

Peter J. Richardson (OSB No. 06668)
Gregory M. Adams (OSB No. 101779)
Richardson & O’Leary PLLC
515 N. 27th Street
P.O. Box 7218
Boise, Idaho 83702
Telephone: (208) 938-7901
Fax: (208) 938-7904
peter@richardsonandoleary.com
greg@richardsonandoleary.com

Attorneys for Community Renewable Energy Association

BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON

IN THE MATTER THE PUBLIC UTILITY)	
COMMISSION OF OREGON)	CASE NO. UM-1396
)	Phase II
Investigation into Determination of Resource)	
Sufficiency, pursuant to Order No. 06-538)	OPENING COMMENTS OF THE
)	COMMUNITY RENEWABLE
)	ENERGY ASSOCIATION

Pursuant to the procedural order issued January 21, 2011, the Community Renewable Energy Association (“CREA”) hereby submits its Opening Comments in Phase II of this case regarding the issues raised by the Public Utility Commission of Oregon’s (“Commission’s”) Order No. 10-488. For the reasons set forth below, CREA supports adoption of separate avoided cost stream for renewable resources if the Commission allows qualifying facilities (“QFs”) to choose the renewable resource avoided costs or the gas plant avoided costs, and requests implementation of a renewable resource rate mechanism as described in these Opening Comments.

BACKGROUND

A. The Public Utilities Regulatory Policies Act of 1978 Mandatory Purchase Provisions

The mandatory purchase provisions of the Public Utilities Regulatory Policies Act of 1978 (“PURPA”) require electric utilities to purchase power produced by cogenerators or small power producers that obtain status as a QF. 16 U.S.C. § 824a-3(a)(2). The price PURPA section 210(b) requires the utilities to pay to QFs in exchange for their output is termed the “avoided cost rate,” which is “the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.” 16 U.S.C. § 824a-3 (d). FERC’s regulations entitle QFs to long-term contract rates set at the utilities’ *full* avoided costs. *See* 18 C.F.R. § 292.304(a); *See* FERC Order No. 69, 45 Fed. Reg. 12,214, 12,222-12,223 (Feb. 25, 1980), *affirmed by American Paper Institute, Inc. v. FERC*, 461 U.S. 402, 417-18, 103 S.Ct. 1921, 1930 (1983). Federal law directs the state public utilities commissions to implement FERC’s PURPA regulations. 16 U.S.C. § 824a-3(a)(2), (f), (g); *see also* O.R.S. 758.505 *et seq.*

B. Oregon’s Implementation of PURPA

1. The avoided cost rate structure adopted in UM 1129

In Docket UM 1129, the Commission addressed a number of issues related to Oregon utilities’ purchases from QFs. The Commission determined the methodology to calculate published avoided cost rates available to QFs under 10 megawatts (“MW”) would be a surrogate combined cycle combustion gas plant model. *See* Order No. 05-584, at pp. 27-28. That model generates a rate that will pay the QF for its energy and its capacity, and the Commission clarified

in a separate proceeding that Oregon QFs retain ownership of any non-energy attributes of their QF, such as renewable energy credits (“RECs”). *See* Order No. 05-1229, at p. 8 (reasoning that “rates based on avoided costs do not include compensation for any social or environmental benefits that may be associated with a particular facility’s generation of electricity.”); *see also* OAR 860-022-0075.

The Commission also determined that the avoided costs should reflect the utilities’ resource position, and determined that when the utility is resource sufficient, the avoided costs for PacifiCorp and Portland General Electric Company should be based on monthly on-peak and off-peak forward market prices set at the time of the utility’s avoided cost filing. Order No. 05-584, at p. 28.¹ But, in UM 1129, the Commission declined to address the issue of *when* a utility should be considered resource deficient. *See* Order No. 06-538, at p. 54.

2. Prior proceedings in this resource sufficiency docket

The Commission opened this docket to further address questions related to a utility’s resource position in calculating avoided cost rates. In Phase I of this docket, the Commission determined that the Integrated Resource Plan (“IRP”) is the appropriate venue for addressing resource sufficiency/deficiency issues. Order No. 10-488, at p. 8. Where the Commission has acknowledged an IRP and it shows a range of on-line years for a major resource, the Commission determined that the earliest date in the range will set the date for resource deficiency. *Id.* If the IRP is only partially acknowledged, the Commission determined that the analysis of resource sufficiency/deficiency should be conducted on a case-by-case basis. *Id.* The Commission adopted the same 100 MW threshold for a “major resource” as used in its

¹ The Commission allows Idaho Power to use a gas proxy at all times for administrative consistency with its procedures in Idaho. Order No. 05-584, at pp. 26-27.

Competitive Bidding Guidelines, and retained its practice of requiring updates to the avoided cost rates every two years after acknowledgement of a utility's IRP. *Id.*

The Commission deferred determination on a number of issues until this phase of the proceeding, including whether to allow renewable QF developers to choose among two avoided cost streams – (1) a stream with rates calculated under the gas plant proxy (or the market curve during a sufficiency period for PGE and PacifiCorp), or (2) a stream with rates calculated under a renewable resource methodology. The Commission left that issue, and details associated with it for this phase of the proceeding.

COMMENTS

CREA believes the Commission should implement an avoided cost rate structure that allows for a QF to receive compensation for environmental attributes of their generation if the QF chooses to provide the utility with the benefits of the environmental attributes. CREA directly addresses each of the issues raised in the Appendix to Order No. 10-488, in the order listed therein.

I. Substantive Issues

A. **The Commission should require that each utility determine its avoided cost for a renewable resource.**

In its Order deferring additional issues to this docket, the Commission specifically noted FERC's recent ruling with regard to environmental attributes of QF generation. *See* Order No. 10-488, at p. 9 (citing *California Public Utilities Commission*, 133 FERC ¶ 61,059 (Oct. 21, 2010) (order granting clarification and dismissing rehearing), *rehearing denied*, 134 FERC ¶ 61,044 (January 20, 2011)). FERC's recent ruling firmly establishes that a state utility commission has the authority to create a separate avoided cost rate structure for QFs ceding

RECs to the utility if those RECs will help the utility avoid costs it would otherwise incur to comply with a renewable portfolio standard (“RPS”) pursuant to state law.

FERC had, in prior cases, determined that avoided cost rates compensate a QF only for its energy and capacity, and therefore the sale by a QF to a utility pursuant to PURPA does not convey any environmental attributes to the utility. *American Ref-Fuel Co.*, 105 FERC ¶ 61,004, ¶¶ 21-23 (2003), *aff’d on reh’g*, 107 FERC ¶ 61,016 (2004). FERC determined that because state law creates these valuable RECs, they are separate commodities from energy and capacity sold pursuant to a PURPA contract. *Id.*

In the recent *California Public Utilities Commission* case, the California Public Utilities Commission (“PUC”) requested clarification that the “‘full avoided cost’ need not be the lowest possible avoided cost and can properly take into account real limitations on ‘alternate’ sources of energy imposed by state law.” *California Public Utilities Commission*, 133 FERC ¶ 61,059, at ¶ 21. California had enacted a state law, titled AB 1613, that required utilities to procure a specified amount of energy and capacity from combined heat and power (“CHP”) facilities that met stringent efficiency standards. Thus, the California PUC “asked whether it may implement a two-tiered rate structure, where AB 1613-compliant QFs receive rates based on higher, long-run avoided cost rates reflecting more stringent efficiency standards, and non-AB 1613 compliant QFs continue to receive rates based on lower short-run avoided costs.” *Id.*

FERC provided clarification that a state utility commission can implement a higher avoided cost rate stream for QFs that allow the utility to avoid costs of compliance with state law procurement requirements. “Both section 210 of PURPA and our regulations define avoided costs in terms of costs that the electric utility avoids by virtue of purchasing from the QF. The

question, then, is what costs the electric utility is avoiding.” *Id.* at ¶ 26. FERC elaborated that “just as a state may take into account the cost of the next marginal unit of generation, so as well the state may take into account obligations imposed by the state that, for example, utilities purchase energy from particular sources of energy or for a long duration.” *Id.* FERC further explained that “if the environmental costs are real costs that would be incurred by utilities, then they may be accounted for in a determination of avoided cost rates.” *Id.* at ¶ 31 (internal quotation omitted).² FERC further explained that “a state may properly look at the actual sources of capacity and/or energy available to the electric utility, rather than at some theoretical source, which is not permitted by state law, that may be cheaper.” *California Public Utilities Commission*, 134 FERC ¶ 61,044, at ¶ 30.

The Commission should act on FERC’s recent clarification to implement a mechanism whereby an Oregon utility must compensate a QF for the additional costs of compliance it will avoid if the QF provides the utility with RECs associated with the QF generation. If the utility needs RECs to satisfy an RPS requirement, the utility is renewable resource deficient, and if the QF will provide RECs bundled with its electrical output, PURPA requires the utility to compensate the QF for the *full* avoided costs of alternative resources that would otherwise provide the energy, capacity, and RECs. This premise should guide the Commission in its determination of the issues addressed below.

² Notably, FERC overruled prior precedent that could have been read to preclude a two-tiered rate structure that would provide QFs with a higher rate stream if they help the utility avoid not only the costs of the energy and capacity provided, but also the cost of compliance with a state law. *See id.* at ¶ 30 (expressly overruling *Southern California Edison Co.*, 70 FERC ¶ 61 (1995)).

1. Should the IRP Action Plan be used to identify when a renewable resource acquisition would be avoided, or should a utility purchase of unbundled renewable energy credits signal the start of a renewable resource deficiency period?

The Commission should determine that a utility will be renewable resource deficient whenever the utility's IRP Action Plan states the utility will need to acquire bundled or unbundled RECs, and whenever the utility's actions indicate it needs renewable resources, including when it purchases unbundled RECs. If a utility announces it will need to acquire renewable resources or unbundled RECs to meet an RPS standard, the utility should be held to its determination in the IRP that it will soon incur costs for compliance with the RPS, which it would avoid with a renewable QF purchase. Likewise, if a utility is purchasing unbundled RECs on the market, it is obviously renewable resource deficient. Under either circumstance, QFs should be allowed to enter into a long-term contract to sell energy, capacity, and RECs to the utility, and the utility should compensate the QFs for the *full* avoided costs of the energy, capacity, and RECs.

2. Should out-of-state renewable portfolio standards be taken into account when determining when a renewable resource can be avoided by a purchase from an Oregon QF?

The Commission should require the utilities to take into account out-of-state renewable portfolio standards when determining when a renewable resource can be avoided. FERC's PURPA regulations require utilities to compensate QFs for the *full* avoided costs. If an out-of-state RPS imposes a cost on the utility that the utility can avoid by purchasing a QF's bundled electrical output and RECs, then the utility must compensate the QF for that avoided RPS cost the same as the utility must compensate the QF for any other avoided cost. Therefore, the Commission should require that the renewable resource deficiency period also begins whenever

the utility's IRP Action plan calls for renewable generation to meet an out-of-state RPS, or whenever the utility is purchasing RECs to meet that out-of-state RPS.

3. Should the renewable avoided cost be based on the estimated cost of the renewable resources identified in the IRP Action Plan, or should the Commission use a “proxy” resource approach similar to the current approach used by PGE and PacifiCorp for standard avoided costs?

The Commission should require a separate proxy resource to generate renewable resource QF rates. The IRP process is complex, involves many issues, and is merely acknowledged in a proceeding without full hearing rights. While the IRP process is a valuable public process for general planning purposes, it is not traditionally a litigated proceeding in which a utility's estimates of the costs of its resources are subjected to extensive discovery and review. Moreover, the utility itself is not held to any of the cost projections in its IRP in subsequent rate recovery proceedings. The IRP is merely a planning tool.

Avoided cost rate models are complex models on which the utilities and the QFs have traditionally disagreed. The Commission should not require QFs to engage in the entire IRP process that provides no recourse but the minimal acknowledgement proceedings currently available to challenge what will likely be underestimates of renewable resource avoided costs derived from the IRP. Development of a renewable resource proxy should occur in a separate docket with full evidentiary hearing rights provided to all interested parties. Once the renewable resource proxy is developed, the utility should update the inputs to the proxy on a time frame consistent with its updates to gas proxy inputs, which is 30 days after acknowledgement of the IRP or at any other time that a party demonstrates an update is warranted. This will provide some needed predictability to QFs.

Alternatively, if the Commission allows the utility to rely on the IRP Action Plan to develop renewable resource avoided cost rates, it should require compelling evidence in future rate recovery proceedings for recovery of costs associated with the utility's own future self-built renewable resource plants which exceed the cost projections in the applicable IRP Action Plan. In that manner, the utilities would have less incentive to "game" the IRP process such that QFs are provided with something less than the *full* avoided costs.

4. When should the renewable avoided cost stream reflect an avoided purchase of an unbundled renewable energy certificate?

The Commission should determine that the renewable avoided cost stream should reflect the purchase of an unbundled REC if the utility is purchasing unbundled RECs. Under CREA's recommended approach, the QF could choose to take the renewable avoided cost stream during such time periods from a renewable resource proxy.

B. The Commission should allow the renewable QFs to choose among the two avoided cost streams because renewable QFs have the choice in Oregon of whether they will sell their RECs to the purchasing utility.

As discussed above, FERC has determined that a QF sale of energy and capacity under PURPA contract does not automatically transfer RECs to a utility as a matter of federal law, but rather that individual states must determine how RECs may be created and transferred. *See American Ref-Fuel Co.*, 105 FERC ¶ 61,004, at ¶¶ 21-23. And in Oregon, the Commission has determined that because the gas proxy rates or the alternative market rates do not include compensation for any social or environmental benefits that may be associated with a particular QF's generation of electricity, QFs retain ownership of any non-energy attributes of their QF, such as RECs. *See* No. 05-1229, at p. 8. Nothing in the existing scheme prevents a QF from

contracting separately with the purchasing Oregon utility for the sale of RECs in exchange for compensation from the utility in addition to the existing avoided cost rates.

The Commission should require that the utilities offer the renewable QFs the option of demonstrating that they qualify for the renewable avoided cost stream by demonstrating that a bundled sale of electrical output and RECs from the QF would qualify for a state RPS applicable to the utility. There is no reason, however, that development of a second avoided cost rate stream available to renewable QFs willing to cede their RECs should impact the existing option for any QF, including a renewable QF, to retain the RECs should it choose to proceed under the existing gas proxy or market rate stream.

PURPA requires the utilities to purchase energy and capacity from any QF, but PURPA does not require the QF to provide the utility with its RECs. The RECs may be more valuable to the QF to sell into another REC market, such as California or outside of the Northwest region. For the Commission to impose a requirement that all renewable QFs cede their RECs would be a drastic policy shift in Oregon without any mandate from FERC or from the Oregon legislature. The Commission should instead allow renewable QFs to choose to (1) sell under the gas proxy or market rates and retain their RECs, or (2) sell under the renewable proxy rates and cede their RECs to the utility. If the Commission applies a resource sufficiency period under the renewable proxy rates during the full renewable proxy rates are unavailable, the Commission should state that the QFs retain ownership of RECs during the sufficiency period when they are not being compensated at renewable proxy rate. This would provide clarity that the renewable QFs are not ceding RECs at times when they are not compensated for more than merely the energy and capacity from their projects.

C. The Commission should determine that, for purposes of determining the start of a resource sufficiency period, the planned resource acquisition should be avoidable until the project is online.

The final substantive questions posed by the Commission address a matter critical to this entire proceeding. When is a planned resource acquisition avoidable? If no irreversible commitment has been made to the project, is the project avoidable? What constitutes an irreversible commitment? If the utility has been deemed to have committed to bring a particular resource online in the future, the utility may argue that the commitment is so certain that the utility should be considered resource sufficient for purposes of calculating avoided cost rates years in advance of when the resource actually comes online.

The Commission should be careful not to implement a structure that will allow the utilities to “game” the resource sufficiency period and pay QFs less than the full avoided costs. The Idaho Public Utilities Commission allowed Idaho utilities to implement a resource sufficiency or “surplus” energy period, during which the utilities paid QFs only for their energy and not capacity on the ground that the utility was, in theory, not acquiring new resources. The Idaho Commission found, after many years of experience, that the utilities were acquiring resources during times when the load and resource forecasts used to calculate avoided cost rates indicated they were resource sufficient. *In the Matter of Investigation of the Continued Reasonableness of Current Size Limitations for PURPA QF Published Rate Eligibility (i.e., 1 MW) and Restrictions on Contract Length (i.e., 5 years)*, Idaho Public Utilities Commission Case No. GNR-E-02-01, Order No. 29124, p. 8 (2002). “Not once during this recent period of resource acquisition and building, it was noted, did a utility suggest that we should revisit avoided cost rates because perhaps the rates were too low, failed to reflect the need for resources

and were not sending an appropriate price signal to QFs.” *Id.* The Idaho Commission determined that the utilities “in failing to update for changes in load/resource balance have compromised the public confidence in the reasonableness of its continued use.” *Id.* Ultimately, the Idaho Commission found that a sufficiency period is unworkable due to gaming by the utilities and discontinued its use. *Id.*

There are numerous examples of a utility’s planned major resources being abandoned for various reasons well after they would be considered “committed” resources in an IRP or even in an executed contract. The utilities will attempt to render future resources “committed” in advance of any real commitment so that they can sooner implement the lower, resource-sufficient rates. As the Idaho experience demonstrates, the utilities are unlikely to voluntarily increase the avoided cost rates should changed circumstances so warrant. The Commission should determine therefore, that for purposes of determining the start of a resource sufficiency period, the planned resource acquisition should be avoidable until the major resource is online. In other words, the Commission should ensure the utilities pay QFs the full avoided costs by making the resource deficiency period applicable until the utility’s new planned resource is online, not at some earlier time.

II. Procedural Issues

A. Which of these issues should be the subject of evidentiary proceedings?

The Commission should process the issues listed in Phase II of this docket by comments alone, and should hold subsequent evidentiary proceedings to develop renewable avoided cost rates for each utility. The matters addressed in this Phase II are matters requiring only legal and policy determinations. The Commission need not, therefore, hold any evidentiary proceedings in

this phase of the case. However, when the Commission develops actual renewable avoided cost rates, or a structure by which those rates will be implemented, the Commission should hold an evidentiary proceeding to address the complex factual issues that will arise in that proceeding.

B. Should the evidentiary proceedings be generic, or conducted on a utility-by-utility basis?

The facts specific to each utility's avoided costs for a renewable resource will be quite different. The costs for each utility to build its own renewable resource will differ based upon several factors such as that utility's cost of capital, its access to viable sites to build renewable resources, and the costs of transmission from those sites to its load centers. Additionally, the utilities must meet differing RPS requirements. For example, PacifiCorp operates in several states with an RPS, while Idaho Power only has an RPS requirement in Oregon. While PacifiCorp may have access to better wind sites in Wyoming than Portland General Electric or Idaho Power, the additional costs of transmission from those sites to Oregon ratepayers will be a fact-specific inquiry. These will be relevant factors in determining the renewable avoided costs. *See California Public Utilities Commission*, 133 FERC ¶ 61,059, at ¶ 31 (stating that "if the CPUC bases the avoided cost 'adder' or 'bonus' on an actual determination of the expected costs of upgrades to the distribution or transmission system that the QFs will permit the purchasing utility to avoid, such an 'adder' or 'bonus' would constitute an actual avoided cost determination and would be consistent with PURPA and our regulations").

In short, the avoided costs of buying from an Oregon renewable QF instead of the utility's renewable resource will be a fact-specific inquiry for each utility, and the Commission should hold adequate evidentiary proceedings to address each utility's unique circumstances.


CONCLUSION

The Community Renewable Energy Association respectfully requests that the Commission initiate evidentiary proceedings to develop a separate avoided cost stream for renewable resources which will allow renewable qualifying facilities to choose the renewable resource avoided costs or the gas proxy or market rate avoided costs as described in these Comments.

RESPECTFULLY SUBMITTED this 13th day of May, 2011.

RICHARDSON & O'LEARY PLLC

By



Peter J. Richardson
Gregory M. Adams
Attorneys for Community Renewable
Energy Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of May, 2011, a true and correct copy of the within and foregoing **COMMUNITY RENEWABLE ENERGY COALITION'S PHASE II OPENING COMMENTS** was served as shown to:

Oregon Department of Energy
Matt Krumenauer
Vijay A Satyal
Andrea F Simmons
matt.krumenauer@state.or.us
vija.a.satyal@state.or.us
andrea.f.simmons@state.or.us

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

G. Catriona McCracken
Robert Jenks
CITIZEN'S UTILITY BOARD OF OREGON
catriona@oregoncub.org
bob@oregoncub.org

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Irion Sanger
Davison Van Cleve
333 SW Taylor Ste 400
Portland OR 97204
las@dvclaw.com

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Michael T Weirich
Janet L Prewitt
Department of Justice
1162 Court Street, NE
Salem OR 97301-4096
michael.weirich@doj.state.or.us
janet.prewitt@doj.state.or.us

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Ed Durrenberger
OREGON PUBLIC UTILITIES COMM.
PO Box 2148
Salem OR 97308-2148
ed.durrenberger@state.or.us

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

PacifiCorp Oregon Dockets
825 NE Multnomah Ste 2000
Portland OR 97232
oregondockets@pacificorp.com

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Randall Dahlgren
J Richard George
Portland General Electric
pge.opuc.filings@pgn.com

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Christa Bearry
Donovan E Walker
Idaho Power Company
Boise ID 83707-0070
cbearry@idahopower.com
dwalker@idahopower.com

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Lisa A. Rackner
McDowell Rackner & Gibson PC
lisa@mcd-law.com

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Thomas H Nelson
Attorney at Law
nelson@thnelson.com

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Will K Carey
Annala, Carey, Baker, et al, PC
wcarey@hootriverattorneys.com

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Paul Woodin
Community Renewable Energy
pwoodin@communityrenewables.org

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Elain Prause
John M Volkman
Energy Trust of Oregon
elaine.prause@energytrust.org
john.volkman@energytrust.org

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Jordan A White
Pacific Power & Light
Jordan.white@pacificcorp.com

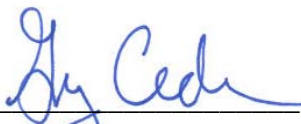
Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Randall J Falkenberg
RFI Consulting Inc
PMB 362
8343 Roswell Rd
Sandy Springs GA 30350
consultrfi@aol.com

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

David A Lokting
Stoll Berne
209 SW Oak Street Ste 500
Portland OR 97204
dlokting@stollberne.com

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Signed 
Gregory M. Adams