BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1129

In the matter of: **Investigation Related to Electric Utility Purchases from Qualifying Facilities**	**OPENING POST-HEARING BRIEF OF THE FAIR RATE COALITION**

I. INTRODUCTION.

The FRC consists of non-utility owners of operating hydroelectric facilities with installed capacities generally under 500 kilowatts, and those who have a community of interest with other existing and emerging small producers of renewable energy. The members who testified, Steve Sanders, Doug Pegar, Toni Roush and Loyd Fery are all owners/operators of a "small power production facility" -- one with a production capacity of no more than 80 megawatts (MW) and uses as a primary energy source renewable resources such as wind, water or solar energy to produce electric power. 16 USC § 796(17)(A).

II. FRC ISSUES.

A. The FRC relies upon the testimony submitted by Staff and Sherman County and its experts for guidance in determining avoided costs in this proceeding.

B. Since all of the current FRC participants are what might be viewed as micro- or mini-producers, they take no position on the size threshold for standard rates, noting that it can well be greater than the present

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threshold.

C. For the reasons set out in their testimony, Pegar, Sanders, Roush and Fery favor the longest reasonable time duration for contract terms.

D. FRC urges that the small producers not be obligated to carry insurance.

E. They devote the majority of this brief to discussion of the proposed "adder" or "kicker" of .5 to 1.5 mills they propose

1. In recognition of the reliance they placed upon PURPA and Oregon laws, utility promises and earlier decision of the Commission, in developing and maintaining their facilities; and,

2. They propose the adder of .5 to 1.5 mills as a fair surrogate the avoided cost for the benefits that small producers confer upon ratepayers and the community in general.

III. FRAMEWORK.

The Public Utility Regulatory Policies Act of 1978 ("PURPA"), was passed to encourage the conservation of fossil fuels and promote the development of new generating facilities with "equitable rates" for consumers. ***North Star Steel Co. v. US***, 58 Fed Cl 720, 724 (2003). Qualifying facility (QF) status of a small power producing facility is a creature of Title II, which reflects, predominantly, "solicitude for certain types

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of producers rather than for the consumers who must pay their rates." ***Connecticut Valley Elec. Co., Inc. v. FERC***, 208 F3d 1037 (DC Cir 2000); PURPA, 16 USC §§ 824a-3, 2611. FRC's proposed modest adder is *de minimis*, thus does not violate any mandate to protect customers, furthers the congressional intent to encourage diverse and non-aggregated power production, and honors the congressional intent to grandfather-in those who relied upon PURPA in various contexts.

Congress's rationale for its concern for small power producers and co-gen was explained by the FERC in 1995:

> When Congress enacted PURPA in 1978, there was very little non-utility generation. In 1978 virtually all new generating capacity was provided by traditional electric utilities. In fact, one of the principal reasons Congress adopted section 210 of PURPA was because electric utilities had refused to purchase power from non-utility producers. In contrast to 1978, non-traditional producers, including QFs, now provide well in excess of half of all new generating resources, and the Commission has determined that there is no longer any dominance in the provision of new generating capacity.

Re Southern California Edison Company, Re San Diego Gas and Electric Company, 70 FERC ¶ 61,215, 1995 WL 169000 (1995).

FERC rules specify that in determining avoided costs the following factors shall be taken into account to the extent practicable:

> (2) The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:
>
> > (i) The ability of the utility to dispatch the qualifying facility;

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> (ii) The expected or demonstrated reliability of the qualifying facility;
>
> ....
>
> (vi) The individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and
>
> ....
>
> (3) The relationship of the availability of energy or capacity from the qualifying facility as derived in paragraph (e)(2) of this section, to the ability of the electric utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use.

18 CFR § 292.304(e)(2)-(3).

The small power producers fit well within §§ 292.304(e)2(i) and (ii) and (3). While not large in production, they are important in developing diverse supply within local communities and for long-range planning if more small producers can be encouraged to enter the market and meet the goals of PURPA.

IV. DISCUSSION.

A. RELIANCE AND GRANDFATHERING.

In other contexts implementing PURPA, states are permitted to achieve fairness through grandfathering. According to the FERC, "[i]t is up to the States, not this Commission, to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law." ***West Penn Power Co.***, 71 FERC ¶ 61,153 (1995) (footnote omitted). For example, a state commission can set the date of contracting: "[c]onferment of grandfathered status

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on qualifying facility is essentially an IPUC finding that a legally enforceable obligation to sell power existed by a given date. Such a finding is within the discretion of the state regulatory agency." ***Rosebud Enterprises, Inc., v. Idaho PUC, and PacifiCorp, dba Utah Power & Light Company***, 128 Idaho 609, 917 P2d 766, Util L Rep ¶ 26,535 (1996).

Moreover, other QF developers[1] were grandfathered by law in recognition of their reliance on the proposed legal framework:

> In recognition of the fact that some developers have relied on the provisions of the Federal Power Act and PURPA and have committed substantial amounts of money to their projects, special provisions are included in the legislation to exempt these developers from some or all of the additional environmental reviews for PURPA inspired new dam or diversion projects.

H R REP NO 99-507, 99TH CONG, 2D SESS 44 (1985).

In the case of Oregon facilities, the record in this case demonstrates that many small hydro producers indeed relied on the availability of PURPA benefits in choosing to develop their projects. They further relied upon the negotiation history with the utilities and earlier decisions of the Commission in making long-range plans and maintaining their facilities in the past three decades. Toni Roush, Doug Pegar, Loyd Fery and Steve Sanders all testified as to personal and family

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[1] See Implementation of section 8 of the Electric Consumers Protection Act of 1986; Hydroelectric Applicants with Projects at a New Dam or Diversion Seeking Benefits under the Public Utility Regulatory Policies Act of 1978, FERC Statutes and Regulations, P 30,822 (issued July 11, 1988, effective September 16, 1988) (Order No. 499).

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investment and the financial risks they took as PURPA pioneers and in reliance upon a reasonably certain income-stream for their efforts and risks.

As to reliance upon purchases by PGE, Steve Sanders and Doug Pegar testified at length.

> MHP [Minikahda Hydro Plant] was financed in part by receiving the first Small Energy Loan Program (SELP) in Oregon for $87,000 and additional funds for a total over $200,000, by the time the second small turbine of 25kw capacity was added to the original 75 kw generator. This is in line with the "rule of thumb" of $2,000 development costs per kilowatt of installed capacity.
>
> The headworks was built by John West who had built facilities at Multopor ski area. First however, a variance was required from Clackamas County since a portion of the slope was over 35%. This required a soil engineers study and extensive negotiations with county officials.
>
> After construction, my father realized there was additional capacity that had to be utilized to increase production to recover construction costs and repay the loan. It went online in the fall of 1984.
>
> At the time, the utilities stated in the media and in consultation with my father that he would be paid to produce power at the same rate a residential user would be charged, called the "tail block rate." This assurance was the cornerstone of securing the SELP loan and the decision to expend additional private funds.
>
> Portland General Electric Co. paid at what they called the avoided cost rate, about 2.4 cents/kwh at the time. This was not enough to pay the SELP loan or repay its debt.
>
> A PUC docket, UM 28, was opened in 1984, and Paul Sanders intervened. The parties reached agreement in 1985 to pay the promised tail block rate starting in 1985 ($.0529/kwh), with a 4% increase each year until 1988 ($.05883/kwh), at which time the rate was frozen. There were three five year extensions starting in 1988, the last of which expired October 31, 2003. Between 1985 and 2002 the PGE residential average rate has gone from $.0529 to $.0733/kwh.

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p. 2-3.

Doug Pegar also invested in the promise of PURPA and has dealt with PGE:

I planned, constructed and operate Canyon Creek Hydro.

I have been involved in small scale hydro-electric development for more than 25 years. I began before the energy shortage of the late 1970s and before PURPA was enacted. I had an interest in developing power from water. Prior to the era of the big dams developed in the Northwest there were lots of smaller water powered generating plants, but since that time there has not been much information on the subject, nor have there been any incentives. PURPA changed the "picture" for small scale energy production. Its purpose was to encourage the development of alternative sources of electricity. It sought to alter dependence of fossil based fuels as sources of energy production.

About that time I designed and built a small scale (under 100 kw) water powered plant. It took several years to obtain the licenses, permits and other regulatory and agency clearances. I have been operating the Canyon Creek Hydro since 1985. It is located on U.S. Forest Service land 50 miles from my home. I have also done consulting on a per-bono basis for others interested in exploring small hydro. There is not a deep pool of knowledgeable technicians and operators for us to fall back on for advice.

I was responsible for financing and constructing the Canyon Creek small hydro. It was self-financed and self constructed with, help of my father-in-law and my son. There was funding available from the Oregon Department of Energy (ODOE) with their State Energy Loan Program (SELP, but the requirements were very time consuming and conforming would have added to the overall cost of the project.

The first contract to sell/purchase power by Portland General Electric Co. (PGE) was remarkably simple and unencumbered. There was a “standard” contract for Qualified Facilities (QFs) of a rated capacity of 100 kw or less. The "standard rate" paid at that time was the same as the residential rate charged of 5.029 cents per kw. There was a 4% price escalation per year for the first five year term. This amounted to a price of 5.883 cents at the end of five years. The contract was renewable for three

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(3) additional five (5) year terms for a total of twenty (20) years. At the end of the twenty (20) years the amount being paid was still 5.883 cents per kw. In the beginning there were several contract options/choices, including one for a term of up to thirty-five years with a "levelized" payment option. These contracts are now netting 8 or 9 cents per kw. Since my 20 year contract expired on October 31, 2003, I have been operating without the benefit of a contract with over a 20% reduction in payment compared to the old contract price.

Since the early days not one new QF has gone on-line. This has really defeated the purpose of PURPA which had been to encourage the development of alternative sources of energy.

Testimony of Doug Pegar, pp. 3-5.

As for small producers who dealt with Pacific Power and Light, Toni Roush and Loyd Fery set out detailed testimony. Mrs. Roush explained the reliance of her husband and herself in developing Roush Hydro:

The planning and construction of our hydro plant in 1983 was a exciting time for us. We undertook the whole project with a hands-on approach. We worked closely with the construction company. My husband designed and built the fish screens and a automatic cleaning device. Over the years, as Oregon Department of Fish and Wildlife requirements changed, he modified and improved the screening devices.

We financed our hydro project though US Bank at a time when interest rates were at their peek. The 20% interest rate we paid was definitely a financial burden. At the time we owned and operated Stayton Feed and Seed. In the short term, as small business owners, we planned to use the power to off-set our own electrical expenses. In the long term, we considered the building of our micro-hydro plant an investment in the future.

The concept of small hydro production was a new idea at the time, in the early 1980s. We saw the investment as a win-win situation. We had an opportunity to generate CLEAN energy without using up or damaging the environment and also add some income so that we would be able to pay for college for our children and generate a

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retirement income for ourselves. Three years ago my husband passed away and I am left to see that the sacrifices we made to help pioneer small hydro were not done in vain. In 1991 we had a huge fire that destroyed our business and all of our records, including photographs I had taken during the construction of our hydro plan, but even though those material things are gone, I can work to see that the energy promise continues.

Our original contract with PP&L was calculated a price to us obtained from the residential "tail-block" rate. It was a fixed rate of $.05850. The length of the contract was 20 years, consisting of one ten year and two five year renewals. At the time we negotiated this rate, we were led to believe that the rates paid to us would not decrease because energy costs were rising.

Roush testimony pp. 1-2.

Loyd Fery also explained his family involvement and the overwhelming public support he received for his efforts:

The original idea and design of the hydroplant was mine. My parents, Alva and Cecilia Fery invested $30,000.00 of their own savings to fund the construction of the plant. The first turbine was a Bankie Turbine manufactured in Coos Bay, Oregon. I had to personally reconstruct and rebuild it several times before we purchased the current turbine. That current turbine is a vintage 1900 Leffel model. I searched for a replacement, located it in Alaska, and then had it moved from Wrangle, Alaska. It also had to be rebuilt before installation. A few illustrative photographs of the construction days are included in my exhibits.

When we first began we were paid just over $.02 per kw and rates were based on residential rates raising consistently until the end of the contract in 2003. At that time we were being paid $.058 per kw. The current 2004 contracts are at $.043 per kw which is approximately a 25% decrease in rates and thus a 25% decrease in my income.

* * *

Within the very first year of getting started and operating, we had over 400 visitors, including elected officials, at the hydroplant to view this example of a renewable resource. State and federal legislators lauded our energy example.

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> PP&L encouraged its ratepayers to get involved in supporting energy independence such as the model provided by my plant. I know countless people learned about renewable energy through the publicity about my facility. I was proud to be an energy pioneer, and feel that I met an important social challenge to take a chance 25 years ago for Oregon's energy future.

Fery Testimony, pp. 1-2.

B. SMALL PRODUCERS CONFER A MULTITUDE OF BENEFITS WHICH ARE DIFFICULT TO QUANTIFY.

The amount to be paid for QF power is based on the avoided cost. The "avoided cost" essentially represents the amount of money a utility would otherwise spend if it had to construct a facility to produce needed energy or to purchase it from another source, rather than purchasing it from the QF. 18 CFR § 292.101(b)(6) and 16 USC § 824a-3(b), establish that rates for QF purchases may not be greater than the "full avoided costs of the utility." See also 18 C.F.R. § 292.304(a)(2); ***American Paper Institute, Inc. v. American Electric Power Service Corp***., 461 US 402, 103 SCt 1921, 76 LEd2d 22 (1983).

The FRC testimony has advocated a modest "adder" of .5 to 1.5 mills to capture some of the other costs a utility (and ratepayers) avoid through the benefits conferred by small hydro. These producers contribute civic works and aesthetic benefits--- dams, impoundments, fish passageways, recreational amenities, etc., which have value to society for reasons other than power generation. If generation is discontinued, the costs of upkeep will be shifted to others.

Steve Sanders explained at p. 3 of his testimony:

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Minikahda Hydro diverts water from Minikahda Creek, under a secondary water permit, which flows through our property. Minikahda feeds into Clear Creek a mile from its confluence with the Sandy River, a wild and scenic river. The primary water right is owned by the Minikahda Water District (no connection to the power company) which serves 35-40 homes. A deal was struck with the assistance of a water engineer representing the water district, whereby the water district receives water from our pipe before it is used to generate power. The installation of our facility greatly enhanced the reliability of the diversion and transmission of water for the community. The fact that our pipes are used for drinking water speaks to the healthy and clean nature of our operation. In addition, an easement for the use of 2.5 acres was obtained from our neighbor to the north to site the diversion and collection tank.

The hydro site in the forest with ponds is used by community groups for picnics. Beaver, otter, wild ducks, blue heron, and other wildlife are numerous

Loyd Fery testified at p. 4:

I planned, designed and oversaw the building of the facility. Since then, I am involved in all the day to day operations such as cleaning and maintaining the trash racks and fish screens. An important function is the adjustment of water flow, as the facility is on the Santiam Water Control District's main canal. The water is used for irrigation during the summer months and for flood control in winter.

* * *

The hydroplant uses the existing falls installed in the early 1900's for a source of farm power but which were never fully developed. No threat to the environment exists as all precautions have been taken for safety to fish and wildlife as well as to humans.

We are a small QF adding to the power grid thus reducing the need for fossil fuel and maximizing the power available at the most reasonable cost.

Within the very first year of getting started and operating, we had over 400 visitors, including elected officials, at the hydroplant to view this example of a renewable resource. State and federal legislators lauded our energy example. PP&L encouraged its ratepayers to get involved in

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supporting energy independence such as the model provided by my plant. I know countless people learned about renewable energy through the publicity about my facility. I was proud to be an energy pioneer, and feel that I met an important social challenge to take a chance 25 years ago for Oregon's energy future.

Toni Roush testified at p. 3 of her testimony about the unique benefits of a plant located within a small community.

My hydro turbine is located two blocks from downtown Stayton. In an emergency I could generate enough power to keep the lights on in our core area, which includes the City Hall and the Police Department. My hydro unit does not have a negative impact on the environment. Water just passes through it. It does not consume any water and does nor pollute anything: water goes in clean and comes out the same way.

Small QF's like mine provide a back up to the large producers, and could benefit customers in the local area.

Doug Pegar explained at p. 3:

The Canyon Creek Hydro Project has been inspected by various federal and state agencies, all of which have determined that the project is being operated in a proper manner. My project has aa "clean bill of health." It creates no adverse environmental impacts. It is "low impact hydro." It provides for the generation of over 750,000 kwh per year of clean energy. This saves the use of fossil fuels and reduces the production of CO_2 gasses. It provides a job for one person--me.

The Canyon Creek Hydro Project provides additional benefits and attributes to the purchasing utility and its customers by providing a "cleaner" electrical current by adding what is known as "VARs" at the end of the utility's transmission line. The project is remotely located on Forest Service lands. It provides the utility with a clean and green source of electricity. It also provides the utility a source of "home grown" power.

There are numbers of small hydro projects and potential renewable facilities in Oregon. They are a tiny part of the State's overall energy supply, but are a significant presence in many small communities. Their average size is small enough that the financial effect on ratepayers of establishing long-term contracts with certain fair

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commitments will be insignificant. Many of these hydro projects were made feasible by above-market PURPA pricing but absent fair indexing of rates, fair pricing and long-term contracts, will now, unfortunately, be forced to sell their renewable energy for less than its real value under terms which jeopardize the facilities' long term viability. This penalizes the individuals who rose to PURPA's mission and will harm the greater public good.

C. CONTRACT DURATION.

FRC favors a form of "evergreen" contract with set *minimum* rates and appropriate periodic indexing to assure continued fairness in pricing. Long-term stability coupled with price minimums and indexing are important for existing facilities and to encourage new renewable plants and emerging technologies.

Existing small hydro facilities are at risk economically because of small size, disadvantageous rules and the extreme disparity in individual bargaining power between small producers and the utility. FRC plants were constructed or reconstructed by environmentally concerned local individuals following the passage of PURPA in 1978. Selling into the open market is unrealistic or impossible for small plants, so the local utility is the customer. Small, dispersed generators have no bargaining power. Given this lack of bargaining power, it is particularly important for government to insure equitable conditions of power sales.

Unlike large corporate owners, these individuals are unable to spread expenses across a number of installations. These individual owners face a particular management burden

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because they are not primarily engaged in either the hydroelectric or generating business, both of which are complicated regulatory and marketing environments. They are now facing an uncertain future in the deregulated marketplace. Small plants have no economies of scale per unit of output, and comparatively major operating expenses to the individual owner such as labor, parts, insurance, regulatory compliance/licensing and contract administration

The reinvestment cycle for these small plants tends to be shorter than for large plants. There are 15-20 year old PURPA plants which need investment now. Small machines wear out faster. There are plants currently facing the need for life extension, rehabilitation, or maintenance. If power sales contracts are short term, with no lower price limit, reinvestment in a fixed-cost asset becomes uncertain and problematical.

D. INSURANCE.

Insurance has not been previously required for the small producers, although some operators have included their facilities as part of larger operations (Fery, Roush) in the past.

FRC strongly urges that insurance not be made mandatory due to the unknowable insurance rates and the lack of underwriter availability. Small producers have a very low margin of profit and cannot undertake completely

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unpredictable costs. FRC recommended NARUC model for contract negotiation format and contract language from this point forward, especially in its recommended term regarding insurance.

V. CONCLUSION.

Long term contracts are necessary for all small renewables and emerging plants and technologies. The ***New York Times***, in an August 26, 2003, post-blackout article (*90 Seconds That Left Tens of Millions of People in the Dark*), reported:

> Within New York there was a patchy pattern of regions that made it through the general blackout with their lights on - often areas served by small generating facilities. There are about 200 nongovernment-owned power plants around the state, many quite small hydroelectric facilities. The spottiness of blackouts upstate "had a lot to do with the fact that the hydro plants kept running," said Peter Barden, spokesman for the New York Power Authority.

A similar story could well be true for Oregon in an emergency. These plants and other small scale renewable projects in the aggregate contribute to the economic well being of their local communities and the transmission grid. Those in rural areas and at the "end of the line" contribute to efficient voltage regulation. In aggregate these renewable facilities reduce dependence upon foreign sources of fossil fuels, enhance Oregon's diversity of generation, support the transmission/distribution system in remote areas, provide local employment, and can make large contributions to local

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tax bases. The policy of the Commission and State should be to support the continued operation of these uniquely valuable small scale renewable generators.

The FRC thus urges the Commission to consider the longest duration reasonably feasible for contract duration, to not make insurance coverage mandatory, and to approve a modest adder of .5 to 1.5 mills for small power producers.

Dated: December 23, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed by facisimile and mail the Original and 5 copies of the foregoing Opening Post-Hearing Brief and further certify that I served true copies of same by e-mail this date and by depositing in the U.S. Postal Service at Portland, Oregon, with first class postage prepaid, to the parties in UM 1129, addressed as listed and following:

December 23, 2004

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