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February 27, 2006

Via Electronic Filing and U.S. Mail

Oregon Public Utility Commission
Attention: Filing Center
PO Box 2148
Salem OR 97308-2148

Re: In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities
OPUC Docket No. UM 1129

Attention Filing Center:

Enclosed for filing in the above-captioned docket are the original and five copies of Portland General Electric's Phase II Direct Testimony of Doug Kuns and Brett Simms and Exhibits (PGE/401- PGE/403).This document is being filed by electronic mail with the Filing Center.

An extra copy of this cover letter is enclosed. Please date stamp the extra copy and return it to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,

/s/ RICHARD GEORGE

JRG:am
Enclosure
cc: UM 1129 Service List

BEFORE THE PUBLIC UTILITY COMMISSION
OF THE STATE OF OREGON

UM-1129 Phase II Compliance

PORTLAND GENERAL ELECTRIC COMPANY

Investigation Relating to Electric Utility Purchases from Qualifying Facilities

DIRECT TESTIMONY

OF

Doug Kuns
Brett Sims

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I. Introduction

1 **Q. Please state your name and position.**

2 A. My name is Doug Kuns. I am employed by Portland General Electric Company as Manager
3 of Pricing and Tariffs. I have previously presented testimony in this docket.

4 My name is Brett Sims. I am employed by Portland General Electric Company as Director,
5 Origination, Structuring and Resource Planning. My qualifications are provided in Section
6 VI.

II. Summary of Testimony

1 **Q. What is the purpose of your testimony?**

2 A. We present testimony in two broad areas. First, we present our draft Standard Contract for
3 out of service area Qualifying Facilities (QFs). Second, we discuss the parameters and
4 guidelines for developing non-standard QF power purchase agreements.

5 The Out of Service Area Standard Contract we present here is based on the approved
6 standard contract for QFs modified to accommodate the circumstance where the QF is
7 physically not connected to our system, yet is selling power as a PURPA project to us.

8 With respect to Phase II issues, we respond to most of those identified by the
9 Commission in Order 05-584, as supplemented by the November 29, 2005, Ruling
10 (Appendix B) in this docket, shown on Exhibit 401. The Phase II issues focus primarily on
11 QFs with nameplate ratings greater than 10 MW. We explain that PGE's power purchases
12 from these large QFs should be negotiated, non-standard power purchase contracts that (1)
13 reflect the unique avoidable costs (value of the power) associated with the particular QF, (2)
14 maintain a power supply cost structure that does not harm utility customers as a result of the
15 mandated QF power purchases, and (3) are subject to OPUC approval. With these
16 guidelines, we are committed to working with QFs in good faith to develop purchase
17 agreements for mandated PURPA purchases. Further, we believe that the protections
18 afforded to QFs through the Commission's oversight of QF policy will yield a fair
19 application of the PURPA rules for QFs and customers.

20 We also examine the evolving nature of PURPA and QFs contracts addressed in the
21 Energy Policy Act of 2005 (EPAct 2005). We believe it is important for the Commission to

1 consider how to assure that mandatory purchases are aligned with the variety of market
2 supply options and market access that is and will be emerging in the region and nation.

III. Out of Service Area Standard Contract

1 **Q. Please describe the Standard Contract for our out of service area QF power**
2 **purchases.**
3 A. Our proposed Out of Service Area Standard Contract is presented in Exhibit 402.
4 The contract is based on our current Standard Contract with modifications to
5 accommodate QFs delivering power from outside the service area. In addition, the
6 Out of Service Area Standard Contract includes certain general changes to the
7 Standard Contract that we agreed to make in Phase I. As a Standard Contract, the
8 Out of Service Area Standard Contract is applicable to QFs located outside of PGE's
9 service area that meet the eligibility requirements for the Standard Contract (10 MW
10 or less nameplate capacity) and who are selling power to PGE.
11 The Out of Service Area Standard Contract's essential provisions allow the QF
12 to elect the same pricing options and contract terms as available to directly
13 interconnected QFs. In addition, the contract requires that the QF deliver power at
14 its cost to PGE's service area. The QF is responsible to arrange for and maintain a
15 firm delivery path to PGE. The provisions in the contract related to QF requirements
16 for arranging the delivery path include provisions such as:
17 • an agreement that demonstrates that the QF has a firm transmission path to
18 PGE for power,
19 • PGE has on-going access to generation output information, and
20 • PGE receives appropriate delivery schedules from the scheduling entity.

1 We expect that the out of service area QF power deliveries will be made over
2 transmission systems operated by other utilities or the Bonneville Power
3 Administration (BPA) and the point of delivery will be at a PGE transmission
4 interconnection with the transmitting utility (such as BPA). The power must be
5 scheduled consistent with the requirements of the transmitting utility which in turn
6 must be consistent with regional transmission operating requirements. In accordance
7 with the terms of the contract, PGE will purchase the scheduled and delivered power.
8 We will require power production data from the QF to verify that, consistent
9 with the PURPA requirement, the QF produces the power that is ultimately
10 scheduled, delivered to and purchased by PGE. That is, the scheduled delivery
11 accurately reflects the Net Output of the QF which under PURPA we are required to
12 purchase. We also require that the QF be responsible for settling any transmission
13 system scheduling deviations with the transmitting entity. In this manner, we will
14 receive power pursuant to a schedule and purchase the power at the appropriate
15 pricing and have no settlement obligations with the transmitting entity or further
16 settlement obligations with the QF.
17 We propose to modify our Schedule 201 to state that the Commission-approved
18 Standard Contract for out of service area QFs is available and will be supplied upon
19 request. We propose not to add the Out of Service Area Standard Contract form to
20 our tariff book in the interests of saving space and paper, but we will file the
21 agreement with the Commission for approval. The standard contract is already
22 included in the tariff as Appendix 1 to Schedule 201.

1 **Q. What is your perspective on standard contract insurance requirements for QFs**
2 **under 200kw (Issue 7)?**
3 A. We do not believe it is appropriate to forego insurance protection based on the size
4 of a QF. As evidenced by Idaho's experience, insurance is available for QFs,
5 regardless of size. Should the Commission decide insurance protection is
6 unnecessary, the number of exempt QFs should be limited.

IV. Large QF Non-standard Contract Issues

1 **Q. Please describe your perspective on the Phase II issues for large QFs requiring**
2 **non-standard power purchase contracts.**
3 A. First and foremost, our basic goal for non-standard QF contracts continues to be
4 consistency with the Commission's objectives as succinctly stated in the summary to
5 Order No. 05-584:

6 - *"This Commission's goal has been to encourage the economically*
7 *efficient development of these qualifying facilities (QFs), while protecting*
8 *ratepayers by ensuring that utilities pay rates equal to that which they*
9 *have incurred in lieu of purchasing QF power."(Order No. 05-584, Page*
10 *1)*
11
12 The goal is straightforward: Each non-standard large QF power purchase
13 arrangement must result in an economic resource addition to the PGE system. The
14 large QF will make commitments to supply power to PGE and must be priced at the
15 otherwise avoidable cost for the type and quality of power the QF is committing to
16 deliver. To accomplish the Commission's goals, the price for power must reflect the
17 nature and quality of the power based on the resource characteristics and the
18 commitments the QF makes regarding its supply agreements.
19 Our second foundational perspective is that our QF power purchases must fit
20 within our total resource needs both in the near and long-term. QF supply must be a
21 beneficial supply addition to our system. If it is, customers will readily support QF
22 development, and we can plan and operate our system in a fully integrated and cost-
23 effective manner.

1 **Q. Please describe how you anticipate applying the objectives described to your**
2 **development of non-standard QF contracts?**
3 A. The non-standard contract will, in our view, be a truly successful (that is, useful and
4 beneficial) resource addition when:

5 - The QF supply is based on accurate avoided costs
6 - The avoided costs reflect the particular attributes of the individual QF thus
7 reflecting delivery and reliability characteristics of the resource and the
8 impact on utility system operations, and
9 - The individual commitments by the utility and QF appropriately reflect
10 PURPA and Commission requirements to keep customers whole with
11 respect to QF power supply.

12 To achieve this result, project developers proposing to sell QF power and the
13 purchasing utility must work together closely to create a power purchase agreement
14 that is accurate and complete with respect to the arrangements for power supplied by
15 the particular QF.
16 A less successful outcome will occur if we pursue an alternative path using
17 highly standardized contract and pricing structure based on a generic avoided cost
18 calculation. We do not believe this generic approach is appropriate in today's power
19 markets which offer a the myriad of products and arrangements offered including
20 capacity and energy that can be bought or sold. Although the potential time savings
21 in the contracting process is attractive, this path is inconsistent with the broad goals
22 of least cost planning.

1 **Q. What is PGE's approach to parameters and guidelines for non-standard QF**
2 **contracts (per Phase II, Issue 1)?**
3 A. Our following comments on Issue 1, "Development of negotiation parameters and
4 guidelines for non-standard QF contracts," plus its various subparts as described in
5 the November 29, 200, ruling in this docket, outline the objectives and processes we
6 believe are necessary to reach a successful non-standard contract.
7 We recognize that non-standard QF contracts may have numerous provisions
8 and require careful analysis, but given the importance and potential impacts of large
9 QF power sales to PGE, the time and effort required is appropriate.
10 **Q. To which QFs do you expect non-standard contracts to apply?**
11 A. We expect that most non-standard QF power purchase agreements will be developed
12 primarily because the potential QFs nameplate capacity exceeds 10 MW. There may
13 also be circumstances where a less than 10 MW QF requests non-standard contract
14 terms.
15 We expect that non-standard contracts for less than 10 MW QFs will contain
16 terms or pricing that differs substantially from the otherwise available Standard
17 Contract, otherwise we prefer to use the Commission-approved Standard Contract
18 for all QFs below the 10 MW threshold. The Standard Contract offers a variety of
19 pricing options with limited contractual supply obligations.
20 **Q. What are PGE's general guidelines for developing a non-standard QF contract?**
21 A. We propose that the process to develop non-standard QF contracts include steps that
22 define the QF project, establish delivery commitments, describe initial proposed

1 pricing and further refine the commitments, pricing agreements and contract
2 execution.

3 The initial QF proposal will need to include information such as:

4 1. Project description
5 - Technology
6 - QF status
7 - Location
8 2. Proposed term of agreement
9 - On-line or commercial operation date
10 3. Proposed pricing, price structure
11 4. Operational factors
12 - proposed power production and delivery schedule
13 - expected minimum and maximum levels of operation
14 - output by QF-specified time period
15 - (e.g., hourly, daily, monthly, annual)
16 - electrical interconnection location
17 - fuel supply
18 - commitments, delivery terms
19 - maintenance schedules
20 - expected forced outage and planned maintenance rates
21 - special or unusual operational conditions or constraints
22 - transmission agreements, if any
23 - dispatchability options

24 The information described above provides us with the initial description of the
25 project and allows us to prepare a response that includes initial pricing, subject to
26 further refinement for parameters discussed below. If a QF is unable to complete the
27 above information, there is no basis for further negotiation.

28 We do not propose to predefine a specific contract length for a non-standard
29 contract. The contract length should be consistent with the QFs needs and the supply
30 commitments being made.

31 The non-standard contract will incorporate necessary terms and conditions to
32 clearly establish the commitments and responsibilities of the parties.

Q. What considerations are required for developing a non-standard QF power purchase agreement (Issue 1. b., c., and d.)?

A. We will evaluate the energy supply characteristics to determine the avoidable costs which will set the purchase price based on the project information supplied by the QF. The key factors that are required by PURPA to consider are set out in 18 CFR § 292.304 (e), "Factors affecting rates for purchases".

The rule states that:

(e) *Factors affecting rates for purchases.* In determining avoided costs, the following factors shall, to the extent practicable, be taken into account:

1. The data provided pursuant to § 292.302(b), (c), or (d), State review of any such data;
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;
   (ii) The expected or demonstrated reliability of the qualifying facility;
   (iii) The terms of any contract or other legally enforceable obligation, including the duration of the obligation, termination notice requirement and sanctions for non-compliance;
   (iv) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the utility's facilities;
   (v) The usefulness of energy and capacity supplied from a qualifying facility during system emergencies, including its ability to separate its load from its generation;
   (vi) The individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and
   (vii) The smaller capacity increments and the shorter lead times available with additions of capacity from qualifying facilities; 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; and
4. The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility, if the purchasing electric utility generated an

1 equivalent amount of energy itself or purchased an equivalent
2 amount of electric energy or capacity.

3 Clearly, the critical factors to be consider in negotiating a QFs non-standard
4 contract and pricing are the specific nature of the QFs power supply and associated
5 commitments to deliver that power. In accordance with 18 CFR §292.304 (d)[1], the
6 commitments to supply power are expressed as either "legally enforceable
7 obligations" or "as available" with the choice made by the QF. These QF
8 commitments differentiate supply arrangements and provide price signals to QFs
9 about the value of power.

10 **Q. How do you differentiate between power supplied pursuant to "legally**
11 **enforceable obligation" and "as available" power?"**

12 A. A "legally enforceable obligation" is a QF supply that is "firm" and known in
13 advance of delivery and there is recourse if delivery does not occur as committed.
14 Such a supply will be provided under specific contractually enforceable terms and
15 will achieve a result comparable to "firm" supply in the wholesale market. We
16 anticipate that QFs will be interested in committed supply structures that allow for

[1] (d) Purchases ``as available'' or pursuant to a legally enforceable obligation. Each qualifying facility shall have the option either:
(1) To provide energy as the qualifying facility determines such energy to be available for such purchases, 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.

1 some variation from a completely "firm" supply. In these cases, avoided cost prices
2 will be adjusted to reflect the differences in value.
3 Power supplied on an "as available" basis is considered a non-firm supply with
4 delivery that is less predictable in advance. The value of non-firm supply to
5 customers should reflect the market-value of the power purchases avoided at the time
6 of delivery. This approach to prices provides the necessary differentiation between
7 QF supply arrangements. A legally enforceable obligation that provides specific
8 delivery commitments well in advance of delivery adds certainty and value to
9 supply. A commitment to deliver power "as available" means that there are limited
10 commitments and the value should be based on the avoided costs at the time of
11 delivery.
12 **Q. How do you propose to minimize concerns about discriminatory contract**
13 **development?**
14 A. To avoid concerns about discriminatory practices in developing a non-standard
15 pricing offer, we recommend that each non-standard QF contract be contingent on
16 OPUC approval. The review would allow the Commission to determine if the
17 requirements of PURPA and the conditions noted above are being applied in a fair
18 and equitable manner.
19 **Q. How will PGE determine the avoided costs for a non-standard QF contracts?**
20 A. We expect that the applicable avoided costs will be derived by considering the
21 factors described above and using information from our Integrated Resource Plan as
22 it is periodically updated. This will allow us to match avoided costs with the QFs
23 specific project proposal to sell power under PURPA. We expect to maintain the

1 link between our least cost planning process and QF purchase rates. The connection
2 will assure a consistent implementation of Commission policies for resource
3 acquisitions from a variety of resource additions to our total supply portfolio. A
4 consistent basis for valuing many different resources is important to achieve a
5 balanced resource portfolio which may also include potential demand-response/load
6 management options.

7 The avoided costs we file provide QF developers with information from which
8 to start evaluating QF project economics. However, such filed costs must be
9 adjusted to reflect the actual avoided costs attributable to a particular facility. The
10 parties may also need to consider information from other sources including markets,
11 other projects and power cost modeling to evaluate the avoidable costs for a specific
12 project given the QFs proposed operating plans. We are not allowed to base avoided
13 costs on the QFs costs.

14 **Q. What other options are available to establish the appropriate parameters and**
15 **price structures for non-standard QF contracts?**

16 A. Issue 11 raises the question of using an RFP process to set the pricing for large QFs:

17 - *Should competitive bidding be used to set pricing for Qualifying Facilities*
18 *greater than a certain size (e.g., larger than 100 MW) if the utility has*
19 *recently completed an RFP, or a bidding process is in progress or*
20 *imminent? If so, how?*
21

22 The RFP process may be useful in determining an appropriate price. However,
23 we do not necessarily advocate using a new RFP in each case that a large QF seeks a
24 PURPA contract because already available avoided cost information may be
25 reasonable. Nevertheless, a recently concluded RFP may provide useful data about

1 supply options and costs for calibrating non-standard QF contract pricing and other
2 terms and conditions.
3 **Q. How do you expect to price non-standard QF contracts for intermittent**
4 **production patterns?**
5 A. Large QFs with intermittent production characteristics such as wind projects are
6 appropriately priced under PURPA mandatory purchase requirements in a manner
7 consistent with avoidable costs for a particular supply with comparable uncertainty
8 about timing and amounts of power delivery. Intermittent power supplies present a
9 different value and risk profile than a firm power supply.
10 We do not expect to differentiate avoided cost pricing on the basis of whether a
11 resource is a renewable resource or not, but only on the production characteristics
12 and the terms of the legally enforceable obligation (if any). We are not allowed
13 under Commission rule to automatically receive the green tags (the tradable
14 renewable credits) from a QF. While a reasonable policy that avoids certain avoided
15 cost pricing issues, this also means that QFs are not differentiated on the basis of the
16 environmental attributes of the resource. "Greens tag" purchases are not a part of the
17 mandatory QF power purchase agreement. For example, two large QFs (with non-
18 standard contracts) with identical characteristics, except one has green tags available
19 will not have different avoided costs.
20 **Q. What are the appropriate factors to consider in "simultaneous sale and buy"**
21 **and "net output sales" arrangements for non-standard contracts**
22 **(Issues 8 and 9)?**

1 A. Issues 8 and 9 address important fairness and equity issues between QFs and utility
2 customers where the QF has an option on how to utilize some or all of its power
3 generation besides selling it to the utility under a PURPA contract. In particular,
4 these issues address the situation where the QF is also a utility customer that can or
5 does place load requirements on the utility.

6 We support a policy that applies the principle that the utility's customers are
7 held harmless with respect to QF power supply arrangements. This means that
8 combined QF/utility customer sites can decide to develop QF-eligible generation and
9 take advantage of such generation to maximize their economic gains, but they are
10 subject to reasonable conditions to assure all other customers are treated equitably.

11 PURPA supports the option for buy-sell arrangements. A QF project associated
12 with a retail customer that sells all generation to a utility and purchases all load
13 requirements as a cost of service customer is a feasible arrangement. However, if the
14 QF/customer seeks to manage its generation and tap into utility cost of service
15 supply as a free option or hedge, then risks of adverse impacts on other customers
16 are greatly increased. We have addressed an aspect of this issue through our
17 Schedule 75 and Schedule 76R Partial Requirements tariff. The power supply
18 arrangements for customers with on-site generation under those schedules
19 specifically address how the utility and customer will manage their supply
20 commitments.

21 QF contracts with buy-sell or net output arrangements must specifically address
22 the ongoing supply commitments being made by both parties. The QF should not be

able to adversely affect all customers through its decisions to use utility-supplied power or use its on-site generation for its own service. Key considerations include:

- Under what conditions can a QF/customer access cost of service-based pricing for load otherwise served or occasionally served by its on-site generation?
- Is the utility to be asked to be the emergency provider of last resort (that is, on standby). The role of the utility and how it plans for the customers load is important in developing the appropriate contractual terms.
- Is the customer using utility cost of service prices or market (or forward prices) as the benchmark for generation operations or load requirement decisions? If cost of service is the benchmark, then gaming is possible. If market prices are the benchmark, then economically efficient decisions are likely.

Q. Please describe the Energy Policy Act of 2005 provisions related to PURPA purchase requirements?

A. The Energy Policy Act of 2005 (EPAct 2005) addresses issues relevant to Commission considerations in this phase of UM 1129 and specifically Issue 12:

- *Do provisions of the Energy Policy Act of 2005 affect the rules regarding new contracts with Qualifying Facilities? Specifically, should an Oregon electric company be required to enter into a new contract with a Qualifying Facility that is located in the service territory of an electric utility that has been relieved by FERC of a mandatory purchase obligation under PURPA?*

The Federal Energy Regulatory Commission (FERC) has initiated a rulemaking (AD06-10) to provide an administrative process to structure how utilities may terminate their mandatory QF power purchase obligation under specific conditions

1 based on a demonstration (i.e., with supporting evidence) that an open market for the
2 sale and purchase of power is in place.
3 The FERC rulemaking, Notice of Proposed Rulemaking, AD06-10, is attached
4 as Exhibit 403. The Notice provides a useful overview of utility PURPA obligations
5 in today's power markets. The rulemaking also briefly summarizes the drivers for
6 PURPA's original requirements to require utility purchases of power from certain
7 types of independent sources, as well as the conditions that allow such purchase
8 requirements to be lifted.
9 Although we have not examined the applicability or implications of these EPAct
10 2005 provisions to PGE, the EPAct 2005 modifications to PURPA and the FERC
11 rulemaking point to an important principle that advances the goal to create
12 economically efficient, competitive markets for power supply. The critical
13 Commission consideration here in Oregon is how to support economic resource
14 development, but not create an artificial QF market that causes uneconomic project
15 development either locally or outside of our service area subsidized by PGE
16 customers.
17 With an accurate application of avoided cost based pricing to QF power
18 purchases, lifting the mandatory purchase requirement should have minimal effect on
19 economic QF development.
20 **Q. Please discuss default security creditworthiness for non-standard QF contracts**
21 **(Issue 2).**
22 A. This topic has been discussed extensively in the context of a standard contract. For
23 non-standard contracts, our basic approach to creditworthiness and default security

requirements is based on the premise of the QF meeting the commitments it has made for power supply. Creditworthiness is an appropriate threshold requirement for a large QF. The need for default security will be a function of, and integral to, the risk associated with a project, as defined by such factors as its size and the type of supply commitments the QF is making.

Q. When is a Mechanical Availability Guarantee (MAG) appropriate (Issue 4)?

A. For non-standard QF contracts, a Mechanical Availability Guarantee (MAG) provision is one of a variety of options that may be useful as an incentive to assure that project's production capability is maintained over the life of the agreement. For example, a MAG may be useful if the QF resource has very erratic production patterns. A QF that is paid for output and/or for maintaining capability to produce energy on demand (that is, the QF is providing capacity) will have built-in incentives to keep the project functional, but monitoring QF availability in the form of a MAG can be a useful additional tool.

The MAG incents the QF to maintain the facility in working order and provides the utility information about the project's on-going viability and potential production. A MAG does not necessarily eliminate the potential for default due to failures to deliver power according to the QFs commitments, nor does a MAG create capacity from a project.

The MAG may also be used in standard QF contracts (<10 MW). Our Standard Contract does not have a MAG but uses a Minimum Net Output test to determine if the small QF is functional over time.

1 For both large and small QFs, a MAG provision sets a target "availability" level
2 that is meaningful with respect to the QFs project performance. A MAG
3 performance standard requires that specific assumptions be made about the projects
4 expected operations. An availability level that is too low will have little meaning
5 and will not be useful in determining if a QF is in default of its operating
6 commitments. Additionally, a MAG requires that data to verify availability is
7 accessible and not too costly to the QF to acquire and supply to the utility.
8 **Q. In Phase I, PGE testified that damage caps were inappropriate in Standard**
9 **Contracts. Does PGE hold the same position for negotiated contract (Issue 6)?**
10 A. Yes. PGE believes mandated damage caps are inappropriate in negotiated contracts.
11 Such caps would expose shareholders or customers to risks due to QF non-
12 performance. These risks are properly borne by the QF developer.
13 **Q. Do you anticipate Commission and Staff involvement in QF contract**
14 **development and dispute resolution (Issue 10)?**
15 A. In addition to our proposal that the Commission approve non-standard QF contracts,
16 we believe the Commission and Staff have a role in QF contract development that
17 supports appropriate purchase arrangements. Disputes or contract issues, while not
18 inevitable, can and will occur for any number of reasons including simple
19 negotiating tactics. The Commission's guidance will assist in the process of
20 applying PURPA requirements for QF purchases.
21 We see certain challenges for the Commission and Staff in addressing QF
22 contract development and dispute resolution. The Commission and Staff will,
23 through specific responses to disputes, establish expectations of parties about the

1 degree of Commission involvement in contract development. Additionally,
2 Commission and Staff involvement in QF contract negotiations will result in
3 direction to QFs and utilities regarding contract pricing and other terms and
4 conditions.

V. Conclusion

1 **Q. Please summarize your perspective on Phase 2 issues and non-standard QF**
2 **agreements.**
3 A. We support an approach for non-standard QF power purchases that is grounded in
4 the "no ratepayer harm" standard that is foundational to PURPA. In particular, to
5 ensure no such harm, the non-standard QF agreements must address the unique
6 characteristics of the QF project output in the avoided cost-based pricing for the
7 contract. We recognize that negotiating a non-standard QF contract can be involved;
8 however, as long as the non-standard contract parameters and guidelines are
9 grounded in a prudent policy that considers utility customer needs as well as QF
10 goals, the resulting outcomes will yield the right benefits to our customers.

VI. Qualifications

Q. Mr. Sims, please state your educational background and qualifications.

A. I graduated from Linfield College in 1990 with a BS in Business Administration and concentration in economics. I received a Masters of Business Administration in 2001 from George Fox University.

In 2001, I joined PGE and have held various positions involving power supply management. In my current position as Director, Origination, Structuring and Resource Planning, I am responsible for resource acquisition and resource planning which includes PGE's Integrated Resource Plan. In this position I am also responsible for managing portfolio risk through bilateral power purchase and sales arrangements.

List of Exhibits:

Exhibit	**Description**
401	UM-1129 Phase II Adopted Issues List
402	Standard Contract Off System Power Purchase Agreement
403	Federal Energy Regulatory Commission 18 CFR Part 292

UM-1129, Ruling, November 29, 2005
APPENDIX B
UM 1129 PHASE II ADOPTED ISSUES LIST

1. Development of negotiation parameters and guidelines for non-standard QF contracts. For example:

    a. What contract length should Qualifying Facilities larger than 10 MW be entitled to? [Order No. 05-584 at 17]

    b. How should QF power supply commitments differentiate between "as available" and "legally enforceable obligations" for delivery of energy and capacity? [PGE]

    c. How should "firm" or "non-firm" supply commitments be defined and differentiated through contractual default and damages provisions? [PGE]

    d. How should avoided costs be adjusted for factors, such as those described in 18 CFR § 292.304, for a Qualifying Facility's specific power supply attributes and commitments? [PGE]

    e. Regarding PacifiCorp's Schedule 38 for Qualifying Facilities larger than 10 MW, are the procedures for negotiating avoided costs, schedules for negotiations, and the information to be exchanged by PacifiCorp and the Qualifying Facility reasonable? [ICNU]

    f. Can the utilities adjust the avoided cost calculations for Qualifying Facilities over 10 MW based on factors that have not been approved by the Oregon Public Utility Commission? [ICNU]

2. In the event of the inability of a QF to establish creditworthiness, determination of an appropriate amount of default security to be required.*

3. Further exploration of how the calculation of avoided costs should reflect the nature and qualify of QF energy. Specifically:

    a. How should firm vs. non-firm commitments and integration of intermittent resources affect the calculation of avoided costs?

    b. Costs and contractual provisions necessary to address purchases from QF projects that are located outside of the utility's control area.

* Staff proposes to address issues 2 and 6 on the same schedule as the Phase I Compliance investigation. Therefore, staff did not include these items in its proposed consolidated list of issues for that investigation.

4. Further exploration of a Mechanical Availability Guarantee (MAG). For example, are avoided cost prices affected by a Mechanical Availability Guarantee?

5. Further exploration of market pricing options and alternatives to using nameplate capacity to determine the size of a QF project for standard contract eligibility purposes, including:
   a. Should PacifiCorp offer a market pricing option?
   b. Provide clear definition of "nameplate capacity" if that is retained as defining eligibility for standard contracts and avoided cost rates.

6. Cap on amount of default losses that can be recouped, pursuant to future QF contract payment reductions.

7. Liability insurance for QFs with a design capacity at or under 200 kW.

8. Negotiation parameters and guidelines for "simultaneous sale and purchase" QF contract.

9. Negotiating "net output sales" for non-standard contracts.

10. Further exploration of Staff's role in the informal dispute resolution of QF contract disputes. Related to that issue, what is the role of the Commission in dispute resolution during contract negotiations and during the term of the power purchase agreement?

11. Should competitive bidding be used to set pricing for Qualifying Facilities greater than a certain size (e.g., larger than 100 MW) if the utility has recently completed an RFP, or a bidding process is in progress or imminent? If so, how?

12. Do provisions of the Energy Policy Act of 2005 affect the rules regarding new contracts with Qualifying Facilities? Specifically, should an Oregon electric company be required to enter into a new contract with a Qualifying Facility that is located in the service territory of an electric utility that has been relieved by FERC of a mandatory purchase obligation under PURPA?

13. Is it appropriate to consider the effect of debt imputation issues resulting from new accounting rules on avoided costs and if so, how?

STANDARD CONTRACT POWER PURCHASE AGREEMENT

THIS AGREEMENT, entered into this _______ day, _____________ 200___, is between _________________________ ("Seller") and Portland General Electric Company (“PGE”) (hereinafter each a “Party” or collectively, “Parties”).

RECITALS

Seller intends to construct, own, operate and maintain a _____________ facility for the generation of electric power located in _______________ County, _____________ with a Nameplate Capacity Rating of ___________________ kilowatt (“kW”), as further described in Exhibit B ("Facility"); and

Seller intends to operate the Facility as a “Qualifying Facility,” as such term is defined in Section 3.1.3, below.

Seller shall sell and PGE shall purchase the entire Net Output, as such term is defined in Section 1.19, below, from the Facility in accordance with the terms and conditions of this Agreement.

AGREEMENT

NOW, THEREFORE, the Parties mutually agree as follows:

SECTION 1: DEFINITIONS

When used in this Agreement, the following terms shall have the following meanings:

1.1. “As-built Supplement” means the supplement to Exhibit B provided by Seller in accordance with Section 4.4 following completion of construction of the Facility, describing the Facility as actually built.

1.2. "Billing Period" means from the start of the first day of each calendar month to the end of the last day of each calendar month.

1.3. “Capacity Value” has the meaning provided for in the Tariff (as defined below).

1.4. “Cash Escrow” means an agreement by two parties to place money into the custody of a third party for delivery to a grantee only after the fulfillment of the conditions specified.

1.5. "Commercial Operation Date" means the date that the Facility is deemed by PGE to be fully operational and reliable which shall require, among other things, that all of the following events have occurred:

1.5.1. PGE has received a certificate addressed to PGE from a Licensed Professional Engineer (“LPE”) acceptable to PGE in its reasonable judgment stating that the Facility is able to generate electric power reliably in amounts required by this Agreement and in accordance with all other terms and conditions of this Agreement (certifications required under this Section 1.5 can be provided by one or more LPEs);

1.5.2. Start-Up Testing of the Facility has been completed in accordance with Section 1.28;

1.5.3. After PGE has received notice of completion of Start-Up Testing, PGE has received a certificate addressed to PGE from an LPE stating that the Facility has operated for testing purposes under this Agreement uninterrupted for a Test Period at a rate in kW of at least 75 percent of average annual Net Output divided by 8,760 based upon any sixty (60) minute period for the entire testing period. The Facility must provide ten (10) working days written notice to PGE prior to the start of the initial testing period. If the operation of the Facility is interrupted during this initial testing period or any subsequent testing period, the Facility shall promptly start a new Test Period and provide PGE forty-eight (48) hours written notice prior to the start of such testing period;

1.5.4. PGE has received a certificate addressed to PGE from an LPE stating that all required interconnection facilities have been constructed, all required interconnection tests have been completed;

1.5.5. PGE has received a certificate addressed to PGE from an LPE stating that Seller has obtained all Required Facility Documents and, if requested by PGE in writing, has provided copies of any or all such requested Required Facility Documents;

1.5.6. PGE has received a copy of the Transmission Agreement.

1.6. “Contract Price” means the applicable price for Delivered Net Output as selected by Seller in Section 5.

1.7. "Contract Year" means each twelve (12) month period commencing at 00:00 hours on January 1 and ending on 24:00 hours on December 31 falling at least partially in the Term of this Agreement.

1.8. “Effective Date” has the meaning set forth in Section 2.1.

1.9. “Environmental Attributes” means any and all current or future credits, benefits, emissions reductions, environmental air quality credits, emissions reduction credits, offsets and allowances, howsoever entitled, resulting from the avoidance of the emission of any gas, chemical or other substance attributable to the Facility during the Term, or otherwise attributable to the generation, purchase, sale or use of energy from or by the Facility during the Term, including without limitation any of the same arising

out of legislation or regulation concerned with oxides of nitrogen, sulfur or carbon, with particulate matter, soot or mercury, or implementing the United Nations Framework Convention on Climate Change (the "UNFCCC") or the Kyoto Protocol to the UNFCCC or crediting "early action" emissions reduction, or laws or regulations involving or administered by the Clean Air Markets Division of the Environmental Protection Agency or successor administrator, or any State or federal entity given jurisdiction over a program involving transferability of Environmental Attributes, and any Green Tag Reporting Rights to such Environmental Attributes.

1.10. "Facility" has the meaning set forth in the Recitals.

1.11. "Forward Replacement Price" means the price at which PGE, acting in a commercially reasonable manner, purchases for delivery at the Point of Receipt a replacement for any Net Output that Seller is required to deliver under this Agreement plus (i) costs reasonably incurred by PGE in purchasing such replacement Net Output, and (ii) additional transmission charges, if any, reasonably incurred by PGE in causing replacement energy to be delivered to the Point of Receipt. If PGE elects not to make such a purchase, costs of purchasing replacement Net Output shall be Dow Jones Mid C Index Price for such energy not delivered, plus any additional cost or expense incurred as a result of Seller's failure to deliver, as determined by PGE in a commercially reasonable manner (but not including any penalties, ratcheted demand or similar charges).

1.12. "Generation Interconnection Agreement" means an agreement governing the interconnection of the Facility with _____ electric system.

1.13. "Letter of Credit" means an engagement by a bank or other person made at the request of a customer that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the letter of credit.

1.14. "Licensed Professional Engineer" or "LPE" means a person who is licensed to practice engineering in the state where the Facility is located, who has no economic relationship, association, or nexus with the Seller, and who is not a representative of a consulting engineer, contractor, designer or other individual involved in the development of the Facility, or of a manufacturer or supplier of any equipment installed in the Facility. Such Licensed Professional Engineer shall be licensed in an appropriate engineering discipline for the required certification being made and be acceptable to PGE in its reasonable judgment.

1.15. "Lost Energy Value" means for a Contract Year: zero, unless the Net Output is less than Minimum Net Output and the mean Dow Jones Mid C Index Price is greater than the Contract Price, in which case Lost Energy Value equals: (Minimum Net Output - Net Output) X (Mean Dow Jones Mid C Index Price – Mean Contract Price) minus Transmission Curtailment Replacement Energy Cost if any for like period.

1.16. "Mid-Columbia" means an area which includes points at any of the switchyards associated with the following four hydro projects: Rocky Reach, Rock Island, Wanapum and Priest Rapids. These switchyards include: Rocky Reach, Rock

Island, Wanapum, McKenzie, Valhalla, Columbia, Midway and Vantage. Mid-Columbia shall also include points in the "Northwest Hub," as defined by Bonneville Power Administration. For scheduling purposes, the footprint described above shall dictate the delivery point name for the then current Western Electricity Coordinating Council ("WECC") scheduling protocols. If the footprint changes during the Term, a mutually agreed upon footprint that describes an area containing the most liquidity for trading purposes shall apply.

1.17. "Nameplate Capacity Rating" means the maximum capacity of the Facility as stated by the manufacturer, expressed in kW, which shall not exceed 10,000 kW.

1.18. "Net Dependable Capacity" means the maximum capacity the Facility can sustain over a specified period modified for seasonal limitations, if any, and reduced by the capacity required for station service or auxiliaries.

1.19. "Net Output" means all energy expressed in kWhs produced by the Facility, less station and other onsite use and does not include any environmental attributes.

1.20. "Off-Peak Hours" has the meaning provided in the Tariff.

1.21. "On-Peak Hours" has the meaning provided in the Tariff.

1.22. "Point of Receipt" means the PGE System.

1.23. "Prime Rate" means the publicly announced prime rate or reference rate for commercial loans to large businesses with the highest credit rating in the United States in effect from time to time quoted by Citibank, N.A. If a Citibank, N.A. prime rate is not available, the applicable Prime Rate shall be the announced prime rate or reference rate for commercial loans in effect from time to time quoted by a bank with $10 billion or more in assets in New York City, N.Y., selected by the Party to whom interest based on the prime rate is being paid.

1.24. "Prudent Electrical Practices" means those practices, methods, standards and acts engaged in or approved by a significant portion of the electric power industry in the Western Electricity Coordinating Council that at the relevant time period, in the exercise of reasonable judgment in light of the facts known or that should reasonably have been known at the time a decision was made, would have been expected to accomplish the desired result in a manner consistent with good business practices, reliability, economy, safety and expedition, and which practices, methods, standards and acts reflect due regard for operation and maintenance standards recommended by applicable equipment suppliers and manufacturers, operational limits, and all applicable laws and regulations. Prudent Electrical Practices are not intended to be limited to the optimum practice, method, standard or act to the exclusion of all others, but rather to those practices, methods and acts generally acceptable or approved by a significant portion of the electric power generation industry in the relevant region, during the relevant period, as described in the immediate preceding sentence.

1.25. “Recoupment Value” means, on a date during a Contract Year, the On-Peak Net Output generated and delivered from the Facility to the Point of Receipt during such Contract Year up to and including such date multiplied by the applicable Capacity Value.

1.26. "Required Facility Documents" means all licenses, permits, authorizations, and agreements necessary for construction, operation, interconnection, and maintenance of the Facility including without limitation those set forth in Exhibit C.

1.27. “Senior lien” means a prior lien which has precedence as to the property under the lien over another lien or encumbrance.

1.28. "Start-Up Testing" means the completion of applicable required factory and start-up tests as set forth in Exhibit D.

1.29. “Step-in rights” means the right of one party to assume an intervening position to satisfy all terms of an agreement in the event the other party fails to perform its obligations under the agreement.

1.30. “Tariff” shall mean PGE rate Schedule 201 filed with the Oregon Public Utilities Commission in effect on the Effective Date of this Agreement and attached hereto as Exhibit E.

1.31. “Term” shall mean the period beginning on the Effective Date and ending on the Termination Date.

1.32. “Test Period” shall mean a period of 60 days or a commercially reasonable period determined by the Seller.

1.33. “Transmission Agreement” means an Agreement executed by the Seller and the Transmission Provider(s) for Transmission Services.

1.34. “Transmission Curtailment” means a limitation on Seller’s ability to deliver any portion of the scheduled energy to PGE due to the unavailability of transmission to the Point of Receipt (for any reason other than Force Majeure)

1.35. “Transmission Curtailment Replacement Energy Cost” means the greater of zero or the difference between Dow Jones Mid C Index Price – Contract Price X curtailed energy for periods of Transmission Curtailment.

1.36. “Transmission Provider(s)” means the signatory (other than the Seller) to the Transmission Agreement.

1.37. “Transmission Services” means any and all services (including but not limited to ancillary services and control area services) required for the firm transmission and delivery of Energy from the Facility to the Point of Receipt for a term not less than the Term of this Contract.

1.38. References to Recitals, Sections, and Exhibits are to be the recitals, sections and exhibits of this Agreement.

SECTION 2: TERM; COMMERCIAL OPERATION DATE

2.1 This Agreement shall become effective upon execution by both Parties ("Effective Date").

2.2 Time is of the essence of this Agreement, and Seller's ability to meet certain requirements prior to the Commercial Operation Date and to complete all requirements to establish the Commercial Operation Date is critically important. Therefore,

2.2.1 By ________ [*date to be determined by the Seller*] Seller shall begin initial deliveries of Net Output; and

2.2.2 By ________ [*date to be determined by the Seller*] Seller shall have completed all requirements under Section 1.5 and shall have established the Commercial Operation Date.

2.3 This Agreement shall terminate on _________, ____ [*date to be chosen by Seller*], up to 20 years from the Effective Date, or the date the Agreement is terminated in accordance with Section 9 or 12.2, whichever is earlier ("Termination Date").

SECTION 3: REPRESENTATIONS AND WARRANTIES

3.1 Seller and PGE represent, covenant, and warrant as follows:

3.1.1 Seller warrants it is a ___________ duly organized under the laws of___________.

3.1.2 Seller warrants that the execution and delivery of this Agreement does not contravene any provision of, or constitute a default under, any indenture, mortgage, or other material agreement binding on Seller or any valid order of any court, or any regulatory agency or other body having authority to which Seller is subject.

3.1.3 Seller warrants that the Facility is and shall for the Term of this Agreement continue to be a "Qualifying Facility" ("QF") as that term is defined in the version of 18 C.F.R. Part 292 in effect on the Effective Date. Seller has provided the appropriate QF certification, which may include a Federal Energy Regulatory Commission ("FERC") self-certification to PGE prior to PGE's execution of this Agreement. At any time during the Term of this Agreement, PGE may require Seller to provide PGE with evidence satisfactory to PGE in its reasonable discretion that the Facility continues to qualify as a QF under all applicable requirements.

3.1.4 Seller warrants that it has not within the past two (2) years been the debtor in any bankruptcy proceeding, and Seller is and will continue to be for the Term of this Agreement current on all of its financial obligations.

3.1.5 Seller warrants that during the Term of this Agreement, all of Seller's right, title and interest in and to the Facility shall be free and clear of all liens and encumbrances other than liens and encumbrances arising from third-party financing of the Facility other than workers', mechanics', suppliers' or similar liens, or tax liens, in each case arising in the ordinary course of business that are either not yet due and payable or that have been released by means of a performance bond posted within eight (8) calendar days of the commencement of any proceeding to foreclose the lien.

3.1.6 Seller warrants that it will design and operate the Facility consistent with Prudent Electrical Practices.

3.1.7 Seller warrants that the Facility has a Nameplate Capacity Rating not greater than 10,000 kW.

3.1.8 Seller warrants that Net Dependable Capacity of the Facility is _____________ kW.

3.1.9 Seller estimates that the average annual Net Output to be delivered by the Facility to PGE is __________ kilowatt-hours ("kWh"), which amount PGE will include in its resource planning.

3.1.10 Seller will schedule and deliver from the Facility to PGE at the Point of Receipt Net Output not to exceed a maximum of _______ kWh of Net Output during each Contract Year ("Maximum Net Output"). The cost of delivering energy from the Facility to PGE is the sole responsibility of the Seller.

3.1.11 Seller has entered into a Generation Interconnection Agreement for a term not less than the term of this Agreement.

3.1.12 PGE warrants that it has not within the past two (2) years been the debtor in any bankruptcy proceeding, and PGE is and will continue to be for the Term of this agreement current on all of its financial obligations.

SECTION 4: DELIVERY OF POWER

4.1 Commencing on the Effective Date and continuing through the Term of this Agreement, Seller shall sell to PGE the entire Net Output from the Facility. Seller's Net Output shall be scheduled and delivered to PGE at the Point of Receipt in accordance with Section 4.5.

4.2 Provided Seller has elected the Contract Price options in Section 5.1, 5.2, or 5.3, Seller shall schedule and deliver to PGE from the Facility either a) a minimum of

seventy-five percent (75%) of its average annual Net Output or b) the Alternative Minimum Amount as defined in Exhibit A during each Contract Year (hereinafter "Minimum Net Output"), provided that such Minimum Net Output for the first or last Contract Year during which Commercial Operations begins shall be reduced pro rata to reflect the Commercial Operation Date, and further provided that such Minimum Net Output shall be reduced on a pro-rata basis for any periods during a Contract Year that the Facility was prevented from generating electricity for reasons of Force Majeure. Scheduled and delivered Net Output is subject to the Contract Price.

4.3 Provided Seller has elected the Contract Price options in Section 5.1, 5.2, or 5.3, Seller agrees that if Seller does not deliver the Minimum Net Output each Contract Year for reasons other than Transmission Curtailment, PGE will suffer losses equal to the Lost Energy Value. As damages for Seller's failure to deliver the Minimum Net Output (subject to adjustment for reasons of Force Majeure as provided in Section 4.2) in any Contract Year, notwithstanding any other provision of this Agreement the purchase price payable by PGE for all deliveries in the Contract Year following the year in which Seller failed to deliver such Minimum Net Output shall be the Off-Peak Price of the applicable Contract Price option until Recoupment Value equals Lost Energy Value. If during such succeeding Contract Year Seller succeeds in delivering the Minimum Net Output for that Contract Year, then the purchase price payable by PGE for all deliveries in such Contract Year occurring after the Billing Period in which Seller first succeeds in delivering the Minimum Net Output for such Contract Year will be as set forth in Section 5.1, 5.2, or 5.3, as applicable.

4.4 Upon completion of construction of the Facility, Seller shall provide PGE an As-built Supplement to specify the actual Facility as built. Seller shall not increase the Nameplate Capacity Rating above that specified in Exhibit B or increase the ability of the Facility to deliver Net Output in quantities in excess of the Net Dependable Capacity, or the Maximum Net Output as described in Section 3.1.10 above, through any means including, but not limited to, replacement, modification, or addition of existing equipment, except with the written consent of PGE.

4.5 Seller shall provide preschedules for all deliveries of energy hereunder, including identification of receiving and generating control areas, by 10:00:00 PPT on the last Business Day prior to the scheduled date of delivery. The Parties' respective representatives shall maintain hourly real-time schedule coordination; provided, however, that in the absence of such coordination, the hourly schedule established by the exchange of preschedules shall be considered final. Seller and PGE shall maintain records of hourly energy schedules for accounting and operating purposes. The final E-Tag shall be the controlling evidence of the Parties' schedule. All energy shall be prescheduled according to customary WECC scheduling practices. Seller shall make commercially reasonable efforts to schedule in any hour an amount equal to its expected Net Output for such hour. Seller shall maintain a minimum of two years records of Net Output and shall agree to allow PGE to have access to such records and to imbalance information kept by the Transmission Provider.

4.6 Seller may report under §1605(b) of the Energy Policy Act of 1992 or under any applicable program as belonging to Seller any of the Environmental

Attributes produced with respect to the Facility, and PGE shall not report under such program that such Environmental Attributes belong to it.

SECTION 5: CONTRACT PRICE

PGE shall pay Seller for the price options 5.1, 5.2, 5.3 or 5.4, as selected below, pursuant to the Tariff. Seller shall indicate which price option it chooses by marking its choice below with an X. If Seller chooses the option in Section 5.1, it must mark below a single second option from Section 5.2, 5.3, or 5.4 for all Contract Years in excess of 15 until the remainder of the Term. Except as provided herein, Sellers selection is for the Term and shall not be changed during the Term.

5.1 ____ Fixed Price
5.2 ____ Deadband Index Gas Price
5.3 ____ Index Gas Price
5.4 ____ Mid-C Index Rate Price

SECTION 6: OPERATION AND CONTROL

6.1 Seller shall operate and maintain the Facility in a safe manner in accordance with the Generation Interconnection Agreement, and Prudent Electrical Practices. PGE shall have no obligation to purchase Net Output from the Facility to the extent the interconnection of the Facility or transmission to PGE's electric system is curtailed, disconnected, suspended or interrupted, in whole or in part. Seller is solely responsible for the operation and maintenance of the Facility. PGE shall not, by reason of its decision to inspect or not to inspect the Facility, or by any action or inaction taken with respect to any such inspection, assume or be held responsible for any liability or occurrence arising from the operation and maintenance by Seller of the Facility.

6.2 Seller agrees to provide 60 days written advance written notice of any scheduled maintenance that would require shut down of the Facility for any period of time.

6.3 If the Facility ceases operation for unscheduled maintenance, Seller immediately shall notify PGE of the necessity of such unscheduled maintenance that could affect the generation, scheduling or delivery of energy to PGE, the time when such maintenance has occurred or will occur and the anticipated duration of such maintenance. Seller shall take all reasonable measures and exercise its best efforts to avoid unscheduled maintenance, to limit the duration of such unscheduled maintenance, and to perform unscheduled maintenance during Off-Peak hours.

SECTION 7: CREDITWORTHINESS

In the event Seller: a) is unable to represent or warrant as required by Section 3 that it has not been a debtor in any bankruptcy proceeding within the past two (2) years; b) becomes such a debtor during the Term; or c) is not or will not be current on all its

financial obligations, Seller shall immediately notify PGE and shall promptly (and in no less than 10 days after notifying PGE) provide default security in an amount reasonably acceptable to PGE in one of the following forms: senior lien, step in rights, a cash escrow or line of credit. The amount of such default security that shall be acceptable to PGE shall be equal to: (annual On Peak Hours) X (On Peak Price – Off Peak Price) X (Minimum Net Output / 8760).

SECTION 8: BILLINGS, COMPUTATIONS AND PAYMENTS

8.1 On or before the thirtieth (30th) day following the end of each Billing Period, PGE shall send to Seller payment for Seller's deliveries of Net Output to PGE, together with computations supporting such payment. PGE may offset any such payment to reflect amounts owing from Seller to PGE pursuant to this Agreement, and any other agreement related to the Facility between the Parties or otherwise.

8.2 Any amounts owing after the due date thereof shall bear interest at the Prime Rate plus two percent (2%) from the date due until paid; provided, however, that the interest rate shall at no time exceed the maximum rate allowed by applicable law.

SECTION 9: DEFAULT, REMEDIES AND TERMINATION

9.1 In addition to any other event that may constitute a default under this Agreement, the following events shall constitute defaults under this Agreement:

9.1.1 Seller's failure to meet the requirements as provided in Section 2.2.

9.1.2 Breach by Seller or PGE of a representation or warranty, except for Section 3.1.4, set forth in this Agreement.

9.1.3 Seller's failure to provide default security, if required by Section 7, prior to delivery of any Net Output to PGE or within 10 days of notice.

9.1.4 Seller's failure to deliver the Minimum Net Output for two consecutive Contract Years.

9.1.5 If Seller modifies the Facility such that the Nameplate Capacity Rating exceeds 10,000 kW.

9.1.6 If Seller is no longer a "Qualifying Facility".

9.1.7 Failure of PGE to make any required payment pursuant to Section 8.1.

9.1.8 Seller's failure to accurately schedule Net Output, as required by Section 4.5, where there is a demonstrated pattern of scheduling errors. Scheduling errors may include: scheduled energy that differs from Net Output by more than 10% for multiple monthly periods, or in cases where net deviations result in demonstrated excess payments by PGE to the Seller.

9.2 In the event of a default hereunder, the non-defaulting party may immediately terminate this Agreement at its sole discretion by delivering written notice to Seller and may pursue any and all legal or equitable remedies provided by law or pursuant to this Agreement including damages related to the need to procure replacement power. Such termination shall be effective upon the date of delivery of notice, as provided in Section 21.1. The rights provided in this Section 9 are cumulative such that the exercise of one or more rights shall not constitute a waiver of any other rights.

9.3 If this Agreement is terminated by PGE as provided in this Section 9, PGE shall make all payments, within 30 days, that, pursuant to the terms of this Agreement, are owed to Seller as of the time of Seller's receipt of notice of default. PGE shall not be required to pay Seller for any Net Output delivered by Seller after such notice of default.

9.4 If this Agreement is terminated as a result of Seller's default, Seller shall pay PGE the positive difference, if any, obtained by subtracting the Contract Price from the sum of the Forward Replacement Price for the Minimum Net Output that Seller was otherwise obligated to provide for a period of twenty-four (24) months from the date of termination plus any cost incurred for transmission purchased by PGE to deliver the replacement power to the Point of Receipt and the estimated administrative cost to the utility to acquire replacement power. Accounts owed by Seller pursuant to this paragraph shall be due within five (5) business days after any invoice from PGE for the same.

9.5 In the event PGE terminates this Agreement pursuant to this Section 9, and Seller wishes to again sell Net Output to PGE following such termination, PGE in its sole discretion may require that Seller shall do so subject to the terms of this Agreement, including but not limited to the Contract Price until the Term of this Agreement (as set forth in Section 2.3) would have run in due course had the Agreement remained in effect. At such time Seller and PGE agree to execute a written document ratifying the terms of this Agreement.

9.6 Sections 9.1, 9.3, 9.4, 9.5, 11, and 20.2 shall survive termination of this Agreement.

SECTION 10: TRANSMISSION CURTAILMENTS

10.1 Seller shall give PGE notice as soon as reasonably practicable of any Transmission Curtailment that is likely to affect Seller's ability to deliver any portion of energy scheduled pursuant to Sections 4.5 of this Agreement.

10.2 If as the result of a Transmission Curtailment, Seller does not deliver any portion of energy (including real-time adjustments), scheduled pursuant to Section 4.5 of this Agreement, Seller shall pay PGE the Transmission Curtailment Replacement Energy Cost for the number of MWh of energy reasonably determined by PGE as the difference between (i) the scheduled energy that would have been delivered to PGE

under this Agreement during the period of Transmission Curtailment and (ii) the actual energy, if any, that was delivered to PGE for the period.

SECTION 11: INDEMNIFICATION AND LIABILITY

11.1 Seller agrees to defend, indemnify and hold harmless PGE, its directors, officers, agents, and representatives against and from any and all loss, claims, actions or suits, including costs and attorney's fees, both at trial and on appeal, resulting from, or arising out of or in any way connected with Seller's delivery of electric power to PGE or with the facilities at or prior to the Point of Receipt, or otherwise arising out of this Agreement, including without limitation any loss, claim, action or suit, for or on account of injury, bodily or otherwise, to, or death of, persons, or for damage to, or destruction or economic loss of property belonging to PGE, Seller or others, excepting to the extent such loss, claim, action or suit may be caused by the negligence of PGE, its directors, officers, employees, agents or representatives.

11.2 PGE agrees to defend, indemnify and hold harmless Seller, its directors, officers, agents, and representatives against and from any and all loss, claims, actions or suits, including costs and attorney's fees, both at trial and on appeal, resulting from, or arising out of or in any way connected with PGE's receipt of electric power from Seller or with the facilities at or after the Point of Receipt, or otherwise arising out of this Agreement, including without limitation any loss, claim, action or suit, for or on account of injury, bodily or otherwise, to, or death of, persons, or for damage to, or destruction or economic loss of property belonging to PGE, Seller or others, excepting to the extent such loss, claim, action or suit may be caused by the negligence of Seller, its directors, officers, employees, agents or representatives.

11.3 Nothing in this Agreement shall be construed to create any duty to, any standard of care with reference to, or any liability to any person not a Party to this Agreement. No undertaking by one Party to the other under any provision of this Agreement shall constitute the dedication of that Party's system or any portion thereof to the other Party or to the public, nor affect the status of PGE as an independent public utility corporation or Seller as an independent individual or entity.

11.4 NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR SPECIAL, PUNITIVE, INDIRECT OR CONSEQUENTIAL DAMAGES, WHETHER ARISING FROM CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE.

SECTION 12: INSURANCE

12.1 If the Facility has a design capacity of 200 kW or more, Seller shall secure and continuously carry for the Term hereof, with an insurance company or companies rated not lower than "A" by the A. M. Best Company, insurance policies for bodily injury and property damage liability. Such insurance shall include provisions or endorsements naming PGE, it directors, officers and employees as additional insureds; provisions that such insurance is primary insurance with respect to the interest of PGE and that any insurance maintained by PGE is excess and not contributory insurance with the

insurance required hereunder; a cross-liability or severability of insurance interest clause; and provisions that such policies shall not be canceled or their limits of liability reduced without thirty (30) days' prior written notice to PGE. Initial limits of liability for all requirements under this section shall be $1,000,000 million single limit, which limits may be required to be increased or decreased by PGE as PGE determines in its reasonable judgment economic conditions or claims experience may warrant.

12.2 Seller shall secure and continuously carry for the Term hereof, in an insurance company or companies rated not lower than "A" by the A. M. Best Company, insurance acceptable to PGE against property damage or destruction in an amount not less than the cost of replacement of the Facility. Seller promptly shall notify PGE of any loss or damage to the Facility. Unless the Parties agree otherwise, Seller shall repair or replace the damaged or destroyed Facility, or if the facility is destroyed or substantially destroyed, it may terminate this Agreement. Such termination shall be effective upon receipt by PGE of written notice from Seller. Seller shall waive its insurers' rights of subrogation against PGE regarding Facility property losses.

12.3 Seller shall provide PGE with a copy of each insurance policy required under this Section, certified as a true copy by an authorized representative of the issuing insurance company or, at the discretion of PGE, in lieu thereof, a certificate in a form satisfactory to PGE certifying the issuance of such insurance. If Seller fails to provide PGE with copies of such currently effective insurance policies or certificates of insurance, PGE at its sole discretion and without limitation of other remedies, may upon ten (10) days advance written notice by certified or registered mail to Seller either withhold payments due Seller until PGE has received such documents, or purchase the satisfactory insurance and offset the cost of obtaining such insurance from subsequent power purchase payments under this Agreement.

SECTION 13: FORCE MAJEURE

13.1 As used in this Agreement, “Force Majeure” or “an event of Force Majeure” means any cause beyond the reasonable control of the Seller or of PGE which, despite the exercise of due diligence, such Party is unable to prevent or overcome. By way of example, Force Majeure may include but is not limited to acts of God, fire, flood, storms, wars, hostilities, civil strife, strikes, and other labor disturbances, earthquakes, fires, lightning, epidemics, sabotage, restraint by court order or other delay or failure in the performance as a result of any action or inaction on behalf of a public authority which by the exercise of reasonable foresight such Party could not reasonably have been expected to avoid and by the exercise of due diligence, it shall be unable to overcome, subject, in each case, to the requirements of the first sentence of this paragraph. Force Majeure, however, specifically excludes Transmission Curtailment, the cost or availability of resources to operate the Facility or changes in market conditions that affect the price of energy or transmission, and obligations for the payment of money when due.

13.2 If either Party is rendered wholly or in part unable to perform its obligation under this Agreement because of an event of Force Majeure, that Party shall be excused from whatever performance is affected by the event of Force Majeure to the

extent and for the duration of the Force Majeure, after which such Party shall re-commence performance of such obligation, provided that:

13.2.1 the non-performing Party, shall, promptly, but in any case within one (1) week after the occurrence of the Force Majeure, give the other Party written notice describing the particulars of the occurrence; and

13.2.2 the suspension of performance shall be of no greater scope and of no longer duration than is required by the Force Majeure; and

13.2.3 the non-performing Party uses its best efforts to remedy its inability to perform its obligations under this Agreement.

13.3 No obligations of either Party which arose before the Force Majeure causing the suspension of performance shall be excused as a result of the Force Majeure.

13.4 Neither Party shall be required to settle any strike, walkout, lockout or other labor dispute on terms which, in the sole judgment of the Party involved in the dispute, are contrary to the Party's best interests.

SECTION 14: SEVERAL OBLIGATIONS

Nothing contained in this Agreement shall ever be construed to create an association, trust, partnership or joint venture or to impose a trust or partnership duty, obligation or liability between the Parties. If Seller includes two or more parties, each such party shall be jointly and severally liable for Seller's obligations under this Agreement.

SECTION 15: CHOICE OF LAW

This Agreement shall be interpreted and enforced in accordance with the laws of the state of Oregon, excluding any choice of law rules which may direct the application of the laws of another jurisdiction.

SECTION 16: PARTIAL INVALIDITY

It is not the intention of the Parties to violate any laws governing the subject matter of this Agreement. If any of the terms of the Agreement are finally held or determined to be invalid, illegal or void as being contrary to any applicable law or public policy, all other terms of the Agreement shall remain in effect. If any terms are finally held or determined to be invalid, illegal or void, the Parties shall enter into negotiations concerning the terms affected by such decision for the purpose of achieving conformity with requirements of any applicable law and the intent of the Parties to this Agreement.

SECTION 17: WAIVER

Any waiver at any time by either Party of its rights with respect to a default under this Agreement or with respect to any other matters arising in connection with this Agreement must be in writing, and such waiver shall not be deemed a waiver with respect to any subsequent default or other matter.

SECTION 18: GOVERNMENTAL JURISDICTION AND AUTHORIZATIONS

This Agreement is subject to the jurisdiction of those governmental agencies having control over either Party or this Agreement. Seller shall at all times maintain in effect all local, state and federal licenses, permits and other approvals as then may be required by law for the construction, operation and maintenance of the Facility, and shall provide upon request copies of the same to PGE.

SECTION 19: SUCCESSORS AND ASSIGNS

This Agreement and all of the terms hereof shall be binding upon and inure to the benefit of the respective successors and assigns of the Parties. No assignment hereof by either Party shall become effective without the written consent of the other Party being first obtained and such consent shall not be unreasonably withheld. Notwithstanding the foregoing, either Party may assign this Agreement without the other Party's consent as part of (a) a sale of all or substantially all of the assigning Party's assets, or (b) a merger, consolidation or other reorganization of the assigning Party.

SECTION 20: ENTIRE AGREEMENT

20.1 This Agreement supersedes all prior agreements, proposals, representations, negotiations, discussions or letters, whether oral or in writing, regarding PGE's purchase of Net Output from the Facility. No modification of this Agreement shall be effective unless it is in writing and signed by both Parties.

20.2 By executing this Agreement, Seller releases PGE from any third party claims related to the Facility, known or unknown, which may have arisen prior to the Effective Date.

SECTION 21: NOTICES

21.1 All notices except as otherwise provided in this Agreement shall be in writing, shall be directed as follows and shall be considered delivered if delivered in person or when deposited in the U.S. Mail, postage prepaid by certified or registered mail and return receipt requested:

To Seller: ____
____
____
____

with a copy to: ____
____
____
____

To PGE: Contracts Manager
QF Contracts, 3WTCBR06
PGE - 121 SW Salmon St.
Portland, Oregon 97204

21.2 The Parties may change the person to whom such notices are addressed, or their addresses, by providing written notices thereof in accordance with this Section 21.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed in their respective names as of the Effective Date.

PGE

By: ________________________
Name:______________________
Title: _______________________

_________________________.
(Name Seller)

By: ________________________
Name:______________________
Title: _______________________

EXHIBIT A
MINIMUM NET OUTPUT

Seller may designate an alternative Minimum Net Output to seventy-five (75%) percent of annual Net Output in this exhibit ("Alternative Minimum Amount"). Such Alternative Minimum Amount, if provided, shall exceed zero, and shall be established in accordance with Prudent Electrical Practices and documentation supporting such a determination shall be provided to PGE upon execution of the Agreement. Such documentation shall be commercially reasonable, and may include, but is not limited to, documents used in financing the project, and data on output of similar projects operated by seller, PGE or others.

EXHIBIT B

DESCRIPTION OF SELLER'S FACILITY

[Seller to Complete]

EXHIBIT C

REQUIRED FACILITY DOCUMENTS

[Seller list all permits and authorizations required for this project]

Sellers Generation Interconnection Agreement with interconnecting utility

Firm Transmission Agreement between Seller and Transmission Provider

Standard Contract Power Purchase Agreements Addendum between PGE and Seller

EXHIBIT D

START-UP TESTING

[Seller identify appropriate tests]

Required factory testing includes such checks and tests necessary to determine that the equipment systems and subsystems have been properly manufactured and installed, function properly, and are in a condition to permit safe and efficient start-up of the Facility, which may include but are not limited to (as applicable):

1. Pressure tests of all steam system equipment;
2. Calibration of all pressure, level, flow, temperature and monitoring instruments;
3. Operating tests of all valves, operators, motor starters and motor;
4. Alarms, signals, and fail-safe or system shutdown control tests;
5. Insulation resistance and point-to-point continuity tests;
6. Bench tests of all protective devices;
7. Tests required by manufacturer of equipment; and
8. Complete pre-parallel checks with PGE.

Required start-up test are those checks and tests necessary to determine that all features and equipment, systems, and subsystems have been properly designed, manufactured, installed and adjusted, function properly, and are capable of operating simultaneously in such condition that the Facility is capable of continuous delivery into PGE's electrical system, which may include but are not limited to (as applicable):

1. Turbine/generator mechanical runs including shaft, vibration, and bearing temperature measurements;
2. Running tests to establish tolerances and inspections for final adjustment of bearings, shaft run-outs;
3. Brake tests;
4. Energization of transformers;
5. Synchronizing tests (manual and auto);
6. Stator windings dielectric test;
7. Armature and field windings resistance tests;
8. Load rejection tests in incremental stages from 5, 25, 50, 75 and 100 percent load;
9. Heat runs;
10. Tests required by manufacturer of equipment;
11. Excitation and voltage regulation operation tests;
12. Open circuit and short circuit; saturation tests;
13. Governor system steady state stability test;
14. Phase angle and magnitude of all PT and CT secondary voltages and currents to protective relays, indicating instruments and metering;
15. Auto stop/start sequence;
16. Level control system tests; and
17. Completion of all state and federal environmental testing requirements.

EXHIBIT E

TARIFF

[**Attach currently in-effect rate Schedule 201]**

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 292

(Docket No. RM06-10-000)

New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities

(Issued January 19, 2006)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is proposing to amend its regulations governing small power production and cogeneration in response to section 1253 of the Energy Policy Act of 2005 (EPAct 2005), which added section 210(m) to the Public Utility Regulatory Policies Act of 1978 (PURPA). The Commission seeks public comment on the amended regulations proposed herein.

DATES: Comments are due [**insert date thirty days after publication in the FEDERAL REGISTER**] Reply Comments are due [**insert thirty days after comment date**].

ADDRESSES: Comments may be filed electronically via the eFiling link on the Commission's web site at http://www.ferc.gov. Commenters unable to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, N.E., Washington,

D.C., 20426. Refer to the Comment Procedures section of the preamble for additional information on how to file comments.

FOR FURTHER INFORMATION CONTACT:

Deborah Wyrick (Technical Information)
Office of Energy Markets and Reliability
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
(202) 502-6113

Marka Shaw (Technical Information)
Office of Energy Markets and Reliability
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
(202) 502-8641

Samuel Higginbottom (Legal Information)
Office of the General Counsel
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
(202) 502-8561

Giuseppe Fina (Legal Information)
Office of the General Counsel
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
(202) 502-8696

SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities — Docket No. RM06-10-000

NOTICE OF PROPOSED RULEMAKING

(Issued January 19, 2006)

I. Introduction

1. On August 8, 2005, the Energy Policy Act of 2005 (EPAct 2005)[1] was signed into law. Section 1253(a) of EPAct 2005 adds a new section 210(m) to the Public Utility Regulatory Policies Act of 1978 (PURPA)[2] which provides for termination of an electric utility's obligation to purchase energy and capacity from qualifying cogeneration facilities and qualifying small power production facilities (QFs), if the Federal Energy Regulatory Commission (Commission) finds that certain conditions are met. Section 210(m)[3]: (1) provides a procedure for an electric utility to file an application for relief

[1] Pub. L. No. 109-58, § 1253, 119 Stat. 594 (2005).

[2] 16 U.S.C. 824a-3 (2000).

[3] We note that the Commission has issued a notice of proposed rulemaking regarding added section 210(n) in Docket No. RM05-36-000. That section makes clear that no new qualifying cogeneration facility can enter into a contract with an electric utility unless the cogeneration facility satisfies criteria for new qualifying cogeneration facilities that will be established by the Commission. Revised Regulations Governing

(continued)

from the mandatory purchase obligation on a service territory-wide basis; (2) provides a procedure for any affected entity or person to apply to the Commission for an order reinstating the electric utility's obligation to purchase energy; (3) provides for termination of an electric utility's obligation to sell to QFs energy and capacity if the Commission finds that certain conditions are met; (4) protects existing rights and remedies under any contract or obligation in effect or pending approval involving the purchase of energy or capacity or sale of energy or capacity to a QF; and (5) allows the Commission to issue and enforce regulations to ensure that an electric utility recovers all prudently incurred costs associated with the purchase of energy from a QF.

2. The Commission proposes to amend its regulations, specifically 18 CFR § 292.303, to implement the requirements in section 210(m).[4] The Commission seeks public comment on the regulations proposed herein.

II. **Background**

3. When Congress enacted section 210 of PURPA, it required the Commission to prescribe rules as the Commission determined necessary to encourage cogeneration and small power production, including rules requiring electric utilities to offer to purchase

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Small Power Production and Cogeneration Facilities, Notice of Proposed Rulemaking, 70 FR 60,456 (Oct. 18, 2005), FERC Stats. & Regs. ¶ 32,590 (2005).

[4] We will generally refer to EPAct 2005's added section 210(m) of PURPA as "amended section 210." All other references to PURPA section 210 are as it currently exists.

electric power from and sell electric power to QFs. Additionally, section 210 of PURPA authorized the Commission to exempt QFs from certain federal and state laws and regulations.

4. Under section 201 of PURPA, cogeneration facilities and small power production facilities which meet certain standards and which are not owned by persons primarily engaged in the generation or sale of electric power[5] can become QFs, and thus become eligible for the rates and exemptions pursuant to section 210 of PURPA and found in our regulations.[6]

5. A cogeneration facility is defined in the Federal Power Act (FPA)[7] as a facility which produces electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes.[8] Thus, cogeneration facilities simultaneously produce two forms of useful energy, namely electric power and heat. Cogeneration facilities can use significantly less fuel to produce electricity and

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[5] The ownership requirement was codified in sections 3(17)(A) and 3(18)(A) of the FPA. Section 1253(b) of EPAct 2005 removed the ownership requirement from sections 3(17)(A) and 3(18)(A) of the FPA, and the Commission has proposed to remove the ownership requirement from its regulations in Docket No. RM05-36-000. Revised Regulations Governing Small Power Production and Cogeneration Facilities, Notice of Proposed Rulemaking, 70 FR 60456 (Oct.18, 2005), FERC Stats. & Regs. ¶ 32,590 (2005).

[6] 18 CFR Part 292 (2005).

[7] 16 U.S.C. 824 et seq. (2000).

[8] 16 U.S.C. 796(18) (2000).

steam (or other forms of energy) than would be needed to produce the two separately.

6. Small power production facilities as defined in the FPA use biomass, waste, or renewable resources, including wind, solar energy and water, to produce electric power and have a power production capacity which, together with any other facilities located at the same site, are not greater than 80 megawatts.[9] Reliance on these sources of energy can reduce the need to consume fossil fuels to generate electric power.

7. Prior to the enactment of PURPA, a cogenerator or small power producer seeking to establish interconnected operation with a utility faced three major obstacles. First, utilities were not generally willing to purchase this electric output or were not willing to pay an appropriate rate for that output. Second, utilities generally charged discriminatorily high rates for back-up service to cogenerators and small power producers. Third, a cogenerator or small power producer which provided electricity to a utility's grid ran the risk of being considered a public utility and thus being subjected to extensive state and federal regulation.

8. Section 210 of PURPA was designed to remove these obstacles. Each electric utility is required under section 210 to offer to purchase available electric energy from cogeneration and small power production facilities which obtain qualifying status. The rates for such purchases from QFs must be just and reasonable to the ratepayers of the utility, in the public interest, and must not discriminate against cogenerators or small

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[9] 16 U.S.C. 796(17)(A)(i)-(ii) (2000).

power producers. Rates also must not exceed the incremental cost to the electric utility of alternative electric energy (also known as the electric utility's "avoided costs"). Section 210 also requires electric utilities to provide electric service to QFs at rates which are just and reasonable, in the public interest, and which do not discriminate against cogenerators and small power producers.

9. Since Congress enacted PURPA, electric utilities have complained that their obligation to purchase from and sell to QFs, as implemented by the Commission in 18 CFR 292.303(a)-(b), was not economically beneficial and that they were purchasing energy they did not need and selling energy they did not want to sell. In 1995, the Commission clarified that in determining the avoided cost rate, the electric utility must take into account all alternative sources including third-party suppliers and does not have to buy power it does not need.[10] In the past decade, with the development of exempt wholesale generators (EWGs) introduced by the Energy Policy Act of 1992,[11] and increasing competition in wholesale electric markets as well as some retail electric markets, Congress has debated whether to repeal PURPA altogether, or to revise it. The

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[10] Southern California Edison Company and San Diego Gas & Electric Company, 70 FERC ¶ 61,215 at 61,677-78, reconsideration denied, 71 FERC ¶ 61,269 at 62,078 (1995) (finding that the determination of avoided cost must take into account "all sources").

[11] Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, (1993) (EPAct 1992). EPAct 1992 added a new section 32 to the Public Utility Holding Company Act of 1935 (PUHCA) to permit a category of sellers called EWGs to be exempt from PUHCA.

result is new section 210(m), which is the subject of this rulemaking, and new section 210(n), which is being addressed in Docket No. RM05-36-000. New section 210(m) requires the Commission to lift the mandatory purchase obligation if it finds, in effect, that there is a sufficiently competitive market for the QF to sell its power. While the provision permits electric utilities to file applications for relief from the mandatory purchase obligation, and requires the Commission to act on such applications within 90 days, the Commission has determined that it can more appropriately address this issue through rulemaking.

III. Proposed Revisions To Regulations

A. Obligation to Purchase

10. Section 292.303(a) of the Commission's regulations, 18 CFR 292.303(a), states that:

> Obligation to purchase from qualifying facilities. Each electric utility shall purchase, in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility:
>
> (1) Directly to the electric utility; or
>
> (2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

11. The new PURPA section 210(m)(1) amends the obligation to purchase and states that:

> . . . no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility has nondiscriminatory access to –

> (A)(i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or
>
> (B)(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or
>
> (C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

Section 210(m)(1) thus relieves an electric utility of its obligation to enter into a new contract or obligation to purchase QF power upon a Commission finding that certain market conditions exist.

12. As discussed below, the Commission will: (1) discuss its interpretation of the criteria for electric utility relief from the purchase obligation; (2) make a preliminary finding that QFs interconnected with utilities that are members of Midwest Independent Transmission System Operator, Inc. (Midwest ISO), PJM Interconnection, L.L.C. (PJM), ISO New England, Inc. (ISO-NE), and New York Independent System Operator (NYISO) have nondiscriminatory access to those markets and that those markets satisfy the section 210(m)(1)(A) criteria for removing the obligation of those electric utilities to

enter into new contracts or obligations with QFs; and (3) provide guidance on the definition of "nondiscriminatory access," and "new contract or obligation."

1. Meaning of section 210(m)(1)

13. Section 210(m)(1) states that no utility shall be obligated to enter into a new contract or obligation if the Commission finds that QFs have nondiscriminatory access to one of the three market circumstances described in section 210(m)(1)(A), (B), and (C). In effect, Congress has required the Commission to remove the mandatory purchase obligation if it finds that there is access to a sufficiently competitive market for QFs to sell their power. Based on this statutory language, in this section, we discuss our interpretation of what type of markets are required by section 210(m)(1) of PURPA to relieve a utility of the mandatory purchase obligation.

14. Subparagraph (A) waives the purchase obligation if QFs have nondiscriminatory access to (i) independently administered, auction-based day-ahead and real-time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy. We conclude that the most reasonable interpretation of subsection (A) is that it was crafted to apply in regions in which Independent System Operators (ISO) and Regional Transmission Organizations (RTO) administer day-ahead and real-time markets, and bilateral long-term contracts for the sale of capacity and electric energy are available to participants/QFs in these markets.

15. We note that the second prong of subparagraph (A) does not require auction-based long-term capacity or energy markets and such an interpretation would not be consistent

with the statutory text. First, subparagraph (A)(ii) does not use the terms "organized," "independently administered," or "competitive" when describing the long term markets. As evidenced by subparagraph (B)(ii), discussed below, Congress could have imposed such requirements for the long-term wholesale markets, but did not. Therefore, we conclude that no such requirement was intended for the long-term markets of section 210(m)(1)(A)(ii). Second, unlike subparagraph (B)(ii), subparagraph (A)(ii) does not require the Commission to consider "evidence of transactions within the relevant market" when determining whether QFs have meaningful opportunities to sell into wholesale markets outside the host utility. This suggests that Congress presumed there was a meaningful opportunity to sell for QFs that have "nondiscriminatory access to" ISO and RTO regions with day-ahead and real-time markets.

16. A reasonable interpretation of subparagraph (B) is that it is intended to apply in non-auction-based markets because it waives the mandatory purchase requirement so long as there is (i) a Commission-approved regional transmission entity providing nondiscriminatory transmission and interconnection services; and (ii) "competitive wholesale markets" for short- and long-term energy and capacity sales and real-time energy sales. To meet subparagraph (B)(i), QFs must have nondiscriminatory access to transmission and interconnection service that is nondiscriminatory, which we interpret to mean access pursuant to a Commission-approved open access transmission tariff (OATT) and interconnection rules and provided by an entity that is regional in scope. Amended section 210 does not contain any express definition, and, therefore, the Commission has

discretion in this context to deem an entity to be “regional” based on factors such as sufficient regional scope or configuration or the multiple discrete transmission systems it controls.

17. As to the second prong, subparagraph (B)(ii) requires that QFs have access to "competitive wholesale markets that provide a meaningful opportunity" to sell capacity and energy on both a short- and long-term basis and energy on a real-time basis (emphasis added). "Meaningful opportunity" is to be determined by the Commission after considering, among other factors, "evidence of transactions within the relevant market." Taken together, the terms “competitive,” “meaningful opportunity” and “evidence of transactions” suggest that Congress intended that waiver occur in a non-auction-based market only if it could be established that QFs had opportunities to sell their output into competitive wholesale markets.

18. Subparagraph (C) removes the purchase obligation in wholesale markets for the sale of capacity and electric energy that are, “at a minimum,” of comparable competitive quality as markets described in subparagraphs (A) and (B). Although this provision is not clear on its face, its reference to subparagraphs (A) and (B) requires the Commission to be mindful, in interpreting the provision, of the two types of requirements that are embodied in those sections, i.e., (1) nondiscriminatory access to transmission and interconnection services, and (2) competitive short-term and long-term markets. These provisions appear to require a case-by-case approach, but we seek comments on whether the Commission can make generic findings on these provisions.

19. The Commission's existing OATT, adopted in Order No. 888,[12] and interconnection rules, adopted in Order Nos. 2003[13] and 2006,[14] are designed to eliminate undue discrimination in the provision of transmission and interconnection services. Although the Commission recently issued a Notice Of Inquiry regarding changes to the OATT, the OATT has been considered sufficient to provide non-discriminatory access to transmission until such time as modified. Accordingly, we conclude that QFs have non-discriminatory access to transmission and interconnection if they have access to utilities providing service under an Order No. 888 OATT (or to utilities providing service under a Commission-accepted reciprocity tariff) and

[12] Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. Regulations Preambles January 1991-June 1996 ¶ 31,036 (1996), Order No. 888-A, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

[13] Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), order on reh'g, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004), order on reh'g, Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004), order on reh'g, Order No. 2003-C, 70 Fed. Reg. 37,661 (June 30, 2005), FERC Stats. & Regs. ¶ 31,190 (2005).

[14] Standardization of Small Generator Interconnection Agreements and Procedures, Order No. 2006, 70 Fed. Reg. 34,100 (Jun. 13, 2005), FERC Stats. & Regs. ¶ 31,180 at 31,406-31,551 (2005), order on reh'g, Order No. 2006-A, 70 Fed. Reg. 71,760 (Nov. 30, 2005), FERC Stats. & Regs. ¶ 31,196 (2005).

interconnection services pursuant to the Commission's interconnection rules. However, we seek comment on whether there are any circumstances in which an OATT should be considered insufficient for purposes of section 210(m). We also seek comment on whether a Commission-accepted reciprocity tariff filed by a nonjurisdictional electric utility has the same effect as an OATT for purposes of meeting section 210(m)(1)(C). We also seek comment on whether nonjurisdictional utilities provide nondiscriminatory interconnection services for purposes of section 210(m)(1)(C) of PURPA.

20. We also recognize that small QFs may be in a unique situation with respect to nondiscriminatory access because they interconnect with the host utility at a distribution level. For instance, Granite State has recently filed a petition in Docket No. EL06-26-000 asking the Commission to initiate a rulemaking implementing section 210(m) of PURPA and as part of that rulemaking, issue rules retaining the mandatory purchase obligation for small QFs (those with a nameplate capacity of 5 MW or less) and creating a rebuttable presumption in favor of retaining the mandatory purchase obligation for small power production facilities with a capacity over 5 MW and up to 20 MW. Granite State suggests that small hydro QFs do not have nondiscriminatory access to RTO/ISO markets. Therefore, we seek comment on whether the purchase obligation should be retained for small renewable projects and, if so, how to define "small," e.g., 5 MWs or below, 20 MWs or below as proposed by Granite State. In addition, we seek comment on whether there may be other categories of QFs that lack nondiscriminatory

access to RTO/ISO short-term or long-term wholesale markets for which we should retain the obligation to purchase.

21. With respect to whether the second prong of section 210(m)(B)(ii) is met in non-ISO/non-RTO markets, i.e., whether QFs in non-ISO/non-RTO markets have access to wholesale markets for long-term sales of capacity and electric energy, would that prong be satisfied if there is a demonstration that an organized power procurement process exists in which QFs can participate (albeit not an auction-based process)? We seek comments on ways the prong may be satisfied.

2. Implementation of section 210(m)(1)

(a) Subparagraph A

22. As we discussed above, the Commission interprets section 210(m)(1)(A) to apply in regions in which ISOs and RTOs administer day-ahead and real-time markets, and bilateral long-term contracts for the sale of capacity and electric energy are available to participants/QFs in these markets. The Commission proposes to find that the Midwest ISO, PJM, ISO-NE, and NYISO satisfy the requirements of section 210(m)(1)(A).[15] These entities are Commission approved ISO or RTOs that provide non-discriminatory

[15] While Southwest Power Pool, Inc. (SPP) and the California Independent System Operator Corporation (Cal ISO), respectively are a Commission-approved RTO and ISO, they do not satisfy the requirements of section 210(m)(1)(A) because neither has day-ahead markets. However, any utility within SPP and Cal ISO may file an application with the Commission to seek relief from the mandatory purchase obligation under sections 210(m)(1)(B) or (C), on a case-by-case basis.

open access transmission services and independently administer auction-based wholesale markets for day-ahead and real-time energy sales. Additionally, with respect to (A)(ii), the existence of bilateral long-term contracts for long-term sales of capacity and energy is an indication of a market. It is reasonable to conclude that the second prong of subparagraph (A) is met because bilateral long-term contracts are available to participants in the footprints of the Midwest ISO, PJM, ISO-NE, and NYISO. Therefore, we propose to find that electric utilities that are members of the Midwest ISO, PJM, ISO-NE, and NYISO would meet the requirements for relief from the mandatory purchase obligation. We describe these markets in more detail below.

(1) Midwest ISO

23. On December 20, 2001, the Commission found that the Midwest ISO satisfied the requirements, including independence from market participants, of Order No. 2000, and thus granted the Midwest ISO RTO status.[16] Thus, we believe that the Midwest ISO "independently administers" auction-based real-time markets. With respect to subparagraph (1)(A)(i), the Commission approved the Midwest ISO's proposed Transmission and Energy Markets Tariff (TEMT), which allowed the Midwest ISO to initiate Day 2 operations in its 15-state region.[17] The Midwest ISO's Day 2 operations

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[16] See Midwest Independent Transmission System Operator, Inc., 97 FERC ¶ 61,326 (2001) order on reh'g, 103 FERC ¶ 61,169 (2003).

[17] See Midwest Independent Transmission System Operator, Inc., 108 FERC ¶ 61,163 (Midwest ISO, FERC Electric Tariff, Third Revised Volume No. 1, Module C), (continued)

include, among other things, day-ahead and real-time energy markets and a Financial Transmission Rights (FTR) market for transmission capacity. The Midwest ISO began Day 2 operations on April 1, 2005. Since market participants have access to the Midwest ISO's day-ahead and real-time energy markets to sell their electric energy, a QF that has "non-discriminatory access" would have the same opportunity. Also, bilateral contracts exist in the Midwest ISO for the long-term sales of capacity and energy. Accordingly, we would expect that such long-term sales would be available to all participants in the Midwest ISO's footprint. Based on the foregoing, we propose to find that the Midwest ISO meets the conditions of subparagraph (A).

(2) PJM

24. PJM received Commission approval as an independent regional transmission organization on July 12, 2001.[18] Since independence from market participants is one of four characteristics that PJM had shown for Commission approval to operate as an RTO, PJM satisfies the "independently administered" condition. Second, since 1997, PJM has operated auction-based, day-ahead and real-time wholesale energy markets pursuant to its

order on reh'g, 109 FERC ¶ 61,157 (2004), order on reh'g, 111 FERC ¶ 61,043 (2005).

[18] PJM Interconnection, L.L.C., 96 FERC ¶ 61,061 (2001). On December 20, 2002, in PJM Interconnection, L.L.C., 101 FERC ¶ 61,345 (2002), PJM was granted full, rather than provisional, RTO status. Independence was one of the matters considered in the 2002 Order.

OATT and Operating Agreement.[19] Because PJM's market participants have access to auction-based day ahead and real time wholesale energy markets, a QF would have the same opportunity as other generators to sell energy in that market. Also, there are bilateral contracts in PJM for the long-term sales of capacity and energy. Accordingly, we would expect that such long-term sales would be available to all participants in PJM's footprint. Therefore, we propose to find that PJM meets the conditions of subparagraph (A).

(3) ISO-NE

25. ISO-NE received Commission approval as an independent regional transmission operator on March 24, 2004, by having satisfied the Commission's criterion of independence from market participants.[20] Due to ISO-NE's status as an RTO, we believe that the ISO-NE satisfies the "independently administered" condition of subparagraph (A)(i). With respect to the second condition of subparagraph (A)(i), ISO-NE, pursuant to Market Rule 1 of its OATT, commenced operation of its auction-based energy markets on March 1, 2003. Since ISO-NE's market participants have access to auction-based day ahead and real time wholesale energy markets, a QF would have the same opportunity. Also, there are bilateral contracts in ISO-NE for the long-term sales of capacity and

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[19] PJM Interconnection, L.L.C., FERC Electric Tariff, Sixth Revised Volume No. 1.

[20] ISO New England, Inc., 106 FERC 61,280 (2004).

energy. Accordingly, we would expect that such long-term sales would be available to all participants in ISO-NE's footprint. Therefore we propose to find that ISO-NE meets the conditions of subparagraph (A).

(4) NYISO

26. The NYISO received Commission authorization to operate as an independent transmission operator on June 30, 1998 after showing that it is independent of market participants.[21] On November 18, 1999, the NYISO commenced operation of its auction-based energy markets. Under the ISO Market Administration and Control Area Services Tariff, NYISO's market participants have access to auction-based day ahead and real time wholesale energy markets,[22] and a QF would have the same opportunity as other generators within NYISO to sell energy into NYISO's auction-based day ahead and real time wholesale energy markets. Also, there are bilateral contracts in NYISO for the long-term sales of capacity and energy. Accordingly, we would expect that such long-term sales would be available to all participants in NYISO's footprint. Therefore we propose to find that NYISO meets the conditions of subparagraph (A).

(5) Conclusion

27. The Commission thus proposes to find in this rulemaking proceeding that QFs

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[21] Central Hudson Gas & Electric Co., 83 FERC ¶ 61,352 (1998), order on reh'g, 87 FERC ¶ 61,135 (1999).

[22] New York Independent System Operator, Inc., FERC Electric Tariff Original Volume No. 2.

interconnected with electric utilities that are members of Midwest ISO, PJM, ISO-NE, and NYISO have nondiscriminatory access to those markets and those markets meet the section 210(m)(1)(A) criteria for removing the obligation of those electric utilities to enter into new contracts or obligations with the QFs. We seek comments, including specific evidence, which either support or refute this preliminary finding Finally, as noted previously, we seek comment on whether the obligation to purchase should be retained in these markets for "small" QFs.

28. Under our proposed regulations, to claim relief from the purchase obligation, electric utilities that are members of Midwest ISO, PJM, ISO-NE, and NYISO will need to make compliance filings pursuant to section 210(m)(3). This compliance filing is discussed in more detail in our discussion of section 210(m)(3).

(b) Subparagraphs B and C

29. The Commission proposes to determine on a case-by-case basis[23] whether a utility has met the requirements of sections 210(m)(1)(B) and 210(m)(1)(C) for relief from its purchase obligation. An electric utility filing an application claiming to meet the requirements of section 210(m)(1)(B) or section 210(m)(1)(C) of PURPA must demonstrate the "factual basis upon which relief is requested." Applicants should

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[23] We will allow joint applications to be filed by a number of utilities in a region if the applications for relief from the purchase obligation present common issues of law and fact. We would expect common issues of law and fact to exist where one or more utilities operate within the same market.

provide, among other evidence, actual sales data for (1) long-term and short-term capacity and (2) long-term, short-term, and real-time electric energy as well as evidence that the utility operates in a competitive wholesale market. Accordingly, to be relieved of their mandatory purchase obligations, electric utilities that are not members of Midwest ISO, PJM, ISO-NE, and NYISO would be required to file such applications with the Commission pursuant to section 210(m)(3) of PURPA.

30. We propose that other markets, i.e., both non-auction-based markets and non-RTO markets, as well as new auction-based markets, and utility-specific markets would be addressed on a case-by-case basis, pursuant to section 210(m)(3) discussed below. In addition, subsequent changes to market conditions in all markets would be handled on a case-by-case basis, pursuant to section 210(m)(4) discussed below.

3. Other Issues

31. Section 210(m)(1) states that no electric utility shall be obligated to purchase from a QF if the Commission finds that the QF has nondiscriminatory access to the market conditions identified in each subparagraph. We propose that there be a rebuttable presumption that a utility provides nondiscriminatory access if it has an open access transmission tariff in compliance with our pro forma OATT (or a Commission-approved reciprocity tariff).[24] We also propose that QFs or any other affected party should be

[24] In Docket No. RM05-25-000, the Commission is currently reviewing the adequacy and sufficiency of the pro forma OATT to ensure that it prevents undue discrimination in the provision of transmission service.

allowed to rebut that presumption, for example, by providing specific and credible evidence that the QF does not have non-discriminatory access to wholesale markets. However, the presumption cannot be rebutted by an argument that the utility has not properly implemented or administered its OATT. Improper implementation of an OATT is more properly the subject of a complaint and the Commission will take appropriate steps in response to a complaint to ensure that the OATT is properly implemented.

32. Section 210(m)(1) also states that no electric utility "shall be required to enter into a new contract or obligation" to purchase electric energy from a QF if the Commission makes the required finding. The Commission proposes to find that when a contract terminates by its own accord, an electric utility is not compelled to enter into a new, successor contract with the QF if the Commission has found that the QF has nondiscriminatory access to markets that satisfy the criteria of section 210(m)(1). Some have alleged that the grant of QF status means that electric utilities have an "obligation" to purchase from that QF in perpetuity. We disagree. That a facility has QF status does not mean that an electric utility has an "obligation" to purchase from the QF in perpetuity, or, conversely, that the QF has the right to demand that the utility purchase at avoided-cost rates in perpetuity. The Commission proposes to find that if a contract is entered into after August 8, 2005, the date of enactment, but before the Commission has determined that an electric utility is entitled to relief from the obligation to purchase from a QF, the contract already entered into will be treated as though it was in effect on August 8, 2005 for purposes of section 210(m)(1).

B. Purchase and Sale Obligations for New Cogeneration Facilities

33. Section 210(m)(2)(A) of PURPA reads:

> REVISED PURCHASE AND SALE OBLIGATIONS FOR NEW FACILITIES – (A) After the date of enactment of this subsection, no electric utility shall be required pursuant to this section to enter into a new contract or obligation to purchase from or sell electric energy to a facility that is not an existing qualifying cogeneration facility unless the facility meets the criteria for qualifying cogeneration facilities established by the Commission pursuant to the rulemaking required by subsection (n).

34. This provision reinforces the requirement that new qualifying cogeneration facilities must satisfy the section 210(n) criteria for new qualifying cogeneration facilities, which the Commission is implementing in pending Docket No. RM05-36-000. The Commission proposes to make this clarification in section 292.309(d) of its regulations.

35. Section 210(m)(2)(B) defines the term “existing qualifying cogeneration facility” to mean a facility that: (i) was a qualifying cogeneration facility on the date of enactment of subsection (m), or (ii) had filed with the Commission a notice of self-certification, self-recertification or an application for Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by subsection 210(n). The Commission proposes to adopt this definition in new section 292.309(b)(1) of its regulations.

C. Application for Relief

36. Section 210(m)(3) of PURPA states:

> COMMISSION REVIEW- Any electric utility may file an application with the Commission for relief from the mandatory purchase obligation pursuant to this subsection on a service territory-wide basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in subparagraphs (A), (B) or (C) of paragraph (1) of this subsection have been met. After notice, including sufficient notice to potentially affected qualifying cogeneration facilities and qualifying small power production facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in subparagraphs (A), (B) or (C) of paragraph (1) have been met.

37. The Commission proposes to include in new section 292.310 the language of section 210(m)(3) of PURPA. Since the enactment of EPAct 2005, two applications for relief from the mandatory purchase obligation have been filed with the Commission.[25] In Alliant, the Commission explained that, in order to meet the express statutory requirement of "notice," including "sufficient notice to potentially affected qualifying cogeneration facilities and qualifying small power production facilities," contained in section 210(m)(3) of PURPA, it would require that an applicant identify all potentially affected QFs in any application for relief filed pursuant to section 210(m)(3).[26] The Commission then described which facilities constitute "all potentially affected QFs."[27]

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[25] See Alliant Energy Corporate Services, Inc., 113 FERC ¶ 61,024 (2005) (Alliant); Montana-Dakota Utilities Co., 113 FERC ¶ 61,045 (2005) (Montana-Dakota). In both instances, the Commission dismissed petitions for declaratory orders pursuant to section 210(m)(3) of PURPA requesting relief from the mandatory purchase obligation on the grounds of insufficient notice.

[26] Alliant, 113 FERC ¶ 61,024 at P 18.

[27] Id. at P 19-20.

38. Consistent with Alliant and Montana-Dakota, before the Commission will consider an application filed pursuant to section 210(m)(3) of PURPA, an applicant must first identify in the application all potentially affected QFs (with their names and current addresses) – including: (1) those QFs that have existing power purchase contracts with the applicant; (2) other QFs that sell their output to the applicant or that have pending requests for the applicant to purchase their output; (3) any developer of generating facilities with whom the applicant has agreed to enter into power purchase contracts or is discussing power purchase contacts; (4) the developers of facilities that have pending state avoided cost proceedings; and (5) any other QFs that the applicant reasonably believes to be affected by its petition. This will ensure that the statutory obligation is met to provide notice and an opportunity to comment to all potentially affected QFs. The Commission proposes to incorporate this interpretation of "sufficient notice" and "all potentially affected QFs" in new section 292.310(b) and (c).

39. We point out that under section 210(m)(3) the Commission must make a finding regarding an application for relief of the purchase obligation and that the finding must be made within 90 days of the date of such application. The Commission, accordingly, will expect an application for relief to be fully supported by documentation upon which the required finding can be made, i.e., a case in chief. For those not in one of the Commission-certified markets, such documentation should include, but is not limited to: (1) prepared testimony; (2) affidavits; (3) exhibits; and (4) any other evidence. Given the

statutory 90-day time limit for finding, we stress that the burden will be on the applicant to provide a fully-supported application in the first instance.

40. With regard to applications filed by electric utilities that are members of Midwest ISO, PJM, NYISO, or ISO-NE, an electric utility need only submit a compliance filing showing that: (1) it is a member of one of these RTOs/ISOs; (2) the Commission has made a final finding that the RTO/ISO that it is a member of provides QFs with nondiscriminatory access;[28] (3) a list of all potentially affected QFs; and (4) the QFs have the right to request service under an OATT or OATTs (or reciprocity tariffs) on file. Once a final rule issues and the Commission has acted on rehearing of the final rule, the Commission will not reevaluate its decision on specific markets made in the instant proceeding, absent changed circumstances. The Commission seeks comments on whether there are any QFs within the service territories of members of the Midwest ISO, PJM, ISO-NE, and NYISO that, although they have access to an OATT or OATTs (or reciprocal tariffs), nonetheless do not have nondiscriminatory access to those markets.

41. We anticipate that the compliance filings of the electric utilities that are members of the Midwest ISO, PJM, NYISO, or ISO-NE and seeking relief from the purchase obligation will be essentially ministerial; we do not expect the findings made in this

[28] The final rule in this proceeding must have become effective before an electric utility may rely upon it. As a result, any electric utilities that file early and seek to rely on the preliminary findings with respect to Midwest ISO, PJM, NYISO or ISO-NE in this NOPR will not be permitted to do so.

rulemaking to be re-litigated in the compliance filing proceeding. In this regard, we conclude that the existence of a filed OATT (or reciprocity tariff) will be construed to provide nondiscriminatory access. If a QF believes that the administration or implementation of the OATT denies it access to markets, it is not an issue for the compliance filing proceeding; instead the QF may file a complaint challenging the implementation or administration of an OATT.

D. Reinstatement of Obligation to Purchase

42. Section 210(m)(4) provides:

> REINSTATEMENT OF OBLIGATION TO PURCHASE. At any time after the Commission makes a finding under paragraph (3) relieving an electric utility of its obligation to purchase electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to purchase electric energy under this section. Such application shall set forth the factual basis upon which the application is based and describe why the conditions set forth in subparagraphs (A), (B) or (C) of paragraph (1) of this subsection are no longer met. After notice, including sufficient notice to potentially affected utilities, and opportunity for comment, the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to purchase electric energy under this section if the Commission finds that the conditions set forth in subparagraphs (A), (B) or (C) of paragraph (1) which relieved the obligation to purchase, are no longer met.

43. The Commission views this section as an opportunity for a QF, a state agency, or any affected person to seek to reinstate the purchase obligation should there be a material change in the circumstances under which the Commission granted relief. We note that the applicant bears the burden to "set forth the factual basis" upon which the application is based. The requirement for a "factual basis" indicates that allegations of a change in

the conditions upon which relief was granted must be supported with evidence. The Commission proposes to consider these applications on a case-by-case basis.

44. Consistent with our interpretation of "notice" under section 210(m)(3), the Commission will require an applicant to identify all potentially affected utilities in the application so that the Commission will be able to meet its statutory requirement to provide sufficient notice and an opportunity for comment.

E. Obligation to Sell

45. Section 292.303(b) of the Commission's regulations, 18 CFR 292.303(b), states that: "Each electric utility shall sell to any qualifying facility, in accordance with § 292.305, any energy and capacity requested by the qualifying facility." Under new section 210(m)(5), this mandatory obligation to sell can be terminated if the Commission finds that: "competing retail electric suppliers are willing and able to sell and deliver electric energy to the qualifying cogeneration facility or qualifying small power production facility; and the electric utility is not required by State law to sell electric energy in its service territory."

46. The Commission proposes to incorporate the language of section 210(m)(5) of PURPA in new section 292.312 of the Commission's regulations. The Commission proposes to interpret the phrase "new contract or obligation" contained in section

210(m)(3) consistently with its interpretation of the same words contained in section 210(m)(1) of PURPA.[29]

47. The Commission is also proposing to include a provision, section 292.313, allowing a QF, State agency, or any other affected person to apply to the Commission for an order reinstating the electric utility's obligation to sell electric energy if the factual predicate for the determination that the obligation to purchase should be terminated no longer exists.

F. Section 210(m)(6)

48. Section 210(m)(6) of PURPA requires that:

> Nothing in this subsection affects the rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority or non-regulated electric utility on the date of enactment of this subsection, to purchase electric energy or capacity from or to sell electric energy or capacity to a qualifying cogeneration facility or qualifying small power production facility under this Act (including the right to recover costs of purchasing electric energy or capacity).

49. We propose to implement section 210(m)(6) of PURPA by adopting the language of the statute in section 292.314. In addition, the Commission will clarify that the stage of the construction of a facility has no bearing on whether the protections of section 210(m)(6) are triggered. The Commission interprets section 210(m)(6) to protect the rights and remedies under a contract or obligation in effect *or* pending approval before

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[29] See P 29 supra.

the state regulatory authority, regardless of the construction stage of the facility that may be the subject of the contract or obligation. We solicit comments on whether further or different language and/or clarifications other than those proposed here should be incorporated into our regulations.

G. Section 210(m)(7)

50. Section 210(m)(7) of PURPA requires that:

> (A) The Commission shall issue and enforce such regulations as are necessary to ensure that an electric utility that purchases electric energy or capacity from a qualifying cogeneration facility or qualifying small power production facility in accordance with any legally enforceable obligation entered into or imposed under this section recovers all prudently incurred costs associated with the purchase. (B) A regulation under subparagraph (A) shall be enforceable in accordance with the provisions of law applicable to enforcement of regulations under the Federal Power Act (16 U.S.C. 791a et seq.).

51. The Commission does not believe that regulations are necessary at this time; this is a matter that the Commission can address on a case-by-case basis. However, the Commission will consider a regulation under this section in the future if a need becomes apparent.

52. We solicit comments on whether there is a need for the Commission to consider a regulation, and if so what that regulation should state, to ensure that an electric utility that purchases electric energy or capacity from a cogeneration QF or qualifying small power production facility in accordance with any legally enforceable obligation entered into or imposed under section 210(m)(7) recovers all prudently incurred costs associated with the purchase.

IV. Information Collection Statement

53. The Commission is submitting the following collection of information contained in this proposed rulemaking to the Office of Management and Budget (OMB) for review under Section 3507(d) of the Paperwork Reduction Act of 1995.[30] The Commission identifies the information provided for under Part 292 as FERC-556. These collections of information are specifically mandated by statute.

54. The Commission solicits comments on the Commission's need for this information, whether the information will have practical utility, the accuracy of the provided burden estimates, ways to enhance the quality and clarity of the information that the Commission will collect, and any suggested methods for minimizing the respondent's burden, including the use of information techniques. The burden estimates for complying with this proposed rule are as follows:

Data Collection FERC-556	Number of Respondents	Number of Responses	Hours Per Response	Total Annual Hours
§292.310	230	1	2	460
§292.312	230	1	2	460
§292.413	630	1	3	1,890
Totals	860	1		2,810

Total Annual Hours for the Collection: (reporting + recordkeeping if appropriate)

[30] 44 U.S.C. 3507(d) (2000).

Information Collection Costs: Because of the regional differences and the various staffing levels that will be involved in preparing the documentation (legal, technical and support) the Commission is using an hourly rate of $150 to estimate the costs for filing and other administrative processes (reviewing instructions, searching data sources, completing and transmitting the collection of information). The estimated cost is anticipated to be $421,500.

Title: FERC-556 Small Power Production and Cogeneration Facilities

Action: Proposed Data Collections

OMB Control Nos. 1902-0075

Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of this rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number or the Commission has provided justification as to why the control number should not be displayed.

Respondents: Businesses or other for profit, state, local or tribal government.

Necessity of the Information: The Commission proposes amending its regulations to implement section 210(m) of PURPA which was enacted in section 1253 of the EPAct 2005; specifically, its regulations governing purchases of electric energy from and sales of electric energy to qualifying small power production and cogeneration facilities

These requirements conform to the Commission's plan for efficient information collection, communication, and management within the energy industry. The

Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426 [Attention: Michael Miller, Office of the Executive Director, Phone: (202)502-8415, fax: (202)273-0873, e-mail: michael.miller@ferc.gov]

55. For submitting comments concerning the collection(s) of information and the associated burden estimate(s), please send your comments to the contact listed above and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D.C. 20503, [Attention: Desk Officer for the Federal Energy Regulatory Commission, phone: (202)395-4650, fax: (202)395-7285, e-mail: oira_submission@omb.eop.gov.

V. Environmental Analysis

56. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment. The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. As explained above, this proposed rule is clarifying in nature. It interprets several amendments made to PURPA by EPAct 2005, and clarifies the applicability of these amendments to electric utilities and QFs; it does not substantially change the effect of the legislation. Accordingly, no environmental consideration is necessary.

VI. Regulatory Flexibility Act Analysis

57. The Regulatory Flexibility Act of 1980 (RFA)[31] generally requires a description and analysis of rules that will have significant economic impact on a substantial number of small entities and where notice and comment rulemaking is required. Certain rules are exempt from notice and comment from the RFA requirements; exempt rules include interpretative rules, general statements of policy, or rules of agency organization procedure or practice.[32] Interpretative rules "generally interpret the intent expressed by Congress, where an agency does not insert its own judgments or interpretations in implementing a rule and simply regurgitates statutory language."[33] The rule we are proposing in this docket is an interpretative rule. Accordingly, no regulatory flexibility analysis is required.

VII. Comment Procedures

58. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due [insert date _30__ days after publication in the FEDERAL REGISTER]. Reply comments are due [insert date 30 days after comment date]. Comments and reply comments must refer to Docket

[31] 5 U.S.C. 601-12.

[32] 5 U.S.C. 553(b)(A)

[33] "How to Comply with the Regulatory Flexibility Act: A Guide for Government Agencies", Small Business Administration, Office of Advocacy, P.5, May 2003.

No. RM06-10-000, and must include the commenters' names, the organizations they represent, if applicable, and their address in their comments. Comments and reply comments may be filed either in electronic or paper format.

59. Comments and reply comments may be filed electronically via the eFiling link on the Commission's web site at http://www.ferc.gov. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make paper filings. Commenters that are not able to file comments and reply comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, N.E., Washington, D.C. 20426.

60. All comments and reply comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments and reply comments on other commenters.

VIII. Document Availability

61. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (http://www.ferc.gov) and in the Commission's Public Reference Room during normal

business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington, D.C. 20426.

62. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

63. User assistance is available for eLibrary and the Commission's website during normal business hours. For assistance, please contact FERC Online Support at 1-866-208-3676 (toll free) or (202) 502-8222 (e-mail at FERCOnlineSupport@FERC.gov), or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659 (e-mail at public.referenceroom@ferc.gov).

List of subjects in 18 CFR Part 292

64. Electricity, Electric power plants, Electric utilities, Natural gas, Reporting and recordkeeping requirements.

By direction of the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

In consideration of the foregoing, the Commission proposes to amend Part 292, Chapter I, Title 18, Code of Federal Regulations, as follows

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PART 292 – REGULATIONS UNDER SECTIONS 201 AND 210 OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978 WITH REGARD TO SMALL POWER PRODUCTION AND COGENERATION

1. The authority citation for part 292 continues to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.

2. Section 292.303 is revised to read:

§ 292.303 Electric utility obligations under this subpart.

(a) Obligation to purchase from qualifying facilities. Each electric utility shall purchase, in accordance with § 292.304 of this chapter, unless exempted by § 292.309 of this chapter, any energy and capacity which is generated from a qualifying facility

(1) Directly to the electric utility; or

(2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

(b) Obligation to sell to qualifying facilities. Each electric utility shall sell to any qualifying facility, in accordance with § 292.305of this chapter, unless exempted by § 292.312 of this chapter, energy and capacity requested by the qualifying facility.

* * * * *

3. Sections 292.309 through 292.314 are added to read as follows:

§ 292.309 Termination of obligation to purchase from qualifying facilities.

(a) An electric utility shall no longer be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility has nondiscriminatory access to:

(1)(i) Independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and

(ii) Wholesale markets for long-term sales of capacity and electric energy; or

(2)(i) Transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and

(ii) Competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected; in determining whether a meaningful opportunity to sell exists within the meaning of § 309(a)(2)(ii), the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

(3) Wholesale markets for the sale of capacity and electric energy that are, at a

minimum, of comparable competitive quality as markets described in paragraphs (a)(1) and (a)(2) of this section.

(b) Definitions

(1) For purposes of this section, an “existing qualifying cogeneration facility” is a facility that

(i) Was a qualifying cogeneration facility before or on August 8, 2005; or

(ii) Had filed with the Commission a notice of self-certification, self-recertification or an application for Commission certification under § 292.207 prior to **[insert the date the Commission issues a final rule]**.

(2) For the purposes of this section, a “new qualifying cogeneration facility” is a facility that satisfies the criteria for qualifying cogeneration facilities under § 292.205 of this chapter.

(3) For the purposes of this section, a renewal of a contract that expires by its own terms is a “new contract or obligation.”

(c) For the purposes of this section, there is a rebuttable presumption that there is “non-discriminatory access” to wholesale markets when a qualifying facility is provided transmission services pursuant to a Commission-approved open access transmission tariff or reciprocity tariff, and interconnection services pursuant to Commission-approved interconnection rules.

(d) No electric utility shall be required to enter into a new contract or obligation to purchase from or sell electric energy to a facility that is not an existing qualifying

cogeneration facility unless the facility meets the criteria for new qualifying cogeneration facilities established by the Commission in § 292.205 of this chapter.

§ 292.310 Procedures for utilities requesting termination of obligation to purchase from qualifying facilities.

(a) Any electric utility may file an application with the Commission for relief from the mandatory purchase obligation in § 292.303(a) of this chapter pursuant to this section on a service territory-wide basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in § 292.309(a)(1), (2) or (3) of this chapter have been met. After notice, including sufficient notice to potentially affected qualifying cogeneration facilities and qualifying small power production facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in § 292.309(a)(1), (2) or (3) of this section have been met; provided, however, that if the Commission has made a determination pursuant to notice and comment rulemaking or order that a particular market meets the criteria for relief in § 292.309(a)(1), (2) or (3), an applicant may make a ministerial application under this section and the application will be treated as a compliance filing.

(b) Sufficient notice shall mean that an electric utility must identify with names and addresses all potentially affected qualifying facilities in an application filed pursuant to paragraph (a).

(c) All potentially affected qualifying facilities shall include:

(1) Those qualifying facilities that have existing power purchase contracts with the applicant;

(2) Other qualifying facilities that sell their output to the applicant or that have pending self-certification or Commission certification with the Commission for qualifying facility status whereby the applicant will be the purchaser of the qualifying facility's output;

(3) Any developer of generating facilities with whom the applicant has agreed to enter into power purchase contracts or are in discussion with regard to power purchase contacts;

(4) The developers of facilities that have pending state avoided cost proceedings; and

(5) Any other qualifying facilities that the applicant reasonably believes to be affected by its application filed pursuant to paragraph (a).

§ 292.311 Reinstatement of obligation to purchase.

At any time after the Commission makes a finding under § 292.310 of this chapter relieving an electric utility of its obligation to purchase electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to purchase electric energy under this section, if there has been a change in the conditions upon which the Commission based its finding. Such application shall set forth the factual basis upon which the application is based and describe why the

conditions set forth in § 292.309 (a)(1), (2) or (3) of this chapter are no longer met. After notice, including sufficient notice to potentially affected utilities, and opportunity for comment, the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to purchase electric energy under this section if the Commission finds that the conditions set forth in § 292.309 (a)(1), (2), or (3) of this chapter which relieved the obligation to purchase, are no longer met.

§ 292.312 Procedures for utilities requesting termination of obligation to sell to qualifying facilities.

(a) An electric utility shall not be required to enter into a new contract or obligation to sell electric energy to a qualifying small power production facility, an existing qualifying cogeneration qualifying facility, or a new qualifying cogeneration facility if the Commission has found that:

(1) Competing retail electric suppliers are willing and able to sell and deliver electric energy to the qualifying cogeneration facility or qualifying small power production facility; and

(2) The electric utility is not required by State law to sell electric energy in its service territory.

(b) Any electric utility may file an application with this Commission for relief from the mandatory obligation to sell under this paragraph on a service territory-wide basis or a single qualifying facility basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in paragraphs

(a)(1) and (a)(2) of this section have been met. After notice, including sufficient notice to potentially affected qualifying facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in paragraphs (a)(1) and (a)(2) of this section have been met.

§ 292.313 Reinstatement of obligation to sell.

At any time after the Commission makes a finding under § 292.312 of this chapter relieving an electric utility of its obligation to sell electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to sell electric energy under this section, if there has been a change in the conditions upon which the Commission based its finding. Such application shall set forth the factual basis upon which the application is based and describe why the conditions set forth in § 292.312 (a)(1) and (a)(2i) of this chapter are no longer met. After notice, including sufficient notice to potentially affected utilities, and opportunity for comment, the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to sell electric energy under this section if the Commission finds that the conditions set forth in § 292.312 (a)(1) and (a)(2) of this chapter are no longer met.

§ 292.314 Existing rights and remedies

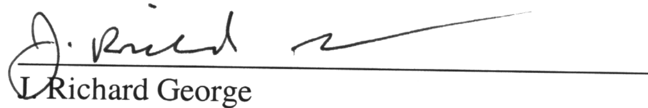
Nothing in this §§292.303 through 292.314 of this chapter affects the rights or

remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority or non-regulated electric utility on or before August 8, 2005, to purchase electric energy or capacity from or to sell electric energy or capacity to a qualifying cogeneration facility or qualifying small power production facility (including the right to recover costs of purchasing electric energy or capacity).

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the PHASE II DIRECT TESTIMONY AND EXHIBITS OF PORTLAND GENERAL ELECTRIC COMPANY to be served by electronic mail, and for those parties who have not waived paper service, by First Class US Mail, postage prepaid and properly addressed, upon each party on the attached service list, pursuant to Oregon Administrative Rule 860-013-0070.

Dated at Portland, Oregon, this 27th day of February 2006.



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