BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON

UM 1610

PHASE II

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON, Investigation into Qualifying Facility Contracting and Pricing	)	**GARDNER CAPITAL SOLAR DEVELOPMENT, LLC** **PREHEARING BRIEF**

INTRODUCTION

Gardner Capital Solar Development, LLC ("Gardner Solar") respectfully submits this prehearing brief to the Oregon Public Utilities Commission ("the Commission"), pursuant to the prehearing schedule established on March 26, 2015. Gardner Solar is only briefing Issue No. 8 from the Phase II issues list, which requests parties to address when there is a legally enforceable obligation ("LEO").

As explained more fully below, the Commission's current rule governing the time at which a LEO is established should be revised. *See* Or. Admin. R. 860-029-0010(29). The current rule essentially requires that, as a condition precedent to a LEO, a qualifying facility ("QF") and an electric utility must execute a written agreement establishing the date on which a QF obligates itself to provide electricity to the utility. This rule is inconsistent with the regulations that the Federal Energy Regulatory Commission ("FERC") has established under the Public Utility Regulatory Policy Act ("PURPA). FERC has stated that a LEO may arise before a QF and a utility execute a final contract and that state regulations cannot require a fully executed

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contract as a condition precedent to a LEO. From a policy perspective, the current rule places QFs—which are often in a position of inferior bargaining power to begin with—at an economic disadvantage by allowing utilities to unreasonably delay negotiations and ensure that QFs are paid for power at a lower avoided cost rate. The result of such a disadvantage is that the benefits of increased renewable power that could be experienced in Oregon are delayed or never realized.

For these reasons, the Commission should revise the rule and make the preconditions for establishment of a LEO clear in conformance with Gardner Solar's proposal outlined further below. Alternatively, the Commission should adopt the proposals advanced by Commission Staff and/or the Renewable Energy Coalition ("the Coalition") with a slight addition as indicated below.

BACKGROUND

Gardner Solar is a leading developer of utility-scale solar projects and is currently developing a number of QF projects in Oregon. *Gardner Solar/100, Benga/2*. Gardner Solar's recent experience negotiating PPAs with Idaho Power for these projects illustrates how the current rule governing LEOs can disadvantage QFs by allowing utilities to unreasonably delay negotiations and game the system. Gardner Solar acknowledges that this is a generic docket in which the Commission intends to address PURPA-related policies for all QFs, and thus it is not a forum for resolving Gardner Solar's particular dispute with Idaho Power. However, Gardner Solar believes that its experience with Idaho Power demonstrates why, as a broader policy matter, the current rule governing LEOs in Oregon needs to be changed.

One of the reasons that Gardner Solar began to develop solar projects in Oregon is because Oregon's practice of providing standard contracts at previously determined avoided cost

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prices would reduce risks and mitigate concerns over unpredictable and time-consuming PPA negotiations. *Id.* at 5. Accordingly, Gardner Solar invested time and money to evaluate sites and obtain site control, to research local requirements and speak with landowners and local authorities. *Id*.

Gardner's reasonable expectations, based on review of the applicable rules and tariff, did not match what has actually occurred. Gardner Solar submitted all of the information required under Idaho Power's Schedule 85 tariff regarding six solar projects for development in Idaho Power's service territory on April 27 and May 6, 2015. *Id.* at 5-6. According to the explicit terms of Schedule 85, Gardner Solar expected that Idaho Power would respond by providing a draft energy services agreement within 15 days. *Id.* at 6. But rather than adhere to the plain terms of its tariff, Idaho Power informed Gardner Solar by letter that it had filed an emergency request for stay of its obligations under Schedule 85 with the Commission, and that, pending the Commission's resolution of this request, it would not be processing Schedule 85 applications. *Id*. Gardner Solar responded to Idaho Power's letter in writing and attempted to resolve the matter, but to no avail. Accordingly, Gardner Solar intervened to oppose Idaho Power's Motion for a Stay (in docket UM 1725), and also filed a complaint against Idaho Power (in docket UM 1733). Gardner Solar is now in the position of having to litigate with Idaho Power over the terms and conditions that should apply to its QF projects, rather than proceeding with their orderly and timely development.

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ARGUMENT

A. The issue of when a LEO arises is of enormous practical significance to QFs and utilities alike.

As all parties to this docket would agree, whether and when a LEO arises in the course of negotiations between a QF and a utility is a critical issue, in part because it could affect the avoided cost pricing to which the QF is entitled. *See Coalition/500, Lowe/15*. Under both federal and Oregon law, utilities must update their avoided costs every two years. *See* 18 C.F.R. § 292.302(b)(1); O.R.S. § 758.525(1). One purpose of the LEO is to establish a "date certain" for determining the applicable avoided cost rates to be used in the negotiations between the QF and utility, absent a formally executed contract. Indeed, as Gardner Solar is painfully aware, utilities can "delay the negotiation process, request unreasonable information, or impose unduly burdensome restrictions or requirements," just to ensure that a later and lower avoided cost rate applies to the PPA in question. *See Coalition/400, Lowe/24-25; Coalition/500, Lowe/14-15*. In this way, the LEO protects the QF "from delays in PPA negotiations and helps match current avoided cost rates with current QF projects. In addition, the LEO serves to ensure that QFs that are at the same development stage are treated the same with regard to avoided cost rates." *See In Re Requests for Waivers*, 2015 WL 3760732, at *5 (N.C.U.C. Jun. 12, 2015). On the other side of the issue, utilities argue that there is a need for specific LEO criteria "to provide certainty to the [utilities] and QFs when deadlines or price changes are approaching, but more importantly to satisfy PURPA's 'ratepayer indifference' mandate." *PAC/1000, Griswold/11*. Establishing clear criteria for when a LEO arises will provide certainty and benefit developers and utilities alike.

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B. The Commission cannot require a fully executed contract as a precondition to a LEO, and it is unreasonable to require a QF to file a formal complaint with the Commission to establish a LEO in situations where the utility refuses to negotiate with the QF.

Consistent with PURPA's scheme of cooperative federalism, state utility commissions have primary responsibility for determining when and under what conditions a LEO arises. *See West Penn Power Co.*, 71 FERC ¶ 61,153, at P 61,495 (1995); *see also Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 751 (1982). However, the state's determination regarding when a LEO arises must be in accordance with FERC's regulations. *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, at P 33 (2013) ("*Grouse Creek*").

In several recent declaratory orders, FERC has recognized that a fully executed contract between a QF and a utility is not a necessary precondition to a LEO. *Grouse Creek*, 142 FERC ¶ 61,187, at P 40; *see also Power Resource Group, Inc. v. Pub. Utility Comm'n of Tex.*, 422 F.3d 231, 237-38 (5th Cir. 2005). It is thus clear that "a legally enforceable obligation may be incurred before the formal memorialization of a contract in writing." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at PP 35-37 (2011) ("*Cedar Creek*"). In what should be a final nail in the heart of Or. Admin. R. 860-029-0010(29), as addressed further below, FERC has explicitly stated that "state restrictions mandating that a legally enforceable obligation may be created only by a fully-executed contract are inconsistent with PURPA and the Commission's regulations implementing PURPA." *Grouse Creek*, 142 FERC ¶ 61,187, at P 36; *see also Murphy Flat Power, LLC*, 141 FERC ¶ 61,145, at P 24 (2012) ("*Murphy Flat*") (same); *Rainbow Ranch*, 139 FERC ¶ 61,077, at PP 23-24 (2012) ("*Rainbow Ranch*") (same). The purpose of allowing a LEO to arise before the formation of a formal contract is to prevent the utility from circumventing its obligation to purchase electricity from a QF merely by refusing to execute a power purchase

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agreement. *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980); *see also Snow Mountain Pine Co.*, 734 P.2d at 1371 (noting that allowing a utility "to delay the date to be used to calculate the purchase price simply by refusing to purchase energy would expose qualifying facilities to risks that we believe Congress and the Oregon Legislature intended to prevent").

FERC recognizes another important constraint on state implementation of PURPA: it is "unreasonable" for a state utility commission to require a QF to file a "meritorious complaint" with the commission when the utility is being unresponsive:

> [T]he tool of 'seek[ing] state regulatory authority assistance to enforce the PURPA-imposed obligation' does not mean that seeking such assistance is a necessary condition precedent to the existence of a legally enforceable obligation. The Idaho Commission's requirement that a QF formally complain 'meritorious[ly]' to the Idaho Commission before obtaining a legally enforceable obligation would both unreasonably interfere with a QF's right to a legally enforceable obligation and also create practical disincentives to amicable contract formation. <u>Such obstacles to QFs are at odds with the Commission's regulations implementing PURPA. They are not reasonable conditions for a state PURPA process</u>. *Grouse Creek*, 142 FERC ¶ 61,187, at P 40 (emphasis added).

Thus FERC has made it is clear that when setting QF policy, state regulations (1) must recognize that a LEO may arise prior to the execution of a formal contract and (2) must not leave the full litigation of a meritorious state commission complaint as the only option available to a QF when faced with a utility that fails to negotiate QF contracts in accordance with its tariff.

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C. <u>The Commission's current rule governing the establishment of a LEO is untenable and should be revised</u>.

The Commission's current LEO rule is outdated. As background, the Oregon Court of Appeals issued an opinion addressing when a LEO arises under Oregon law in 1987. The Court held that a QF has the power to establish a LEO "by tendering an agreement [to the utility] that obligates it [the QF] to provide power." *Snow Mountain Pine Co.*, 734 P.2d at 1371. After that opinion was issued, the Commission adopted a rule defining when a LEO is created under Oregon law. *See Staff/500, Andrus/36-39*. The rule states that the LEO is created on the date when the QF and the utility execute a PPA or on "the date agreed to, in writing, by the qualifying facility and the electric utility as the date the obligation is incurred for the purposes of calculating the applicable rate." *See* Or. Admin. R. 860-029-0010(29).

This administrative rule now must be repealed and replaced, as it is contrary to FERC's decisions in *Grouse Creek*, *Rainbow Ranch*, *Murphy Flats*, and *Cedar Creek.*[1] As for the first prong, "requiring a PPA executed by both parties before a QF is entitled to avoided cost pricing conflicts with [FERC] decisions." *See PAC/1000, Griswold/18*. The second prong of the rule fares no better. As Commission Staff witness Andrus explained, "requiring the utility to agree in writing to certain avoided cost prices before a LEO can be established is little different from requiring the QF to obtain an executed PPA." *Staff/500, Andrus/39*. Thus from a legal perspective, Oregon's current rule conflicts with FERC's recent declaratory orders.

[1] Gardner Solar notes that the appropriate procedural mechanism under Oregon law for this step would appear to be that a rulemaking proceeding be opened. It would thus be appropriate for the Commission to complete work on this issue in this docket by stating that it will be proposing the text for a new rule and expects to proceed with that rulemaking on a considerably expedited basis, given the extensive prior consideration that has been given to this question in Docket UM 1610.

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From a policy perspective, it is unreasonable to require a written agreement as a condition precedent to a LEO, particularly when the basic terms for a written agreement can be established through prior approval of standard contracts which "have pre-established rates, terms, and conditions that an eligible QF can elect without any negotiation." *In Re Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Order No. 05-584, Docket UM 1129, at 12 (OPUC May 13, 2005). Of course, there can be negotiations over the terms of standard contracts. *See, e.g.*, *PAC/1000, Griswold/8* (noting that it can take three to four months to finalize a standard contract). But that is not the problem. The problem is often a recalcitrant utility that seeks delay, knowing that delays bring added and potentially project-fatal pressures on developers. Indeed, Gardner Solar's recent experience with Idaho Power is concrete evidence of this practice—Idaho Power unilaterally and (in Gardner Solar's view) illegally suspended its obligations under its Schedule 85 tariff. *See Gardner Solar/100, Benga/6-7; Gardner Solar/200, Benga/2-3*.

Ultimately, Oregon's current rule governing LEOs is inconsistent with federal law, and allows the utilities to "impose or request unreasonable restrictions and conditions or otherwise delay the process." *Coalition/400, Lowe/4*. The rule should be revised to be consistent with federal law, and to ensure that utilities cannot use their position of superior bargaining power to force "to agree to inappropriate or problematic terms or conditions and simply ensure that it is not paid lower avoided cost rates." *Id.*

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D. To determine when a LEO arises, the Commission should adopt Gardner Solar's proposal or, in the alternative, the proposal advanced by Commission Staff and/or the Coalition with an addition.

1. The Commission should adopt Gardner Solar's proposal.

As noted, state utility commissions have primary responsibility for determining when and under what conditions a LEO arises, and such determinations must be consistent with PURPA and FERC's implementing regulations. Gardner Solar thus recommends that the following key circumstances should be considered the appropriate trigger points for determining whether a LEO has been established:

a) The utility has a current avoided cost determination in place as approved by the Commission;

b) The utility has a contract with terms and conditions for QF purchases that has been previously approved by the Commission; and

c) The QF has submitted to the utility a complete application identifying all relevant parameters for the project. *See Gardner Solar/100, Benga/7-8*.

Using these conditions as the benchmark for establishing a LEO would provide certainty to the QF community and assurances that utilities cannot delay executing a PPA simply to pigeonhole the developer into lower avoided cost prices. *Gardner Solar/100, Benga/8*.

Relying on now outdated law, Idaho Power criticizes this approach for being inconsistent with the Commission's previous decision in *International Paper Company v. PacifiCorp*, Order No. 09-439, Docket UM 1449 (Nov. 4, 2009). In that case, International Paper argued that a LEO had been established when it agreed to all terms and conditions in a draft energy services agreement provided to it by PacifiCorp. *Id.* at 5. The Commission held that because there was no "binding, written obligation to deliver energy or an agreement in writing as the date an obligation was incurred" under Or. Admin. R. 860-029-0010(29)(a) or (b),

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there was no LEO. *Id.* at 6. Of course, the Commission's decision in *International Paper Company* relied heavily on the language of the outdated Oregon rule governing LEOs. As numerous parties—including Commission Staff, PacifiCorp, and Gardner Solar—agree, this rule is inconsistent with FERC's declaratory orders regarding LEOs. Given the strong legal and policy rationale for changing the rule, the Commission's analysis in that case should have little bearing on its determination regarding LEOs in the current docket.

2. In the alternative, the Commission should adopt the proposals advanced by Commission Staff and/or the Coalition with one addition to determine when a LEO is established.

If the Commission is not prepared to support Gardner Solar's proposal, then it would be appropriate to adopt with a slight addition the proposals advanced by Commission Staff and/or the Coalition. *Gardner Solar/200, Benga/3-4*. Unlike the current administrative rule, each of these proposals recognizes that a LEO can be created prior to the execution of a written agreement between the QF and the utility. These proposals also provide a means by which a QF can establish a LEO—without having to file a formal complaint—if the utility with which it is negotiating refuses to follow the terms of its tariffs or insists upon unreasonable terms and conditions.

In particular, Commission Staff suggests that a LEO should be established:

a) upon the QF's execution and tendering of a final executable draft contract, if the utility does not timely execute this final draft and create an enforceable PPA, or

b) earlier in the iterative contracting process, *see Staff/500, Andrus/40*, if the QF can show (i) that it has provided the utility with the information required under the utility's tariff, (ii) the utility has not met the deadlines imposed under its tariff or form of standard contract, and (iii) the QF is committed to deliver energy on the scheduled commercial on-line date and will be subject to the penalties specified in the form of standard contract for failure to do so. *Staff/500, Andrus/39-41.*

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This second condition is crucial. As Commission Staff noted—and as Gardner Solar is acutely aware—a utility's failure to comply with the timeline in its tariff or form standard contract would "circumvent the QF's ability to enter into a PPA," which is exactly the situation that a non-contractual LEO is intended to prevent. *Staff/500, Andrus/41*. In such circumstances, "the QF should have the ability to establish a LEO even though the utility has not provided it with a final draft executable contract." *Id.*

As for the procedure by which a QF could demonstrate that it established a LEO "earlier in the iterative contracting process," Commission Staff stated that QFs could use the dispute resolution process for standard contracts, which the Commission approved as part of Order 15-130. *Staff/700, Andrus/12*. In this way, a QF could make the showing that a LEO has been established before tendering a final draft executable version of the PPA to the utility, and without having to spend time and money to file a formal complaint with the Commission. *Id.*

Gardner Solar would additionally recommend that, as part of this dispute resolution process, there should exist a rebuttable presumption that a QF has a LEO, provided it has filed a statement with the Commission indicating it meets the three requirements Commission Staff described. *Gardner Solar/200, Benga/3-4*. The utility would then have the obligation to rebut this presumption by clear and convincing evidence.

The Coalition proposal is similar to Staff's, in that it demonstrates the conditions under which a LEO could be established in the absence of a partial or full execution of an energy

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services agreement. *See Staff/800, Andrus/26; Coalition/500, Lowe/17.*[2] In particular, the Coalition has proposed that a QF would be able to create a LEO if, after providing the required information under the utility's tariff and negotiating in good faith, it is unable to resolve outstanding issues with the utility. *Coalition/400, Lowe/26*. Specifically, a QF should be able to create a LEO by committing itself to sell power under then-current avoided cost rates if there are unresolved disputes 15 days after the utility has (or should have) provided a draft contract to the QF. *Coalition/400, Lowe/26*. After committing itself to sell power, the QF can then file the complaint[3] or continue negotiations on the disputed terms, without the risk that they will lose the then current avoided cost rates. *Id.* at 26. As Gardner Solar understands this proposal, after the QF complies with the procedures established by the Commission in the utility's tariff and attempts to resolve any disputes with the utility, the QF can seek resolution of the dispute with the Commission and still maintain access to current avoided cost rates. *Coalition/600, Lowe/15*.

3. Idaho Power's LEO proposal is unreasonable and inconsistent with previous stipulations established by the parties in this proceeding.

There are a number of problems with the proposal advanced by Idaho Power, but one in particular requires comment. Idaho Power would require that, as a condition precedent to a LEO, a QF must be able to deliver power to the utility within one year of the LEO being established. As the Coalition noted, "this is a thinly veiled attempt to prevent most QFs from

[2] In this way, Gardner Solar regards the Coalition's suggestion as not so much an alternative to what Commission Staff has proposed, but as illustrating the specific circumstances under which a LEO could be established within the framework that Commission Staff has laid out.

[3] Because of the problems with requiring a complaint proceeding discussed above, rather than requiring a complaint Gardner Solar instead recommends Staff's suggestion that a dispute resolution process be utilized with the QF given the opportunity to establish a rebuttable presumption regarding the presence of a LEO, while also allowing the Commission to resolve any issues regarding the reasonableness of a particular term or condition.

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entering into a legally enforceable obligation," *Coalition/500, Lowe/15*, and is inconsistent with a stipulation that Idaho Power entered into with other parties earlier this year.

As noted above, Idaho Power's proposal essentially means that a QF could only secure a LEO if it were able to deliver power to the utility within one year of the LEO. From a practical standpoint, most QFs (particularly small QFs that are eligible for standard contracts) could not comply with this requirement. It generally takes longer than a year for a QF to order equipment, arrange for contractors, and construct a project. *See generally Coalition/100, Lowe/16-17; Redacted CREA/100, Hilderbrand/20-21*. For smaller QFs, financing is generally critical to carrying out any of these activities. *Coalition/500, Lowe/16*. However, a QF generally cannot obtain financing until <u>after</u> it has an executed PPA or a LEO to deliver power to the utility. *Staff/600, Andrus/25-26*. From a practical standpoint, Idaho Power's proposal would put QF's between a rock and a hard place, in that they would either (a) have to begin equipment ordering and construction prior to obtaining financing, or (b) complete those tasks all within a year of executing the PPA. Neither of these alternatives is feasible, particularly for small QFs. *Staff/600, Andrus/26; Redacted CREA/100, Hilderbrand/21*.

For this very reason, a number of parties to this proceeding—including Idaho Power—entered into a stipulation under which a QF always has the option to select a commercial on-line date that is no more than 36 months from the date of the execution of the PPA. *See Investigation Into Qualifying Facility Contracting and Pricing*, Order No. 15-130, Docket UM 1610 (Apr. 16, 2015). As Commission Staff noted, the parties agreed to this 36-month COD because "allowing too little time between contract execution and scheduled COD can create a barrier for QFs because QFs generally cannot obtain financing for a new project

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until after they have executed a PPA." *Staff/600, Andrus/25-26*. Thus, not only would Idaho Power's proposal effectively prevent QFs from establishing non-contractual LEOs, it also contradicts the terms of a stipulation that Idaho Power itself entered into earlier this year.

CONCLUSION

For the reasons discussed above, Gardner Solar respectfully requests that the Commission adopt its proposal regarding the conditions under which a QF can establish a LEO. Alternatively, the Commission should adopt the proposals recommended by Commission Staff or the Coalition to determine when a LEO is established.

Dated this 2nd day of September, 2015.

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