

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 **UM 1610**

4 In the Matter of the PUBLIC UTILITY
5 COMMISSION OF OREGON

6 INVESTIGATION INTO QUALIFYING
7 FACILITY CONTRACTING AND PRICING.

BRIEF IN SUPPORT OF STIPULATION

8
9 The Commission opened this investigation into qualifying facility (QF) contracting and
10 pricing in 2012, prompted to do so by the utilities' concerns that avoided cost prices were
11 overcompensating intermittent QFs and several docketed disputes between QFs wanting to enter
12 into standard contracts and utilities. Administrative Law Judge Grant subsequently bi-furcated
13 the investigation into two phases and identified the issues that would be addressed in each phase.
14 In February 2014, the Commission issued Order No. 14-058 resolving certain Phase I issues and
15 deferring consideration of some issues to Phase II.

16 Since the Commission issued Order No. 14-058, several parties to this docket have met
17 many times to discuss issues related to the utilities' compliance filings submitted after Order No.
18 14-058, and the potential scope of issues for Phase II. The results of these discussions are: 1) an
19 agreement on what issues should be submitted to the Commission in Phase II; 2) an agreement
20 resolving several substantive issues; 3) an agreement to drop several issues identified over the
21 course of the last year (and beyond) from Phase II; and 4) an agreement to postpone to a third
22 phase of this docket, or to a different proceeding, certain questions related to the standard
23 contracting and interconnection process.

24 The parties to the stipulation resolving substantive issues ("the Stipulation") are Staff, the
25 Community Renewable Energy Association (CREA), Renewable Energy Coalition (REC),
26 Obsidian Resources, Inc., One Energy, LLC., Oregon Department of Energy (ODOE), Portland

1 General Electric, PacifiCorp, and Idaho Power Company (hereinafter “the Stipulating Parties”).
2 The parties to the Stipulation re: Issues List are the parties listed above and the Small Business
3 Utility Advocates (SBUA).

4 The Stipulation resolves the following questions:

- 5 1. What is the window of time in which QFs can schedule the commercial on-line date
6 (COD) of their resource in the standard contract?
- 7 2. Must the utilities provide an opportunity to cure if a QF defaults on a standard
8 contract for failing to meet the scheduled COD?
- 9 3. Should a utility be allowed to terminate a standard contract for a default for failure to
10 meet the scheduled COD even when the utility is resource sufficient?
- 11 4. Should QFs entering into a standard contract have access to the same expedited
12 complaint process the Commission ordered for QFs negotiating non-standard
13 contracts?
- 14 5. What is the proper method to calculate net replacement power costs for purposes of
15 imposing a penalty for not meeting the minimum availability guarantee (MAG)?
- 16 6. Should a utility be allowed to terminate a standard contract for consistent failure to
17 meet the MAG? If so, what criteria apply?¹
- 18 7. Should filings to modify the forms of standard contracts be separate from filings to
19 change avoided cost prices? Can stakeholders and Staff ask the Commission to
20 modify the forms of standard contracts?
- 21 8. What are the criteria for application of the community-based independent family-
22 owned exemption to the single QF facility criteria?

23 **A. Scheduled commercial on-line date**

24 A standard contract for a QF project will typically specify an operational date for the QF.
25 On that date, the QF and utility anticipate the QF will begin power deliveries for which it will be
26 compensated.² Currently, no Commission order specifies a minimum or maximum amount of
lead time a QF should be allowed for the scheduled commercial on-line date (COD) in the
standard contract. The utilities have generally imposed their own limits on how much lead time

25 ¹ In Order No. 14-058, the Commission directed UM 1610 parties to address this issue and the
26 previous issue regarding penalties for failure to meet a MAG in Phase II.

² See Order No. 05-584 at 46 (explaining scheduled on-line date in standard contract).

1 for the scheduled COD can be put into a standard contract. PGE generally requires that QFs
2 select a scheduled COD within 12 months contract execution. PacifiCorp allows for scheduled
3 CODs up to two years beyond date of contract execution.

4 A limitation on the amount of time that can expire between standard contract execution
5 and the scheduled COD is a reasonable tool to limit the ability of QFs to enter into, and protect
6 utility customers from, speculative contracts. However, allowing too little time between contract
7 execution and the scheduled COD can create a barrier for QFs because QFs generally cannot
8 obtain financing for a new project until after they have executed a PPA. This means that QFs
9 must wait for execution of a standard contract before commencing many of the steps that are
10 necessary to bring a resource on line.

11 In order to balance the QFs' need for sufficient time to complete their projects once the
12 standard contracts are executed with other interests, including certainty for the utilities' resource
13 planning, the Stipulating Parties agreed that QFs can select a scheduled COD anytime within
14 three years of contract execution. The Stipulating Parties also agreed that a QF can elect a
15 scheduled COD that is more than three years from the contract execution if the QF can establish
16 to the utility that a period in excess of three years is reasonable and necessary and the utility
17 agrees to the scheduled COD. The Stipulation provides that utilities will not unreasonably
18 withhold their consent. Finally, the Stipulation further notes that if a utility and QF disagree
19 about whether the QF has demonstrated that a later COD is reasonable and necessary, they can
20 use an expedited dispute resolution process that is the subject of another agreement among the
21 parties.

22 **B. Opportunity to cure after default for failure to meet scheduled COD**

23 Currently, the Commission does not require that utilities provide QFs with an opportunity
24 to cure if they default on the standard contract by failing to meet the scheduled COD. The
25 standard contracts of two utilities include an opportunity to cure a default for failure to meet the
26 scheduled COD. The standard contract of the third utility allows for immediate termination of

1 the standard contract upon such a default, but the utility's practice is to provide an opportunity to
2 cure.

3 In order to balance competing interests and create certainty, the Stipulating Parties agreed
4 that standard contracts should specify that: utilities may issue a notice of default if a QF does not
5 meet the scheduled COD; QFs have 12 months in which to cure a default for failure to meet the
6 scheduled COD; and that utilities should can collect damages during the 12-month default
7 period.

8 The Stipulating Parties also agreed on how damages for this default should be calculated. The
9 Stipulating Parties agreed that damages should be equal to the positive difference between the
10 utility's replacement power costs less the prices in the standard contract during the period of
11 default, plus costs reasonably incurred by the utility to purchase replacement power and
12 additional transmission charges, if any, incurred by utility to deliver replacement energy to the
13 point of delivery.

14 **C. Contract termination for default for failure to meet scheduled COD**

15 Currently, utilities cannot terminate a standard contract for a QF's failure to meet the
16 scheduled COD if the utility is resource sufficient at the time of the scheduled COD. In Order
17 No. 06-538, the Commission stated:

18 [W]e recognize that damages may be incurred when a QF's operation is delayed,
19 even if a utility is resource sufficient. However, we would expect that a resource
20 sufficient utility would be able to minimize the damages on a going forward basis.
21 Consequently, we determine that a QF's operational delay pursuant to a contract
with a resource sufficient utility should result in default, but not in termination.³

22 Some of the Stipulating Parties disagree on whether the resource position referred to in the
23 excerpt above is the utility's actual resource position at the time of the QF's default, or the
24 resource position on which the prices in the standard contract are based.

25
26 ³ *In re Electric Utilities Purchases from Qualifying Facilities*, Order No. 06-538 at 23.

1 In order to forestall future disputes regarding the proper interpretation of the
2 Commission's statements excerpted above, and as part of the consideration for the agreement
3 that QFs may select a scheduled COD within a three-year window after the contract execution
4 date (or beyond three years with the utility's agreement), the Stipulating Parties agree that a
5 utility may terminate a standard contract after a QF defaults for failing to meet the scheduled
6 COD regardless of the utility's resource sufficiency/deficiency position.

7 The three agreed-to provisions discussed above provide a balance between ensuring QFs
8 have adequate time to bring new resources on line, providing utilities and QFs with certainty for
9 planning purposes, and protecting utilities and their customers from speculative projects. . Under
10 the current requirements of one of the three investor-owned utilities operating in Oregon, a QF
11 must select a scheduled COD within one year of contract execution in order to obtain a standard
12 contract. And, if the QF fails to meet the scheduled COD, the utility could issue a Notice of
13 Default and immediately terminate the contract (assuming the utility is not resource sufficient),
14 without providing the QF the opportunity to cure. Although it has been this utility's practice to
15 provide defaulting QFs with an opportunity to cure (meaning additional time to bring the
16 resource on-line), the utility is not required to do so, creating uncertainty for the QF.

17 On the other hand, the inability of utilities to terminate a standard contract if a QF
18 defaults for failing to meet the scheduled COD when the utility is resource sufficient creates
19 uncertainty for the utilizes and risk for their customers. A QF that fails to meet the scheduled
20 COD when the utility is resource sufficient can remain in default for years, but still be entitled to
21 prices in the previously-executed standard contract if and when the QF eventually builds the
22 resource.

23 Under the agreed-to provisions in the Stipulation, a QF can select a scheduled COD
24 anytime within three years of contract execution, and beyond three years if it can establish to the
25 utility such a COD is necessary and reasonable. If the QF fails to meet the scheduled COD, the
26 utility can issue a Notice of Default and the QF has one year in which to cure the default by

1 bringing the resource on-line. If the QF does not bring the resource on-line within the one-year
2 cure period, the utility can terminate the contract no matter the utility's resource position.

3 **D. Dispute resolution process**

4 In Order No. 07-360, the Commission created an expedited process for complaints filed
5 by the QF or utility regarding disputes arising during the negotiation of non-standard PURPA
6 contracts.⁴ This process is currently not available when QFs and utilities are entering into
7 standard contracts. The several complaints filed in the last few years regarding disputes between
8 utilities and QFs wanting to enter into standard contracts indicate that an expedited resolution
9 process for the standard contracting process could be useful notwithstanding that the terms of the
10 standard contract are supposed to be "standard."⁵ For example, a QF could seek an expedited
11 resolution from the Commission if the QF and utility do not agree on whether the QF satisfies
12 the independent family-owned or community-based exemption for a multi-site facility.

13 The Stipulating Parties agree that the expedited review process ordered by the
14 Commission in Order No. 7-360 should be available to QFs and utilities entering into standard
15 contracts, with some slight modifications. First, the Stipulating Parties removed the provisions
16 relating to time to file a complaint under utilities' tariffs for non-standard contracts. Second, the
17 Stipulating Parties removed the provision that only the complaining QF and utility can intervene
18 in the proceeding.⁶ The agreed-to dispute resolution process is as follows:

19 The QF may file a complaint asking the Commission to adjudicate disputes
20 regarding the formation of the standard contract. The QF may not file such a
21 complaint during any 15-day period in which the utility has the obligation to
22 respond, but must wait until the 15-day period has passed.

23 ⁴ See Order No. 07-360 at 9-10.

24 ⁵ See e.g., UM 1546 (complaint regarding treatment of third-party transmission costs), UM 1566
25 (complaint regarding transmission service required by utility), UM 1572 (complaint regarding
26 utility's refusal to enter into standard contract); and UM 1615 (utility application for
determination that four QFs are not eligible for standard contract).

⁶ The requirements for intervention in ORS 756.525 and OAR 860-001-0300 will apply.

1 The utility may respond to the complaint within ten days of service.

2 The Commission will limit its review to the issues identified in the complaint
3 and response, and utilize a process similar to the arbitration process adopted to
4 facilitate the execution of interconnection agreements among
telecommunications carriers. See OAR 860, Division 016. The ALJ will act
as an administrative law judge, not as an arbitrator.

5 **E. Penalty for not meeting the minimum availability guarantee (MAG)**

6 In Phase I, the Commission concluded that the minimum availability guarantee (MAG)
7 language for wind QFs in standard contracts should address three requirements: 1) an overall
8 mechanical availability percentage; 2) a planned maintenance allowance that is not counted with
9 regard to the overall availability percentage; and 3) a specified penalty for failure to meet the
10 overall guarantee.⁷ The Commission adopted guidelines for the first two requirements and
11 determined that the penalty for failure to meet the MAG should be based on the costs of
12 replacement power for the shortfall in output from the QF.⁸ The Commission directed Phase II
13 parties to develop a methodology for calculating such net replacement power costs and also, to
14 address whether and under what circumstances a utility can terminate a standard contract for
15 persistent failure to meet the MAG.⁹

16 The Stipulating Parties agree on the following method for calculating net replacement
17 costs for purposes of imposing a penalty for failure to meet the MAG: 1) determine the amount
18 of the “shortfall,” which is the difference between the projected average on- and off-peak net
19 output from the project that would have been delivered had the project been available at the
20 minimum guaranteed availability for the contract year and the actual net output provided by the
21 QF for the contract year; 2) multiply the shortfall by the positive difference, if any, obtained by
22 subtracting the Contract Price from the price at which the utility purchased replacement power;

23
24 _____
25 ⁷ Order No. 14-058 at 30.

26 ⁸ *Id.*

⁹ *Id.*

1 and 3) add any reasonable costs incurred by utility to purchase replacement power and additional
2 transmission costs to deliver replacement power to point of delivery, if any.

3 **F. Termination for consecutive failure to meet MAG**

4 The Stipulating Parties agree that a utility should be allowed to issue a Notice of Default
5 and terminate a standard contract, pursuant to its terms and limitations, for failure to meet the
6 MAG if the QF does not meet the MAG for two consecutive years, if such failure it not
7 otherwise excused under the contract.

8 **G. Criteria for eligibility for the community-based/independent family-owned
9 exemption to the Single QF project rule**

10 In Order No. 14-058, the Commission modified the criteria to determine whether a QF is
11 a “single QF project” for the purpose of qualifying for a standard contract.¹⁰ Under the criteria
12 in effect prior to Order No. 14-058, multiple facilities operating at different sites within a five-
13 mile radius will be considered a single QF if they are owned by the same person(s) or affiliated
14 person(s), with an exemption for multiple generating facilities owned by a “passive investor.”¹¹
15 In Order No. 14-058, the Commission adopted the recommendation to limit the passive investor
16 exemption to “independent family owned or community-based projects”:

17 We agree with Staff and Pacific Power that the applicability of the passive
18 investor exemption should be limited to independent family-owned or
19 community-based projects. The current criteria used to determine whether a QF
20 is a “single project” includes an exemption specifying the multiple facilities
21 owned by a “passive investor” are not owned by the same person. We adopt
22 Pacific Power’s proposal to modify the criteria and limit the passive investor
23 exemption to family owned or community-based projects.¹²

24 The Stipulating Parties disagreed on the appropriate criteria to determine whether a
25 project is “independent family owned or community based.” After negotiations, the Stipulating
26 Parties agree on criteria that they believe captures the Commission’s intended result.

24 _____
25 ¹⁰ Order No. 14-058 at 27.

26 ¹¹ See Order No. 14-058 at 26-27.

¹² Order No. 14-058 at 27 (citation omitted).

1 **H. Revisions to the forms of standard contracts**

2 Utilities often seek changes to the forms of standard contracts at the same time they file
3 proposed changes to their avoided cost prices and do so in the same filing. Accordingly,
4 challenges to the form of standard contract may delay the effective date of new avoided cost
5 prices. To avoid the potential of delaying review of avoided cost prices to address challenges to
6 changes to the form of standard contracts, and vice versa, the Stipulating Parties agree that
7 proposed changes to the forms of standard contract should be filed independently of proposed
8 revisions to the avoided cost rates. Proposed changes to both the forms of contracts and avoided
9 cost prices can be filed at the same time, but must be in separate filings.

10 The Stipulating Parties also agree that stakeholders, Staff, or the utilities can ask the
11 Commission to revise the terms of the forms of standard contracts, and that this ability is not
12 reserved to utilities.

13 DATED this 26th day of February 2015.

14 Respectfully submitted,

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17 Attorney General

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19 
20 *for* Stephanie S. Andrus, #925123
21 Senior Assistant Attorney General
22 Of Attorneys for Staff of the Public Utility
23 Commission of Oregon
24
25
26

CERTIFICATE OF SERVICE/SERVICE LIST

I hereby certify that on the 26th day of February 2015, I served the foregoing BRIEF IN SUPPORT OF STIPULATION document upon all parties of record in this proceeding by electronic mail only as all parties have waived paper service.

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