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March 20, 2006

VIA ELECTRONIC MAIL AND HAND DELIVERY

Public Utility Commission of Oregon
Attention: Filing Center
550 Capitol Street NE, #215
P.O. Box 2148
Salem, OR 97308-2148
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Re: *In the Matter of Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*
OPUC Docket No. UM 1129
DOJ File No. 330-020-GN0041-04

Enclosed for filing are originals and five copies of Oregon Department of Energy's Post Hearing Brief (Phase 1 Compliance) and certificate of service in the above-captioned matter.

Sincerely,

/s/ Janet L. Prewitt

Janet L. Prewitt
Assistant Attorney General
Natural Resources Section

Enclosures

c: Phil Carver, ODOE (email only)
Jeff Keto, ODOE (email only)
UM 1129 Service List

JLP:jrs/GENP5358

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1129

In the Matter of the PUBLIC UTILITY COMMISSION OF OREGON Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities	**OREGON DEPARTMENT OF ENERGY'S POST HEARING BRIEF (PHASE 1 COMPLIANCE)**

This Post Hearing Brief is filed on behalf of the Oregon Department of Energy (ODOE) pursuant to direction from the Administration Law Judge in the above captioned matter. In general ODOE agrees with many of the staff's recommendations. This brief addresses remaining issues raised in this case, where additional clarification or instruction from the Commission is needed.[1]

Phase 1 Compliance Issue No. 4: Criteria For Determining Whether Multiple Energy Projects Are In Fact A Single Qualifying Facility.

Commission Should Adopt the Stipulation Regarding Multiple Sites

Issue Number 4 in this compliance proceeding states:

> **Should the Commission adopt criteria for determining whether multiple energy projects are in fact a single Qualifying Facility to protect the intent of Order No. 05-584, which directs that only projects 10 MW and smaller are eligible for standard avoided cost rates and a standard contract? For example, if a 60 MW wind farm is divided into six 10 MW installments in close proximity to one another, all built in the same calendar year, and with underlying ownership structures containing similar persons or entities, should each installment be eligible for standard rates and standard contracts? What criteria determine when a Qualifying Facility is 10 MW or less and eligible for the standard contract when the project/site has multiple generating units?**

[1] ODOE generally agrees with the arguments put forth by JR Simplot, Sherman County in its Post Hearing Brief. However, ODOE takes no position on the surplus period issue.

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On February 8, 2006, the Oregon Department of Energy filed a stipulation of the parties that settles issue No. 4. The ODOE urges the Commission to adopt the stipulation and incorporate it into its order in the compliance proceeding.

Phase 1 Compliance Issue No. 15: Gas Price Forecasts

1. The Commission should give effect to Order 05-584 and order PGE and PAC to re-file their avoided costs for both the sufficiency period and post-sufficiency period based on the latest available data.

The Commission has explicitly provided that utilities and other interested parties may request the Commission to review avoided cost rates on an unscheduled basis:

> *Understanding that circumstances may change to make existing avoided cost rates either too low or too high, we recognize that other parties besides the utility may wish to address avoided cost rates on an unscheduled basis. Consequently, we will exercise our discretion, when appropriate, to direct a utility to make an avoided cost filing between scheduled filings. The Commission may institute a supplementary proceeding to review a utility's avoided costs on its own motion or at the request of any party. We encourage parties to notify the Commission when it may be appropriate to review avoided cost rates between filing deadlines.*

Order 05-584, p. 29. ODOE requested that Commission take another look at the avoided cost rates:

> *The natural gas price forecasts the Portland General Electric and PacifiCorp (PAC) have used for determining avoided costs are not reasonable. Even if they were reasonable at the time, natural gas prices have shifted significantly since July of 2005. Much of the change occurred before August 30 so it is not related to damage to the Gulf Coast gas infrastructure from hurricanes Katrina and Rita.*

ODOE 7,Carver 1. In the direct testimony of Dr. Don C. Reading, the Sherman County Court and J. R. Simplot also requested the Commission to require the utilities to resubmit their compliance filings with updated gas prices. Sherman/Simplot/Reading Direct, p. 11.

Staff rejected these requests. Staff 1600/Chriss 16. Staff expressed concern over "asymmetrical rent-seeking" and a "moving target" that could result from repeated

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adjustments of avoided costs. *Id*. Staff's rejection of the update is also based on staff's belief that changing the avoided costs on the two year cycle of the integrated resource plan is adequate. Chriss, Transcript, p. 171.

Staff's position is not consistent with the Commission's order. The Commission unambiguously ordered that avoided cost rates may be reviewed on an unscheduled basis. Furthermore, such review can be triggered on the Commission's own motion or on the motion of a utility or other interested party. ODOE and Sherman County/J. R. Simplot have made just such a request, in part based on steady upward pressure on natural gas prices since the avoided cost filings in this matter in July, 2005. Throughout this proceeding, ODOE has consistently urged the Commission to adopt a consistent, transparent method of determining gas prices that is not subject to manipulation by QF buyers or sellers. Updates at the Commission's discretion do not allow for manipulation.

ODOE notes that PGE's and PacifiCorp's forecasts were based on March 2005 data at the latest. We are now more than half-way through a two year avoided cost cycle. *See* Transcript, p. 66, l. 17-21. Because wholesale prices in the sufficiency period are strongly affected by natural gas prices, both near-term and long-term natural gas prices are relevant. *See* generally Reading Direct testimony and Reading Rebuttal testimony on behalf of Sherman/Simplot. ODOE's testimony on this issue is based on the following criteria for judging whether a price change is significant and how often to update:

1. Is the percentage change in spot prices large and persistent?
2. Do futures or forward markets indicate the price change is likely to persist for years?
3. How expensive or burdensome is it to update avoided costs?
4. Has sufficient time elapsed since the last avoided costs filing to judge the recent trends. [Also it is procedurally impractical to update avoided costs every few of months, so at least a few month need to elapse, as is true now regarding the July filings.]

See generally ODOE 7/Carver 1-7.

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Applying these criteria indicates that avoided costs should be updated now. ODOE agrees that the Commission must be mindful of imposing additional procedure unnecessarily. Nevertheless, there is sufficient evidence in this record to demonstrate a persistent upward trend in market prices of natural gas to warrant refilling avoided cost rates now.

It is indisputable that spot prices are up dramatically. Carver shows that spot prices began a steep rise **before** Katrina, showing that they are responding to more fundamental trends. Also, Carver demonstrated the 2010 (Henry Hub) futures price as not influenced by Katrina and Rita. This is shown by comparing NYMEX HH future price for 2010 of $6.98 on the trading day 7-6-05 (PGE filing) to $7.01 on trading day 11/14/05. ODOE 7, Attachment 1, p. 2. Reading, in rebuttal, shows that between Dec. 6, 2005 and Jan. 18, 2006 the HH future price for 2010 has risen by roughly $1.50. Reading Reb, p. 8; Exhibit Reading REB-1. The record demonstrates large changes in spot prices and 2010 HH futures prices. Furthermore, the record definitely shows that these increases are not driven by recent hurricanes.

Evidence submitted by the utilities does not directly disprove the need for updated avoided cost rates. While PacifiCorp notes that Carver and Reading propose that PAC update its forecast and acknowledges that price can change dramatically, their testimony does not actually rebut the need for an update. PPL 500/Engberg 4. The only relevant sentence is oblique: "Whenever natural gas prices need to be fixed or established for a period of time…" PPL 500/Engberg 3, line 21. Similarly, PGE in rebuttal talks only about spot prices. PGE/Drennan/Kuns at 17. PGE acknowledges changes in spot prices but indicates that spot prices may not necessarily reflect changes in 20 year prices. PGE provides no alternative criteria for judging when circumstances have changed

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significantly. Nor does PGE refer to either Henry Hub futures prices or local hub forward prices. Furthermore, the utilities have no incentive to change avoided cost rates when it will result in a higher price to QF facilities.

OPUC Staff does not dispute that the changes in spot and futures prices indicate a significant shift has occurred. Staff 1600/Chriss 16, lines 4-6. Although Chriss discusses high prices for next winter, it is not clear if he is using local forward or HH futures markets to make this judgment. *Id*.

2. The Commission should order PGE and PAC to refile avoided costs in a way that will likely result in reasonable forecasts of natural gas prices, including the period after 6 years when local hub forward or Henry Hub futures prices are unavailable or perceived as too volatile or illiquid.

Chriss proposes a process where a utility forecast is accepted if it is not significantly different from the current price in nominal dollars as long as it was produced by a known consultant. Staff 1100/Chriss 10, 17. Since there are always a wide range of consultant forecasts (and even a range of forecasts for a single consultant, e.g. CERA), this gives unreasonable latitude for utilities to set avoided costs for QFs. And, notwithstanding Staff's position that a consultant's work should be accepted because "it is safe to assume that they have put a great deal of thought and work into their forecast product," the Commission should be mindful of the ability of the utility to choose a beneficial forecast and thereby manipulate the avoided cost. *See* Staff 1100/ Chriss 10, 17.

OPUC Staff's apparent criterion for unreasonableness, is to measure the forecast against flat nominal prices. The use of flat nominal prices does not make sense in economic theory. Except in periods of deflation, flat nominal prices will result in a standard that has real prices decreasing over time. In fact, this record demonstrates that real prices for natural gas will remain flat or increase substantially by 2010 (the

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sufficiency period). Even if the more reasonable flat real price criteria were substituted, this does not incorporate relevant short trends (up to 6 years) from the Henry Hub futures market adjusted for basis differentials or from local hub forward markets (as used by PAC for the Opal hub). Beyond the 6 years or so that market prices are available, the rebuttable presumptions should be that prices are flat in real terms. Generally, depletable resource prices should trend upward in real terms. Utilities should provide evidence for real escalation or deflation but should not be allowed to just reference a consultant's forecast without explanation.

3. The Commission Should Instruct Utilities On Methods Used To File Gas Price Forecasts.

If utilities are ordered to refile, PAC would likely submit its most current official forecast which is likely to be reasonable. *See generally*, Transcript, Engberg at pages 66-68. PGE's July filed forecast rejected by staff as implausibly low and out of sync with then current prices and forward or futures market prices. PGE should be required to provide a forecast using forward price quotes from brokers for local hubs for at least 6 years. The reasons for any deviations from flat real prices after that period should included in the filing documents.

PGE states: "there is no credible evidence presented to discredit its (CERA's) forecast." PGE/Drennan/Kuns 21, lines 10-11. This is factually incorrect. ODOE's December 9, 2005 testimony included an article by Ron Cooke challenging CERA's oil and gas forecasts as an exhibit. ODOE 7/Attachment 4. No one rebutted the linkage between oil and natural gas prices in pointed out by ODOE. ODOE 7/Carver 5-7. Nor was the disconnect in CERA's local hub gas price forecast ("Rearview Window") from Henry Hub futures rebutted. Further the extreme assumptions behind CERA's oil price

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forecast as shown by Cooke were not rebutted. This is further proof that PGE should update its avoided costs. Although PGE assessed local hub prices in a few early years, these values were not used in its gas-price forecasts for the proxy gas-fired plant. PGE participates in regional forward markets at AECO and Sumas hubs to procure natural gas for its power plants. *See* PGE's *Final Action Plan 2002 IRP*, pages 68-71.[2] . The Commission should order PGE to use these markets to forecast regional gas prices for up to 9 years as described in the Final Action Plan.

PacifiCorp's use of forward market prices is reasonable. As noted in PacifiCorp's testimony,

> *"PacifiCorp obtains market prices on each trading day. In the case of Rockies/Opal, market prices are frequently quoted as a basis [differential] to Henry Hub, which is the delivery point for the NYMEX futures contracts, which are also consistently available through the six year horizon."*

PPL 500/Engberg 3, 4-7. This statement indicates that local hub markets view the Henry Hub futures prices as reasonable and not overly volatile.

Conclusion: Gas Price Forecasts

The Commission should order utilities to refile avoided cost rates using most recent gas price forecasts. Utilities should use verifiable market prices for natural gas prices (local hubs or Henry Hub adjusted for basis differentials) for at least 6 years. After that natural prices should be rebuttably presumed to escalate at the nominal rate of inflation. In addition, utilities should be required to demonstrate why natural gas prices should not equal crude oil prices in the long-term, if their long-term natural gas price is different from current light-sweet crude oil prices. Utilities can present evidence to rebut

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[2] *See* ODOE's Request for Official Notice, February 1, 2006. This plan was acknowledged by the Commission.

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flat real prices and the connection between crude oil and hub gas prices, but it must be substantive and factual. Utilities should be required to use long-term natural gas price forecasts that are consistent with forward prices at local hubs. PacifiCorp does this. PGE should do so as well.

Miscellaneous Creditworthiness and Default Provisions

ODOE submitted testimony on a variety of compliance issues, primarily related to contract provisions addressing creditworthiness and default provisions. ODOE's Small Scale Energy Loan Program (SELP) is a lender to PURPA qualified facilities (QF). The terms of the standard power purchase agreements provide the revenue stream that SELP uses to finance a QF. Thus, ODOE has general concerns about the implementation of the creditworthiness provisions of Order 05-584 and concerns about specific staff recommendations.

1. General Approach to Creditworthiness

ODOE believes that staff's approach to determining or proving creditworthiness allows purchasing utilities too much discretion in the mechanisms a QF must provide in showing creditworthiness. As stated in ODOE's opening testimony:

> ODOE believes, per Order # 05-584, § L(2)(c), that a QF has the option of meeting creditworthiness by making the following representations and warranties: "that the QF has good credit, including that it is current on existing debt obligations and has not been a debtor in a bankruptcy proceeding within the preceding two years." ODOE understands the Order to mean that a QF can demonstrate creditworthiness by making this set of representations and warranties without any other action or representation required. The Order further states "we adopt Staff's proposal that requires a QF unable to satisfy credit rating requirements to provide a reasonable amount of default security by one of the following means, selected at the QF's discretion: senior lien, step-in-rights, a cash escrow or a line (letter) of credit." ODOE interprets this to mean that a utility can accept a QF as creditworthy if it has a satisfactory credit rating (long-term debt rating by Moody's or Standard and Poor's) and thus not require the QF to provide default security. ODOE believes that this does not mean that a long-term debt rating is required in addition to making the prior set of representations and

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> warranties in order to establish creditworthiness. Requiring a long-term credit rating, which the majority of QFs would not possess, or any other condition, other than making the above set of representations and warranties, does not comply with the Order.
>
> The filed utility contracts include requirements for creditworthiness beyond a QF making the above set of representations and warranties. Idaho Power (IP) (§ 4.1.6) states that the specified security requirements are "at a minimum," which does not bring transparency to the contract and leaves IP to add additional requirements as they see fit or to require the posting of security. PacifiCorp (§ 3.2.7) requires QFs over 3MW to have a long-term debt rating in addition to making the stated representations and warranties or post security.

UM 1129 ODOE 6 Keto 3-4. ODOE reiterates its position that permitting utilities to impose additional conditions on a QF's creditworthiness, such as requiring a credit rating from QFs seeking a standard contract is beyond what the Order permits. Even if staff is correct and the term "including" permits a utility to require additional demonstrations of creditworthiness, the Order does not permit a utility to require more than representations. Furthermore, any information required by a utility must be spelled out in the standard contract. Permitting the utility to declare that the information required is "at a minimum" gives too much latitude to the utility and does not provide adequate transparency to the QF. Similarly, as noted in the testimony above, permitting a utility to require a credit rating in addition to a set of representations would eliminate a substantial number of small QFs from obtaining standard contracts because the credit rating is either not available or prohibitively expensive for the small facility.

The Commission should clarify that any requirements imposed upon a QF to demonstrate creditworthiness must be consistent with the Commission's stated objective to encourage QF's in Oregon:

> We seek to provide maximum incentives for the development of QFs of all sizes, while ensuring that ratepayers remain indifferent to QF power by having utilities pay no more than their avoided costs. We are persuaded that significant barriers exist to the negotiation of non-standard contracts and that the details negotiation

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> parameters and guidelines, as well as other measures, may overcome these barriers.

Order 05-584, p. 11. The Commission should ensure that utilities cannot erect barriers to the development of small QFs by requiring demonstrations of creditworthiness that are not available to the small QF or by imposing draconian security requirements on them when they cannot provide such demonstrations.

<u>Relating to Termination</u>

ODOE seeks Commission clarification of two issues regarding termination. The staff summary contained the following recommendation:

> Require the utilities to modify their standard contracts to exclude delay of commercial operation as an event of default, including as a cause of termination or related damages, if the utility determines at the time of contract execution that it will be resource sufficient as of the QF on-line date specified in the contract.

Staff 1501/Schwartz 1-2. ODOE understands this provision to mean that a utility may not use delay of commercial operation as either an event of default or grounds for termination of the QF contract, if the utility is resource-sufficient at the on-line date. However, in addition, the Commission should specifically provide that all of the standard contracts include a reasonable opportunity to cure before termination is allowed. That is, as ODOE testified:

> The PacifiCorp contract (11.2.2) allows an opportunity to cure for a delay in commercial operations—a provision critical to obtaining financing. The PGE contract does not include such an opportunity to cure. The Idaho Power contract provides ten months cure provision in (section 5.4) if the scheduled operation date is not met.

ODOE 9/Keto 3.

ODOE believes that PGE should also be required to include an opportunity to cure provision in its contract similar to Pacific or IP. As ODOE testified:

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> Termination for late start up or under-delivery of power will make many QF projects unfinancable by SELP. If termination is allowed for under-delivery of power, it should be allowed only in the most egregious cases that do not involve that lack of motive force, and the contracts should allow the QF to make repairs and correct operational problems or allow the lender to take legal action and facilitate renewed generation within a commercially reasonable time frame. The time needed to accomplish these actions could be more than one year if parts, contractors or transportation are difficult to obtain. If the Commission allows termination for under-delivery in egregious cases, SELP recommends that the contracts allow two years to cure the lack of power delivery before termination is an option

ODOE 6 Keto 9-10. As stated above, it is crucial to financing that the contracts allow a commercially reasonable amount of time to correct for delayed start up or under delivery in all cases before a utility is permitted to terminate the power purchase agreement. The penalty provisions take care of the financial loss, so immediate termination should not be permitted.

The second issue in termination ODOE seeks the Commission action on is in regards to under delivery of power.

As ODOE testified in ODOE 9 Keto 3-4:

> **Q: STAFF/1000 SCHWARTZ/1, PAGE 37 LINES 14-19 STATES "IDAHO POWER STATES THAT IT WOULD NOT TERMINATE A QF CONTRACT DUE TO REDUCED RESOURCE AVAILABILITY RESULTING FROM ADVERSE NATURAL MOTIVE FORCE CONDITIONS OR PRODUCTION CURTAILMENTS AT THE HOST INDUSTRIAL FACILITY, UNLESS THE PROJECT APPEARS TO HAVE PERMANENTLY CURTAILED ITS GENERATION TO VERY LOW LEVELS AND THE DEVELOPER IS NOT MAKING REASONABLE EFFORTS TO CURE THE PROBLEM." DOES ODOE SUPPORT THE COMMISSION REQUIRING THIS LANGUAGE IN ALL STANDARD CONTRACTS?**
>
> A: Yes. We support such standard language. In response to ODOE's data request #9, Staff stated:
>
> > "Staff has testified throughout this proceeding that weather should not be a cause for default or termination. Staff supports the use of a Mechanical Availability Guarantee (MAG) as the basis for determining default for underdelivery.

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> Weather-related under-deliveries would not trigger default or termination under such a mechanism.
>
> Without a MAG, utilities must rely on the QF to account for adverse natural motive force conditions in designating minimum annual generation, with supporting documentation. Similarly, a cogeneration QF should account for production curtailments in designating minimum generation. Avoided cost rates are based on a firm proxy resource. In order for a utility to avoid such a resource, the QF must provide reasonable estimates of anticipated generation.
> Under PGE's standard contract, the Company will not terminate for under-delivery unless the QF has underdelivered for two consecutive years. Therefore, Staff does not believe it is necessary for the Commission to require PGE to add language consistent with Staff's testimony, cited above.
>
> Under Idaho Power's standard contract, the Company will not terminate a QF unless it fails to deliver at least 10% of its minimum obligation in any contract year. If, for example, a hydroelectric project does not produce energy for a year due to temporary lack of water, the contract would allow for termination, even though the Company states it would not terminate the contract under such a circumstance. In the absence of a MAG, Staff would not object to a party recommending the Commission require Idaho Power's standard contract to include language consistent with Staff's testimony, cited above, for intermittent renewable resources
> .
> PacifiCorp's contract provides no exceptions for termination due to under-delivery other than events excused by force majeure, which do not include lack of wind or water. In the absence of a MAG, Staff would not object to a party recommending the Commission require PacifiCorp's standard contract to include language consistent with Staff's testimony, cited above, for intermittent renewable resources."

ODOE recommends that the Commission require that QF contracts include language either similar to the Idaho Power statement in Staff's testimony above (regarding non-termination for under-delivery because of lack of motive force or production curtailment at the host industrial facility if the developer is making a reasonable attempt to increase the generation) or language as in PGE's contract (that PGE

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will not terminate for under-delivery unless the QF has under-delivered for two consecutive years).

Relating to Minimum Delivery Requirements

ODOE is concerned that Staff's recommendation regarding minimum delivery requirements did not address all of the issues. Staff's summary contains the following recommendation:

> Allow the utilities to amend their standard contracts to use a Mechanical Availability Guarantee based on annual production as the basis for determining default for under delivery for QFs relying on intermittent resources.

Staff 501/Schwartz 1, lines 35-37. Because the Commission has not yet defined or approved the use of mechanical availability guarantees, the issue of how to determine the minimum delivery requirements for the standard contracts remains open. ODOE testified at some length on this issue. *See* ODOE 6, Keto 7-8. In general, ODOE believes that the Commission should decide how the minimum delivery obligation should be determined in the absence of a mechanical availability guarantee. Furthermore, the method should eliminate the potential for negotiation over the issues.

Currently, each of the filed contracts provides space for the QF to fill in an amount of delivered energy on a monthly or annual basis, which if not delivered will result in default and penalties. ODOE agrees with Staff recommendation to require IP to establish minimum delivery on an annual basis. ODOE proposed set minimums based on resource type:

> To avoid potential negotiations ODOE recommends the standard contracts state a minimum amount of delivered power based on the type of resource. ODOE recommends setting annual minimum power delivery based on the following capacity factors of nameplate ratings: 5 percent for solar, 10 percent for hydro and wind, 20 percent for geothermal, biomass or natural gas fired cogeneration. The percentage should be adjusted by the percentage of power a QF intends to use

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> on site. These pre-set minimums need to accommodate a wide variety of generating projects including the small farm-scale facilities. If the contract requires minimum delivered power that is likely to put a QF in default or require payment of damages, financing the project will be very difficult if not impossible.

Id. Although staff rejected the set contract capacity amounts, but instead proposed using a MAG, staff did not address the negotiation issue. Thus, if a MAG is not required, the fall-back is to "fill-in-the blank," which could potentially lead to protracted negotiations over what is supposed to be a standard contract. Although Staff rejects ODOE's proposed set numbers as not being reasonable, it is very possible that unusual weather years could result in production well outside of the parameters of the years studied. Thus, significant derating from nameplate is warranted in order to protect a QF from facing penalties solely on the basis of failure of an intermittent resource. The Commission should eliminate the potential for negotiations over minimum delivery obligations by adopting ODOE's recommended set amounts as the default if there is no mechanical availability guarantee.

<u>Relating to Cap on Default Damages</u>

ODOE is concerned that the Commission explicitly adopt ODOE's underlying assumptions regarding minimum delivery obligation that supports Staff's recommendation of a cap on default losses. Staff's summary contains the following recommendation:

> Establish a cap for the standard contracts for default losses that can be recouped pursuant to future QF contract payment reductions, equal to 100% of the QF contract price multiplied by the amount of energy the QF failed to deliver, based on its minimum delivery obligation for the year in which the event of default occurs.

Staff 1501/Schwartz 2, lines 38-42. This cap was proposed by ODOE. Staff 1500/Schwartz 19. As part of this proposal ODOE testified:

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> * * * ODOE recommended the contract cap on default damages be set at the value of the contracted minimum power delivery during the default period. (ODOE/Exhibit 6/Keto/Page 16, Lines 19-21). In response to Staff's data request #20 ODOE responded, "I would not recommend financing if projected maximum damages under the power purchase agreement could not be paid from a reduction in future revenue within a reasonable time while keeping expenses and debt service current."
>
> The recommended cap on default damages is based on the recommended minimum power delivery requirements. As an example, a biomass generation project that has a long-term projected capacity factor of 85% and establishes the contract minimum delivery at a capacity of 20% would have a cap on damages of about 23% of its anticipated generation (20/85). This 23% would be close to the maximum amount the QF could be expected to repay the utility in a reasonable amount of time and still have funds for plant operations and debt service. *Our recommendation for a default damages cap was complementary with our recommendation for the minimum delivery requirements.*

ODOE 9/Keto 1-2 (emphasis added). ODOE remains concerned that if the minimum delivery requirement is subject to negotiation without boundaries, the cap on damages recommended by staff will inhibit financing because it would be impossible to pay the required damages and debt service and costs of operation of the QF. Thus, the Commission should clarify that this cap on damages is coupled with the determination of the minimum delivery obligation as proposed by ODOE.

Finally, ODOE reiterates its position that, if the Commission does not accept ODOE's minimum delivery requirements by project type, ODOE believes that Commission should adopt a cap based on 110% of the utility's forward market prices at the time of contract, as described in Staff's opening testimony. Staff/1000/ 53-54. This provides what is needed for financing: a quantifiable cap at the time of loan underwriting and a maximum amount that could be repaid in a reasonable time and still maintain project viability.

Summary:

ODOE respectfully requests that the Commission make it clear that under Order 05-584, utilities do not have unfettered discretion to impose added creditworthiness

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requirements on QFs. In addition the Commission should require all utilities to explicitly provide a commercially reasonable opportunity to cure before terminating the contract, and clarify the circumstances under which a contract can be terminated for under delivery, provide a mechanism to determine the minimum delivery obligation if there is no mechanical availability guarantee, and clarify the cap on default damages.

Dated this 20th day of March, 2006.

Respectfully submitted,

HARDY MYERS
Attorney General

/s/ *Janet L. Prewitt*

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Assistant Attorney Generals
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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2006, I served the foregoing POST HEARING BRIEF (PHASE 1 COMPLIANCE) upon the persons named on the attached UM 1129 service list by electronic mail and by mailing a full, true and correct copy thereof addressed to the persons at the addresses on the UM 1129 service list (with the exception of those parties who have waived paper service).

Dated: March 20, 2006

/s/ *Janet L. Prewitt*

Janet L. Prewitt, #85307
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