BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 593

In the Matter of	)	
	)	RENEWABLE ENERGY COALITION
PUBLIC UTILITY COMMISSION OF	)	AND COMMUNITY RENEWABLE
OREGON,	)	ENERGY ASSOCIATION'S JOINT
	)	COMMENTS ON STAFF'S DRAFT
Petition to Amend OAR 860-029-0040,	)	PROPOSED RULES
Relating to Small Qualifying Facilities.	)	

I. INTRODUCTION

The Renewable Energy Coalition (the "Coalition") and the Community Renewable Energy Association ("CREA") (collectively the "Joint QF Parties") respectfully submit these Comments to the Oregon Public Utility Commission (the "Commission" or "OPUC") in advance of the public hearing scheduled for August 23, 2018. These comments are in response to the draft proposed rules Commission staff ("Staff") circulated to stakeholders on August 17, 2018, which modify Oregon's Public Utility Regulatory Policies Act ("PURPA") implementation to reflect current Commission orders and policies.

The Joint QF Parties have participated in the informal workshops and appreciates the herculean effort from Staff to bring the Commission's rules up to date. We understand that the scope of this formal rulemaking is merely to establish the status quo, as opposed to identifying where additional changes are needed, and therefore reserve the right to raise additional substantive arguments regarding the Commission's PURPA rules. These comments focus only on

whether Staff's August 17 proposal accurately captures the Commission's current policies; the Joint QF Parties believe they largely do.

The current draft rules, however, still need additional work. The Commission should take affirmative action to ensure the rules accurately capture the Commission's existing PURPA policies without creating any new controversies. For example, the Commission should confirm that it does not intend for its use of the term "firm energy" in its administrative rules is intended to deprive intermittent qualifying facilities ("QFs") of long-term fixed-price rates. Additionally, as described below the Joint QF Parties reiterate that, as is, the proposal may impermissibly expand the Commission's jurisdiction. For simplicity sake, the rules are addressed sequentially below.

II. BACKGROUND

On November 13, 2015, Obsidian Renewables, LLC filed a petition for rulemaking to revise and adopt new PURPA rules. Obsidian argued that the Commission's rules should be developed during an official rulemaking process rather than collected as a patchwork of unconnected Commission orders. The Commission agreed that a rulemaking was appropriate, but because it had several open PURPA dockets at that time, decided to wait until those dockets were complete before moving forward with Obsidian's request. At the January 17, 2018 Public Meeting, the Commission determined that because "the majority of QF contracting and pricing issues that were pending at the time this rulemaking

was opened have been resolved … it is an appropriate time to resume the rulemaking process."[1]

On June 1, 2018 Staff circulated new draft rules with the intent to initiate a formal rulemaking at the June 19, 2018 Public Meeting. At that meeting, the Commission allowed additional time for stakeholders to review and comment on Staff's proposal, but Chair Decker explained her desire to initiate a formal rulemaking process as quickly as possible to establish the "status quo" baseline as a necessary starting point before moving on to a more holistic look at the Commission's PURPA policies.[2] Thus, the scope of the instant process is to accurately capture the Commission's current practices rather than consider whether the current rules are the best policies or whether they should be amended.

III. COMMENTS

A. The Commission Should Make Minor Revisions to the Proposed Rules in Several Discrete Areas

The Joint QF Parties reiterate how impressive Staff's efforts in this docket have been and supports the vast majority of the changes proposed in the current draft. Codifying all of the various Commission orders dealing with PURPA is no small task and Staff has done a remarkable job. That said, the Commission should take affirmative action to improve a few key areas.

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1 Order No. 18-016 at Appendix A at 1-2 (Jan. 17, 2018).

2 Public Meeting at 17:26–19:50 (June 19, 2018).

1. OAR 860-029-0010 the Definition for Nameplate Capacity Has Been Established And Should Be Easy to Incorporate Now

The parties could not find consensus on a definition for "Nameplate Capacity" and Staff opted to leave the term undefined in the proposed rules. The Joint QF Parties recommend the Commission use the definition adopted in UM 1129.[3] In that docket, the parties agreed to define Nameplate Capacity as:

> The full-load electrical quantities assigned by the designer to a generator and its prime mover or other piece of electrical equipment, such as transformers and circuit breakers, under standardized conditions, expressed in amperes, kilovoltamperes, kilowatts, volts, or other appropriate units. Usually indicated on a nameplate attached to the individual machine or device.

The Commission adopted this definition then and should adopt it (again) now.

Additionally, the current practice in the industry and in implementation of the Commission's standard contracts for solar QFs is that nameplate capacity for a solar QF is the facility's maximum output measured in alternating current (A/C). This issue arises because a solar facility initially generates electric energy in direct current (D/C), but it is then converted to A/C before injection the electrical grid. The quantity of useful electric energy in A/C is less than the quantity initially generated in D/C prior to conversion to A/C, and therefore the facility's output is generally understood to be measured in A/C, which is the measure for all other types of generating facilities. Measuring capacity in A/C for purposes of this Commission's rules would be consistent with the Federal Energy Regulatory

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[3] Re In the Matter of OPUC Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. UM 1129, Order No. 07-360 at 37 (Aug. 20, 2007) ("The parties agreed to the following definition of 'nameplate capacity'…").

Commission's ("FERC") treatment of the issue on its Form 556, which requires the small power production QF to demonstrate that is maximum net output is 80 MW or less in A/C, after calculating losses in the conversion from D/C to A/C.[4] Each of the Oregon utilities has executed numerous standard contracts with small solar QFs at the eligibility cap level (formerly 10 MW and now 3 MW) that specify the nameplate capacity in A/C output. Although this issue is therefore resolved in practice, this clarification is necessary in the rule to avoid future disputes over the issue and provide clarity to the industry participants.

This issue is important for inclusion in the rules because the eligibility for standard rates and contracts is currently attached to the nameplate capacity. The Joint QF Parties expect that in the subsequent phase of this investigation, parties will discuss whether the nameplate capacity, as opposed to some other measurement criteria such as maximum net output used by FERC,[5] should be used to determine a QF's size or eligibility. There is uncertainty as to whether this practice is representative of real-world practices or even best practices in the industry, but there should not be uncertainty as to what nameplate capacity means. Establishing the definition now, may help focus subsequent conversations later.

2. OAR 860-029-0020 Should Not Expand the Commission's Jurisdiction

This section of the proposed rules require all QFs contracts to include language indicating that "this agreement is subject to the jurisdiction of those

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4 See Item 7d on FERC Form 556, available at https://www.ferc.gov/docs-filing/forms/form-556/form-556.pdf.

5 For a description of FERC's measurement criteria for maximum net output, see American Ref-Fuel Co., 54 FERC ¶ 61,287, 61,816 (1991).

governmental agencies and courts having control over either party to this agreement."[6] The Joint QF Parties reiterate the points made in CREA's prior comments filed on July 10, 2018, that the Commission is impermissibly expanding its jurisdiction through this rulemaking by re-codifying the currently proposed language in light of recent Commission orders that have redefined that language in an unlawful manner. In its July 10, 2018 filing, CREA explained that in light of recent Commission orders redefining section (2)(a) of this section as a forum-selection clause that confers jurisdiction over contract disputes on the Commission, this section of the draft proposal is now controversial, uncertain, and should therefore be deleted.[7] CREA's rationale—that the original intent behind Order No. 85-099 was not to create jurisdiction over contract disputes and that an administrative agency cannot expand its own jurisdiction by administrative rule—is persuasive and the Commission must act cautiously here.

Specifically, the Commission's 1985 order requiring inclusion of this "Governmental Agencies and courts" provision in all Oregon PURPA PPAs evidenced no intent to expand the Commission's jurisdiction over contract disputes. The 1985 order explained that this section of the administrative rules was merely is intended to "to insure that prior to the date of commercial operation, a qualifying facility can demonstrate that it has complied with all

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6 Draft PURPA Rules at OAR 860-029-0020(2)(a) (July 10, 2018).

7 See Portland General Electric Against Pacific Northwest Solar, LLC, Docket No. UM 1804, Order No. 18-025 at 5 (concluding that the QF had voluntarily submitted to Commission jurisdiction by signing a PPA that "explicitly acknowledges our authority over the terms and conditions of the agreement").

applicable local, state and federal statutes, rules and regulations governing its operations."[8] Further, the provision "states the contract is subject to the jurisdiction of all governmental agencies and courts having control over the parties to the proceeding."[9] The Commissioner stated he included "this language with the understanding that if a governmental agency or a court orders the QF to halt generation, the utility is no longer obligated to purchase power under the contract."[10] The substance of the applicable administrative rule has remained unchanged since 1985.[11] The 1985 order, and all orders until 2018, made no reference to any intent to use OAR 860-029-0020(2)(a) and resulting provisions in executed contracts as a basis to establish personal or subject matter jurisdiction in the Commission over any contractual dispute.

However, with the Commission's more recent orders in Docket Nos. UM 1894 and UM 1931, the Commission has redefined the intent and import of OAR 860-029-0020(2)(a), and converted it into an unlawful provision that expands the Commission's jurisdiction. In those dockets, the Commission expressly relied upon the language from OAR 860-029-0020(2)(a), included in the PURPA contracts at issue by the Commission's own requirement, as the basis to find personal jurisdiction and subject matter jurisdiction over a contract dispute filed

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8 In the Matter of the Adoption of a Rule Relating to Approval of Utility Purchases from Qualifying Facilities, OPUC Docket No. AR 114, Order No. 85-099, at 1 (Feb. 12, 1985).

9 Id. at 2.

10 Id.

11 See OAR 860-029-0020(2)(a).

by a utility against a QF, even where the QF sought to have the contract dispute adjudicated in court.

It is black letter law that the Commission cannot expand its own jurisdiction by administrative rule, and that the Commission's jurisdiction is strictly limited by statute.[12] Indeed, a leading treatise cites the Oregon Supreme Court's *Diack* decision, among other decisions from across the nation for the following proposition of well-established black-letter law:

> An administrative agency cannot enlarge its own jurisdiction, nor can jurisdiction be conferred upon the agency by parties before it; thus, deviations from an agency's statutorily established sphere of action cannot be upheld based upon an agreement, contract, or consent of the parties. Nor can they be made effective by waiver or estoppel.
>
> No action of the parties can confer subject-matter jurisdiction on an administrative tribunal.[13]

Therefore, the Commission cannot lawfully mandate that all QF contracts include a contract provision that the Commission will later use to support its assertion of jurisdiction over a QF's contractual dispute. Given that the Commission has recently started relying upon the contractual language mandated by OAR 860-029-0020(2)(a) as a basis for the Commission's own jurisdiction, the administrative rule must be repealed. Otherwise, the Commission is now placing an unlawful condition on the QFs' exercise of their statutory rights to sell their energy and capacity under a long-term contract.

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12 Diack v. City of Portland, 306 Or 287, 293, 759 P2d 1070 (1988).

13 2 Am. Jur. 2d Administrative Law § 283 (2004).

We understand Staff's inclination to leave the proposed rule language alone, since the parties were unable to agree upon specific language. However, for the reasons explained herein, the Commission should remove the section 2(a) from OAR 860-029-0020 before adopting the proposed rules.

3. OAR 860-029-0043 Must Maintain Existing Rate Structures

Additional clarity is needed to ensure that the status quo has been captured by of the proposed rule. This section states, "Each public utility will file standard avoided cost rates that differentiate between qualifying facilities of different resource types by taking into account the contribution to meeting the utility's peak capacity of the different resource types."[14] The Joint QF Parties do not have a recommendation for replacement language, and instead simply asks that the Commission confirm that this rule language is not meant to require a specific rate be established for each type of facility. For example, under the current rules, a geothermal QF is eligible to select a utility's baseload rate. This makes sense because the baseload rate more accurately reflects a geothermal facility's energy and capacity shape than, for example, that of a wind or solar facility. A strict reading of the rule suggests that perhaps that existing practice is not intended to be carried over. Rather modify the specific language, the Commission should simply confirm that the proposed rule is intended to allow the existing practices, which do not require rates for each specific technology type and allow multiple technologies to take advantage of one rate.

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[14] Draft PURPA Rules at OAR 860-029-0043(4).

4. OAR 860-029-0080 Updates to Data Should Mean Updates to Prices

The utilities take issue with the current language ensuring that certain updates will be effective 90 days from filing, but their argument is nonsensical. Generally, the Commission requires utilities to update their avoided cost prices according to a particular schedule that also establishes when the updated avoided cost prices will go into effect. This is helpful to QF and utilities alike during the contract negotiation process, but QFs in particular have advocated for more certainty with respect to avoided cost price updates to help developers.

This particular section refers to avoided cost updates that arise outside the normal schedule, due to what the Commission terms a "significant change" in utility operations. OAR 860-029-0080 requires utilities to provide "sufficient data ... to allow the owner or operator of a qualifying facility to estimate ... the payment it could receive" and provides several additional requirements. Additionally, the section states that in the event there are significant changes in the utilities' circumstances, "the Commission may require a public utility to file the data described" and in those circumstances, "[s]uch a revision will become effective 90 days after filing."[15] The utilities have advocated for striking the 90 day effective language, arguing that under the current rule the updated *data* becomes effective rather than any updated *prices.* This begs the question, how does *data* become effective?

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[15] Draft PURPA Rules at OAR 860-029-0080(1), (8).

The plainest reading of this rule would mean that updated avoided cost *prices* become effective 90 days after an unusual change in the utility's circumstances. Avoided cost updates generally go into effect 30 days from the utility's routine avoided cost price update filing rather than 90.[16] While it may be tempting to have these avoided cost filings become effective along the same time frame, it is important to consider that QFs know when to expect routine updates and would not know to expect an update in this scenario. Stripping this language would harm QFs and work against the State's policy of creating a "settled and uniform institutional climate" for QFs in Oregon.[17] Thus, the Commission should leave the 90-day language in the rules.

5. OAR 860-029-0085 Out-of-Cycle Updates to Standard Rates Should Expressly Require a Higher Burden of Proof

This section pertains to another kind of avoided cost update—the out-of-cycle update. The Commission has unequivocally stated that out-of-cycle updates require a high burden, and that should be reflected in the rules. In Order No. 14-058, the Commission states, "in light of our decision here to require annual updates in addition to updates following IRP acknowledgment, we caution stakeholders that the 'significant change' required to warrant an out-of-cycle update will be very high."[18] The Commission went on to state, "[w]e expect the

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16 Draft PURPA Rules at OAR 860-029-0085(3) ("standard avoided cost rates will be effective 30 days after filing unless suspended by the Commission").

17 ORS 758.515(3)(b).

18 Re OPUC Staff Investigation Into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, Order No. 14-058 at 25-26 (Feb. 24, 2014).

parties to use this option infrequently."[19] The proposed language correctly captured the timing for the updates—as it was laid out in this order—but neglected to capture the Commission's expectation or standard.

This is important because out-of-cycle updates disrupt QF negotiations and again work against creating a settled and uniform climate for QFs. The utilities have responded that because the Commission's expectation and standard is still captured in Order No. 14-058, it need not be repeated in the rule. This logic runs counter to the purpose of this rulemaking. Parties should not need to look through old orders to understand the Commission's rules and policies. The Commission's policy is clear and all parties agree there is a heightened burden on utilities to demonstrate that an out-of-cycle update is needed, so this should be included in OAR 860-029-0085. The Joint QF Parties recommend language similar to that in other sections be inserted into OAR 860-029-0085(4)(b).[20] For example, the rule could state,

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19 Id. at 26.

20 See e.g., Draft PURPA Rules at OAR 860-029-0046 ("The public utility will bear the burden to establish the proposed integration charge or charges reflect the cost of integrating the type of resource that will be subject to the charge."); Draft PURPA Rules at OAR 860-029-0080(6) ("Any data submitted by a public utility under this rule shall be subject to review and approval by the Commission. In any such review, the public utility has the burden of supporting and justifying its data."); Draft PURPA Rules at OAR 860-029-0085(3) ("In any such review, the public utility has the burden of supporting and justifying its standard avoided cost rates.").

> Updates filed under this subsection are subject to review and approval by the Commission as described in subsection (3). *In any such review, which the Commission expects to be infrequently, the public utility has a high burden to demonstrate a significant change has occurred that warrants an out-of-cycle update.* Standard avoided cost rates filed under this subsection will be effective within 60 days of filing.

Adding the italicized language does a better job capturing the Commission's policy and the current status quo with respect to out-of-cycle updates.

B. The Commission Should Make Substantive Changes to the Rules in Three Areas: Clarification of the term "Firm Energy", Inclusion of Large QF Guidelines, and Removal of the Alternative Dispute Resolution Provisions

In addition to the minor revisions suggested above, the Commission should also take more substantive action to ensure the rules capture the Commission's current policies and status quo. First, the Commission should clarify that the rules' use of the term "firm energy" is not intended to deprive intermittent QFs to the a long-term fixed-price rate. Second, the Large QF Guidelines should be adopted as rule despite concerns raised by Staff and the utilities. Third, the Commission should consider opening a separate investigation to reconsider its alternative dispute resolution process.

1. The Commission Should Clarify that Use of the term "Firm Energy" Is Not Intended to Deprive Intermittent QFs of Long-Term Fixed Price Rates

As CREA recommended in its July 10, 2018 comments the Commission should revise the proposed OAR 860-029-0100(15) and -0130(3) to clarify that the Commission's implementation of PURPA offers long-term fixed-price rates to all QFs, including intermittent QFs. Specifically, the Joint QF Parties recommend

the following edit to the definition of "Firm energy" to more accurately track the Commission's existing policies:

> "Firm energy" means a specified quantity of energy committed by a qualifying facility to an electric utility. For purposes of these rules, a commitment to deliver "firm energy" includes a firm commitment to deliver the electrical output of a qualifying facility over a specified term and does not necessarily require a commitment that a specified quantity of electrical energy will be delivered at a specified time.[21]

The Joint QF Parties are concerned that, if not clarified, some party may eventually argue that these sections of the draft rule, read in conjunction with other rules, could be misread to suggest that Oregon subscribes to the Texas "firm power" rule that precludes creation of a legally enforceable obligation by intermittent wind and solar QFs.[22] We recommend a revision to avoid confusion since the Commission's orders clearly track the reasoning of FERC on this point, where firmness and predictability of the power affects the capacity rate paid to the QF but not the ability to form a legally enforceable obligation.[23]

The Joint QF Parties' proposed revision and the Commission's existing policy are consistent with FERC's views on the topic, which is clearly expressed in JD Wind 1, LLC, 130 FERC ¶ 61,127, at PP 16-25 (Feb. 19, 2010). In that order, FERC clearly rejected the notion that its rules should be implemented to deprive intermittent QFs of the long-term fixed-price rates. Instead, FERC

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21 Draft PURPA Rules at OAR 860-029-0100(15) (underlines reflects Joint QF Parties' proposed edits).

22 See generally Exelon Wind I, LLC v. Nelson, 766 F.3d 380 (5th Cir. 2014)

23 See, e.g., Order No. 14-058 at 2 & 8-15.

explained, "each QF, including each [wind QF], has the right to choose to sell pursuant to a legally enforceable obligation, and, in turn, has the right to choose to have rates calculated at avoided costs calculated at the time that obligation is incurred,"[24] and there is no "reasonable basis for an understanding that legally enforceable obligations are limited to firm resources."[25]

The Commission should ensure that its own rules are not ambiguous on this point and that each QF may elect to sell under long-term fixed-price rates.

2. All of the Large QF Negotiation Guidelines from Order No. 07-360 Should Be Included in The Current Rulemaking

It strikes the Joint QF Parties as odd that several guidelines are missing from the proposed rules. It seems that where there is consensus about what the Commission requires, the Commission's policies should be included wholesale—at least absent a compelling reason not to include them. Yet, when it comes to the Guidelines for the Negotiation of Non-Standard Contracts from Order No. 07-360 (the "Large QF Guidelines"), Staff has determined that including these requirements may create some ambiguity depending on where they are inserted. These guidelines were established through the traditional Commission process with stakeholder involvement and are critically important to larger QFs. The Large QF Guidelines were well thought out. More than twenty parties participated in UM 1129 by submitting testimony and legal briefing, and the Commission issued a 51 page order explaining and adopting 17 different

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24 JD Wind 1, LLC at P 8.

25 Id. at P 17.

guidelines. They guidelines addressed below simply must be included somewhere.

Guideline 7 underscores how important this issue is because there is uncertainty as to whether the utilities are complying with it. Guideline 7 states, "When QF rates are based on avoided costs calculated at the time of delivery, the utility should use day-ahead on- and off-peak market index pries at the appropriate market hub(s)."[26] At the workshops, there was some confusion about whether the utilities were using spot pricing rather than day-ahead pricing. This kind of uncertainty highlights the need for this rulemaking. QFs should have the right to require utilities to conform to the Commission's policies.

Guideline 8 should be incorporated for essentially the same reasons. It states "The utility should not make adjustments to standard avoided cost rates other than those approved by the Oregon Commission and consistent with these guidelines."[27] The Joint QF Parties cannot think of any reason why something this simple would be neglected from the rules, other than to ensure that the utilities have the discretion to ignore the requirements..

Guideline 11 is particularly interesting because there is some question as to whether the Commission implicitly repealed this requirement when it approved PacifiCorp's PDDRR methodology for calculating avoided cost prices. Guideline 11 states, "If avoided cost rates for a QF are calculated at the time of the obligation and the utility's avoided resource is a fossil fuel plant, the utility should

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26 Order No. 07-360 at Appendix A.

27 Id.

adjust avoided cost rates for the resource deficiency period to take into account avoided fossil fuel price risk."[28] There is confusion as to whether all three utilities are complying with this guideline, and that confusion should be cleared up.[29] But, this confusion does not provide a rationale for simply skipping this requirement or leaving it out of the rules.

Guideline 13 provides a specific methodology that QFs should be allowed to insist upon, which means this guideline should also be included and adopted. Guideline 13 states, "The utility should adjust avoided cost rates for QF line losses relative to the utility proxy plant based on a proximity-based approach."[30] The proximity-based approach was offered by PacifiCorp in the UM 1129 process and is still being used by QFs during their negotiations. This guideline should be included.

Guideline 14 provides the opportunity for an adjustment favoring QFs and should therefore be included and adopted. Guideline 14 requires utilities to "evaluate whether there are potential savings due to transmission and distribution system upgrades that can be avoided or deferred as a result of the QF's location relative to the proxy plant and adjust avoided cost rates accordingly."[31] If a QF's location provides these kinds of savings, the QF's negotiated rate should reflect those savings.

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28 Id.

29 PGE has stated that it is complying with this guideline and PacifiCorp believes that it may also be complying, but is using a Commission-approved methodology.

30 Order No. 07-360 at Appendix A.

31 Id.

On the other hand, Guideline 15 confirms that adjustments should not be made for distribution or transmission system upgrades needed to accept QF power. According to Guideline 15, these costs should be charged separately as part of the interconnection process. As this is clearly the Commission's policy, it should be included in the Commission's PURPA rules.

Likewise, Guideline 16 confirms that QFs should not be penalized by any additional costs associated with debt imputation by a credit rating agency. This issue has been thoroughly addressed over the years, is part of the current status quo, and should not be re-hashed again. The Commission should find a way to incorporate Guideline 16 into its PURPA rules.

Guideline 17 addresses Surplus Sales and Simultaneous Purchase and Sales and should be incorporated without further adieu. This guideline includes several provisions and was part of a stipulation signed by the UM 1129 parties and adopted by the Commission. The Commission concluded, "[w]e find the parties' settlement to be a reasonable resolution of these issues" when it adopted the stipulation and included Guideline 17.[32] Given this background—and the absence of *any* reason not to include it—it seems odd to the Joint QF Parties that these provisions would not just go directly into the rules.

3. OAR 860-029-0100 Alternative Dispute Resolution Process Appears Unused and Irrelevant

Finally, while the Joint QF Parties support the ultimate proposal made by Staff, we would also like to take this opportunity to question whether the

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[32] Order No. 07-360 at 32.

Commission's alternative process provides value to either the Commission or its stakeholders. Although none of the parties took issue with this section during the workshops, there was some question about whether this process offered a valuable alternative to the traditional complaint process. The Commission should consider whether this process is still relevant and worthwhile or whether improvements are needed.

IV. CONCLUSION

The Joint QF Parties appreciate the opportunity to participate in this important proceeding and recommends the Commission adopt Staff's proposed rules subject to the changes detailed above.

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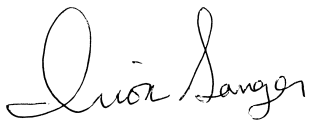
Dated this 21st day of August 2018.

Respectfully submitted,



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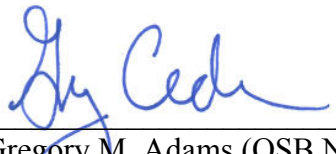

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