BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1610

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Investigation Into Qualifying Facility Contracting and Pricing.	)	RENEWABLE ENERGY COALITION PRE-HEARING BRIEF PHASE II

I. INTRODUCTION

Pursuant to the Administrative Law Judge's August 28, 2015 Ruling, the Renewable Energy Coalition (the "Coalition") submits this pre-hearing brief addressing the Phase II issues in this investigation into qualifying facility ("QF") contracting and pricing under the Oregon and federal Public Utility Regulatory Policies Acts ("PURPA"). The Oregon Public Utility Commission's (the "Commission" or "OPUC") resolution of many of the issues in this proceeding will have a long lasting impact on the viability of Oregon QFs, and whether they will have a role to play in meeting this state's energy needs. If the Commission adopts the policy recommendations by the utilities in this and other proceedings, then it could mean a halt to new QF development and the death of many existing projects that have been selling their power to the utilities for decades.

The Coalition is concerned that the Commission will adopt harmful policies in this proceeding based on exaggerated and unfounded allegations of a deluge of new solar QFs. Bringing any new project on line is, and has always been, extremely difficult. Like the hydro QF boom of the 1980s and the wind QF boom earlier in this decade, it is likely that only a few of the strongest and luckiest projects will eventually generate and sell power. In addition, the majority of these new proposed projects are located in Idaho and Utah, and there is less than megawatt ("MW") of Oregon solar QFs selling power.

Despite over thirty five years of PURPA, QFs continue to play a very small part of the utilities' resource portfolios, there are extremely few new non-solar new QF contracts, and existing QFs are struggling to remain in operation. It is also ironic that the Commission may significantly harm existing and new Oregon QFs in an effort to prevent the possibility that Oregon could become as friendly a state to non-utility owned renewable energy development as Idaho and Utah.

The Commission should not be driven by hyperbole, but should instead ensure that existing and new projects will have a fair opportunity to sell their electricity at reasonable rates. Projects should live or die based on whether they can economically sell power at the utilities' actual avoided costs, and not rates that are manipulated with a complex and easily manipulated computer model, or that inadequately compensate QFs for their capacity value. Most important for the long term, avoided cost rates should be set with adequate review. It will be impossible for rates to ever be fair or reasonable unless Staff, QFs, and interested parties have an opportunity to review, challenge, and obtain Commission resolution of issues related to the avoided cost calculations.

In addition to setting the correct price, the Commission can provide QFs with a fair opportunity to sell their power by protecting them from being driven out of business by cumbersome contract negotiations, or exorbitant third party transmission. Regardless of the avoided cost price, QFs cannot sell their power if they can be stonewalled to death or otherwise prevented from forming a contract or legally enforceable obligation.

II. BACKGROUND

The Commission established comprehensive policies for both large and small QFs in 2005 and 2007, and rules and policies for handling small generator interconnections in 2009. Re Investigation Relating to Elec. Util. Purchases from QFs, UM 1129, Order No. 05-584 (May 13, 2005); UM 1129, Order No. 07-360 (Aug. 20, 2007); Re Rulemaking to Adopt Rules Related to Small Generator Interconnection, Docket No. AR 521, Order No. 09-196 (June 8, 2009). The Commission opened this proceeding upon requests by the utilities, Staff, and QFs that certain policies should be revised. One important issue was that Idaho Power made exaggerated and ultimately inaccurate claims that it was facing an avalanche of new wind development that never occurred. See Re Investigation into QF Contracting and Pricing, Docket No. UM 1610, Order No. 14-058 at 4-5 (Feb. 24, 2014).

The Commission resolved a number of key issues in Phase I, and deferred others into Phase II. Id. at 2-3. The original Phase II procedural schedule planned to address six additional issues. UM 1610, Ruling (Dec. 21, 2012); UM 1610, Ruling (Jan. 30, 2013). In Order No. 14-058, the Commission added three additional issues to Phase II. UM 1610, Order No. 14-058 at 2-3. The utilities filed compliance filings to implement the Phase I order and update their avoided cost rates, which were challenged by Staff and QFs. Eventually, the parties agreed to allow the filings to go into effect based on the agreement that over a dozen of Staff's and the QFs' issues would be addressed in Phase II. E.g., UM 1610, Stipulation between PacifiCorp, Staff, the Coalition and the Community Renewable Energy Association ("CREA") (Aug. 11, 2014).

With potentially over twenty-five Phase II issues, the parties participated in extensive and detailed settlement discussions, and eventually agreed to resolve a number of key issues, drop other issues, and a limited set of Phase II issues. The Commission approved the parties' settlement on eight specific issues. _UM 1610, Order No. 15-130 (April 16, 2015). The parties agreed and the ALJs adopted a more limited Phase II issues list. The Coalition's positions on the key issues for new and existing QFs are:

- Issue: What is the appropriate forum to resolve disputed avoided cost rate inputs and assumptions?

  Coalition recommendation: Staff, QFs, and interested parties should be allowed an opportunity to review, challenge, and obtain Commission resolution on inputs and assumptions used in avoided cost rate calculations. The best way to have this review is in a separate proceeding at the same time as the review of the utility's integrated resource plan ("IRP").

- Issue: Whether the market prices used during the resource sufficiency period compensate for capacity?

  Coalition recommendation: No. The Commission should revise the methodology for calculating avoided cost rates during the resource sufficiency period to include the utilities' planned capacity costs.[1]

- Issue: What is the most appropriate methodology for calculating non-standard avoided cost prices? Should the methodology be the same for all three electric utilities operating in Oregon?

  Coalition recommendation: The Commission's current methodology for calculating non-standard avoided cost rates should not be changed. PacifiCorp and Portland General Electric Company ("PGE") should continue to use the Commission approved method to change the standard avoided cost rates, and Idaho Power should be allowed to continue to use the methodology approved by the Idaho Public Utilities Commission ("Idaho Commission").

- Issue: When is there a legally enforceable obligation?

  Coalition recommendation: A QF can create a legally enforceable obligation when the utility fails to comply with the Commission approved negotiation process in the utility's rate schedule, and/or there are disputes regarding contract terms, informational requirements, or other relevant issues. Before creating a legally enforceable obligation, the QF must comply with the Commission

[1] The Coalition is addressing this issue in a separate pre-hearing brief that is jointly filed with CREA, Obsidian Renewables, and OneEnergy.

approved rate schedule and make a good faith attempt to resolve any dispute. Most importantly, a QF should not lose its right to the then current avoided cost rates because of a dispute between the utility and the QF.

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

  Coalition recommendation: The QF should be provided key load pocket information early in the contract formation process, and should have the right to require the utility acquire the lowest cost reliable transmission to move their net output to the utility's load. Existing QFs should be grandfathered and should not have to pay third party transmission costs that they did not cause to be incurred.

III. ARGUMENT

1. Parties Should Be Provided a Fair Opportunity to Review and Challenge Avoided Cost Rates

The Commission should ensure that Staff, QFs, and interested parties have a forum to review, challenge, and obtain resolution of the inputs and assumptions that the utilities (often unilaterally) choose to include in avoided cost rates. History has shown that there are relatively few issues that Staff and QFs have regarding avoided cost rates, in part because most inputs and assumptions do not significantly alter the rates enough to justify the high litigation costs to challenge them. To different degrees, the utilities argue that they should effectively have the unfettered ability to set at least some aspects of their avoided cost rates without meaningful participation by Staff or QFs. The utilities, however, should not be allowed to determine the avoided cost rates, and the Commission should only approve the rates after resolving all concerns.

The Coalition strongly supports a separate and parallel proceeding at the time the Commission processes a utility's IRP to review avoided cost rate issues. This will ensure that all issues are fully addressed and the final rates are not inconsistent with the results of an acknowledged IRP. A minimally acceptable outcome, however, is a properly structured review after IRP acknowledgement that allows the parties to address all inputs and assumptions. The most important aspect is that the utilities retain the burden of proof to establish the justness and reasonableness of the rates, and that QFs, Staff, and other interested parties can challenge and obtain Commission resolution of any disputes.

A. The Utilities Have the Burden of Proof to Establish that Avoided Cost Rates are Just and Reasonable

Oregon law requires that the utilities must establish by at least a preponderance of the evidence that their proposed avoided cost rates are just and reasonable. The legal standard for approving avoided cost rates is whether the rates "shall over the term of a contract be just and reasonable to the electric consumers of the electric utility, the qualifying facility and in the public interest." ORS § 758.515(2)(b); see also 18 USC § 824a-3. PacifiCorp at least agrees that avoided cost rates must be just and reasonable. PAC/1000, Griswold/15.

In Oregon, it is the initial responsibility for the electric utility to "prepare, publish and file" with the Commission its avoided costs "over at least the next 20 years." ORS § 758.525(1). All avoided cost prices "shall be reviewed and approved by the commission." Id. The Commission recognizes that the utility "has the burden of supporting and justifying" the underlying avoided cost data. OAR § 860-029-0080(1)&(4). Placing the burden of proof on the party that developed the information is consistent with general administrative legal principles that the movant or proponent has the burden of proof. E.g., ORS § 757.210; 5 USC 556(d); 16 USC § 824d(e). The Commission's final order in this proceeding should reaffirm that the utilities have the burden to prove that their avoided cost rates are just and reasonable.

B. The Current Manner of Setting Avoided Cost Rates Is Inadequate

There are significant differences among the parties regarding what the current process is for setting avoided cost rates. For example, Staff's perspective is that parties have a legal right to review and challenge all avoided cost rate inputs after the utility files them, and the only potential confusion is where is the forum to challenge the resource sufficiency demarcation. Staff/500, Andrus/21-25. In contrast, PGE believes that the IRP sets avoided cost rate inputs and assumptions, and parties can only challenge those inputs and assumptions to determine if they are consistent with the IRP. PGE/700, MacFarlane-Morton/5-6.

At a minimum, the Commission needs to clarify how parties can review, challenge, and obtain resolution of disputed avoided cost rate issues. The Commission's rules provide that "[s]tandard rates for purchases shall be implemented . . . [i]n the same manner as rates are published for electricity sales . . . ." OAR § 860-029-0040(4). The rules further provide that: "Any standard rates filed under OAR 860-029-0040 shall be subject to suspension and modification by the Commission." OAR § 860-029-0080(6). The Commission has also ruled that parties can challenge an individual utility's gas price forecast when it files its avoided cost rates. UM 1129, Order No. 05-584 at 36-37; UM 1129, Order No. 06-538 at 44.

The Commission recently explained that the avoided cost rates should include "inputs and assumptions taken from IRPs that are subject to stakeholder review." UM 1610, Order No. 14-058 at 12. The Commission also expressly stated that the resource sufficiency/deficiency demarcation should be addressed in the IRP. Re Commission Investigation into determination of resource sufficiency, pursuant to Order No. 06-538, UM 1396, Order No. 10-488 at 8 (Dec. 22, 2010). PGE and PacifiCorp view this reliance on the IRP as precluding the ability of Staff and QFs to challenge any inputs or assumptions included in the IRP, even if not addressed by the Commission.

Relying upon the IRP for avoided cost rate inputs and assumptions has significant flaws. The IRP is a utility planning document that rarely focuses on or considers key avoided cost rate issues. Coalition/400, Lowe/9-12; ODOE/700, Carver/7-8. For example, the resource sufficiency/deficiency demarcation has a huge impact on avoided cost rates. The IRP, however, focuses on the short term Action Plan, and (for planning purposes) there is no reason to challenge or dispute the time of the utility's next major resource acquisition if it is outside of the Action Plan. There are other issues that have a huge impact on avoided cost rates, but obtain no or only a cursory review in the IRP.

The current approach is also flawed because the IRP does not provide any party an opportunity to obtain Commission resolution on disputed issues. Coalition/400, Lowe/12-13; see also ODOE/700, Carver/7-8. Regardless of the analysis done in an IRP or the ability to submit comments, the utilities make the ultimate decision. Coalition/600, Lowe/4-5. In the end, "the IRP is not a contested case and no party can truly challenge the evidence used in the IRP." Id. at Lowe/5. While the Commission "acknowledges" the overall IRP and some major aspects, the Commission does not approve any or acknowledge most of the specific inputs and assumptions used to set avoided cost rates.

If the Commission decides to continue relying upon the IRP and have a post-avoided cost filing review process, then the Commission should clarify how the utility must demonstrate that its inputs, assumptions, calculations, and methodologies are just and reasonable. The utilities avoided cost filing should be consistent with prior

Commission methodologies and include inputs, assumptions, calculations, and methodologies from the most recently acknowledged IRP. The utility, however, should have the discretion to depart from the IRP, but must identify and explain the change.

Similar to how rates for end use consumers are set, "consistency with specifically acknowledged part of the plan may be evidence in support of reasonableness when approving the avoided cost rates, but it should not be a guarantee that the rates will be approved." Coalition/400, Lowe/15-16. In addition, any aspect of the IRP that was not specifically acknowledged by the Commission should not be relevant. Id. In other words, any party should be allowed to challenge any input or assumptions on the grounds that they would not produce just and reasonable avoided cost rates, regardless of whether they are consistent with the IRP.

Even with these clarifications, the Coalition is skeptical that relying upon the IRP for initial inputs and assumptions with a post-avoided cost filing review will be sufficient or workable. QFs may aggressively participate in both the IRP and the avoided cost filing to ensure that they do not miss their opportunity to raise issues, unless there is a clearer break between the IRP and avoided cost rates. Coalition/400, Lowe/16-17.

More importantly, even if the Commission clarifies that "IRP acknowledgment does not prevent parties from challenging avoided cost inputs and assumptions, this may not work on a practical basis." Coalition/600, Lowe/6. PacifiCorp and PGE have strenuously argued that any inconsistency between the IRP and avoided cost rates would be disastrous. While these concerns are overblown, the Coalition is concerned that the Commission may be extremely reluctant to conclude that an input or assumption included in an IRP was incorrect or inaccurate. Id.

C. The Commission Should Set Avoided Cost Rates in a Separate Proceeding at the Same Time as the IRP Is Reviewed

Avoided cost rate inputs and assumptions should be adjudicated at the same time as the Commission reviews the utility's IRP because it will provide the most fair and timely avoided cost rate review. A simultaneous review will increase administrative efficiencies, allow sufficient time for review, reduce the possibility of inconsistency between the IRP and avoided cost rates, and allow more expedited approval of avoided cost rates after IRP acknowledgement.

Reviewing avoided costs at the same time as the IRP will "reduce the possibility of the Commission acknowledged integrated resource plan having inputs or assumptions that depart from those used to set avoided cost rates." Coalition/400, Lowe/14-15. ODOE/1100, Carver/2. This is the only legal way to have true consistency between the IRP and avoided cost rates. ODOE/1100, Carver/3-4.

The Coalition's recommendation should not result in a significant change to the current IRP process because it would be limited to "only those major issues that result in a change in avoided cost rates." Coalition/400, Lowe/14. Most issues in the IRP "have no impact on avoided cost rates, and the Commission would not need to resolve any issue that does not change the prices." Id. Therefore, only key avoided cost rate issues like resource sufficiency periods and capacity costs would need to be reviewed. Id.

The Commission has frequently expressed a preference for timely updating of avoided cost rates. Review of the inputs and assumptions in an expanded or separate IRP proceeding will result in "less of a need to review the utilities' post IRP avoided cost filings." Id.; ODOE/1100, Carver/2. This should result in quicker and less controversial approvals of avoided cost rates, and allow them "to be put into place at roughly the same time as the acknowledgement order." ODOE/700, Carver/5.

D. The Utilities Should Be Required to Include Minimum Filing Requirements ("MFRs") with Any Avoided Cost Rate Filing

The Commission should establish MFRs for avoided cost rate updates to reduce the time to review and approve avoided cost rates. Coalition/400, Lowe/17-18; Staff/500, Andrus/27-28; ODOE/900, Carver/7-8. MFRs are important because, while "it is often difficult to find this information without asking for it directly with Data Requests." Staff/500, Andrus/27. MFRs are routine in utility rate cases because they expedite review. As explained by Staff witness Brittany Andrus, the Commission should "require the MFRs to help ensure review of the avoided cost filing is as efficient and speedy as possible." Id. The MFRs proposed by either the Coalition or Staff, as supplemented by ODOE, are acceptable. Id.; ODOE/900, Carver/7-8; Coalition/400, Lowe/17-18.

2. The Commission Should Not Change the Methodology for Setting Large QF Rates, and Should Reject PacifiCorp's Computer Modeling Approach

PacifiCorp has not established that any changes in the Commission's current methodology for determining the avoided cost rates for QFs above 10 MWs are warranted. The Commission should continue to allow the QF and the utility to negotiate their rates, based on the Commission approved criteria. Using PacifiCorp's computer model as the basis for negotiations will allow the company too much discretion to unilaterally lower large QF avoided cost rates, increase the costs and disputes in the negotiation process, and potentially shut down the last couple remaining large Oregon QFs.

PacifiCorp has not demonstrated that there are any flaws in the current negotiation process for large QFs. PacifiCorp and PGE start with the standard Commission approved avoided cost rates for projects 10 MWs and under, and then "make specific adjustments to account for FERC approved factors to modify these avoided cost rates." Coalition/400, Lowe/21; UM 1129, Order No. 07-30 at 15-29 and Appendix A at 3 (Aug. 20, 2007).

If done properly, the adjustments based on Commission-approved factors and the computer modeling approach should produce similar results. Coalition/200, Schoenbeck/8-12. The difference is that "the computer modeling method is far more complex, expensive, and prone to disputes." Coalition/400, Lowe/22; Coalition/200, Schoenbeck/8-11; CREA/500, Skeahan/17. Additional costs "include obtaining the computer models, potential disputes regarding confidential material, hiring consultant to run them, and additional negotiations and disputes that can occur when using a non-transparent method." Coalition/400, Lowe/22; Coalition/200, Schoenbeck/8-11.

PacifiCorp's computer model and inputs "are subject to a certain degree of discretion and there can be significant factual disputes." Coalition/400, Lowe/22; Coalition/200, Schoenbeck/8-11. The model's methodologies and inputs are constantly being challenged in a way that requires significant compromise and/or Commission resolution. For example, in only the most recent power cost rate case Staff and intervenors sponsored five expert witnesses that raised over twenty disputes over how the model forecasts future power costs. Coalition/600, Lowe/10-12. A QF would need to spend tens of thousands of dollars to conduct a similar investigation, and there is "no way even large and sophisticated QFs can spend the time and resources to investigate the reasonableness of the company's avoided cost modeling forecasts." Id. at Lowe/12.

As well as the cost, large QFs are at a negotiating disadvantage and have incentives not to raise legitimate issues. QFs often cannot afford the delay associated with a thorough review and challenge of the computer model, including a complaint at the Commission. Id. Large QFs are also not eligible for standard contracts, and disputes regarding the model "would spoil the negotiations on all other issues." Id. This is demonstrated by the fact that almost no large QFs go through this expensive and time consuming process. Coalition/401, Lowe/20-21 (only one large QF used the model). This could change dramatically the Commission significantly lowers the published price eligibility threshold and therefore should be considered before lowering the threshold.

PacifiCorp also admits that its computer model consistently under forecasts net power costs, which means that it will also consistently under estimate avoided cost rates. In UE 296, Mr. Dickman testifies that: "Since at least 2007, the Company's actual NPC required to serve customers have exceeded the forecast included in TAM filings." Re PacifiCorp, dba Pacific Power, 2016 Transition Adjustment Mechanism, Docket No. UM 296, PAC/100, Dickman/21. Therefore, the company wants to use a model that will under forecast avoided cost rates even "before the company makes adjustments to inputs, assumptions, and methodologies to lower avoided cost rates when it actually uses the model for any specific large QF." Coalition/600, Lowe/12-13.

PacifiCorp's computer modeling approach could inappropriately allow the company to set avoided cost rates below the wholesale market. As explained by ODOE witness Phil Carver, using PacifiCorp's approach "would go back to the method of using decremental generating costs during periods of sufficiency. This is not more accurate."

ODOE/900, Carver/10. The value of power should never be lower than the wholesale market price, because the utility always has the option to sell the power. Id.

If anything, Oregon is already has too inhospitable of a climate for large QFs. PacifiCorp has only two QFs above 10 MWs in Oregon. This situation should not be made worse by adding unnecessary complexity and costs to an already difficult process.

3. QFs and the Utilities Should Be Provided Clear Guidance When a Legally Enforceable Obligation Can Be Established

The best way to ensure that PURPA complaints do not become a resource time suck is to establish clear and balanced policies allowing a QF to form a legally enforceable obligation prior to contract finalization. The policies should be designed to protect QFs from common and abusive tactics in the contract formation process that prevent economic QFs from selling their power. The policies should also be designed to prevent QFs from simply signing and filling out draft contracts, or ignoring the Commission approved contract completion processes. Most importantly, a QF should not lose its right to then current avoided cost rates merely because a dispute exists with the utility, and the QF should be eligible for then current avoided cost rates regardless of the outcome of a complaint or other dispute resolution.

A. A QF Has the Legal Right to Sell Power to a Utility Prior to Contract In Certain Circumstances

A QF has the right to receive a legally binding offer to establish a power sale to a utility pursuant to a contract or a legally enforceable obligation. 18 CFR § 292.304(d); Order No. 69, FERC Stats. & Regs. ¶ 30,128, 45 Fed. Reg. 12,214 at 12,224 (Feb. 25, 1980). The purpose of a legally enforceable obligation is to “ensure that a QF can require a utility to purchase its power even if the utility has refused to enter into a contract." Coalition/400, Lowe/23-24.

Both FERC and the Oregon Court of Appeals have explained that a QF can enter into a legally enforceable obligation when it has committed itself or is otherwise ready to sell power. Cedar Creek Wind, LLC, 137 FERC ¶ 61,006 at P. 36, 39 (Oct. 4, 2011); Snow Mountain Pine Co. v. Maudlin, 734 P.2d 1366, 1371, 84 Or. App. 590 (Or. App. 1987). A legally enforceable obligation is broader than simply a contract between a utility and a QF, and may exist without a contract. Grouse Creek Wind Park, LLC, 142 FERC ¶ 61,187 at P. 38 (March 15, 2013). Thus, a QF can require a utility to purchase its power even if the utility has refused to enter into a contract. Snow Mountain Pine Co., 734 P.2d at 1370-71; Murphy Flat Power, LLC, 141 FERC ¶ 61,145 at P. 24 (Nov. 20, 2012); Grouse Creek Wind Park, LLC, 142 FERC ¶ 61,187 at P. 38.

The purpose of a legally enforceable obligation is to allow "a QF to 'lock in' current avoided cost rates, especially when a utility is delaying or otherwise imposing unreasonable terms and conditions." Coalition/400, Lowe/24. As explained by FERC, the utility cannot refuse to sign a contract "so that a later and lower avoided cost is applicable." Cedar Creek Wind, LLC, 137 FERC ¶ 61,006 at P. 36. The Oregon Court of Appeals has similarly explained that the creation of a legally enforceable obligation "is not contingent on an agreed price." Snow Mountain Pine Co., 734 P.2d at 1371. Specifically, the Court explained that:

> To permit a utility to delay the date to be used to calculate the purchase price simply by refusing to purchase energy would expose qualifying facilities to risks that we believe Congress and the Oregon Legislature intended to prevent. The FERC commentary to 18 CFR § 292.304(d)(2) suggests that a utility cannot "merely by refusing to enter into a contract,"

> deprive a qualifying facility of its right to commit to sell power in the future at prices which are determined at the time the qualifying facility makes its decision to provide power.

Id.

The Commission's current administrative rule may be inconsistent with FERC's policies and Oregon law. The Oregon rule appears to require either a contract or utility written agreement to sell power. OAR § 860-029-0010(29). Despite this rule, the Commission has recognized that a legally enforceable obligation can be formed without a written agreement when the utility does not negotiate in good faith. See International Paper Co., Docket No. UM 1449, Order No. 09-439 at 6-9 (Nov. 4, 2009)(no bad faith shown). Parties as diverse as the Coalition, Staff, PacifiCorp, and Idaho Power all agree that written agreement from the utility is not required. Staff/500, Andrus/39; PAC/1000, Griswold/13; Idaho Power/900, Allphin/11-13. Therefore, the Commission should change its administrative rule to comply with the law.

B. Utilities Regularly Abuse the Contract Formation Process

The Commission has attempted to establish policies to avoid disputes in the contract formation process. While these policies have reduced the ability for parties to game the contract formation process, the Commission's current rule and the specific language in the utilities' tariffs encourage both QFs and utilities to act unreasonably. Requiring the utility's written agreement or the resolution of all matters simply encourages the utilities to delay the process or impose unreasonable restrictions. Similarly, having a rule and rate schedule that are inconsistent with FERC precedent and Oregon law has resulted in some QFs simply disregarding both.

The Commission's goal has been to facilitate and direct the process by which a QF can enter into a contract to sell its net output by establishing rules, policies, standard contracts, and rate schedules. UM 1129, Order No. 05-584 at 6-12, 16. There should not even be a negotiation process because intention is to have rates, terms, and conditions that a QF can elect without negotiation. Id. at 12. In other words, the Commission's intention is to "eliminate negotiations . . ." Id. at 16.

While the Commission done a relatively good job of streamlining and reducing the opportunities for difficulties in the contract completion and negotiation process, "the process sometimes results in significant disputes between the QF and a utility." Coalition/400, Lowe/23. The biggest disputes and utility delaying tactics occur "when the avoided cost prices are expected to drop or lower prices already have been filed with the Commission." Id. This may become a larger problem now that the Commission allows at least annual avoided cost rate updates.

The utilities have an almost infinite array of options to stonewall the contract negotiation process to prevent or delay a QF from entering into a contract at rates they are legally entitled to. Tools the utilities often employ include contract pre-requisites, unreasonable requests for information, inappropriate contract terms, delays in providing responsive information and draft contracts, requests to complete the interconnection and transmission process, refusal to sign or complete final contracts, and a lack of willingness to complete or begin the contract process if price changes are in progress. Coalition/100, Lowe/13-16; Coalition/400, Lowe/23.

These problems are exacerbated because there is unequal negotiating experience and resources between the QF and a utility. Coalition/400, Lowe/24. Even the most sophisticated developer with the resources to afford consultants and lawyers is at a disadvantage in terms of knowledge and control over the exchange of information and drafts. Small QFs rarely negotiate power contracts, and have limited knowledge of PURPA, avoided cost matters, and power markets. Id.

Despite the Commission approving specific tariffs and standard contracts that include timelines that are supposed to allow a QF to enter into a contract without negotiation, the reality can be very different. In addition to above listed problems, the utilities sometimes "impose their own requirements in violation of the Commission's policy." Id. at Lowe/25-26. For example, despite the Commission's intention to eliminate negotiations, PacifiCorp believes that the contract negotiation process necessarily requires some level of back and forth negotiations. PAC/1000, Griswold/18.

One recent example of PacifiCorp's unreasonable actions is that the utility has been proposing and requiring QFs to agree to non-standard terms and conditions, despite the Commission's policy that a QF under 10 MWs has the right to a Commission approved contract terms and conditions. Id.; Coalition/401, Lowe/9-19 (PacifiCorp Responses to Coalition DR 7.14, 7.15, 7.16 and 7.17). PacifiCorp admits that "it has requested addendums to standard PPAs based on changes in Company policies . . . ." PAC/1300, Griswold/9. Without retaining legal counsel, a QF cannot be expected to know which of the proposed contract terms, exhibits, and addenda by a utility are required or only optional. In addition, QFs are reluctant to reject new and non-standard contract terms proposed by a utility, especially in the face of an impending rate drop.

The Commission should reaffirm its policy that the utility should not require a QF to enter into non-standard contract forms, and that QFs should be clearly informed that additional terms are optional and that they have the right to elect "to use the standard contracts without modifications." Coalition/400, Lowe/26. In addition, the initial documents provided by a utility should only include materials specifically approved by the Commission. The only non-standard contract terms offered should be those designed to address unique and specific issues to a particular QF, and the utility should clearly communicate that any non-standard terms are optional. If the utilities want to routinely propose new contract terms, then they should ask for the Commission's approval.

QFs sometimes do not follow the established process or can inappropriately seek to obtain a legally enforceable obligation. For example, some QFs simply sign a contract without having even discussed their project with the utility, or made any attempt to provide necessary project specific information. PAC/1000, Griswold/15-18. Regardless of their motives, these actions are not reasonable steps in a fair contract completion process, and do not create a legally enforceable obligation.

C. The Commission Should Establish Clear and Fair Policies that Prevent Both Utilities and QFs From Abusing the Contract Formation Process

The Commission should clarify its policies to avoid future litigation, forestall inappropriate actions by both parties, and reduce the possibility of PURPA complaints. A legally enforceable obligation should be formed if the utility does not provide information or documents in its Commission approved rate schedule, or act consistently with state or federal law and policies. Critically, a QF should be allowed to seek resolution of a legitimate dispute, without risking its right to then current avoided cost rates. Utilities will be provided with an incentive to abuse the contract completion process if a QF loses the current rates because it sought clarification of its rights.

The Coalition recommends that a "QF should be allowed to create a legally enforceable obligation if the QF is unable to resolve outstanding issues after providing required information and negotiating in good faith with a utility." Coalition/400, Lowe/26. The utilities' rate schedules should detail the established negotiation processes, and both a QF and the utility "should be required to make a good faith effort to follow and comply with this process." Id.; Staff/500, Andrus/39-40. QFs need to provide information to allow the utility to prepare a draft contract, respond to reasonable requests for information, and inform the utility that they are ready to sign a contract. Coalition/400, Lowe/26; Staff/500, Andrus/39-40. Assuming that the utility timely provides a draft contract, then the QF should make a good faith attempt to resolve any disputes regarding information, contract terms and conditions, etc.

The major dispute among the parties is what happens if the utility does not follow the process in its rate schedule, acts inconsistently with state or federal law, or if there are other legitimate disputes between the QF and the utility. The Coalition, and the CREA propose that a legally enforceable obligation be formed at this point. Coalition/400, Lowe/23-28; Coalition/600, Lowe/13-15; CREA/500, Skeahan/18. Ms. Andrus makes a similar recommendation:

> If the utility does not provide the QF with the required information or documents within the time specified in its tariff, or act consistently with its own schedule or state or federal policies, the QF should have the opportunity to establish a LEO notwithstanding that the QF has not yet executed a final draft executable standard contract.

Staff/600, Andrus/24. In addition, Ms. Andrus states that: "the positions of CREA and REC help to illustrate when the QF may be able to establish a LEO in the absence of a final draft executable standard contract." Id. at Andrus/26.

The Coalition has proposed illustrative language to PacifiCorp's Schedule 37 that clarifies when a QF can enter into a legally enforceable obligation. The proposed language would create a legally enforceable obligation only after the QF has submitted information, a dispute arises regarding the information requested by the utility or the utility fails to timely provide information, the QF makes a good faith attempt to resolve the dispute, and the QF waits a certain period of time. Coalition/400, Lowe/26-28; Coalition/404 (Revised Schedule 37); Coalition/600, Lowe/13-15.

The utilities propose unreasonable limitations on the ability of a QF to enter into a legally enforceable obligation, including awaiting the outcome of a complaint, needing to show the utility acted in bad faith, or being required to come on line in less than a year. Idaho Power/900, Allphin/9-12; PacifiCorp/1000, Griswold/20. The QF should be able to legally obligate itself if the utility delays, imposes unreasonable restrictions or there are other reasonable disputes, regardless of the utility's motives.

A nuanced, but critical issue regarding legally enforceable obligations is whether the QF should have the ability to seek "clarification or confirmation of its rights from the Commission without losing its access to then current avoided cost rates." Coalition/600, Lowe/15. The question is: After the Commission issues an order on a complaint, will "the QF have the same rights and obligations that it would have if the negotiation process happened in the manner in which it is intended"? Id.

If the QF has to risk losing its avoided cost rates to obtain Commission review of the dispute, then "the utilities have a hammer to hold over the head of the QF to require them to agree to unreasonable restrictions or delays." Id. The QF should have the right to have a disputed issue resolved, be obligated to accept the Commission's decision (in their favor or against them), and still be entitled to the avoided cost rates that existed at the time of the dispute.

The Commission also should reject Idaho Power's proposal that a QF cannot legally obligate itself unless it can deliver the power in 365 days. Idaho Power/900, Allphin/9. It is unreasonable to require QFs to complete their facilities more quickly than the utilities' own projects. CREA/200, Reading/32-34. Many new and existing QFs will be unable to meet this requirement because it is often impossible to deliver power in a year. It is normal for both new and existing QFs to need more than a year, and often multiple years, to complete their interconnection or project construction and upgrades. Coalition/500, Lowe/15-16; CREA/100, Hillderbrand/19-20; CREA/200, Reading/32-35. For example, QFs have little control over the interconnection process, and PacifiCorp has recently stated that interconnection studies can take 6-8 months and construction an additional 18-24 months. Long time lines can apply to existing QFs that need significant interconnection upgrades.

The interconnection study and construction timelines are relevant because both new and existing QFs need to have a power purchase agreement before they can obtain financing to construct or upgrade generation, interconnection, and transmission facilities. As Staff explained earlier in this proceeding, allowing too little time between contract execution and delivery can create a barrier for QFs because they:

> generally cannot obtain financing for a new project until after they have executed a PPA. This means that QFs must wait for execution of a standard contract before commencing many of the steps that are necessary to bring a resource on line.

UM 1610, Brief in Support of Stipulation at 3 (Feb. 26, 2015). The Commission approved the parties' agreement "that a QF should have a reasonable amount of time before contract execution and commercial operation date." Id. Idaho Power's proposal is "a condition precedent to obtaining a legally enforceable obligation that is simply impossible for many QFs to meet." Coalition/500, Lowe/16; Staff/600, Andrus/25-26.

4. QFs Should Only Be Required to Pay the Reasonable Costs of Third Party Transmission that They Cause a Utility to Incur

QFs should be responsible for the reasonable third party transmission costs that they impose upon the utility to move their net output to load. The Commission, however, should reject PacifiCorp's proposals to not provide QFs with reasonable information or options. In addition, existing and operating QFs should be grandfathered and not required to pay for third party transmission because the transmission system was designed and built with existing projects in mind.

QFs typically are located on the utility's system, do not need transmission services, and actually offset a utility's need to transmit its own power to load. Load pockets, however, are areas in which a QF's generation exceeds the utility's local load and need to have their net output transmitted to the utility's loads in other locations. PacifiCorp has proposed that it should not provide QFs with reasonable information, and QFs should be required to purchase the most expensive form of third party "transmission, regardless of whether there may be lower cost alternatives that provide sufficient reliability and value to ratepayers and the utility." Coalition/600, Lowe/16; PAC/1300, Griswold/14-19.

For all QFs, the Coalition recommends that:

- PacifiCorp should be required to provide QFs with all relevant data regarding the availability or lack of availability of transmission on its system. If PacifiCorp merchant or transmission does not have critical data, then the QF should be able to ask or require PacifiCorp to ask for all reasonable information.

- PacifiCorp should be required to make every reasonable effort to acquire the lowest cost third party transmission.

- QFs should have the option to obtain a fixed price for transmission for part or all of the contract, or pay actual transmission costs as they are incurred.

- QFs should be able to select between a separate contract addendum that includes the costs of third party transmission or a reduction in their avoided cost rates.

Existing and operating QFs should be grandfathered and should not be responsible for third party transmission costs that they did not cause the utility to incur. Existing QFs already have network resource status and maintain that status when their contracts renew. PacifiCorp agrees in part that existing QFs should be treated differently, including that an existing QF should not be required to purchase transmission that is required because a new QF creates a load pocket, and that the QF does not lose its network resource status, unless it shuts down permanently. PAC/1300, Griswold/20-21; Coalition/600, Lowe/18.

QFs should also not be responsible for third party transmission costs when the load pocket was created because of a loss of retail load. Coalition/600, Lowe/18-19. PacifiCorp has greater control over the existence of its load in terms of the rates and service quality than the QF, and an existing QF should not be subject to additional costs due to PacifiCorp's increasing rates and service quality reductions. Id.

Payment of third party transmission "because of retail load changes comes down to fairness and equal treatment." Id. at Lowe/19. PacifiCorp's distribution and transmission system has been built based on the operations of existing QFs. PacifiCorp assumes their continued existence in their integrated resource plans and when it decides to acquire new transmission. Id.; Coalition/400, Lowe/4-5.

Existing QFs currently benefit the utility by reducing the utility's need to build or acquire transmission to serve its loads. Coalition/600, Lowe/19. PacifiCorp is not proposing "that the QF be paid a higher avoided cost rate to reflect the real value associated with the company not needing to build or acquire third party transmission." Id. Since these QFs are not compensated for the transmission benefits they provide, then they should not have to pay additional transmission costs if loads disappear. However, if the Commission concludes that existing QFs should be responsible for transmission costs due to load loss, then QFs should have their current avoided cost rates increased to reflect the transmission costs they are currently causing the utility to avoid.

5. QFs Should Own the Green Tags in the Last Five Years of a Twenty-Year Power Purchase Agreement

QFs are paid market rates during the last five years of a twenty-year power purchase agreement, and should be allowed to retain any renewable energy certificates ("RECs") associated with the project. Coalition/400, Lowe/33-34; Staff/500, Andrus/2-6. Oregon's policy allows a QF to retain its Green Tags or RECs when it makes PURPA sales. Coalition/400, Lowe/33-34. Certain renewable QFs have the option to sell the net output and the RECs to a utility and be paid the renewable avoided cost rate. For a fifteen year contract, the QF retains "the RECs during the resource sufficiency period when avoided cost rates are based on market purchases, and the QF transfers the RECs to the utility during the time period in which the avoided cost rates are based on a renewable proxy resource." Id. at Lowe/34.

During the last five years of a twenty year power purchase agreement, the QF is paid market rates by the utility, and there is "no reason why a QF should be required to transfer the RECs to the utility during this time period." Id. In other words, since the rates paid during this period are not based on the costs of a renewable resource, then the QF should not be "required to transfer its RECs to the utility." Staff/500, Andrus/6.

6. Avoided Cost Rates Should Include Avoidable Transmission Costs

Avoided transmission costs for both non-renewable and renewable proxy resources should be included in the avoided cost rates. This is consistent with the Commission's policy of allocating third party transmission costs to QFs, and that avoided cost rates should be based on the costs of resources that the utility would acquire but for the acquisition of power from a QF.

The Coalition specifically supports the recommendation of OneEnergy, which proposes that:

> If the on-system proxy resource cannot be designated a Network Resource at its full capacity without transmission upgrades and without de-rating or curtailing other Network Resources, then the cost of transmission upgrades necessary to make it a Network Resource should be included in avoided cost prices.

OneEnergy/400, Eddie/2-3.

7. The Capacity Value of QFs Should Not Be Subject to a Double Discount

Both renewable and non-renewable QFs should be fully paid the capacity value they provide to the utilities. The Coalition supports the testimony of the Staff, ODOE, Obsidian, and OneEnergy that identify and propose to remedy the inappropriate double discount related to the capacity payments for intermittent QFs.

IV. CONCLUSION

The utilities have traditionally been hostile toward the development of any non-utility owned generation, but have recently become emboldened based on their belief that this Commission wants to prevent additional non-utility resource development. The utilities are now taking extreme and unreasonable positions in the contract negotiation process, when implementing existing contracts, and are making regulatory proposals designed to stop any future QF development in this state and drive existing QFs out of business. The Commission should follow its statutory responsibilities to encourage QF development by protecting QFs from abusive utility practices and unreasonable costs, and ensuring that QFs have the right to review and challenge avoided cost rates.

Dated this 2nd day of September 2015.

Respectfully submitted,

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