Force Majeure event may terminate this Agreement by giving ten (10) days prior notice to the other Party. Upon such termination, neither Party will have any liability to the other with respect to the period following the effective date of such termination; provided, however, that this Agreement will remain in effect to the extent necessary to facilitate the settlement of all liabilities and obligations arising under this Agreement before the effective date of such termination.~~

SECTION 15
SEVERAL OBLIGATIONS

(continued)

Nothing in this Agreement will be construed to create an association, trust, partnership or joint venture or to impose a trust, partnership or fiduciary duty, obligation or Liability on or between the Parties.

**SECTION 16
CHOICE OF LAW**

This Agreement will be interpreted and enforced in accordance with the laws of the State of Oregon, applying any choice of law rules that may direct the application of the laws of another jurisdiction.

**SECTION 17
PARTIAL INVALIDITY ~~AND PURPA REPEAL AND PURPA REPEAL~~**

If any term, provision or condition of this Agreement is held to be invalid, void or unenforceable by a Governmental Authority and such holding is subject to no further appeal or judicial review, then such invalid, void, or unenforceable term, provision or condition shall be deemed severed from this Agreement and all remaining terms, provisions and conditions of this Agreement shall continue in full force and effect. The Parties shall endeavor in good faith to replace such invalid, void or unenforceable terms, provisions or conditions with valid and enforceable terms, provisions or conditions which achieve the purpose intended by the Parties to the greatest extent permitted by law and preserve the balance of the economics and equities contemplated by this Agreement in all material respects.

In the event the Public Utility Regulatory Policies Act (PURPA), related state law, and/or state or federal regulations and rules giving rise to this Agreement are repealed, this Agreement shall not terminate prior to the Termination Date, unless such termination is mandated by state or federal law.

**SECTION 18
NON-WAIVER**

No waiver of any provision of this Agreement will be effective unless the waiver is provided in writing that (a) expressly identifies the provision being waived, and (b) is executed by the Party waiving the provision. A Party's waiver of one or more failures by the other Party in the performance of any of the provisions of this Agreement will not be construed as a waiver of any other failure or failures, whether of a like kind or different nature.

**SECTION 19
GOVERNMENTAL JURISDICTION
~~AND AUTHORIZATIONS~~**

This Agreement is subject to the jurisdiction of those Governmental Authorities and courts having jurisdiction over either Party or this Agreement.

**SECTION 20
SUCCESSORS AND ASSIGNS**

20.1 Restriction on Assignments. Except as provided in this Section 20, neither Party may transfer, sell, pledge, encumber or assign (collectively, "Assign") this Agreement nor any of its rights or obligations

(continued)

**Commented [A116]: 17 Partial Invalidity and PURPA Repeal
B0 JU/QFTG Agreement**

**Commented [A117]: Section 19 Governmental Jurisdictions
B1 -QFTG Proposal inconsistent with Commission Rules**

Staff agrees with the JUs argument that removing this provision is inconsistent with Commission's rules, which is as follows:

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

Commented [A118]: February 7 edit:
Staff adds "add courts" as this is required by OAR 860-029-0020(2)(a), which provides: "All contracts between a qualifying facility and a public utility for energy, or energy and capacity must include language which substantially conforms to the following: This agreement is subject to the jurisdiction of those governmental agencies and courts having control over either party or this agreement."

Staff's failure to include all the language in the rule was an oversight.

under this Agreement without the prior written consent of the other Party, such consent not to be unreasonably withheld, conditioned or delayed.

20.2 Permitted Assignments.

20.2.1 Assignments to Affiliates.

Notwithstanding Section 20.1, either Party may, without the need for consent from the other Party (but with prior notice to the other Party, including the name of the Affiliate), Assign this Agreement to an Affiliate; provided, however, that it shall be a condition precedent to such Assignment that such Affiliate enters into an assignment and assumption agreement pursuant to which such Affiliate assumes all of the assigning Party's obligations under this Agreement and otherwise agrees to be bound by the terms of this Agreement; provided, further that: (a) in the case of Assignment by Utility, such Affiliate must have the same or better credit rating from S&P and Moody's as Utility as of the effective date of such assignment (or if such Affiliate is not rated by S&P and Moody's, the same or better creditworthiness as Utility, as reasonably determined by Seller and (b) in the case of Assignment by Seller: (i) such Affiliate must (A) possess the same or similar experience as Seller (as reasonably determined by Utility) or have engaged the services of a Qualified Operator and (B) possess the same or better credit rating from S&P and Moody's as Seller as of the Execution Date (or if Seller or such Affiliate is not rated by S&P and Moody's, the same or better creditworthiness as Seller, as reasonably determined by Utility, or otherwise agrees, in lieu of demonstrating creditworthiness, to be bound by the Security requirements of Section 8); and (ii) any Security required pursuant to Section 8 must be provided, replaced or remain in full force and effect.

20.2.2 Assignments by Utility to Other Persons Pursuant to Utility Merger or Acquisition.

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

20.2.3 Seller's Assignment for Purposes of Financing. Without Utility's consent, Seller may, upon notice to Utility, collaterally assign, transfer, pledge or encumber this Agreement or any of its rights or obligations hereunder to any lender as collateral for financing with respect to the development, construction and/or operation of the Facility without the assignee being required to execute an agreement in the form of this Agreement in order to make such collateral assignment, transfer, pledge or encumbrance legally effective; provided that no such assignment will relieve Seller of its liability to Utility hereunder.

Upon receiving a request by Seller, Utility will execute a collateral assignment and consent agreement in a form acceptable to Utility in its reasonable-exercised discretion reasonably proposed by Utility. If Seller's Lender or Seller requests that Utility make changes to Utility's collateral assignment and consent agreement form or review any other proposed agreement or documents related to financing of the

(continued)

**Commented [A119]: 20.21 Assignments to Affiliates
B0 QFTG/JU Agreement**

**Commented [A120]: 20.2.2 Assignments by Utility
B0 or B2(3)**

The QFTG proposed revisions to the language in this provision to narrow the circumstances in which the utility could assign the PPA - to another utility acquiring the purchasing utility. The JUs accepted this edit, but broadened to include a circumstance when the purchasing utility sells a portion of its service territory to another utility.

It is not clear whether the QFTG agree to the provision as modified. However, Staff believes allowing the utility to assign the PPA when acquired by or merged with another utility or when it sells a portion of its service territory is a reasonable provision and should be approved.

**Commented [A121]: 20.2.3. Seller's Assignment for Purposes of Financing
B0 - JU/QFTG Compromise**

It appears the JU and QFTG agree on the inclusion of a provision for Seller's Assignment for Purposes of Financing, but it is not clear whether the JUs and QFTG agree on the language.

Staff supports the language proposed by the QFTG as revised by the JUs.

construction or operation of the Facility. Utility will take commercially reasonable efforts to review and, subject to its reasonably exercised discretion, agree to may accept or decline such proposed changes. Seller shall be responsible for all reasonable cost and expense associated with Utility's review and activities reasonably required under this Section 20.2.3, including but not limited to the use of outside counsel; provided that no costs shall be charged in the event, and excluding the execution of ed documents that are unchanged from the original form proposed by Utility. No later than twenty (20) calendar days after receiving an invoice for such cost and expense, Seller shall pay to Utility the amount set forth as due in such invoice.

20.2.43 Release from Liability. If the foregoing requirements for Assignment in ~~this Sections~~ Sections 20.2.1 or 20.32.2 have been satisfied, then effective as of the date of such Assignment Utility and Seller, as applicable, will be released from all liability under this Agreement. Any Party seeking to Assign this Agreement shall be solely responsible for paying all costs and expenses of Assignment, including any costs and expenses incurred by the other Party in connection with the review and/or execution and delivery of the assignment and assumption agreement and any other documents required in connection with the Assignment.

SECTION 21
ENTIRE AGREEMENT

This Agreement supersedes all prior agreements, proposals, representations, negotiations, discussions or letters, whether oral or in writing, regarding the subject matter of this Agreement. No modification of this Agreement is effective unless it is in writing and executed by both Parties.

SECTION 22
NOTICES

All notices, requests, demands, submittals, waivers and other communications required or permitted to be given under this Agreement (each, a "Notice") shall, unless expressly specified otherwise, be in writing and shall be addressed, except as otherwise stated herein, to the addressees and addresses set out in Exhibit K, as the same may be modified from time to time by Notice from the respective Party to the other Party. All Notices required by this Agreement shall be sent by regular first-class U.S. mail, registered or certified U.S. mail (postage paid return receipt requested), overnight courier delivery, or electronic mail. Such Notices will be deemed effective and given upon receipt by the addressee, except that Notices transmitted by electronic mail shall be deemed effective and given on the day (if a Business Day and, if not, on the next following Business Day) on which it is transmitted if transmitted before 16:00 [PPT/MPT], and if transmitted after that time, on the following Business Day, provided that Notices transmitted by electronic mail must be followed up by Notice by other means as provided for in this Section to be effective. If any Notice sent by regular first class U.S. mail, registered or certified U.S. mail postage paid return receipt requested, or overnight courier delivery is tendered to an addressee set out in Exhibit K, as the same may be modified from time to time by Notice from the respective Party to the other Party, and the delivery thereof is refused by such addressee, then such Notice shall be deemed given and effective upon such tender. In addition, Notice of termination of this Agreement under Section 11.3 must contain the information required by Section 11.3 and, where Utility is the Defaulting Party, must be sent to the attention of the then-current President and General Counsel of Utility as required by (and subject to the terms of) Section 11.3, and where Seller is the Defaulting Party, must be sent to the attention of the then-current President and General Counsel of Seller subject to the terms of Section 11.3.

SECTION 23
PUBLICITY

(continued)

Commented [A122]: 23 Publicity B0 JU/QFTG compromise on language modifications.

Before ~~Seller either Party~~ issues any news release or publicly distributed promotional material regarding this Agreement, ~~Seller such Party~~ must first provide a copy thereof to ~~Utility other Party~~ for its review and approval. Any use of any tradename of ~~Utility the other Party~~ or any of its affiliates requires ~~Utility's the other Party's~~ prior written consent.

SECTION 24
DISAGREEMENTS
DISPUTES AND JURY WAIVER

24.1 Negotiations:

~~Prior to proceeding with formal dispute resolution, the Parties must first attempt in good faith to resolve informally all disputes arising out of, related to, or in connection with this Agreement. Any Party may give the other Party notice of any dispute not resolved in the normal course of business. Executives of both Parties at levels one level above those employees who have previously been involved in the dispute must meet at a mutually acceptable time and place within ten (10) days after delivery of such notice, and thereafter as often as they reasonably deem necessary, to exchange relevant information and to attempt to resolve the dispute. If the matter has not been resolved within thirty (30) days after the referral of the dispute to such executives, or if no meeting of such executives has taken place within fifteen (15) days after such referral, then, subject to Section 24.2, either Party may initiate any legal remedies available to the Party. No statements of position or offers of settlement made in the course of the dispute process described in this Section 24.1 will: (a) be offered into evidence for any purpose in any litigation between the Parties; (b) be used in any manner against either Party in any such litigation; or (c) constitute an admission or waiver of rights by either Party in connection with any such litigation. At the request of either Party, any such statements and offers of settlement, and all copies thereof, will be promptly returned to the Party providing the same.~~

24.2 Alternative Dispute Resolution:

~~If the Parties are not able to resolve any the dispute is not resolved under the procedures provided in Section 24.1, then either Party may initiate the Parties may mutually agree to pursue an alternative dispute resolution process under Oregon Administrative Rules Chapter 860, Division 2. The costs of any alternative dispute resolution process, including fees and expenses, will be borne equally by the Parties.~~

24.3 Choice of Forum:

~~To the extent the dispute is not resolved under the procedures provided in Section 24.1 or 24.2, any complaint, claim or action to resolve such dispute shall be brought exclusively in a court in the state of Oregon or governmental agency with jurisdiction over the dispute, including but not limited to any governmental agency having control over either party or this Agreement. By execution and delivery of this Agreement, each Party: (a) accepts the exclusive jurisdiction of such courts or governmental agencies and waives any objection that it may now or hereafter have to the exercise of personal jurisdiction by such courts or governmental agencies over each Party for the purpose of the Proceedings; (b) irrevocably agrees to be bound by any final judgment (after any and all appeals) of any such courts or governmental agencies arising out of the Proceedings; (c) irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to the laying of venue of any of the Proceedings brought in such courts or governmental agencies (including any claim that any such Proceeding has been brought in~~

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Commented [A123]: Staff Feb 7 Edit — Omitting Jury Waiver caption.

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Commented [A124]: 24.1 Negotiations B0- QFTG/JU Agreement QFTG and JU agree to delete this provision.

Commented [A125]: 24.2 Alternative Dispute Resolution B2(3) Not contemplated by AR 631, but not burdensome

The QFTG object to any reference to ADR in contract.

Staff believes the inclusion of reference to ADR as amended by JUs is consistent with Commission rules adopting ADR process and is not burdensome to either party.

Commented [A126]: 24.3 Choice of Forum B0

The JUs propose to omit this provision from and Staff supports omission

an inconvenient forum) in connection herewith; (d) agrees that service of process in any such Proceeding may be effected by mailing a copy thereof by registered or certified mail, postage prepaid, to such Party at its address stated in this Agreement; and (e) agrees that nothing in this Agreement affects the right to effect service of process in any other manner permitted by law.

24.42 WAIVER OF JURY TRIAL:

~~EACH PARTY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVES THE RIGHT TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT AND ANY AGREEMENT EXECUTED OR CONTEMPLATED TO BE EXECUTED IN CONJUNCTION WITH THIS AGREEMENT, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO EACH OF THE PARTIES TO ENTER INTO THIS AGREEMENT. EACH PARTY HEREBY WAIVES ANY RIGHT TO CONSOLIDATE ANY ACTION, PROCEEDING OR COUNTERCLAIM BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY OTHER AGREEMENT EXECUTED OR CONTEMPLATED TO BE EXECUTED IN CONJUNCTION WITH THIS AGREEMENT, OR ANY MATTER ARISING HEREUNDER OR THEREUNDER, WITH ANY PROCEEDING IN WHICH A JURY TRIAL HAS NOT OR CANNOT BE WAIVED. THIS PARAGRAPH WILL SURVIVE THE EXPIRATION OR TERMINATION OF THIS AGREEMENT.~~

Commented [A127]: 24.4 Waiver of Jury Trial B1 Inconsistent with Rule
The JUs proposed this provision requiring parties to the PPA to waive the right to a jury trial for contractual dispute. Staff believes this provision is beyond the scope of the AR 631 rules, is burdensome, and should be omitted.

(continued)

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed in their respective names as of the date last written below.

SELLER:

UTILITY:

[_____]

[_____]

By: _____
Name: _____
Title: _____
Date: _____

By: _____
Name: _____
Title: _____
Date: _____

(continued)

EXHIBIT A
EXPECTED MONTHLY NET OUTPUT²⁹

Month	On-Peak Net Output (MWh)	Off-Peak Net Output (MWh)	Total Net Output (MWh)
January			
February			
March			
April			
May			
June			
July			
August			
September			
October			
November			
December			
<i>First Contract Year Total</i>			

Commented [A128]: Exhibit A Expected Monthly Net Output
B3 - Commission Interpretation
If the Seller changes the expected monthly net output pursuant to Section 6.1 and 6.8, the Seller must notify the utility of the new expected net output in writing within 90 days of Commercial Operation, Section 6.1, which is the due date of the Seller's As-Built Supplement. If such a document is filed, it will be incorporated into Exhibit A.

[The values above may be changed updated by Seller prior to the Commercial Operation Date, or in the case of an existing QF the Initial Delivery Date, as permitted under Section 6.1 and Section 6.8 of the Agreement. If the values are changed pursuant to Section 6.1 and 6.8 of the Agreement, Seller is obligated to notify utility of the change in expected monthly net output in writing and Exhibit A will be modified to include the changed values.]

[The values above will be reduced []% each Contract Year following the Commercial Operation Date] **OR**

[The energy values above will be reduced each Contract Year following the Commercial Operation Date in accordance with the following Expected Annual Degradation Schedule]

MAXIMUM DELIVERY RATE (MWh or kWh)

[]

²⁹ **Note to Form** – Prior to executing the Agreement, Seller will be required to provide Utility information sufficient to allow Utility to reasonably verify the output estimates stated in Exhibit A.

(continued)

EXHIBIT B
DESCRIPTION OF SELLER'S FACILITY

[Provide a detailed description of the Facility, including the following, as applicable:]

Type (synchronous or inductive):
Facility Nameplate Capacity Rating (as stated in Seller's FERC Form 556):
Number of Generating Units:
Model:
Number of Phases:
Power factor requirements:
Rated Power Factor (PF) or reactive load (kVAR):
Rated Output (kW):
Rated Output (kVA):
Rated Voltage (line to line):
Rated Current (A): Stator: ____ A; Rotor: ____ A
Maximum kW Output: ____ kW as measured at the Point of Delivery (Facility)
Maximum kVA Output: ____ kVA (Facility)
Minimum kW Output: ____ kW (Facility)
Number of Phases:
Power factor requirements: ____ Leading and Lagging
Rated Power Factor (PF) or reactive load (kVAR):
Controlled Ramp Rate: ____

The following is a layout of the Facility, including site boundaries of the Premises:

Station service requirements, and other loads served by the Facility, if any:

Location of the Facility: *[Please include city and county, and legal description of parcel]*

(continued)

EXHIBIT C
SELLER'S INTERCONNECTION FACILITIES

[Instructions to Seller:

- 1. Include description of point of metering, and Point of Delivery*
- 2. Provide interconnection single line drawing of Facility including any transmission facilities on Seller's side of the Point of Delivery.]*

(continued)

EXHIBIT D
REQUIRED FACILITY DOCUMENTS

1. *QF Certification*
2. *Interconnection Agreement or, if applicable, the following studies and study agreements completed as of the Effective Date:*
[INSERT DESCRIPTION]
3. *Real property documents listed in Exhibit E to the Agreement with respect to the Premises.*
4. *Licenses, Permits and Authorizations, including:*
[INSERT DESCRIPTION]
5. *Other Required Facility Documents:*
[INSERT DESCRIPTION]

[Depending upon the type of Facility and its specific characteristics, additional Required Facility Documents may be added.]

(continued)

EXHIBIT E
LEASES AND REAL ESTATE DOCUMENTS

(continued)

EXHIBIT F

MECHANICAL AVAILABILITY GUARANTEE – WIND, SOLAR AND HYDRO RESOURCES

1. Availability Guarantee. ~~Beginning after completion of one year after the Initial Delivery Date for existing QFs and three years after the Commercial Operation Date for new QFs,~~ Seller guarantees that the Facility will achieve an Actual Availability Percentage (as defined below) of at least ninety percent (90%) during each covered Contract Year (“Availability Guarantee”) as provided in this Exhibit F. The Actual Availability Percentage will be calculated annually, commencing with the first (1st) day of the second ~~Full~~ Contract Year after Initial Delivery Date for existing QFs and with the first (1st) day of the fourth ~~Full~~ Contract Year after Commercial Operation for new QFs and ending with the last Full Contract Year in the Term. For example, for an existing QF that achieves an Initial Delivery Date of ~~January–July 1, 2026~~, the Actual Availability Percentage will be calculated on or after January 1, 2028~~7~~, based on Facility data from the previous Contract Year. For a new QF that achieves Commercial Operation on ~~January–July 1, 2026~~, the Actual Availability Percentage will be calculated on or after January 1, 2030~~29~~, based on Facility data from the previous Contract Year.

“Actual Availability Percentage” for a particular Contract Year is calculated as follows:

$$\text{Actual Availability Percentage} = 100 \times (\text{Operational Hours in the Contract Year}) / (\text{Number of Hours in the Contract Year} \times \text{Number of Generating Units in the Facility})$$

“Operational Hours” means the total across all of the Facility’s Generating Units of (i) the number of hours each of the Generating Units was capable of producing power regardless of actual weather, season and time of day or night, without any mechanical operating constraint or restriction, and potentially capable of delivering such power to the Delivery Point; (ii) the number of hours during which each Generating Unit was not available to generate due to a Force Majeure event, a default by Utility under this Agreement, or a default by Utility under the Generation Interconnection Agreement; and (iii) the number of hours during which each Generating Unit was not available to generate due to a Planned Outage, but only to the extent such hours ~~were not already assumed in Seller’s calculation of Expected Net Output and~~ do not exceed 200 hours per Generating Unit per Contract Year; and (iv) in the case of a solar facility, the number of hours Planned Outages, Maintenance Outages, and Forced Outages occurring between sunset and sunrise. However, if any of the events described in items (i) through (iii) occur simultaneously, then the relevant period of time will only be counted once in order to prevent double counting. Operational Hours do not include hours when (i) the Facility or any portion thereof was unavailable solely due to Seller’s non-conformance with the Generation Interconnection Agreement or (ii) the Facility or any portion thereof was paused or withdrawn from use by Seller for reasons other than those covered in this definition.

“Generating Unit” means a complete electrical generation system within the Facility that is able to generate and deliver energy to the Point of Interconnection independent of other Generating Units within the Facility. For example, for a solar facility, a Generating Unit is an inverter and the panels associated with such inverter. The number of Generating Unit’s for the Facility shall be identified in Exhibit B.

If the Actual Availability Percentage in any Contract Year commencing with the first ~~full~~ Full Contract Year that is subject to this Availability Guarantee falls below ninety percent (90%), the resulting shortfall will be expressed in MWh as the “On-Peak Availability Shortfall” or the “Off-Peak Availability Shortfall,” as applicable, or together, the “Availability Shortfalls.” In order to determine the damages associated with any such failure to meet the Availability Guarantee, which is determined on an annual basis, the resulting Availability Shortfalls are allocated pro rata to For each calendar month in the Contract Year, the Availability

(continued)

Commented [A129]: Exhibit F -- MAG B3 - Commission Interpretation

The JUs have modified the language in Exhibit F to account for the fact the PPA has "Full Contract years" and Contract Years, to clarify when the MAG starts and ends.

The QFTG propose to change hoe Operational Hours and how damages are capped.

Staff agrees with the JU’s implementation of the Commission’s rules on the MAG, which are explained in the comments below.

Commented [A130]: "Operational Hours" - OAR 860-029-0120(10)(a) gives the QF 200 hours of planned outage, without the added qualification that the QF not have built any planned maintenance into its expected net output figures. So we propose deleting that limiting clause from the PPA because it is inconsistent with the administrative rules. Additionally, we propose subpart (iv) which recognizes that solar QFs will not be penalized for being unavailable to deliver energy at nighttime, which is consistent with the Commission’s treatment of the High Demand Months for outages and will incent solar QFs to conduct outages and maintenance at nighttime.

Commented [A131R130]: The JUs do not object to the QFTGs’ deletion of the provision regarding Planned Outages hours already assumed in the calculation of Expected Net Output. However, the Joint Utilities reject the QFTGs’ proposal to add additional hours “between sunset and sunrise” to the definition of “Operational Hours” for purposes of the MAG. Contrary to the QFTGs’ assertions, this proposal is not consistent with OAR 860-029-0124(2)(b), which simply provides:

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

While solar facilities are not prohibited from conducting Planned Outages during High Demand Months at times when motive force is unavailable to generate and deliver energy, this does not mean t ... [6]

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

On-Peak Availability Shortfall (MWh) = (90 (%) minus Actual Availability Percentage (%)) multiplied by the ~~total applicable monthly On-Peak~~ Expected Net Output (MWh) as defined in Exhibit A for On-Peak Hours as specified in Exhibit A

Off-Peak Availability Shortfall (MWh) = (90 (%) minus Actual Availability Percentage (%)) multiplied by the ~~total applicable monthly Off-Peak~~ Expected Net Output (MWh) as defined in Exhibit A for Off-Peak Hours as specified in Exhibit A

2. Damages Calculation for Availability Shortfall. If an Availability Shortfall occurs in any calendar month in the any Contract Year in which the Availability Guarantee is not met, Seller will compensate pay Utility damages (“Availability Shortfall Damages”), if any, for such calendar month based on the following equation: for both Energy Shortfall (as defined below) REC Shortfall (as defined below) the On-Peak Utility’s Cost to Cover associated multiplied by with the On-Peak Availability Shortfall, plus, the Off-Peak Utility’s Cost to Cover multiplied by the Off-Peak Availability Shortfall.

On-Peak Availability Shortfall x the positive difference between the applicable calendar month’s On-Peak Average Firm Electric Market Price and the applicable calendar month’s On-Peak Contract Price;

Plus

Off-Peak Availability Shortfall x the positive difference between the applicable calendar month’s Off-Peak Average Firm Electric Market Price and the applicable calendar month’s Off-Peak Contract Price;

Where

“On-Peak Average Firm Electric Market Price” means the average Firm Electric Market Pricing, for all On-Peak Hours of the applicable calendar month in the Contract Year, and

“Off-Peak Average Firm Electric Market Price” means the average Firm Electric Market Pricing, for all Off-Peak Hours of the applicable calendar month in the Contract Year;

Plus

In the event the replacement energy procured by Utility as a result of Seller’s failure to deliver the Availability Shortfall results in incremental ancillary services and transmission costs, an amount equal to such costs incurred by Utility, provided however that Utility shall provide commercially reasonable evidence that it incurred such costs as a result of Seller’s failure to deliver in accordance with the Availability Guarantee.

Plus

The Replacement Bundled REC Price x REC Shortfall, if applicable

Where

(continued)

Commented [A132]: JU Comments: Revised to add clarity that Availability Guarantee is assessed on an annual basis as QFTGs noted possible ambiguity.

“REC Shortfall” means the number of renewable energy certificates (“RECs”) Seller would have delivered to Utility had Seller met the Availability Guarantee.

“Replacement Bundled REC” means a REC bundled and simultaneously delivered with the associated qualifying energy generated by an Oregon Renewable Portfolio Standard eligible renewable energy resource and delivered bundled to Utility.

“Replacement Bundled REC Price” means the price determined by Utility by taking the lower of two dealer quotes representing a live offer to sell Replacement Bundled RECs in a quantity sufficient to cover the REC Shortfall.

Notwithstanding the foregoing, the total Availability Shortfall Damages in a given Contract Year may not exceed the aggregate amount Utility would have incurred to purchase Seller’s Net Output and RECs during the Contract Year if Seller had met the Availability Guarantee, which amount shall be the sum of (i) the product of the monthly On-Peak Availability Shortfall and the applicable monthly On-Peak Contract Price for all On-Peak Hours during the applicable each calendar months of the Contract Year and (ii) the product of the monthly Off-Peak Availability Shortfall and the applicable monthly Off-Peak Contract Price for all Off-Peak Hours during the applicable each calendar months of the Contract Year).

(a) Energy Shortfall. The “Energy Shortfall” is comprised of the following cost components:

i. Replacement Energy Cost. Seller shall pay Utility an amount for such deficiency equal to:

- a. The On-Peak Availability Shortfall for the Contract Year, multiplied by the average On-Peak Utility’s Cost to Cover for such Contract Year; plus
- b. The Off-Peak Availability Shortfall for the Contract Year, multiplied by the average Off-Peak Utility’s Cost to Cover for such Contract Year.

ii. Potential Transmission Adjustment. In the event the replacement energy procured by Utility as a result of Seller’s failure to deliver the Availability Shortfall results in incremental ancillary services and transmission costs, Seller shall pay Utility an amount equal to such costs incurred by Utility, provided however that Utility shall provide commercially reasonable evidence that it incurred such costs as a result of Seller’s failure to deliver in accordance with the Availability Guarantee.

(b) REC Shortfall. The “REC Shortfall” is equal to the number of renewable energy certificates (“RECs”) Seller would have delivered to Utility had Seller met the Availability Guarantee. In the case of a REC Shortfall, Seller shall owe Utility the Replacement Bundled REC price, identified by Utility, multiplied by the REC Shortfall. Utility shall use commercially reasonable efforts to mitigate the amount owed by Seller under this Section 2. For purposes of this Exhibit F, “Replacement Bundled REC” shall mean a REC bundled and simultaneously delivered with the associated qualifying energy generated by an Oregon Renewable Portfolio Standard eligible renewable energy resource and delivered bundled to Utility. The Replacement Bundled REC price shall be determined by Utility taking the lower of two dealer quotes representing a live offer to sell bundled RECs in a quantity sufficient to cover the REC Shortfall.

Each Party agrees and acknowledges that (i) the damages that Utility would incur due to the Facility’s failure to achieve the Availability Guarantee would be difficult or impossible to predict with certainty and (ii) the damages calculation methodology contemplated by this provision are a fair and reasonable calculation of

(continued)

Commented [A133]: QFTG Comments: Damages Calculation - The utilities' proposed damages calculation does not really work for a variety of reasons, most significantly that the contract price cap on damages in OAR 860-029-0120(10)(d) is violated by adding REC and transmission costs as potential additional damages after the contract price cap is reached with replacement energy costs. We recommend simplifying the calculation as we have done with our edits.

Commented [A134R133]: JU Comments: JUs have proposed revisions to the damages calculations for clarity and administrative ease.

such damages.

2.3. Invoicing for Availability Shortfall. Following the end of each Contract Year, Utility will deliver to Seller an invoice showing in reasonable detail the Utility's computation of Availability Shortfall, if any, for the prior Contract Year and any amount due to Utility for damages calculated pursuant to this Exhibit F. In preparing such invoices, Utility will utilize the fault log provided to Utility for the applicable Contract Year under Section 6.12.1, provided that if the fault log for any portion of such Contract Year is then incomplete or otherwise not available, Utility may rely other information as may be available to Utility at the time of invoice preparation. Utility shall have the right to offset any payment due under this Exhibit F in accordance with Section 10.2 of the Agreement. Seller must pay to Utility on or before the ~~twentieth (20th)~~ thirtieth (30th) day following the receipt of such invoice, except with respect to any invoiced amounts that are unless the invoice is subject to a good faith dispute under Section 10.4 of this Agreement. Any amounts due under this Exhibit F are subject to Section 10.3, and all disputes regarding such invoices are subject to Section 10.4. ~~Objections not made by Seller within the twenty (20)-day period will be deemed waived.~~

3.4. Event of Default. The occurrence of an Availability Shortfall for two (2) consecutive Contract Years shall be a Seller Event of Default, and Utility shall be entitled to the rights and remedies set forth in Section 11 of the Agreement.

Commented [A135]: QFTG Comments: Invoicing for Output Shortfall - The utilities' proposed invoicing and due dates are inconsistent with the administrative rules, OAR 860-029-0123(5), which require reasonable explanation of the utilities' damage calculation, give the QF 30 days to pay damages, unless subject to dispute. The last sentence in this proposed Section 3. is also inconsistent with Section 10.4 which gives parties up to 2 years to potentially raise an issue with an invoice they have already paid. It is not uncommon for a party to pay an invoice and then discovery some time later there was an error, and Section 10.4 allows such issues to be addressed up to two years after the invoice, so the last sentence here should be deleted as undermining that two year period. Our edits correct these issues.

Commented [A136R135]: JUs do not object to the QFTGs' revisions to this provision.

(continued)

MINIMUM DELIVERY GUARANTEE – GEOTHERMAL, BIOMASS AND OTHER BASELOAD RENEWABLE RESOURCES

1. Output Guarantee. Seller is obligated to deliver a quantity of Net Output during each covered Contract Year which is equal to the Output Guarantee. Seller's compliance with the Output Guarantee will be calculated annually, commencing with the first (1st) day of the second Contract Year after the Commercial Operation Date or Initial Delivery Date, as applicable, based on Facility data from the previous Contract Year and ending with the last Full Contract Year in the Term.

"Output Guarantee" for any Contract Year means ninety percent (90%) of the Expected Net Output of the Facility for such Contract Year, which shall be adjusted for Seller Uncontrollable Minutes.

"Seller Uncontrollable Minutes" means, for the Facility in any Contract Year, the total number of minutes during such Contract Year during which the Facility was unable to deliver Net Output to Utility (or during which Utility failed to accept such delivery) due to one or more of the following events, each as recorded by Seller's Supervisory Control and Data Acquisition ("SCADA") System (where available) and indicated by Seller's electronic fault log (electronic where available): (a) a Force Majeure event; (b) to the extent not caused by Seller's actions or omissions, a curtailment in accordance with Section 4.5 any interconnection or transmission curtailment initiated by Utility, Interconnection Provider, or the Transmission Provider; and (c) a default by Utility under this Agreement or the Generator Interconnection Agreement; provided, however, that if any of the events described above in items (a) through (c) occur simultaneously, then the relevant period of time will only be counted once in order to prevent double counting. Seller Uncontrollable Minutes do not include minutes when (i) the Facility or any portion thereof was unavailable solely due to Seller's non-conformance with the Generation Interconnection Agreement or (ii) the Facility or any portion thereof was paused or withdrawn from use by Seller for reasons other than those covered in this definition.

"Actual Output Shortfall Percentage" for any a particular Contract Year is calculated as follows: will be the

Actual Output Guarantee, less the amount equal to the sum of the Percentage = 100 x (actual Net Output received at the Point of Delivery (or accepted by Utility) plus the Net Output Seller was unable to deliver due to Seller Uncontrollable Minutes in such Contract Year) / Expected Net Output. The Output Shortfall cannot be less than zero (0).

If the Actual Output Percentage in any Contract Year commencing with the first Full Contract Year that is subject to this Guarantee falls below ninety percent (90%), the resulting shortfall will be expressed in MWh as the "On-Peak Output Shortfall" or the "Off-Peak Output Shortfall," as applicable, or together, the "Output Shortfalls." In order to determine the damages associated with any such failure to meet the Output Guarantee, which is determined on an annual basis, the resulting Output Shortfalls are allocated pro rata to For each calendar month in the Contract Year and, the Output Shortfalls will equal the mathematical difference between the Output Guarantee and the Actual Output Percentage, multiplied by the Mmonthly Expected Net Output for the applicable calendar month in the Contract Year, expressed in the formula below:

On-Peak Output Shortfall (MWh) = (90 (%) minus Actual Output Percentage (%)) multiplied by the total-applicable Mmonthly Expected Net Output (MWh) for On-Peak Hours as specified in Exhibit A

(continued)

Commented [A137]: JU Comments: Added to address the QFTGs' concerns at the November 7 Workshop regarding the last partial Contract Year.

Commented [A138]: Q"FTG Comments: Seller Uncontrollable Minutes" - OAR 860-029-0120(12(d) excuses "*any* interconnection and transmission curtailment initiated by the purchasing utility or the transmitting utility" from the MDG. Thus the utilities' proposed additional qualification that it be a curtailment meeting the description in Section 4.5 should not be used. The rule also includes default under the PPA *or the GIA*. Our edits correct these issues.

Additionally, as noted earlier in our comment on Section 6.12.1, not all small QFs will necessarily have SCADA and an electronic fault log that will track and distinguish all of these types of events (e.g., force majeure, interconnection curtailment, default by utility, etc.), so we find this additional SCADA reporting hurdle confusing and prefer deleting it. None of the utilities' current PPAs require small QFs to rely solely on SCADA to record this type of data and distinguish types of outages.

Commented [A139R138]: JU Comments: The JUs do not object to the QFTGs' revisions regarding curtailment but restored the clause providing "to the extent not caused by Seller's actions or omission." The JUs restored this language deleted by the QFTGs because if the curtailment is the Seller's fault, then it should not constitute "Seller Uncontrollable Minutes" under the plain meaning of that term.

... [7]

Commented [A140]: QFTG Comment: Output Shortfall" - This definition needs to add in the Net Output that Seller could not deliver due to Seller Uncontrollable Minutes. Nothing else in the PPA clarifies how that will work, other than the vague reference to an "adjustment" in the definition of "Output Guarantee", so we have proposed a clarifi...

... [8]

Commented [A141R140]: JU Comments: The JUs revised this section to align with their changes to the damages calculations.

Commented [A142]: JU Comments: Revised to add clarity that Output Guarantee is assessed on an annual basis as QFTGs noted possible ambiguity.

Off-Peak Output Shortfall (MWh) = (90 (%) minus Actual Output Percentage (%)) multiplied by the total-applicable Mmonthly Off-Peak-Expected Net Output (MWh) for Off-Peak Hours as specified in Exhibit A

The Output Shortfall shall not be calculated until the completion of the first Contract Year after Commercial Operation and will be calculated as follows:

On-Peak Output Shortfall (MWh) = Output Guarantee, applied to Expected Net Output for On-Peak Hours, minus the amount equal to the sum of the total actual On-Peak Net Output delivered to the Point of Delivery plus the Net Output Seller was unable to deliver due to Seller Uncontrollable Minutes during On-Peak Hours

Off-Peak Output Shortfall (MWh) = Output Guarantee, applied to Expected Net Output for Off-Peak Hours, minus the amount equal to the sum of the total actual Off-Peak Net Output delivered to the Point of Delivery plus the Net Output Seller was unable to deliver due to Seller Uncontrollable Minutes during Off-Peak Hours

2. Damages Calculation for Output Shortfall. If the product of either of the Output Shortfall occurs in any calendar month in any Contract Year in which the Output Guarantee calculations provided above is a positive number not met, Seller will compensate pay Utility damages ("Output Shortfall Damages"), if any, for such calendar month based on the following equation as follows: for the On-Peak Utility's Cost to Cover multiplied by the On-Peak Output Shortfall, plus the Off-Peak Utility's Cost to Cover multiplied by the Off-Peak Output Shortfall, both Energy Shortfall (as defined below) and REC Shortfall (as defined below) associated with the Output Shortfall:

2. _____

On-Peak Output Shortfall x the positive difference between the applicable calendar month's in the Contract Year's On-Peak Average Firm Electric Market Price and the applicable calendar month's On-Peak Contract Price;

Plus

Off-Peak Output Shortfall x the positive difference between the applicable calendar month's in the Contract Year's Off-Peak Average Firm Electric Market Price and the applicable calendar month's Off-Peak Contract Price;

Where

"On-Peak Average Firm Electric Market Price" means the average Firm Electric Market Pricing, for all On-Peak Hours of the applicable calendar month in the Contract Year, and

"Off-Peak Average Firm Electric Market Price" means the average Firm Electric Market Pricing, for all Off-Peak Hours of the applicable calendar month in the Contract Year;

Plus

In the event the replacement energy procured by Utility as a result of Seller's failure to deliver the Output Shortfall results in incremental ancillary services and transmission costs, an amount equal to such costs incurred by Utility, provided however that Utility shall provide commercially

(continued)

Commented [A143]: JUs have proposed revisions to the damages calculations for clarity and administrative ease.

reasonable evidence that it incurred such costs as a result of Seller's failure to deliver in accordance with the Output Guarantee.

Plus

The Replacement Bundled REC Price x REC Shortfall, if applicable

Where

"REC Shortfall" means the number of renewable energy certificates ("RECs") Seller would have delivered to Utility had Seller met the Output Guarantee.

"Replacement Bundled REC" means a REC bundled and simultaneously delivered with the associated qualifying energy generated by an Oregon Renewable Portfolio Standard eligible renewable energy resource and delivered bundled to Utility.

"Replacement Bundled REC Price" means the price determined by Utility by taking the lower of two dealer quotes representing a live offer to sell Replacement Bundled RECs in a quantity sufficient to cover the REC Shortfall.

Notwithstanding the foregoing, the total Output Shortfall Damages in a given Contract Year may not exceed the aggregate amount Utility would have incurred to purchase Seller's Net Output and RECs during the Contract Year if Seller had met the Output Guarantee, which amount shall be the sum of (i) the product of the monthly On-Peak Output Shortfall and the applicable monthly On-Peak Contract Price for all On-Peak Hours during applicable each calendar months of the Contract Year and (ii) the product of the monthly Off-Peak Output Shortfall and the applicable Off-Peak average Contract Price for all Off-Peak Hours during applicable each calendar months of the Contract Year). ~~Energy Shortfall. The "Energy Shortfall" is comprised of the following cost components:~~

Replacement Energy Cost. Seller shall pay Utility an amount for such deficiency equal to:

The On-Peak Output Shortfall for the Contract Year, multiplied by the average On-Peak Utility's Cost to Cover for such Contract Year; plus

The Off-Peak Output Shortfall for the Contract Year, multiplied by the average Off-Peak Utility's Cost to Cover for such Contract Year.

Potential Transmission Adjustment. In the event the replacement energy procured by Utility as a result of Seller's failure to deliver the Output Shortfall results in incremental ancillary services and transmission costs, Seller shall pay Utility an amount equal to such costs incurred by Utility, provided however that Utility shall provide commercially reasonable evidence that it incurred such costs as a result of Seller's failure to deliver in accordance with the Output Guarantee.

(continued)

~~REC Shortfall. The "REC Shortfall" is equal to the number of renewable energy certificates ("RECs") Seller would have delivered to Utility had Seller met the Output Guaranty. Seller shall owe Utility the Replacement Bundled REC price, identified by Utility, multiplied by the REC Shortfall. Utility shall use commercially reasonable efforts to mitigate the amount owed by Seller under this Section 2. For purposes of this Exhibit F, "Replacement Bundled REC" shall mean a REC bundled and simultaneously delivered with the associated qualifying energy generated by an Oregon Renewable Portfolio Standard eligible renewable energy resource and delivered bundled to Utility. The Replacement Bundled REC price shall be determined by Utility taking the lower of two dealer quotes representing a live offer to sell bundled RECs in a quantity sufficient to cover the REC Shortfall.~~

Each Party agrees and acknowledges that (i) the damages that Utility would incur due to the Facility's failure to achieve the Output Guaranty would be difficult or impossible to predict with certainty and (ii) the damages calculation methodology contemplated by this provision are a fair and reasonable calculation of such damages.

3. Invoicing for Output Shortfall. Following the end of each Contract Year, Utility will deliver to Seller an invoice showing in reasonable detail the Utility's computation of Output Shortfall, if any, for the prior Contract Year and any amount due to Utility for damages calculated pursuant to this Exhibit F. In preparing such invoices, Utility will utilize the meter data provided to Utility for the applicable Contract Year, provided that if the meter data for any portion of such Contract Year is then incomplete or otherwise not available, Utility may also rely on historical averages and other information as may be available to Utility at the time of invoice preparation. Utility shall have the right to offset any payment due under this Exhibit F in accordance with Section 10.2., Seller must pay to Utility on or before the thirtieth (30th) twentieth (20th) day following the receipt of such invoice except with respect to any invoiced amounts that are unless such invoice is subject to a good faith dispute under Section 10.4. Any amounts due under this Exhibit F are subject to Section 10.3, and all disputes regarding such invoices are subject to Section 10.4. Objections not made by Seller within the twenty (20) day period will be deemed waived.

4. Event of Default. The occurrence of an Output Shortfall for three (3) consecutive Contract Years shall be a Seller Event of Default, and Utility shall be entitled to the rights and remedies set forth in Section 11 of the Agreement.

Commented [A144]: 3. Invoicing for Output Shortfall
B0 JU/QFTG Agreement
The JU and QFTG agree to language modifications.

(continued)

**EXHIBIT G
SELLER AUTHORIZATION TO RELEASE
GENERATION DATA TO UTILITY**

[DATE]

Director, Transmission Services
Utility
[Utility Address]

RE: Queue Number (if available): _____

To Whom it May Concern:

_____ (“Seller”) hereby voluntarily authorizes Utility’s Transmission business unit to share Seller’s interconnection information with marketing function employees of Utility. Seller acknowledges that Utility did not provide it any preferences, either operational or rate-related, in exchange for this voluntary consent.

(continued)

EXHIBIT H
REQUIRED INSURANCE

1.1 Required Policies and Coverages. Without limiting any liabilities or any other obligations of Seller under this Agreement, Seller must secure and continuously carry with an insurance company or companies rated not lower than "A-/VII" by the A.M. Best Company the insurance coverage specified below:

~~1.1.1 Workers' Compensation to cover claims under applicable State or Federal workers' compensation laws.~~

~~1.1.2 Employers' Liability with limits not less than \$1,000,000 policy limit.~~

1.1.31 Commercial General Liability with a limit of not less than \$1,000,000 each occurrence/combined single limit.

~~1.1.4 Business Automobile Liability to cover liability arising out of any auto (including owned, hired, and non-owned autos) used in connection with the Facility with a limit of not less than \$1,000,000 combined single limit.~~

1.1.52 Umbrella/excess Liability with a limit of not less than \$5,000,000.

~~1.1.63 From and after Commercial Operation, All-risk property insurance providing coverage in an amount at least equal to the full replacement value of the Facility against "all risks" of physical loss or damage, including coverage for earth movement, flood, and boiler and machinery. The All-Risk Policy may contain separate sub-limits and deductibles subject to insurance company underwriting guidelines. The All-Risk Policy will be maintained in accordance with terms available in the insurance market for similar facilities.~~

1.2 Additional Provisions or Endorsements.

1.2.1 Except for workers' compensation, employer's liability, and property insurance, the policies required must include provisions or endorsements as follows:

- (a) naming Utility, parent, divisions, officers, directors and employees as additional insureds;
- (b) include provisions that such insurance is primary insurance with respect to the interests of Utility and that any other insurance maintained by Utility is excess and not contributory insurance with the insurance required under this schedule; and
- (c) cross liability coverage or severability of interest.

1.2.2 Unless prohibited by applicable law, all required insurance policies must contain provisions that the insurer will have no right of recovery or subrogation against Utility.

1.3 Certificates of Insurance. Seller must provide Utility with certificates of insurance within ten (10) days after the date by which such policies are required to be obtained, in ACORD or similar industry form. The certificates must indicate that the insurer will provide thirty (30) days prior written notice of cancellation. If any coverage is written on a "claims-made" basis, the certification accompanying the policy must conspicuously state that the policy is "claims made."

1.4 Term of Commercial General Liability Coverage. Commercial general liability coverage must be maintained by Seller for a minimum period of five (5) years after the completion of this Agreement and for such other length of time necessary to cover liabilities arising out of the activities under this Agreement.

~~1.5 Periodic Review. Utility may review this schedule of insurance as often as once every two (2)~~

(continued)

Commented [A145]: Exhibit H 1.1 Required Policies and Coverages B1 - Inconsistent with Rules

The proposed PPA requires QF to obtain forms of insurance not required under Commission rule, including Workers' Comp, Employers' Liability, Business Auto Liability and Risk Property insurance equal to value of facility.

Staff believes OAR 860-029-0120(17) specifies the types of insurance that may be required in the PPA and the additional forms of insurance specified by JUs should be omitted.

Commented [A146]: 1.5 Period Review B0- JU/QFTG Agreement

The JU and QFTG agree to delete this provision.

FORM OF STANDARD QF PPA (10MW OR LESS)
Small Power Production Facility – FIRM
Attachment X to Oregon Schedule XX

~~years. Subject to applicable regulations and limitations established by the Commission from time to time, Utility may in its discretion require Seller to make reasonable changes to the policies and coverages described in this Exhibit to the extent reasonably necessary to cause such policies and coverages to conform to the insurance policies and coverages typically obtained or required for power generation facilities comparable to the Facility at the time Utility's review takes place.~~

(continued)

EXHIBIT I
NERC EVENT TYPES³⁰

Event Type	Description of Outages
U1	Unplanned (Forced) Outage – Immediate – An outage that requires immediate removal of a unit from service, another outage state or a Reserve Shutdown state. This type of outage results from immediate mechanical/electrical/hydraulic control systems trips and operator-initiated trips in response to unit alarms.
U2	Unplanned (Forced) Outage – Delayed – An outage that does not require immediate removal of a unit from the in-service state but requires removal within six (6) hours. This type of outage can only occur while the unit is in service.
U3	Unplanned (Forced) Outage – Postponed – An outage that can be postponed beyond six hours but requires that a unit be removed from the in-service state before the end of the next weekend. This type of outage can only occur while the unit is in service.
SF	Startup Failure – An outage that results from the inability to synchronize a unit within a specified startup time period following an outage or Reserve Shutdown. A startup period begins with the command to start and ends when the unit is synchronized. An SF begins when the problem preventing the unit from synchronizing occurs. The SF ends when the unit is synchronized or another SF occurs.
MO	Maintenance Outage – An outage that can be deferred beyond the end of the next weekend, but requires that the unit be removed from service before the next planned outage. (Characteristically, a MO can occur any time during the year, has a flexible start date, may or may not have a predetermined duration and is usually much shorter than a PO.)
ME	Maintenance Outage Extension – An extension of a maintenance outage (MO) beyond its estimated completion date. This is typically used where the original scope of work requires more time to complete than originally scheduled. Do not use this where unexpected problems or delays render the unit out of service beyond the estimated end date of the MO.
PO	Planned Outage – An outage that is scheduled well in advance and is of a predetermined duration, lasts for several weeks and occurs only once or twice a year.
PE	Planned Outage Extension – An extension of a planned outage (PO) beyond its estimated completion date. This is typically used where the original scope of work requires more time to complete than originally scheduled. Do not use this where unexpected problems or delays render the unit out of service beyond the estimated end date of the PO.

Commented [A147]: Exhibit I NERC Event Types B1 – Inconsistent with rules
 The QFTG oppose including this Exhibit, noting it is inconsistent with rules.

Staff believes Exhibit should be removed. The definitions of the outages are in rule and in PPA. Adding these additional refinements to the definitions is not consistent with the rules and creates ambiguity in the PPA.

Commented [A148]: February 7 edit. As noted in comment above, Staff's proposal is to delete Exhibit I. In this new edit, Staff indicates the deletion with strikethrough.

³⁰ **Note to Form** – This table will be adjusted as necessary to conform with NERC requirements as they exist at the time of PPA execution.

(continued)

EXHIBIT J
SCHEDULE XX AND PRICING SUMMARY TABLE

(continued)

EXHIBIT K
PARTY NOTICE INFORMATION

Notices	Utility	Seller
All Notices:		
All Invoices:		
Scheduling:		
Payments:		
Wire Transfer:		
Credit and Collections:		
Notices of an Event of Default or Potential Event of Default:		

(continued)

EXHIBIT L

OFF-SYSTEM ADDENDUM

WHEREAS, Seller's Facility will not interconnect directly to Utility's System;

WHEREAS, Seller and Utility have not executed, and will not execute, a Generation Interconnection Agreement in conjunction with the Power Purchase Agreement;

WHEREAS, Seller has elected to exercise its right under PURPA to deliver Net Output from its Facility to Utility via one (or more) third-party Transmission Providers;

WHEREAS, Utility desires that Seller schedule delivery of Net Output on a firm, hourly basis; and

WHEREAS, Utility does not intend to buy, and Seller does not intend to deliver, more or less than the Net Output of the Facility (except as expressly provided, below);

THEREFORE, Seller and Utility do hereby agree to the following, which shall become part of their Power Purchase Agreement:

DEFINITIONS

Capitalized terms in this Exhibit L are defined in the Agreement or this Exhibit L:

"Day" means 0:00 hours to 24:00 hours, prevailing local time at the Point of Delivery, or any other mutually agreeable 24-hour period.

"Delivery Deficit" means any increment of the Facility's hourly Net Output, expressed in MWh, that is generated in excess of the scheduled hourly energy or capacity delivered to the Point of Delivery during that same hour.

"Firm Delivery" means uninterruptible transmission service (i.e., NERC priority level 6 or 7) that is reserved and/or scheduled between the Point of Interconnection and the Point of Delivery pursuant to Seller's Transmission Agreement(s).

"Off-Peak Surplus Delivery" means any positive difference, expressed in MWh, in a given calendar month between the total energy delivered in Off-Peak Hours by the Facility to Utility and the Facility's total Net Output in Off-Peak Hours for the calendar month, i.e., the positive difference between the aggregate Supplemented Delivery for the calendar month and the aggregate Delivery Deficit for the same calendar month, in each case, during Off-Peak Hours.

"On-Peak Surplus Delivery" means any positive difference, expressed in MWh, in a given calendar month between the total energy delivered in On-Peak Hours by the Facility to Utility and the Facility's total Net Output in On-Peak hours for the calendar month, i.e., the positive difference between the aggregate Supplemented Delivery for the calendar month and the aggregate Delivery Deficit for the same calendar month, in each case, during Off-Peak Hours.

(continued)

Commented [A149]: Exhibit L Off-System Addendum B2(3) Beyond scope of rules, but reasonable changes

The proposed updates to Exhibit L are not contemplated by AR 631, but Staff believes the JU proposed edits to the exhibit, and QFTG edits that are agreed to by the JUs, are reasonable and provide clarity. Staff recommends the Commission adopt them.

Staff does not recommend the Commission adopt any of the edits proposed by the QFTG that are not supported by JUs, as indicated in the comments in this document.

Commented [A150]: QFTG Comment: Ex L, Off-System Addendum, Recitals - The recitals should not suggest that the QF must use "hourly" scheduling. The administrative rules do not require that and do not bar use of intra-hour scheduling that may be available from certain transmission providers, so the suggestion for hourly deliveries in the fourth recital should be deleted. See OAR 860-029-0121(2).

Commented [A151R150]: JU Comment: The Joint Utilities restored the "firm, hourly" language, which is consistent with their current approach. Implementing less than hourly scheduling would require adjusting the avoided cost price and may pose administrative challenges. Therefore, such a change should be explored in docket UM 2000 and not adopted in this docket.

Commented [A152]: QFTG Comment: Ex. L, "Firm Delivery" - The region has moved to accepting use of "conditional firm"/NERC Priority 6 as a firm product. For example, the WRAP Tariff (Section 16.3) allows use of NERC Priority 6 or 7 as valid forms of firm transmission in the Forward Showing program. We recommend QFs be allowed to use conditional firm, and have made a corresponding edit.

Commented [A153R152]: JU Comment: As noted above, firm delivery is the Joint Utilities' current requirement, and any change should be considered in docket UM 2000 so that pricing implications can be considered. Level 7 is assumed in current avoided cost pricing.

“Supplemented Delivery” means any increment of scheduled hourly energy or capacity, expressed in MWh, delivered to the Point of Delivery in excess of the Facility’s Net Output during that same hour.

“Surplus Delivery” means collectively, Off-Peak Surplus Delivery and On-Peak Surplus Delivery.

SUPPLEMENTAL PROVISIONS

1. Seller’s Responsibility to Arrange for Delivery of Net Output to Point of Delivery. Seller shall comply with the terms and conditions of the Transmission Agreement(s) between the Seller and the third-party Transmission Provider(s) and shall at all times on and after the Commercial Operation Date for Initial Delivery Date, in the case of an existing QF during the term of the Agreement hold rights sufficient to reserve Firm Delivery of Net Output up to the Maximum Delivery Rate to the Point of Delivery for the Term of the Agreement (i.e., such as through rollover rights). In the event Seller breaches the foregoing obligation and fails to cure such breach within thirty (30) days written notice from Utility, a Seller Event of Default shall have occurred, provided, however, that Seller shall be provided an additional ninety (90) days to cure if such breach cannot reasonably be cured within a thirty (30)-day period, is reasonably capable of being cured within the additional ninety (90)-day period, and Seller commences the cure within the initial thirty (30)-day period. In addition, with respect to any deliveries of Net Output for which Firm Delivery is not secured, Seller will be paid in the manner described in Section 5.1.1. of the Agreement in lieu of the Contract Price.

Commented [A154]: QFTG Comment: Ex. L, Supplemental Provisions 1. - The Seller should have the same cure rights as provided in the administrative rules, per the comments we made on Section 11.1.2(i).

Commented [A155R154]: JU Comment: The Joint Utilities do not object to the QF Trade Groups’ revisions to this provision.

2. Seller’s Responsibility to Schedule Delivery. Seller shall schedule energy with NERC E-tags, pursuant to the most current NERC and WECC scheduling rules and practices, for all deliveries of energy hereunder to the Point of Delivery, by 6:00:00 [PPT/MPT] of the customary WECC pre-scheduling day for each day during the Term when Seller is delivering Net Output. Seller shall schedule the Facility as the identified e-Tag source. Seller may not net or otherwise combine schedules from resources other than the Facility. Seller shall not schedule any energy to be delivered to Utility pursuant to this Agreement using a Dynamic or Pseudo-Tie e-Tag as such terms are defined and used by NERC. Seller and Utility shall maintain records of hourly energy schedules for accounting and operating purposes. The final e-Tag shall be the controlling evidence of the Parties’ schedule. Seller shall make commercially reasonable efforts to schedule in any hour an amount equal to its expected Net Output for such hour, or to the extent the Facility does not produce Net Output in whole MW increments, Seller shall make commercially reasonable efforts to schedule amounts intended to reasonably minimize Supplemental Delivery and Surplus Delivery in each month.

Commented [A156]: QFTG Comment: Ex. L, Supplemental Provisions 2. - The utilities’ proposed additional express limitations against dynamic scheduling and combining schedules from nearby facilities are not included in the administrative rules and not necessarily reasonable to include in the standard PPA. So we propose deletion of that extraneous addition.

Commented [A157R156]: JU Comment: The Joint Utilities restored this deleted language regarding dynamic scheduling, which is in their current PPAs and has been confirmed through litigation at the Federal Energy Regulatory Commission. The Joint Utilities do not object to the QF Trade Groups’ added language at the end of the provision.

3. Seller’s Responsibility to Maintain Interconnection Facilities. Utility shall have no obligation to install or maintain any interconnection facilities on Seller’s side of the Point of Interconnection. Utility shall not pay any costs arising from Seller interconnecting its Facility with the Interconnection Provider.

4. Seller’s Responsibility to Pay Transmission Costs. Seller shall make all arrangements for, and pay all costs associated with, delivering Net Output to the Point of Delivery, including without limitation costs to schedule energy into Utility’s System.

5. Energy Reserve Requirements. Seller is responsible for obtaining all generation

(continued)

reserves as required by the third-party Transmission Provider(s) and WECC and/or as required by any other governing agency or industry standard to deliver the Net Output to the Point of Delivery, at no cost to Utility.

6. Seller’s Responsibility to Report Net Output and Supplemented Delivery. On or before the tenth (10th) day following the end of each calendar month, Seller shall send a report containing the information in **Example 1** below from the previous calendar month, in columnar format substantially similar to **Example 1** below. If requested, Seller shall provide an electronic copy of the data used to calculate Net Output, in a standard format specified by Utility. For each day Seller is late delivering the certified report, Utility shall be entitled to postpone its payment deadline in Section 10 of this Agreement by one (1) Business Day. Seller hereby grants Utility the right to audit its certified reports of hourly Net Output and agrees to allow Utility to have access to imbalance information kept by the Transmission Provider(s). In the event of discovery of a billing error resulting in underpayment or overpayment, the Parties agree to limit recovery to a period of three (3) years from the date of discovery.

7. Seller’s Supplemental Representations, Warranties and Covenants. In addition to the Seller’s representations and warranties contained in Section 3 of this Agreement, Seller represents, warrants, and covenants with respect to each delivery of energy to the Point of Delivery that:

- (a) Seller’s Surplus Delivery, if any, results from Seller’s purchase of some form of energy imbalance ancillary service;
- (b) The third-party Transmission Provider(s) requires Seller to procure energy imbalance ancillary service, as a condition of providing transmission service;
- (c) The third-party Transmission Provider(s) requires Seller to schedule deliveries of Net Output in increments of no less than one (1) MW;
- (d) Seller is not attempting to sell Utility energy or capacity in excess of the Facility’s Net Output; and
- (e) The energy imbalance ancillary service is designed to correct a mismatch between energy scheduled by the Seller and the actual real-time production by the Facility.

8. Acceptance of Supplemented Delivery. In reliance upon Seller’s warranties in Section 7, above, Utility agrees to accept deliveries of imbalance ancillary service energy from Seller in the form of Supplemented Delivery, and Utility will pay Seller the Contract Price for such Supplemented Delivery; provided, however, that Utility is not obligated to pay for Surplus Delivery.

Example 1:

Day	Hour Ending (HE)	Net Output at POI	Maximum Delivery Rate	Net Output in Excess of Maximum Delivery	Scheduled/ Delivered Energy (per e-Tag)	On-Peak Supplemented Delivery/ Delivery Deficit	Off-Peak Supplemented Delivery/ Delivery Deficit
1	1	-	1.50	-	-		-

(continued)

Commented [A158]: QFTG Comment: Ex. L, Supplemental Provisions 8. This section as drafted by the utilities contains no affirmative statement that the Utility will pay for the Supplemental Delivery; it is only implied by negative implication through the statement Utility will not pay for Surplus Delivery. There should be an affirmative statement that the Utility must pay for the Supplemental Delivery, so we have added that.

Commented [A159R158]: JU Comment: The Joint Utilities do not object to the QF Trade Groups’ revisions to this provision.

FORM OF STANDARD QF PPA (10MW OR LESS)
Small Power Production Facility – FIRM
Attachment X to Oregon Schedule XX

1	2	(0.01)	1.50	-	-		-
1	3	(0.01)	1.50	-	-		-
1	4	(0.01)	1.50	-	-		-
1	5	(0.01)	1.50	-	-		-
1	6	0.64	1.50	-	1.00		0.36
1	7	0.83	1.50	-	1.00	0.17	
1	8	0.89	1.50	-	1.00	0.11	
1	9	0.99	1.50	-	1.00	0.01	
1	10	1.19	1.50	-	1.00	(0.19)	
1	11	1.29	1.50	-	1.00	(0.29)	
1	12	1.34	1.50	-	1.00	(0.34)	
1	13	1.44	1.50	-	1.00	(0.44)	
1	14	1.49	1.50	-	1.00	(0.49)	
1	15	1.48	1.50	-	1.00	(0.48)	
1	16	1.54	1.50	0.04	2.00	0.50	
1	17	1.59	1.50	0.09	2.00	0.50	
1	18	1.59	1.50	0.09	2.00	0.50	
1	19	0.99	1.50	-	1.00	0.01	
1	20	0.75	1.50	-	1.00	0.25	
1	21	0.58	1.50	-	1.00	0.42	
1	22	(0.01)	1.50	-	-	-	
1	23	(0.01)	1.50	-	-	-	-
1	24	(0.01)	1.50	-	-	-	-
...	...						
Total		18.55	36.00	0.22	19.00	0.24 (On-Peak Surplus Delivery*)	0.36 (Off-Peak Surplus Delivery*)

On-Peak Scheduled/Delivered Energy (MWhs): 18.00

Off-Peak Scheduled/Delivered Energy (MWhs): 1.00

Total MWhs Utility will pay for:

On-Peak MWhs: 18.00 – 0.24 = 17.76 MWhs

Off-Peak MWhs: 1.00 – 0.36 = 0.64 MWhs

Total MWhs: 18.40 MWhs

*Utility will accept but will not be obligated to pay for Surplus Delivery, per the terms of this [Exhibit L](#) and OAR 860-029-0121.

(continued)

JU Comment: As reflected in the response to questions from the September 12 workshop, the JUs acknowledge after further review of the new rules that the new rules cap the total amount of damages at the contract price. Therefore, the JUs accept the QFTGs' revisions to add any transmission charges to deliver replacement energy and any replacement RECs to the definition of Replacement Cost, which is used to determine the Utility's Cost to Cover. However, rather than applying the damages cap through the "Utility's Cost to Cover" definition, as the QFTGs propose, the JUs propose clarifying application of the damages cap separately for each type of damages because each type of damages is governed by a separate rule that has slightly different terms. For delay damages, the JUs revised the definition to make clear that the aggregate cap is calculated on a monthly or partial monthly basis, which is consistent with OAR 860-029-0120(7)(a) and the PPA provision stating that delay damages are invoiced on a monthly basis.

Delay Damages

B3 -- Commission Interpretation

Staff believes the JUs have revised definitions of terms used in connection with calculation of damages, such as Utility Cost to Cover and Replacement Power costs as well as definition of "Delay Damages," to address many of the concerns raised by the QFTG re: the PPA damages-related provisions. Staff recommends the Commission adopt the JUs' definitions of "Delay Damages," "Replacement Power Costs and "Utility Cost to Cover".

The JUs and QFTG do not agree on how the caps on damages should apply. The QFTG advocate for one method to calculate cap for all different types of damages and the JUs argue the damages cap for Termination, Delay, and failure to meet the MAG and MDG damages are all differently stated in rules and thus, the damages caps should not be identical for all damages.

Staff agrees with the JUs that the damages cap are described differently for each type of damages and agrees with the JUs interpretation of the Commission rules relating to damages, unless specifically noted in this document.

6..8.3. Upgrades to Nameplate Capacity

B3 - Interpretation of Contract

QFTG/JU disagree on meaning of OAR 860-029-0120(14)(d). Question is whether a QF that terminates a contract early because the QF increased Nameplate Capacity is in "default" for early termination.

Staff believes there is some ambiguity, because generally, there is no other provision that allows a QF to terminate a contract. Instead, the rules and contracts contemplate that if the QF stops performing its obligations under the PPA, the utility can issue a Notice of Default, and then, if default is not cured, the utility can issue a notice of termination.

Because the idea of a QF terminating a contract is unique, Staff believes it is correct to treat the QFs early termination as a default, with the limitations on damages as stated in rule.

Staff believes the JU draft of the section captures the intent of the Commission's rule.

For reference, OAR 860-029-0120(14)(d).

"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."

Page 34: [4] Commented [A83] Author

6.9 Telemetry

B2(2)

The QFTG recommend deleting this provision in its entirety on because it is not supported and its cost impact is unknown. The JUs have proposed modifications to limit impact and tie telemetry requirements in PPA to those already in GIA.

Staff believes the JUs have not shown this provision is appropriate or shown the potential costs to QFs will not be unreasonable.

Staff recommends this provision be deleted . Staff notes this provision could be moved to Appendix for future review.

Page 34: [5] Commented [A84] Author

6.11 Dedicated Communication Circuit

B2(2)

The QFTG object to this provision as unsupported and posing cost risk to QFs.

Staff agrees with QFTG.

Staff recommends deleting provision. Staff notes this provision could be moved to Appendix for future review.

Page 65: [6] Commented [A131R130] Author

The JUs do not object to the QFTGs' deletion of the provision regarding Planned Outages hours already assumed in the calculation of Expected Net Output. However, the Joint Utilities reject the QFTGs' proposal to add additional hours "between sunset and sunrise" to the definition of "Operational Hours" for purposes of the MAG. Contrary to the QFTGs' assertions, this proposal is not consistent with OAR 860-029-0124(2)(b), which simply provides:

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

While solar facilities are not prohibited from conducting Planned Outages during High Demand Months at times when motive force is unavailable to generate and deliver energy, this does not mean that the facility is allowed additional Planned Outages hours in the MAG calculation when motive force is not available beyond the 200 hours already specified in subsection (iii) and specifically referenced in the rule.

Page 69: [7] Commented [A139R138] Author

JU Comments: The JUs do not object to the QFTGs' revisions regarding curtailment but restored the clause providing "to the extent not caused by Seller's actions or omission." The JUs restored this language deleted by the QFTGs because if the curtailment is the Seller's fault, then it should not constitute "Seller Uncontrollable Minutes" under the plain meaning of that term.

The JUs restored the language deleted by QFTGs but added caveats so this exhibit is not imposing new requirements. Specifically, SCADA and electronic fault logs are now only required where available.

Page 69: [8] Commented [A140] Author

QFTG Comment: Output Shortfall" - This definition needs to add in the Net Output that Seller could not deliver due to Seller Uncontrollable Minutes. Nothing else in the PPA clarifies how that will work, other than the vague reference to an "adjustment" in the definition of "Output Guarantee", so we have proposed a clarifying edit. Additionally, as with the MAG, the damages calculation does not properly implement the contract price cap on damages for the MDG, see OAR 860-029-0120(c), so we made the same edit as to the MAG.
