BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

IN THE MATTER THE PUBLIC UTILITY COMMISSION OF OREGON Investigation Into Qualifying Facility Contracting and Pricing	))))))))	CASE NO. UM 1610 PHASE II POST-HEARING LEGAL BRIEF OF THE COMMUNITY RENEWABLE ENERGY ASSOCIATION

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I. INTRODUCTION

The Community Renewable Energy Association ("CREA") hereby respectfully submits this post-hearing legal brief to the Public Utility Commission of Oregon ("Commission" or "OPUC"). CREA's pre-hearing brief addressed each of the issues in Phase II, which relate to contract terms and rates available to qualifying facilities ("QF") under the Public Utility Regulatory Policies Act of 1978 ("PURPA") and the Federal Energy Regulatory Commission's ("FERC") PURPA rules. In this post-hearing brief, CREA responds to arguments made by other parties in their pre-hearing briefs on certain issues necessitating a response. On the remaining issues, CREA stands by the arguments in its pre-hearing brief and the Joint QF Parties' pre-hearing and post-hearing briefs.

II. ARGUMENT

A. Issue 1: *Who owns the Green Tags during the last five years of a 20-year fixed price PPA during which prices paid to the QF are at market?*

The QF should retain ownership of renewable energy certificates ("RECs") during the times it is paid anything other than the renewable proxy rates, including the last five years of a 20-year contract. *See CREA's Pre-Hearing Brief* at 3-5. Nothing in PacifiCorp or Portland General Electric Company's ("PGE") briefing undermines this conclusion.

PacifiCorp asserts that the purpose of providing market pricing in the last five years was not "to confer ownership of Green Tags to one party versus another based on the pricing in the PPA." *PacifiCorp's Pre-Hearing Brief* at 5 (citing Order 05-584). According to PacifiCorp, because the purpose of market pricing in the last five years is to mitigate potential price inaccuracies, PacifiCorp should own the RECs during that period. This argument fails for multiple reasons.

First, PacifiCorp fails to explain how the Commission's efforts to mitigate inaccurate pricing in the latter part of the contract term should result in PacifiCorp obtaining a renewable commodity for which it does not pay. There is no logical connection between future price uncertainty for energy and ownership of RECs.

Even if price uncertainty had any relevance, PacifiCorp has not proposed to use a price index that would approximate the costs of renewable power in the last five years of the contract. Instead of proposing to pay an index price based on 100 percent renewable energy in exchange for the QF's energy, capacity, and RECs, PacifiCorp proposes to take the RECs without paying for a renewable commodity.

Additionally, even if PacifiCorp's argument made any logical sense (which it does not), PacifiCorp ignores that the statements it cites in Order No. 05-584 were made in the context of the price volatility associated with a gas-fired proxy – *not* a renewable resource. The basis for adopting market pricing during the last five years was to mitigate price uncertainty in the projected costs of a gas-fired proxy plant, which uses a potentially volatile gas price forecast. Order No. 05-584 at 27, 32-35. In contrast, a renewable proxy rate does not include a variable fuel cost. There is no evidence that a renewable proxy price is as likely as a gas proxy price to diverge from the actual costs at the time of delivery, and there is good reason to assume that a gas price forecast inserts unpredictability that does not exist with a renewable rate.

In sum, Order No. 05-584 does not support PacifiCorp's position, and the Commission should confirm that the QF owns the RECs when it is not paid the full renewable proxy rate.

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B. Issue 5: *What is the appropriate forum to resolve litigated issues and assumptions?*

The QFs and the Commission's Staff must be provided the opportunity to fully review and, if necessary, challenge the utilities' avoided cost rate calculations. The utility cannot unilaterally set the rates for QFs because the rates must be "*reviewed and approved* by the commission." ORS 758.525(1) (emphasis added). Generally speaking, the Commission is required to review and approve utilities' activities in an open and transparent process, where the interested parties have the opportunity to meaningfully investigate the utility's proposal and present opposing views.

Yet PacifiCorp disagrees with the notion that "interested parties should have the opportunity to fully review avoided cost rates and the myriad of assumptions that are behind those rates." *PacifiCorp's Pre-Hearing Brief* at 17 (quoting CREA's testimony, with which PacifiCorp "disagrees"). According to PacifiCorp, there should be no opportunity to challenge the assumptions underlying its avoided cost rates through a contested case process, aside from the integrated resource plan ("IRP"). PacifiCorp's argument should be rejected.

The IRP process does not currently provide a meaningful opportunity for QFs to receive Commission resolution on disputed avoided cost rate calculations. PacifiCorp and PGE point to certain issues that parties have *attempted* to have resolved in IRPs. *PGE's Pre-Hearing Brief* at 6. But they fail to provide a single example where a party raised an avoided cost calculation issue and received Commission resolution of the issue in the IRP order. CREA is aware of no such instances. An IRP order merely approves an action plan for the next few years after a public meeting. ODOE/700, Carver/4-5. There is no evidentiary hearing. It is not a process that is designed to review and approve rates.

The Commission has stated as such itself. When it established its renewable rate policies, the Commission stated:

> We agree with Staff, ICNU, ODOE, and CREA, that implementation of these policies requires an evidentiary record to derive utility-specific avoided cost rates for renewable resources. As CREA notes, the IRP process, while complex, is not a litigated proceeding in which a utility's estimates of the costs of its resources are subjected to extensive discovery.
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> The filings and rate calculations will be subject to evidentiary hearings, wherein parties will have the opportunity to review the material, conduct discovery, and propose changes.

Order No. 11-505 at 11. There is no basis to depart from this reasoning.

The Commission should clarify when these contested case proceedings should typically occur and require the utilities to adopt Staff's minimum filing requirements.

C. Issue 8: *When is there a legally enforceable obligation?*

All parties agree that the Commission should correct its existing administrative rule that requires a utility's agreement to create a legally enforceable obligation ("LEO"). CREA maintains that the Commission should adopt its unexecuted filing process because it would provide clarity to QFs and utilities. *See CREA's Pre-Hearing Brief* at 21-22. Under CREA's proposal, the QF creates a LEO by binding itself to the contract terms that will be set by the Commission, including any applicable penalties for non-performance. *See Florida Power & Light Co.*, 98 FERC ¶ 61,324, at P 80 (2002) (under FERC's unexecuted filing policy, the "request obligates the transmission customer to agree to compensate the transmission provider at whatever rate [FERC] ultimately determines to be just and reasonable and to comply with the other terms and conditions of the tariff"). Thus, the QF will be bound as of the date that it

requests the disputed contract be filed unexecuted. Some parties' pre-hearing briefs, however, misunderstand the applicable rules.

Staff asserts that the QF can only create a LEO after it has subjected itself to a penalty for failure to deliver. *Staff's Pre-Hearing Brief* at 39. This position is not entirely clear. As a matter of contract law, once a party makes an offer, the counter party may form a contract that binds the offering party simply by accepting the offer. *D'Angelo v. Schultz*, 110 Or. App. 445, 449-50, 823 P.2d 997 (1992). This is so even where all terms of the agreement are not certain or in writing. *Id.*; *see also First Nat'l Mortgage Co. v. Fed. Realty Inv. Trust*, 631 F.3d 1058, 1065 (9th Cir. 2011) (enforcing "final proposal" against a party even though all terms were not final). Additionally, the utility's obligation here occurs by operation of law once the QF commits to sell. *Snow Mt. Pine Co. v. Maudlin,* 84 Or. App. 590, 598-600, 734 P.2d 1366 (1987). Thus, the QF would be subject to penalties as soon as it makes the offer. The utility cannot defeat the QF's right to lock in the date of its obligation simply by refusing to accept the offer or otherwise rendering the penalties for non-performance inoperative. *Id.* In any event, CREA's unexecuted filing requirement addresses Staff's concern that the QF must be accountable to the LEO because the QF obligates itself to the terms to be eventually set by the Commission.

PacifiCorp continues to assert that the decision of when a LEO occurs is entirely up to the states, citing *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995). *See PacifiCorp's Pre-Hearing Brief* at 37 & n.153. But *West Penn Power Co.* actually addressed an attempt by a utility to abrogate a fully executed QF contract, not a utility's refusal to sign a contract. And FERC itself has rejected PacifiCorp's attempt to rely on *West Penn Power Co.* to undermine a QF's right to unilaterally create a LEO through a contrary state rule. *See Creek Wind, LLC*, 137 FERC ¶

61,007, at P 34 (2013). In *Cedar Creek Wind, LLC*, a case instigated by PacifiCorp's failure to timely sign contracts with QFs, FERC explained:

> Idaho PUC and other protesters interpret *West Penn's* discussion to give broad discretion to the states as to what constitutes a legally enforceable obligation and when such obligation is incurred. We disagree. While *West Penn* stands for the notion that the [FERC] gives deference to the states to determine the date on which a legally enforceable obligation is incurred, such deference is subject to the terms of [FERC's] regulations. *West Penn* does not, as Idaho PUC argues, give states the unlimited discretion to limit the ways a legally enforceable obligation is incurred.

Id. at P 35 (footnotes omitted). PacifiCorp therefore incorrectly frames the LEO issue.

PGE suggests that a QF must agree to the utility's final executable contract to create a LEO because the "terms of a QF agreement prior to the utility providing the final draft are not sufficiently known and clear for the QF to make a legally enforceable commitment." *PGE's Pre-Hearing Brief* at 10. This position is contrary to FERC's explanation that the contract merely "serves to limit and/or define bilaterally the specifics of the relationship between the QF and the utility." *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, at P 40 (2013). The bi-laterally negotiated details contained in a final contract do not need to be finalized prior to creation of a LEO. *Id.* Otherwise, the utility could defeat the QF's right to a LEO by refusing to provide the final contract.

Idaho Power asserts that the QF must demonstrate that the utility "purposefully" delayed the QF. *See Idaho Power's Pre-Hearing Brief* at 24, 26. But FERC's LEO rule allows for no such requirement. FERC has explained that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations." *Virginia Electric and Power Co.*, 151 FERC ¶ 61,038, P 25 (2015). There is no requirement that the QF prove

the utility acted in bad faith. The utility may believe it is acting within its rights, but nevertheless cause a delay that requires the QF to exercise its right to unilaterally create a LEO.

Idaho Power further asserts that a non-contractual LEO should arise only when the QF is able to deliver power within 365 days of the Commission order acknowledging the LEO. *See Idaho Power's Pre-Hearing Brief* at 24, 27. This proposed limitation contravenes a stipulation signed less than a year ago. *See* Order No. 15-130. The parties to this docket, including Idaho Power, agreed "that QFs can select a scheduled [commercial operation date ('COD')] anytime within three years of contract execution . . . ." *Id.* at 2. The Commission approved this right to select an online date that is three years after contract execution. *Id.* at 3-4. Idaho Power's new proposal would allow the utility to eliminate this right simply by refusing to sign a contract. Furthermore, as demonstrated by the agreement to allow three years to achieve online status, very few QFs can commence operations within 365 days of signing a contract, let alone within 365 days of emerging from a contested case with a utility over a LEO. Idaho Power's proposal is a thinly veiled attempt to eliminate the QF's right to a LEO, and should be rejected.

In sum, the utilities propose rules that would violate the LEO rule by effectively requiring the QF to obtain the utility's agreement to final terms in order to create a LEO, or impose other unreasonable obstacles on a QF's creation of a LEO. In contrast, CREA's proposal to adopt FERC's unexecuted filing requirement as the OPUC's standard for creation of a LEO is a reasonable proposal that the Commission should adopt.

D. Issue 9: *How should third-party transmission costs to move QF output in a load pocket to load be calculated and accounted for in the standard contract?*

CREA proposed a reasonable implementation of the Commission's decision that third-party transmission costs incurred by a utility to move QF output from the point of delivery to

load should be the responsibility of the QF under the avoided cost principles. *See CREA's Pre-Hearing Brief* at 22-29. The Commission should provide three alternative options for the QF in a load pocket: (1) a fixed reduction to the fixed avoided cost rates to account for projected transmission costs; (2) a voluntary waiver of fixed prices to allow for a price reduction for actual transmission costs; and (3) a voluntary waiver of the right to sell all output to allow for a limited curtailment right. *Id.* CREA stands by its arguments in its pre-hearing brief in support of its proposal, and responds below to several incorrect assertions regarding FERC's rules.

1. PURPA Requires a Fixed-Price Option.

CREA's first option – a fixed reduction to the fixed prices otherwise available in the standard contract – must be offered to all "load pocket" QFs in order to meet PURPA's requirement that QFs be entitled to sell all of their output at a fixed avoided cost rate. 18 C.F.R § 292.304(b)(5), (d)(2); ORS 758.525(2)(b). The Commission should not ignore this requirement.

According to PacifiCorp, a fixed-price rate will "fail to keep PacifiCorp's customers indifferent to the purchase of QF's power." *PacifiCorp's Pre-Hearing Brief* at 52. But FERC has explained that its rules enable the QF "to establish a *fixed contract price* for its energy and capacity at the outset of its obligation . . . ." *Small Power Prod. and Cogeneration Facilities; Regulations Implementing Sec. 210 of the Pub. Util. Reg. Pol. Act of 1978*, FERC Order No. 69, 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980) (emphasis added). FERC invoked "the need for qualifying facilities to be able to enter into contractual commitments" and "the need for certainty with regard to return on investment in new technologies" that only those long-term rates could provide. *Id.* PacifiCorp's proposal to provide no opportunity for fixed-price compensation for the energy delivered to PacifiCorp therefore violates PURPA.

Some parties attempt to side-step the requirement for fixed prices by arguing that third-party transmission costs are separate from the avoided cost rates. According to Idaho Power, the Commission can implement a rate reopener in the standard contract by simply calling the third-party transmission costs "interconnection costs." *See Idaho Power's Pre-Hearing Brief* at 5. Idaho Power is wrong. "Interconnection costs" do not even include "network improvements" to the interconnected utility's own system. *Western Massachusetts Electric Co.*, 81 FERC ¶ 61,152 (1997). They cannot therefore include contractual rights to use a third-party utility's system. Moreover, FERC clearly determined that the QF's obligation is "*limited* to delivering energy to the point of interconnection" on the purchasing utility's system. *See Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215, P 38 (2013) (emphasis added). Once that energy gets to the purchasing utility's system, the QF has the right to compel the utility to purchase it at a fixed avoided cost rate. *See id.* If the delivery at that location will result in lower avoided costs than would exist without the load pocket problem, the utility may take the decreased value of the energy at that location into account in calculating the fixed avoided costs. *See id.* at P 41 & n. 79.

PacifiCorp also argues that providing a fixed price option "would necessarily create unwarranted subsidization within QF prices." *PacifiCorp's Pre-Hearing Brief* at 52. But CREA's proposal is not to provide a single price reduction that applies to all standard rates. Instead, our proposal is to apply a forecasted price reduction to the otherwise applicable standard rates to the individual QF at the time of contracting – just as occurred for the TMF Biofuels contract. CREA/502, Skeahan/4; CREA/700, Skeahan/4; PAC/1300, Griswold/16. No cross subsidization will occur between QFs.

In sum, PURPA requires that the Commission provide a fixed-price option, and the Commission should therefore include CREA's first option among the alternatives offered to each load pocket QF.

2. The Commission Should Also Provide Alternatives to a Fixed-Price Rate that May Prove More Economically Efficient.

The Commission should adopt an alternative option for price reduction for actual transmission costs at the time of delivery (CREA's second option) and an alternative option for a limited curtailment right (CREA's third option). The objections to these alternative options either misconstrue the record or misunderstand PURPA's requirements.

a. CREA's proposal to allow the QF to agree to pay for actual costs is reasonable.

Under CREA's second option, PacifiCorp objects to conducting an accounting of its actual costs. It argues it should not be required to refund revenues it realizes from reselling or redirecting the third-party transmission to another use. *PacifiCorp's Pre-Hearing Brief* at 52. According to PacifiCorp, such revenues are "highly unlikely to occur." *Id.* (citing PAC/1300, Griswold/16). But PacifiCorp misreads the record. The testimony PacifiCorp cites for this proposition merely states that few other parties will be interested in *purchasing* rights on the precise path from the load pocket to PacifiCorp's load. PAC/1300, Griswold/16. It does not deny that PacifiCorp can temporarily *redirect* its transmission rights to another path for another useful purpose.

In fact, PacifiCorp has not addressed the undisputed fact PacifiCorp can redirect the point of receipt and the point of delivery on a Bonneville Power Administration ("BPA") point-to-point transmission right. *See* CREA/502, Skeahan/1-2. That means when PacifiCorp acquires

third-party transmission for the QF in a load pocket, PacifiCorp can utilize that transmission for other economic purposes at times during the year that the load pocket problem does not exist. *Id.* The record reflects that PacifiCorp has redirected its excess transmission rights to address the load pocket problem for the Three Mile Canyon QF. *Id*. If the QF elects to have the actual costs of transmission assessed to it, PacifiCorp should not be allowed to charge the QF for the year-round cost of that transmission when PacifiCorp can put the transmission to other economic uses during times when the load pocket problem does not exist. CREA recommends that, if the QF elects to pay the actual transmission costs at the time of delivery, PacifiCorp must be contractually required to conduct a reasonable accounting of the actual costs. PacifiCorp's contrary position is unfair and unreasonable.

b. CREA's proposal to allow QFs to agree to limited curtailment is reasonable and lawful.

Under CREA's third option, PacifiCorp incorrectly asserts that FERC precedent does not allow for the QF to agree to a curtailment right in exchange for obtaining a contract without a price reduction. *PacifiCorp's Pre-Hearing Brief* at 54-55. Staff also incorrectly reaches this conclusion. *Staff's Pre-Hearing Brief* at 41. However, both parties overlook that, once fixed prices for sale of the QF's entire net output are offered, a state commission may also provide additional options that the QF may elect to choose instead. *See Winding Creek Solar LLC*, 151 FERC ¶ 61,103, P 6 (2015); *Otter Creek Solar, LLC*, 143 FERC ¶ 61,282, at P 4 (2013), *reconsid. denied*, 146 FERC ¶ 61,192 (2014).

PacifiCorp and Staff point to *Pioneer Wind Park I, LLC* for the proposition that the prohibition against curtailment is absolute and cannot be waived by a QF. But FERC prefaced its discussion of curtailment in that case by explaining, "It is undisputed here that Pioneer Wind

and PacifiCorp intend to enter into a long-term, fixed rate PPA based on avoided costs calculated *at the time the obligation is incurred* . . . ." 145 FERC ¶ 61,215, at P 36 (emphasis in original). The decision is simply not applicable to the circumstance where the QF knowingly waives its right to sell its entire net output at the avoided cost rates, and instead agrees to "terms or conditions . . . which differ from the . . . terms or conditions which would otherwise be required by [FERC's PURPA rules]." 18 C.F.R. § 292.301(b).

Finally, PacifiCorp also asserts that a curtailment provision would violate the OATT's requirement for curtailment on a non-discriminatory basis. *PacifiCorp's Pre-Hearing Brief* at 55. But PacifiCorp misreads CREA's proposal. CREA did not propose to provide PacifiCorp with the right to curtail the QF prior to PacifiCorp's own generation. Instead, CREA proposed that the QF would agree to waive its right to compel PacifiCorp to take the steps necessary to accept and purchase 100 percent of the QF's net output, and thereby allow PacifiCorp to avoid purchasing third-party transmission to move the QF's output to load. Without acquiring the third-party transmission, PacifiCorp would in turn be forced to occasionally curtail generation in the load pocket, including the QF. As with any other curtailment that occurs under the OATT, PacifiCorp would be required to curtail such a QF on a pro rata basis with similarly situated generators, including PacifiCorp's own generation. *Southwest Power Pool, Inc.*, 140 FERC ¶ 61,225, PP 48, 50, 51, 56 (2012) (requiring that curtailment of QFs be on an equivalent basis to similarly situated resources). The Commission should therefore adopt CREA's reasonable proposal for the load pocket problem.

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III. CONCLUSION

CREA respectfully requests that the Commission adopt the policies recommended herein as more fully briefed in CREA's pre-hearing brief and the Joint QF Parties' briefs.

RESPECTFULLY SUBMITTED this 13th day of October 2015.

RICHARDSON ADAMS, PLLC

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Gregory M. Adams (OSB No. 101779)
515 N. 27th Street
Boise, Idaho 83702
Telephone: (208) 938-2236
Fax: (208) 938-7904
greg@richardsonadams.com
Of Attorneys for the Community Renewable Energy Association