BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1734

In the Matter of PACIFICORP, dba PACIFIC POWER, Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap	SIERRA CLUB'S PREHEARING BRIEF

In accordance with the Revised Scheduling Order issued October 21, 2015 in the above-captioned docket before the Public Utility Commission of Oregon ("Commission"), Sierra Club hereby submits this prehearing brief opposing PacifiCorp's request to reduce the qualifying facility ("QF") contract term under the Public Utility Regulatory Policies Act ("PURPA"). In its pre-filed testimony, PacifiCorp failed to show that its proposal to shorten the contract term for QFs is in the public interest. Further, the pre-filed testimony of Sierra Club and other parties thoroughly rebutted PacifiCorp's assertions that shorter QF terms were in the public interest, and instead provided substantial evidence demonstrating that customers would likely be harmed if the Commission adopted PacifiCorp's proposal to shorten the QF contract term to only three years.

Even if PacifiCorp's proposal was good for the public interest, which it is not, the Commission must still reject the proposed action to shorten the QF contract terms because PacifiCorp's proposal would violate federal law. If approved, PacifiCorp's proposal would controvert the legal obligations imposed by PURPA to provide QF's an opportunity to receive

long-term fixed rates for energy and capacity. For these reasons, the Commission must reject PacifiCorp's request to shorten the contract terms for QFs.

I. SHORTENING THE CONTRACT TERMS FOR QF'S IS NOT IN THE PUBLIC INTEREST

PacifiCorp's proposal to shorten the contract terms for QF facilities would harm both Oregon's ratepayers and the environment by effectively eliminating the ability of renewable QF facilities to compete in the state. As Oregon continues to move toward a cleaner energy future that is less reliant on fossil fuels, the energy opportunity provided by QF facilities will play an important role in keeping renewable energy prices competitive and continuing to foster a market for businesses to develop projects that will provide clean energy at low cost. The Sierra Club in this proceeding recommends that the Commission keep Oregon open for business by continuing to foster a strong market for developing new clean energy infrastructure in Oregon.

A. Shortening the QF Contract Term Would Effectively Stop New QF Project Development.

PacifiCorp's application asks the Commission to reduce from 20 years to three years the term for power purchase contracts with new renewable generation QFs developed in its service territory under PURPA. The Sierra Club opposes PacifiCorp's application because the utility is essentially asking the Commission to undermine the functioning of a market that was expressly designed to counter the monopoly power of the utility. This Commission serves as an important check against PacifiCorp and other utilities' ability to exert their inherent monopoly power to the detriment of ratepayers. This proceeding is an example of PacifiCorp attempting to change the regulatory structure in a manner that would eliminate a class of competitors.

QF development under PURPA provides a relatively small, but nevertheless important, source of renewable energy development in Oregon and other states. However, without the

ability to enter into long-term contracts, the QF market in Oregon would grind to a stop. Several other states provide examples demonstrating that short-term contracts simply do not provide enough incentive for renewable QF developers to successfully build their projects.[1] These examples show that the ability to successfully develop renewable QFs is dependent on the availability of reasonable long-term contracts.

The history of QF development in Oregon also supports this conclusion. Of PacifiCorp's 135.7 MW of existing operational renewable QF contracts in Oregon that do not burn fossil fuels or biomass, the weighted average contract term is 20.2 years.[2] Specifically, 99.9% of this capacity operates under contract terms of 15 years or longer. There are no operating wind, solar, or hydro QFs in Oregon that date from the period from 1996 to 2005 when the QF contract term was limited to no more than 5 years.[3] In other words, long-term contracts are vital to the success of a functioning QF market.

The intent of PacifiCorp's request in this case is to make it impossible to finance additional renewable QF projects in Oregon. Capital-intensive solar and wind projects simply cannot be developed successfully with three-year contracts, and there is no history of them being able to be developed on that basis. PacifiCorp's effort here in Oregon and across the region with other similar filings in Idaho, Utah, and Wyoming, as well as its attempts to influence federal policy, is clearly an effort to relieve the utility of its must-purchase obligation under PURPA. While PacifiCorp asserts that it would still be required to purchase QF power under three-year contracts,[4] the practical effect of approving the Company's application would be to eliminate all

[1] Sierra Club/100, McGuire/16-17.
[2] Sierra Club/100, McGuire/15.
[3] *Id.*
[4] *See, e.g.,* PAC/200, Griswold/3.

QF development in Oregon – and thereby eliminate any "must-purchase" power – because projects would not be able to obtain financing to be built.

B. Oregon's Existing QF Pricing Meets PURPA's Ratepayer Indifference Standard.

Maintaining the existing contract terms for QFs under PURPA will continue to protect ratepayers. Prices in PURPA contracts are set based on the utility's avoided cost; that is, on the cost the utility would incur for the same amount of power if it did not purchase the QF generation. As a result, the utility's ratepayers will be indifferent on a forecast basis to the purchase of the additional solar or wind generation from QF facilities that are able to match the avoided cost pricing. PacifiCorp claims that this methodology is too risky because the market forecasts used to set avoided cost pricing could be wrong.[5] While it is true that forecasts may, as PacifiCorp contends, be too high, there is also a similar risk that those same forecasts will be too low, which would result in a windfall to ratepayers.

PacifiCorp also ignores the fact that a certain amount of risk is inherent in utility planning and spending. The risk associated with setting avoided cost pricing for QFs is no greater than the risks associated with other long-term utility decisions. When PacifiCorp makes a long-term commitment to build a new generating plant or install new capital projects at an existing resource, it relies on the same type of market and price forecasts to determine whether the proposed capital expense is cost effective for ratepayers. Similarly, the same type of forecasts used to set avoided cost prices for QFs are relied on to develop the Integrated Resource Plan. Singling out QF pricing as an unacceptable risk unfairly burdens those sources to the detriment of ratepayers.

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[5] PAC/100, Griswold/13-14.

PacifiCorp's comparison of QF contracts to short-term fuel hedging is also inappropriate. QF pricing is not like short-term hedging of energy commodities such as natural gas, oil, or short-term market power, and as such it should not be subject to the Commission's short-term hedging programs and policies for such commodities.[6] Renewable QFs are new steel in the ground generation projects, and no developer will build new generation projects on the basis of three-year contracts.

C. Oregon's Existing QF Market is Functioning as Intended.

Despite perennial attacks by the utilities, the current system the Commission has established to set QF pricing in Oregon is working fairly well. There is some level of development progressing, but there is no flood of projects that threatens to overwhelm PacifiCorp's system.[7] There is simply no present crisis with an oversupply of renewable QFs in Oregon such that the Commission needs to shorten the contract term in a manner that would completely kill the development of solar and wind QFs in Oregon.

The Commission's current method used to set long-term avoided cost prices in Oregon, as adopted in Order 14-058, allows the utility to update its avoided costs at least every year as well as after the Commission acknowledges a new IRP.[8] These updates can include current natural gas forecasts, forward electric market prices, and any other action or change in an acknowledged IRP update relevant to the calculation of avoided costs. The result of such updates to avoided costs is that the price in QF contracts will decline as fuel cost and load forecasts are revised and as additional QF contracts are added. The market is working correctly and will be self-limiting.

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[6] PAC/100, Griswold/24.
[7] Sierra Club/100, McGuire/6.
[8] *Id.* at 7.

D. Renewable QF Development Under Long-Term Fixed Price Contracts Provides Benefits to Oregon Ratepayers.

Renewable QF generation offers significant benefits to PacifiCorp's ratepayers that are not included in the avoided cost price. Sierra Club does not suggest here that these additional benefits should be included in the avoided cost price methodology, but the existence of these additional benefits means that PacifiCorp's requirement to buy additional solar and wind generation at today's historically low prices is a good deal for Oregon ratepayers. First of all, the renewable energy credits ("RECs") associated with renewable QF development provide a direct and quantifiable benefit to ratepayers, either by allowing PacifiCorp to meet Oregon's renewable portfolio standard or by allowing PacifiCorp to sell those RECs on the market.

Second, the increase in long-term contracts for renewable QFs will avoid future price spikes. As was evident during the 2000-2001 energy crisis in California, and the natural gas price spikes in 2005 and 2007, variable cost generation creates a risk for customers. Fixed-price generation, on the other hand, provides protection for customers against such run-ups in prices. By bringing on more generation in the West that has zero marginal costs, QF development can lower the market prices generally across the whole market.

Finally, there is an economic development benefit for Oregon. These potential solar and wind projects represent investment of potentially hundreds of millions of dollars in clean energy infrastructure in the state of Oregon over the next several years. Even if only a fraction of the proposed projects are developed, they would provide Oregon with economic benefits associated with the construction of modern clean energy facilities. If these projects are not built in Oregon, they could be developed in one of the surrounding states that also are rich in renewable resources.

In summary, from the standpoint of implementing good policy that will benefit Oregon's ratepayers and the environment, the Commission should reject PacifiCorp's proposal to reduce the contract term for QF projects. In addition to the substantive benefits that come from encouraging renewable QF development in Oregon, the Commission must also consider the federal legal requirements imposed by PURPA, which are discussed in more detail below.

II. PACIFICORP'S PROPOSAL WOULD VIOLATE PURPA

If Oregon determines that the current PURPA must-purchase requirements are a poor fit for its state policy goals, PURPA provides a well-established path under Section 210(m) for Oregon to replace its utilities' traditional PURPA obligation by assuming greater control over utility procurement of renewable generation in the state.[9] Many other states have followed this course. However, pursuing 210(m) of PURPA would require other changes in the energy markets in Oregon to ensure that a robust market for renewables continues to exist. Unless and until those steps are taken under Section 210(m), Oregon must continue to ensure that PacifiCorp complies with the requirements under PURPA's traditional must-purchase obligation.

A. Legal Standard Under PURPA

Section 210 of PURPA (16 U.S.C. 824a-3) and FERC's regulations implementing that section prescribe the responsibilities of state regulatory authorities, such as this Commission, to encourage cogeneration and small power production, including rules requiring utilities to offer to purchase electricity from qualifying cogeneration and small power production facilities ("QFs"). The Commission retains authority and discretion over many aspects of implementing PURPA, including, within reason, the authority to determine appropriate specific terms of the must-

[9] Sierra Club/100, McGuire/13-14.

purchase obligation. *FERC v. Mississippi*, 456 U.S. 742, 751 (1982) ("[FERC's regulations] afford state regulatory authorities and nonregulated utilities latitude in determining the manner in which the regulations are to be implemented."). However, the Commission's discretion is not unbounded. Any action by the Commission must be "reasonably designed…*in accordance with* [FERC's rules]." *Id.* at 755 (emphasis added).

FERC has consistently reiterated the need for states to implement policies and practices that are in accordance with FERC's rules. *Jd Wind*, 129 FERC ¶ 61148, 61632 (Nov. 19, 2009) ("a state may take action under PURPA only to the extent that that action is in accordance with the [FERC's] rules"); *Connecticut Light & Power Co.*, 70 FERC ¶ 61012, 61027-28 (Jan. 11, 1995) ("PURPA gave the states responsibility *only* for 'implement[ing]' the Commission's rules. That is, a state may [implement] *only* if it does so in accordance with the Commission's rules.") (emphasis in original); *Allco Renewable Energy Ltd.*, 146 FERC ¶ 61107 (Feb. 20, 2014) ("As a result, a state may take action under PURPA only to the extent that that action is in accordance with the Commission's rules.").

Each electric utility is required under Section 210 of PURPA to offer to purchase available electric energy from cogeneration and small power production facilities that obtain QF status under Section 210 of PURPA. For such purchases, electric utilities are required to pay rates that are just and reasonable to the ratepayers of the utility, are in the public interest, and do not discriminate against cogenerators or small power producers. *See*, North Carolina Utilities Commission, *Order Setting Avoided Cost Input Parameters* (Docket No. E-100 Sub-140, issued December 31, 2014), at p.3. The FERC regulations require that the rates electric utilities pay to purchase electric energy and capacity from qualifying cogenerators and small power producers reflect the cost that the purchasing utility can avoid as a result of obtaining energy and capacity

from these sources, rather than generating an equivalent amount of energy itself or purchasing the energy or capacity from other suppliers. *Id.*

B. FERC's Legally Enforceable Obligation Rule Guarantees Qualified Facilities the Right to Sell Capacity.

The proposal by PacifiCorp to shorten standard QF contract terms to three years would run afoul of FERC's legally enforceable obligation rule because contract terms of such a limited duration would not compensate QFs for their capacity contributions to PacifiCorp's system. FERC's regulatory language implementing the must purchase obligation is clear. 18 C.F.R. § 292.304(d) provides:

> Each qualifying facility shall have the option either:
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> (1) To provide energy as the qualifying facility determines such energy to be available for such purchase, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
>
> (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
>
> (i) The avoided costs calculated at the time of delivery; or
>
> (ii) The avoided costs calculated at the time the obligation is incurred.

If a QF enters into a contract or provides "legally enforceable" assurance that it will be available on the date that the utility would otherwise make a commitment to construct new generation capacity, then the QF is entitled to payments based on the avoided cost of constructing the new generating unit. *See, also, Regulations Implementing Section 210 of the Public Utility Regulatory Policy Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214, 12,225 (Feb. 25, 2980) ("Order No. 69") ("If a qualifying facility provides [contractual or other legally enforceable assurances that

capacity will be available to displace future new capacity], it is entitled to receive rates based on the capacity costs that the utility can avoid as a result of it obtaining capacity from the qualifying facility.").

FERC does not provide an exact timeframe for the "specified term" required in §292.304(d); however, the pre-filed testimony in this proceeding makes clear that a three year contract would not provide a QF compensation for capacity. PacifiCorp's next currently identifiable resource need is a gas plant in 2027, but "the Company will not have any action items to procure a new long-term resource in the next two to four years."[10] FERC Order 69 provides that a QF is entitled to payments when it can make a legally enforceable commitment that would allow a utility to "defer or cancel construction of new generating units." (Order 69, 45 Fed. Reg. at 12,225.) New solar and wind QF facilities in Oregon, which have expected useful lives of 20 or more years, will almost certainly have the ability to provide legally enforceable commitments that would allow PacifiCorp to cancel or defer construction of the planned 2027 gas plant. The Commission therefore can and should accommodate contract terms that allow those QFs to be compensated for their ability to meet that capacity need. However, under PacifiCorp's proposal, the existence of a three year contract term would not impact the Company's decision making with respect to future avoided capacity because, according to PacifiCorp, it does not plan to have any action items related to new long-term resources during that time period.

Qualified facilities can only reasonably prompt the utility to defer or cancel future capacity projects if the QF is able to enter into contracts to provide capacity for at least that long. The record shows that QF facilities are certainly willing to bind themselves to legally

[10] PAC/100, Griswold/31.

enforceable commitments for long term power.[11] However, where a qualified facility contract or legally enforceable obligation is limited to only three years, that power cannot be counted on to be available after three years, and PacifiCorp could not cancel planned generation based on such a short commitment. This result would clearly thwart the intent of the legally enforceable obligation rule's requirement to compensate QF for capacity by allowing PacifiCorp to avoid paying a price to defer or cancel new capacity. *See Virginia Electric Power Co.,* 151 FERC ¶ 61,038, P 24 (2015) ("the requirement that a QF can sell and a utility must purchase pursuant to a legally enforceable obligation were specifically adopted to prevent utilities from circumventing the requirement of PURPA that utilities purchase energy and capacity from QFs"); *Cedar Creek Wind, LLC,* 137 FERC ¶ 61,006, P32 (2011) (same); *Hydrodynamics Inc. et al,* 146 FERC ¶ 61,193, P 31 (2014) (same).

C. PURPA Entitles Qualified Facilities to Prices for Energy and Capacity that Are Determined at the Time the Obligation is Created.

The proposal by PacifiCorp to shorten QF contract terms would fail to implement FERC's PURPA regulations because the shortened terms would deprive QFs of a contract price based on prices calculated at the time the contract is executed. As noted above, the plain language of FERC's legally enforceable obligation rule states that each QF shall have the option to enter into a legally enforceable obligation to sell both energy and capacity based upon the avoided costs calculated at the time the obligation is incurred. 18 C.F.R. § 292.304(d)(2)(ii); *Hydrodynamics Inc. et al,* 146 FERC ¶ 61,193, P 31 ("Under section 292.304(d) of the Commission's regulations, a QF also has the unconditional right to choose whether to sell its

[11] Sierra Club/100, McGuire/15.

power ‘as available’ or at a forecasted avoided cost rate pursuant to a legally enforceable obligation.”). PacifiCorp’s proposal would ignore this requirement.

PacifiCorp attempts to circumvent the requirements of Section 292.304(d) by arguing that a fixed-price contract is a “subsidy” to a QF.[12] However, Sierra Club noted in pre-filed testimony that prices are at least as likely to go up compared to current forecasts as they are to go down.[13] However, even if Mr. Griswold were correct and a fixed-price contract does constitute a “subsidy” – which Sierra Club disputes – PURPA nevertheless expressly provides for QFs to have this benefit. *Hydrodynamics Inc. et al,* 146 FERC ¶ 61,193, P 31. It would be beyond the bounds of a reasonable implementation of PURPA for the Commission to effectively eliminate a QF’s right to obtain pricing based on the avoided costs calculated at the time the obligation is incurred, regardless of whether that right constitutes a subsidy. The Commission therefore must reject PacifiCorp’s proposal to create a system that would not allow a QF to obtain pricing for its product at the time the obligation is created.

III. CONCLUSION

For the reasons set forth above, Sierra Club respectfully requests that the Commission reject PacifiCorp’s proposal to shorten the contract term for QF facilities under PURPA.

[12] PAC/100, Griswold/18.
[13] Sierra Club/100, McGuire/15.

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Respectfully submitted,

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