ORDER NO. 06-538

ENTERED 09/20/06

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1129

In the Matter of	)	
	)	
PUBLIC UTILITY COMMISSION OF OREGON	)	ORDER
	)	
Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities.	)	

DISPOSITION: COMPLIANCE OF FILED STANDARD CONTRACTS REVIEWED; CERTAIN REVISIONS NECESSARY

I. SUMMARY

In this order, we evaluate the compliance of standard power purchase contracts filed pursuant to Order No. 05-584 by Pacific Power and Light Company, doing business as PacifiCorp (PacifiCorp), Portland General Electric (PGE) and Idaho Power Company (Idaho Power) (hereafter collectively referred to as "the utilities" or as "the electric companies"). That order evaluated certain policies and procedures of the Public Utility Commission of Oregon (Commission) regarding the development of qualifying facilities (QFs) in the state under the Public Utility Regulatory Policies Act (PURPA).

As we further discuss below, thirty general issues were raised, and over eighty separate questions were asked about the compliance of the filed standard contracts. Our decision on each question is summarized in a table that follows (in the order we discuss each issue, as opposed to numerical order), with further discussion in the body of this order.

ISSUE NUMBER(S)	RESOLUTION
1-3 (General Questions)	Questions deemed too general to resolve.
4 (Multiple Energy Projects)	Stipulation adopted.
5.a.i. & 5.d. (Requirements to Establish Creditworthiness in Lieu of Providing Security)	A standard contract may require a QF to make representations regarding creditworthiness other than those specified in Order No. 05-584. Section 1.8 of PacifiCorp's filed standard contract is deemed compliant. Standard contracts should be revised to provide that when a QF defaults on a construction loan, the QF

	must provide notice to the utility of the default. Although the utility may request that the QF provide default security at that time, the QF should have an opportunity to avoid doing so in the event that the QF negotiates satisfactory financial arrangements with the construction loan lender that mitigates the QF's financial risks.
5.a.ii. (Letter of Credit for Potential Environmental Remediation Liabilities)	Section 10.5 of PacifiCorp's filed standard contract is not compliant with Order No. 05-584 and should be removed.
5.a.iii. (Definitions of Default Security Options)	Issue resolved by the parties.
5.a.iv. (Definition of "Default Security)	When entering into a standard contract, QFs must demonstrate creditworthiness, or provide a specified amount of default security. Section 1.9 of PacifiCorp's field standard contract is deemed compliant.
35 (Amount of Default Security)	Methodologies proposed by PacifiCorp and PGE, to calculate the amount of default security to be provided by a QF that fails to demonstrate creditworthiness, are reasonable. Idaho Power is directed to modify its standard contract to provide for determination of the amount of default security according to the methodology proposed by either PacifiCorp or PGE.
5.a.v. (Definition of "Letter of Credit")	Section 1.17 of PacifiCorp's filed standard contract is deemed compliant.
5.b.i., 5.b.ii. & 5.b.iv. (Minimum Delivery Requirements)	It is appropriate for standard contracts to require a QF to specify a minimum annual delivery requirement. Idaho Power is directed to revise its standard contract to provide for an annual minimum delivery requirement.
5.b.iii., 5.b.v. & 11 (Weather-Related Contingencies)	The term, "force majeure," should be defined in standard contracts as it is typically defined in other legal contracts. A QF and a utility may negotiate to use a Mechanical Adjustment Guarantee (MAG) in a power purchase contract.
5.b.v., 5.b.vi., 5.b.vii. & 5.b.ix. (Delayed Operation)	A QF's operational delay, under a standard contract with a resource sufficient utility, may result in default, but not in termination.

	When specifying an operational date, QFs should allow sufficient time for multiple testing opportunities.
5.b.x. (Default Payment)	We direct PGE and Idaho Power to revise their filed standard contracts to include a clause with similar wording as Section 11.4.2 of PacifiCorp's filed standard contract.
5.b.xi. (Opportunity to Cure)	PGE agrees to modify Section 10 of its filed standard contract to provide for reciprocity with regard to default terms. Section 18.2.1 of Idaho Power's filed standard contract is deemed compliant. Section 11.2.2 of PacifiCorp's filed standard contract is deemed compliant.
5.b.xii. & 5.b.xiii. (QF Rights After Termination of a Standard Contract)	PacifiCorp agrees to modify Section 11.3.2 of its filed standard contract to include provisions similar to Section 10.4 of PGE's filed standard contract. Idaho Power agrees to add a clause to its filed standard contract that provides, in the event that a QF default results in termination, and the QF subsequently seeks to enter into a new standard contract, the QF must enter into a new standard contract having, for the period that the original contract would have run, the same terms as the original agreement.
5.c.i. - 5.c.iv. (Default and Termination Damages)	Section 1.25 of PacifiCorp's filed standard contract is deemed compliant. PGE agrees to revise its filed standard contract to include the following phrase: "If the contract is terminated due to the QF's default, the QF must pay the positive difference, if any, obtained by subtracting the contract price from projected forward market prices for 24 months beginning with the date of contract termination, for the minimum annual delivery amount specified in the contract." We direct Idaho Power to revise its filed standard contract to be consistent with the standard contracts of PacifiCorp and PGE with regard to a clause in these contracts limiting the accrual of termination

	damages to a period of twenty-four months.

Default Damages for QFs Under 100 kW[1]	We direct each utility to retain terms contained in its last valid standard contract for QFs sized at 100 kW or less relating to default damages.
5.e. (Indemnity Provisions)	Section 12.1 of PacifiCorp's filed standard contract is deemed compliant.
6. (Tariffs)	We direct each utility to modify its tariffs to provide the information identified by Staff.
7. (Verification)	We find terms that require a QF to hire an independent licensed professional engineer to verify that a facility operates as specified to be appropriate.
8. (Increased Operations—Qualifying for a Standard Contract)	We direct each utility to revise its filed standard contract to provide that if a QF increases the nameplate capacity of its facility by a certain percentage above 10 MW, such as ten percent, then on a going-forward basis, that percentage of power delivered will receive new, negotiated pricing, while the remaining percentage of output will receive pricing under the pre-existing standard contract.
9. (Insurance)	We direct each utility to revise its filed standard contract to require that a QF obtain general liability insurance from an insurer with a rating of "B+," or higher, from the A. M. Best Company.
12. (Off-System Standard QF Contracts)	All three utilities filed off-system standard contracts, thereby mooting this issue. Additional issues regarding these filed off-system standard contracts were delegated to another phase of this proceeding.
13. (Net Output)	As questions raised under this issue are not compliance in nature, and in any case, were inadequately developed, we decline to resolve them.
14. (Modifying a Standard Contract)	Any contract, whether standard or negotiated, that is entered into under PURPA's requirement that a utility offer to purchase electric energy from a QF, is a "PURPA contract."
15. & 16. (Natural Gas Price Forecasts and Hubs)	We decline to direct either PacifiCorp or PGE to prepare new natural gas forecasts. We direct Staff to organize, in the future, annual meetings to allow interested persons to discuss issues related to the

[1] This issue was raised during the proceeding and is not numbered, but was addressed following discussion of other issues regarding default damages.

	long-term forecasts of natural gas prices.

17. (Forward Price Projections)	We deem ICNU's proposal to be outside the realm of compliance.
18. (Determination of Resource Position)	As questions raised under this issue are not compliance in nature, we decline to address them at this time. In the near future, however, we anticipate opening a new docket to consider these questions.
19. (Proxy Unit Characterization)	We do not find any element of noncompliance. The question raised by ICNU is properly considered in the portion of this docket dedicated to developing negotiation guidelines for non-standard contracts.
20. (Underlying Elements of Avoided Cost Calculations)	No issue was developed for our resolution.
21. (Ownership of Environmental Attributes)	We direct PacifiCorp and PGE to revise their filed standard contracts to explicitly acknowledge the rules we adopted in Order No. 05-1229 regarding ownership of environmental attributes.
22. (Metering Errors)	Section 8.3 in the filed standard contracts of PacifiCorp and PGE are deemed compliant.
24. (Avoided Costs in Other Jurisdictions)	No issue was developed for our resolution.
25. (Revised Protocol)	Issue is insufficiently developed to resolve.
30. (Liens and Encumbrances)	PGE agrees to modify Section 31.5 of its filed standard contract to allow an exception for statutory liens.
31. (Maintenance)	Section 6.2 of PGE's filed standard contract is deemed compliant.
32. (Blanket Release)	PGE agrees to revise Section 20.2 of its filed standard contract to clarify that the clause applies to releases for third party claims.
33. (FERC Licensing)	Section 3.3 of Idaho Power's filed standard contract does not violate the spirit of Order No. 05-584 and is deemed compliant.
34. (Rights of Way)	Sections 13.2 through 13.4 of Idaho Power's filed standard contract do not violate the spirit of any directive in Order No. 05-584 and are deemed compliant.
36. (Cap on Damages)	We direct the utilities to revise filed standard contracts to insert a clause that caps a QF's default losses, as proposed by Staff, at 100% of the QF contract price multiplied by the amount of energy

	the QF failed to deliver in the previous year, based on its annual minimum delivery obligation. We also direct the utilities to revise filed standard contracts to insert a similar clause, with modifications proposed by Staff, capping losses incurred due to construction delays. We conclude that it is not necessary to cap damages for termination.

II. INTRODUCTION

A. PROCEDURAL BACKGROUND

On January 20, 2004, the Commission opened an investigation related to electric utility purchases from qualifying facilities. On May 13, 2005, the Commission issued Order No. 05-584, resolving issues regarding the continued implementation of the Public Utilities Regulatory Policies Act (PURPA).[2] In that order, the Commission directed Oregon's electric public utilities ("electric utilities" or "electric companies") to file updated tariffs and standard contract forms with the Commission. The order also indicated that a second phase of the investigation would be undertaken in order to address issues that required further evidentiary development.

On July 12, 2005, the electric companies each filed avoided costs, revised tariffs and new standard power purchase contracts for QFs. Despite findings that the compliance filings generally implemented Order No. 05-584, Commission Staff (Staff) determined, in a Staff Report filed on July 28, 2005, that certain issues of compliance merited further review. Other parties concurred that additional investigation was warranted, but most parties perceived the proposed tariffs and contracts, as filed, to be "far superior" to existing tariffs and contracts. Consequently, Staff declined to recommend that the Commission suspend the filings until completion of an investigation. Rather, Staff recommended that the Commission allow the filings take effect during an investigation, with the qualification that they would be subject to refund, pursuant to ORS 757.215(4), upon adoption of final tariffs and contracts. Staff acknowledged, however, some uncertainty as to whether ORS 757.215(4) applied to the utilities' filings, and alternatively suggested that the Commission allow the filed tariffs and contracts to take effect "as is."

At a public meeting on August 2, 2005, the Commission ordered that an investigation of the compliance of the utilities' filings be undertaken, but allowed the filings to go into effect, potentially subject to refund.[3] The Commission directed parties

[2] The United States Congress passed PURPA in 1978, as codified in the United States Codes (USC) at *16 U.S.C. § 824a-3*.
[3] Order No. 05-899. At page 2 of the order, the Commission directed utilities to include language in their standard contracts that would provide for a refund, if necessary.

to address the refund issue at the outset of the investigation of the compliance of the utilities' filings.

On August 17, 2005, a prehearing conference was held in the second phase of Docket No. UM 1129. A schedule was established to address, in the second phase of the proceeding, compliance issues as well as Order No. 05-584 Issues. Indeed, the second phase of the docket was divided into three tracks, with the first track addressing the refund issue, the second track addressing compliance issues, and the third track addressing issues that the Commission had identified, in Order No. 05-584, as needing further investigation. Pursuant to the procedural schedule to address the refund issue, on September 2, 2005, PGE and Idaho Power filed briefs regarding the refund question. On September 21, 2005, Staff filed a response brief. On October 3, 2005, another prehearing conference was held.

On October 4, 2005, the Commission issued Order No. 05-1061. The order reflected parties' agreement that ORS 757.215(4) did not authorize a true-up between rates paid to QFs under tariffs and standard contracts that were allowed to go into effect during further investigation, and rates approved at the conclusion of such investigation.

On October 21, 2005, the following parties submitted comments on issues to be addressed in the compliance track of the docket: Staff, PacifiCorp, PGE, Idaho Power, the Industrial Customers of Northwest Utilities (ICNU), and Weyerhaeuser Corporation (Weyerhaeuser). Staff clarified its position in a letter, dated October 28, 2005. On November 7, 2005, the Fair Rate Coalition (FRC) moved to file response comments. On November 9, 2005, Staff submitted a letter that reported on a settlement meeting held among the parties, on November 1, 2005. On November 17, 2005, Administrative Law Judge Kirkpatrick issued a ruling adopting an issues list, as revised by a later ruling, dated November 29, 2005, for the compliance track of the docket. The full issues list is attached to this order as Appendix A.

On December 9, 2005, Staff and the following parties filed direct testimony regarding the utilities' compliance filings: the Oregon Department of Energy (ODOE), ICNU and Weyerhaeuser, Sherman County Court and J. R. Simplot Company (Sherman County and Simplot), and FRC. On January 20, 2006, the utilities, as well as Staff, ODOE, and ICNU and Weyerhaeuser filed rebuttal testimony. As part of its rebuttal testimony, PacifiCorp filed a standard contract for off-system projects under 10 MW.[4]

A hearing was held in Salem on February 2, 2006. The hearing was continued on February 8, 2006.

[4] On February 2, 2006, PacifiCorp also filed a redlined version of its filed standard contract for off-system projects under 10 MW, demonstrating differences from PacifiCorp's filed standard contract for on-system QFs under 10 MW.

On March 20, 2006, parties submitted one round of simultaneous briefs.

B. STIPULATIONS

Certain parties entered into a Stipulation regarding Issue No. 4. The Stipulation is further addressed during discussion of the issues, below.

C. SCOPE AND FRAMEWORK OF THIS ORDER

In Order 05-584, we specifically declined to adopt a model standard contract form. Instead, we indicated that each utility should draft its own standard contract. We expected each standard contract form to contain terms and conditions that were consistent with the resolution of issues in Order 05-584, or past orders, as appropriate. We did not expect terms to be identical across all standard contract forms. We also recognized that standard contracts would contain terms addressing issues that were not addressed in the first phase of the docket, nor in any prior proceeding. We expected, however, that all of the terms in a standard contract, individually and collectively, would be consistent with, or in the spirit of, our general conclusions about implementation of PURPA.

In Order No. 05-584, we stated that our primary goal, with regard to implementing PURPA, remains, as it has been since we first undertook implementation of PURPA, "to encourage the economically efficient development" of QFs, "while protecting ratepayers by ensuring that utilities pay rates equal to that which they would have incurred in lieu of purchasing QF power.[5] Indeed, we reemphasized our commitment to this goal, stating that we sought to adopt policies and rules that would maximize incentives to QF development, using tools such as accurate price signals and full information to developers, "while insuring that ratepayers remain indifferent to QF power by having utilities pay no more than their avoided costs."

The number and scope of issues in this compliance proceeding were unanticipated. In total, thirty issues were presented to us, asking over eighty separate questions. Upon review, we deem many of these questions to be broader in nature than questions of compliance. For example, many questions essentially ask whether a particular clause in a filed standard contract comports with the spirit of Order No. 05-584, regardless of whether the subject of the clause was addressed in any way during the first phase of the docket. Thus, in our view, numerous new issues, many requiring significant evidentiary development to adequately evaluate, were raised in a proceeding intended to address the compliance of filings made in response to Order No. 05-584.

Although the compliance phase of this proceeding was conducted with the full procedure that is used in all of our contested case proceedings, we are concerned that evidence regarding questions of policy, as opposed to pure questions of compliance, may have been inadequately developed for two reasons: 1) insufficient time due to the sheer

[5] Order No. 05-584 at 1, citing Order No. 81-319 at 3.

number of questions presented, particularly given their scope and breadth; and 2) insufficient focus on new questions of policy, due to instructions to parties, throughout the proceeding, to limit review to compliance matters.

Despite the number and scope of questions presented, and our concerns about the evidentiary development of many of these questions, we have considered each and every question, including those deemed to be more than compliance in nature. Consequently, this order is organized by issue number. For any new question that we deem to be inadequately developed, we decline to resolve the question, instead leaving the issue to negotiation between the parties. For all other questions, we strive to provide sufficient guidance to the utilities, generally and individually, to revise filed standard contracts, as necessary to comply with Order No. 05-584, or other pertinent orders. Many of the questions are phrased with regard to the "reasonableness" of a particular clause of a filed standard contract form. We interpret such questions to ask, whether the clause at issue can be reasonably considered to comply with the specific or general directives of Order No. 05-584. As we discussed in Order No. 05-584, we decline to pre-approve, with regard to general prudency, or cost recovery, any specific standard contract that may be entered into between two parties.

Before we turn to consideration of each issue, we would like to make a general statement about compliance proceedings. At the time ALJ Kirkpatrick established the issues list in this compliance proceeding, she acknowledged that many of the issues were arguably beyond the scope of a compliance investigation. Due to agreement by the parties to address the issues, however, she included issues in the issue list that were likely more than compliance in nature. We understand she did so with the expectation that parties would use the proceeding to negotiate resolutions to such issues. We are disappointed that parties did not resolve more issues by negotiation. To the extent that questions about the utilities' proposed standard contracts remain after implementation of our directives in this order, we encourage parties to negotiate resolutions to such questions. In the future, proceedings to address compliance matters will be much more strictly limited to issues of compliance.

III. ISSUES OF COMPLIANCE FOR FILED STANDARD CONTRACTS

A. ISSUE NUMBERS 1 - 3: GENERAL QUESTIONS

The first three issues are very general in nature, asking:

1. Are the compliance filings consistent with Order No. 05-584?

2. Are the compliance filings consistent with the assumptions used in the utilities' resource acquisition or certification proceedings?

3. Are the standard terms and conditions in the compliance filings reasonable?

As we explained above, our fundamental purpose in this compliance proceeding is to provide utilities with sufficient guidance to write compliant standard contracts. We consider a standard contract to be compliant if it is consistent with both our specific and general directives, as well as with other pertinent orders, such as an order regarding a utility's integrated resource planning (IRP) process. Consequently, we consider the first three questions to provide a framework for our consideration of the utilities' filed standard contracts, but find it unnecessary to further address the questions.

B. ISSUE NUMBER 4: MULTIPLE ENERGY PROJECTS

1. Overview

In Order 05-584, we established a standard contract eligibility threshold of 10 MW. Issue Number 4 expresses concerns about application of that threshold, as follows:

> Should the Commission adopt criteria for determining whether multiple energy projects are in fact a single Qualifying Facility to protect the intent of Order No. 05-584, which directs that only projects 10 MW and smaller are eligible for standard avoided cost rates and a standard contract? For example, if a 60 MW wind farm is divided into six 10 MW installments in close proximity to one another, all built in the same calendar year, and with underlying ownership structures containing similar persons or entities, should each installment be eligible for standard rates and standard contracts? What criteria determine when a Qualifying Facility is 10 MW or less and eligible for the standard contract when the project/site has multiple generating units?

We understand that Issue No. 4 was raised due to concerns regarding the potential for disputes about project size, and worries that the disputes could slow down project development.

2. Positions

On February 6, 2006, ODOE moved to admit a Partial Stipulation resolving Issue Number 4. The Stipulation was signed by: ODOE, Staff, PGE, PacifiCorp, Idaho Power and Sherman County and J. R. Simplot (Simplot). ODOE's motion and comments by Staff indicate that ICNU neither supports, nor opposes the Partial Stipulation. With the understanding that the Partial Stipulation does not effect, in a practical way, very small QFs, the Fair Rate Coalition takes no position on the Partial Stipulation.

The Partial Stipulation agrees to define certain terms and criteria to provide more clarity regarding QF eligibility to receive a standard contract. ODOE, in cooperation with Idaho Power and Sherman County and Simplot, originally proposed language that Staff and parties then further refined. Language proposed in the Partial Stipulation defines the following terms: "Small Cogeneration Facility or Small Power Production Facility Eligible to Receive the Standard Rates and Standard Contract;" "Person(s) or Affiliated Person(s);" "Same Site;" and "Shared Interconnection and Infrastructure." The Partial Stipulation also provides a process for dispute resolution and a clause regarding compliance with the eligibility criteria.

3. Resolution

When this compliance proceeding was undertaken, we hoped that Staff and parties would engage in negotiations to refine the utilities' filed standard contracts. Consequently, we are pleased that a resolution to Issue Number 4 was negotiated among the parties. After reviewing the Partial Stipulation and supporting testimony, we find the proposed language to clarify QF eligibility to enter into a standard contract. Such clarification should reduce future disputes regarding eligibility. Consequently, we approve the Partial Stipulation, as attached as Appendix A to this order, in its entirety.

C. ISSUE NUMBERS 5, 11 and 35: DEFAULT AND TERMINATION, DEFAULT SECURITY, DAMAGES, AND INSURANCE

We held, in Order No. 05-584, that it would be prudent to require QFs entering into standard contracts to: "establish creditworthiness by making a set of representations and warranties that the QF has good credit standing, including that it is current on existing debt obligations and has not been a debtor in a bankruptcy proceeding within the preceding two years."[6] In the event that a QF could not, in good faith, make such representations and warranties, we determined that the QF should be required to provide some default security. For a QF unable to demonstrate creditworthiness, we directed that standard contracts require the QF to provide "a reasonable amount of default security by one of the following means, selected at the QF's discretion: senior lien, step-in rights, a cash escrow or a line of credit." We did not define "reasonable amount of default security," but directed parties to further address the issue in the second phase of this proceeding. We also directed utilities to include a clause in standard contracts, providing in the event that a QF defaults and the market prices to replace the contracted for energy exceed the contract price, that future payments, after the default period ends, shall be commensurately reduced over a reasonable period of time to recoup the costs incurred by the utilities.

Our directions raised numerous issues of compliance. Parties question the compliance of proposed provisions, for one or more of the utilities' proposed standard contracts, regarding requirements to demonstrate creditworthiness, reasons for default, opportunities to cure, and the calculation of damages. Additionally, parties further

[6] Order No. 05-584 at 45.

address what default security terms are reasonable for standard contracts. Each issue or subissue is separately addressed, below.

1. Default Security Provisions

Issue Number 5.a. addresses the compliance of proposed terms for default security requirements. The issue generally asks whether the proposed terms are reasonable, but sub-issues delineate specific concerns. The first sub-issue, Issue Number 5.a.i., addresses requirements to establish creditworthiness in lieu of providing security. As Issue Number 5.d. also addresses this topic, we address it together with Issue Number 5.a.i. As Issue Number 35 addresses another issue related to default security, we also address it at this time.

a. Issue Numbers 5.a.i. and 5.d. (Requirements to Establish Creditworthiness In Lieu of Providing Security)

i. Overview

Issue Number 5.a.i. addresses the reasonableness of Section 4.1.6 of Idaho Power's filed standard contract. Section 4.1.6 calls for a QF to provide commercially reasonable representations and warranties, as well as supporting documents, that, "at a minimum," demonstrate that the QF is current on existing debt obligations and is not, or has not recently been, a debtor in a bankruptcy proceeding. At issue is whether the "at a minimum" language allows Idaho Power to potentially impose stricter requirements than those set forth in Order No. 05-584.

Issue Number 5.d.i. asks whether it is appropriate for the standard contracts of PacifiCorp and Idaho Power to impose obligations beyond requirements that a QF represent it: has good credit; is current on existing debt obligations; and has not been a debtor in the last two years. Pointing to Section 1.8 of PacifiCorp's filed standard contract, which, together with Section 3.2.7(e), requires QFs that are larger than 3 MW to have a long-term credit rating by a credit agency ("Baa3" or greater by Moody's or "BBB-" or greater by S&P) , as an example of an additional requirement, Issue Numbers 5.d.ii. and 5.d.v query whether this clause is appropriate. Issue Number 5.d.iii. asks whether it is reasonable for Section 7 of PGE's filed standard contract to require that a QF must warrant that it will remain current on financial obligations to others throughout the contract term, or notify PGE of any delinquency and provide default security to PGE at that time. Issue Number 5.d.iv. questions whether it is clear enough, in the filed standard contracts, that a QF can be required to provide default security *only* if the QF is unable to establish creditworthiness.

ii. Positions

ODOE, Sherman County and Simplot contend that the Commission, in Order No. 05-584, limited the representations regarding creditworthiness that a QF could be required to make to the following three: 1) that the QF has good credit; 2) that the QF is current on existing debt obligations; and 3) the QF has not been a debtor in a bankruptcy proceeding within the preceding two years. These parties argue that any clause in a filed standard contract that would add requirements to establish creditworthiness beyond calling for a QF to make these three representations are non-compliant with Order No. 05-584. Section 4.1.6 of Idaho Power's filed standard contract and Section 1.8 of PacifiCorp's filed standard contract are identified as doing so. ODOE also observes that Section 3.2.7 of PacifiCorp's filed standard contract, and Section 3.1.4 of PGE's filed standard contract, which calls for a QF to represent that it is, and will continue to be, current on all financial obligations, also add creditworthiness requirements beyond the scope of requirements set forth in Order No. 05-584. Sherman County, Simplot and ODOE also object to Section 7 of PGE's filed standard contract on the grounds that it demands a QF provide default security in situations not contemplated by the Commission in Order No. 05-584. Finally, Sherman County and Simplot do not think that any of the utilities' filed standard contracts are adequately clear that default security is required only if a QF fails to satisfy creditworthiness requirements. Sherman County and Simplot are particularly concerned, however, about PacifiCorp's filed standard contract.

Staff observes that the Commission used the word, "including," in Order No. 05-584, when it stated:

> We are persuaded that all QFs should be required to establish creditworthiness by making a set of representations and warranties that the QF has good credit, including that it is current on existing debt obligations and has not been a debtor in a bankruptcy proceeding within the preceding two years. Requiring a party to a contract to enter the contract with good credit is a reasonable and prudent requirement.

Staff reasons that by using the word, "including," the Commission did not intend to prohibit utilities from requiring other representations regarding creditworthiness, so long as the additional requirements are reasonable. Staff concludes that the terms at issue are reasonable. Further, Staff, interprets the language of Section 4.1.6 of Idaho Power's filed standard contract, as providing a QF with *more*, rather than fewer, options for satisfying creditworthiness than those specified in Order No. 05-584.

ODOE counters that even if Staff is correct about the Commission intended to allow the utilities to require that QFs make representations other than those specified in Order No. 05-584, the Commission did not intend to allow the utilities to

require QFs to take actions other than making representations about creditworthiness. On these grounds, ODOE objects to Section 1.8 of PacifiCorp's filed standard contract.

Concerned about the ability of the small scale energy loan program (SELP) to fund QF projects, Staff recommends that PGE be directed to modify Section 7 of its filed standard contract to provide an exception for delinquency on a construction loan if the QF and the lender negotiate payment arrangements. Staff further recommends that PacifiCorp and Idaho Power revise their filed standard contracts to clarify that should a QF become delinquent on a construction loan, it need not provide default security to the utility if the QF and the lender are negotiating payment arrangements.

PGE and PacifiCorp object to Staff's recommendation. PGE observes that a QF in default on any financial obligation is risky to continue doing business with, regardless of whether a lender is willing to work with the QF to resolve the situation or not. PacifiCorp observes that it is standard business practice to have cross default terms in commercial transactions, and comments that although PacifiCorp may be willing to make exceptions on a case by case basis, it is inappropriate to automatically grant exceptions.

iii. Resolution

We understand the word, "including," as used in a sentence setting forth a list, to typically denote the incompleteness of the list.[7] When we determined, in Order No. 05-584, that QFs entering into standard contracts must establish creditworthiness by making a set of representations and warranties that the QF has good credit standing, *including* that it is current on existing debt obligations and has not been a debtor in a bankruptcy proceeding within the preceding two years, we did not intend to limit the representations and warranties to those we identified. Consequently, we do not deem the clauses at issue to be noncompliant, to the extent that such clauses require representations regarding creditworthiness in addition to those specified in Order No. 05-584.

With regard to Section 1.8 of PacifiCorp's filed standard contract, we acknowledged in Order No. 05-584 that PacifiCorp's standard contract, at the time, required QFs with capacity ratings of 3 MW or more to provide a credit rating. Section 1.8 of PacifiCorp's filed standard contract proposes to do the same. We find that we did not preclude PacifiCorp from doing so; consequently, we find Section 1.8 to be compliant.

With regard to the question of whether utilities should permit a QF in default on a construction loan to not provide default security if the QF and lender agree to alternative payment arrangements, we conclude that the filed standard contracts should explicitly provide for such an exception, but not automatically grant it. To the extent possible, unless we have otherwise directed, filed standard contracts should reflect general commercial conditions. We direct the utilities to provide, in filed standard

[7] *See, e.g.,* The American Heritage Dictionary, (1982), p. 651.

contracts, that in the event that a QF is delinquent on construction related financial obligations, the QF must notify the utility, but may ask for, and receive, an exception to the need to provide default security to the utility should the QF be able to negotiate financial arrangements with the construction loan lender that mitigate the QF's financial risks.

b. Issue No. 5.a.ii. (Letter of Credit for Potential Environmental Remediation Liabilities)

i. Overview

PacifiCorp's filed standard contract includes a term, Section 10.5, directing any QF that is required to provide default security, and selects a senior lien or step-in rights to do so, to also obtain a letter of credit to cover potential environmental remediation costs. Issue No. 5.a.ii. queries whether this provision is reasonable.

ii. Positions

PacifiCorp contends that Section 10.5 of its filed standard contract is appropriate. PacifiCorp asserts that as the magnitude of risk that a particular QF project will incur remediation costs is unknown at the start of a contract, due in part to the inability to assess the individual risks of a QF project entering into a standard contract, financial protection is appropriate.

Finding that it is difficult for small QFs to obtain a letter of credit, and that a utility's risk of being liable for environmental remediation associated with a QF site is minimal, Staff concludes that the clause is unnecessary. Consequently, Staff recommends that PacifiCorp be directed to remove the clause.

ODOE concurs with Staff's position. Should the Commission permit PacifiCorp to require certain QFs to provide protection against environmental remediation costs, however, ODOE proposes, as an alternative means to providing a letter of credit, that if a QF project is sited on an industrial or a brownfield site, that the QF (or its parent company) should have the option to assume the financial responsibility for any environmental remediation.

PacifiCorp responds that it is reasonable to require a QF that provides default security by senior lien or step-in rights to also provide a letter of credit for potential environmental remediation costs. PacifiCorp explains that although a utility would be exposed to joint and several liabilities for environmental remediation costs associated with a QF site under contract, a senior lien or step-in rights would not provide financial security under such circumstances. Regarding QF projects sited on industrial or brownfield sites, PacifiCorp responds that a QF's assumption of the risk is insufficient because there is no guarantee that the QF will have the financial ability to fulfill environmental obligations.

iii. Resolution

Section 10.5 of PacifiCorp's filed standard contract effectively reduces the number of options available to a QF that must provide default security to two options: a cash escrow or a letter of credit. Under Section 10.5, if a QF selects a senior lien or step-in rights as a means to provide default security, the QF must nevertheless obtain a line of credit. As such, Section 10.5 does not comply with the plain language of Order No. 05-584, directing utilities to provide four options, as specified at page 45 of the Order, as follows.

> . . . in the event that a QF cannot demonstrate creditworthiness, the QF should be required, regardless of its size, to provide some default security . . . we adopt Staff's proposal that requires a QF unable to satisfy credit rating requirements to provide a reasonable amount of default security by one of the following means, selected at the QF's discretion: senior lien, step-in rights, a cash escrow or a line of credit.

PacifiCorp did not address environmental remediation costs that may be associated with QF projects in the first phase of this proceeding, and in this compliance phase, PacifiCorp fails to provide sufficient evidence that the identified risk is great enough to justify reconsideration of our decision in Order No. 05-584. Indeed, PacifiCorp admits that risks associated with potential QF environmental remediation are very low. Consequently, we direct PacifiCorp to make its filed standard contract compliant with Order No. 05-584 by removing Section 10.5.

c. Issue No. 5.a.iii. (Definitions of Default Security Options)

i. Overview

Issue No. 5.a.iii. queries whether the default security options of "cash escrow," "senior lien," "step-in rights" and "letter of credit" should be defined in the standard contracts of PGE (Section 7) and Idaho Power (Section 4.1).

ii. Positions

Pointing to definitions of the terms in PacifiCorp's filed standard contract, ODOE calls for PGE and Idaho Power to provide the same transparency by defining the terms at issue.

Staff represents that the issue is resolved, as PGE and Idaho Power have agreed to provide definitions for these terms.

iii. Resolution

Parties' agreement on this issue moots it, and we find no need to further address it.

d. Issue Number 5.a.iv. (Definition of "Default Security")

i. Overview

In Order No. 05-584, we determined that a QF entering into a standard contract must either demonstrate creditworthiness, or provide upfront default security. We declined, however, to impose any requirements regarding the amount of default security that a utility could require of a QF that failed to demonstrate creditworthiness. As parties had not addressed the issue in the first phase of Docket UM 1129, we left the amount of default security that could be required to the discretion of each utility, but directed Staff and the parties to further address the issue, as appropriate, in the second phase of the docket. Parties instead agreed to address this issue, as it applies to standard contracts, in this compliance phase as Issue No. 35, which we address below, next.

Before turning to Issue Number 35, we address Issue Number 5.a.iv. Exercising the discretion granted to it, PacifiCorp defined the term, "Default Security," in Section 1.9 of its filed standard contract as being the positive difference, for twelve average months over the term of an agreement, between 110% of monthly forward power prices and the estimated payments to the QF, provided that the minimum default security requirement would equal three average months of estimated payments to the QF. Issue Number 5.a.iv. asks whether this definition is consistent with Order No. 05-584.

ii. Positions

Sherman County and Simplot not only generally object to PacifiCorp's definition of "Default Security," they argue that Order No. 05-584 does not authorize the imposition of default security under any circumstances.

PacifiCorp disagrees, arguing that Order No. 05-584 clearly allows a utility to require that a QF provide default security under specified circumstances. Staff also disagrees with the position of Sherman County and Simplot, indicating that the Commission authorized utilities to require, should a QF fail to demonstrate creditworthiness, that the QF provide default security, in some amount.

iii. Resolution

The perception of Sherman County and Simplot that we did not authorize a utility to require a QF to provide default security under any circumstances is erroneous. At page 45 of Order No. 05-584, we state, without equivocation, that a QF entering into a

standard contract must either demonstrate that it is creditworthy, or provide upfront default security, as follows:

> We are persuaded that all QFs should be required to establish creditworthiness by making a set of representations and warranties that the QF has good credit, including that it is current on existing debt obligations and has not been a debtor in a bankruptcy proceeding within the preceding two years . . . We conclude, however, that in the event that a QF cannot demonstrate creditworthiness, the QF should be required, regardless of its size, to provide some default security.

It is, therefore, proper for PacifiCorp's standard contract to include a provision that a QF must provide default security in lieu of establishing creditworthiness. As we gave the utilities discretion to define the amount of default security required in such circumstances, subject to our review, it is proper for PacifiCorp to include Section 1.9 in its filed standard contract. No party raised any specific objection to the language of Section 1.9, and we find no reason to deem it to be noncompliant.

e. Issue Number 35 (Amount of Default Security)

i. Overview

As we explained above, in Order No. 05-584 we did not address the proper amount of default security to be provided by a QF entering into a standard contract but failing to demonstrate creditworthiness. We left determination of that amount initially to the discretion of each utility, but directed Staff and the parties to further address the issue, as appropriate, in the second phase of Docket 1129. Parties instead agreed to address this issue, as applied to standard contracts, in this compliance phase. Consequently, Issue No. 35 asks what the appropriate level of default security is in the event that a QF does not establish creditworthiness.

ii. Positions

As addressed in our discussion of Issue No. 5.a.iv. above, Section 1.9 of PacifiCorp's filed standard contract defines the amount of default security to be imposed, as the positive difference, for twelve average months over the term of the agreement, between 110% of monthly forward power prices and the estimated payments to the QF, provided that the minimum default security requirement would equal three average months of estimated payments to the QF.

PGE's filed standard contract also defines the amount of default security required, under appropriate circumstances. PGE bases its calculation on capacity payments to a QF over one year, using the calculation:

> Annual number of on-peak hours X (Minimum net output/8,760 hours) X (On-peak price – Off-peak price).

Staff evaluated both approaches, and found both to be reasonable. Staff observes that Idaho Power's filed standard contract did not, however, state how the amount of default security to be imposed would be calculated. Consequently, Staff advises that Idaho Power be directed to do so.

ODOE recommends that the amount of default security that could be required of a QF entering into a standard contract be limited to approximately two percent of the capital costs for the project. ODOE anticipates that the QF will be required to obtain additional equity in order to provide the default security and anticipates that doing so will be difficult. ODOE argues that the amount of default security required should be reasonably low, and explains how it arrived at its proposed formula of two percent of a QF project's capital cost:

> We arrived at the limit of 2% of project capital costs using the following example that represents a locally owned project that SELP would like to finance. To look at the cost of an escrow deposit in terms of a potential project, ODOE has reviewed a 1.5 MW QF project that costs around $2.4 million to construct. An ODOE loan, an Oregon Business Energy Tax Credit pass-through and tax-equity contribution based on federal tax credits is projected to provide the majority of the project funding while $100,000 to $200,000 is provided by the local land owners. This project is based on some added revenue from the Energy Trust. A 2% increase in project cost for an escrow default security account would be around $50,000. This would be a significant amount for the property owners to raise. A larger sum would likely make the project unworkable. Higher equipment prices are increasing the cost of generating projects. As a result the Energy Trust is being asked to contribute more. I suspect the Energy Trust would not increase their contribution to a project just to cover a default security deposit. In this example, a **[sic]** $50,000 represents roughly three months of projected average projected power sales revenue.[8]

iii. Resolution

In Order No. 05-584, we determined that a utility could request default security from a QF entering into standard contracts only if the QF failed to demonstrate creditworthiness. If a QF failed to demonstrate creditworthiness, we indicated a QF

[8] ODOE Exhibit 6, Keto, p. 16.

should provide default security. We did so because we perceived a higher risk to a utility and its ratepayers of a default, by a QF that could not demonstrate creditworthiness, resulting in utility purchases of replacement power at higher cost than the standard contract price for power.

Determination of the amount of default security to be provided by a QF failing to demonstrate creditworthiness should reflect the nature and scope of this risk. As the methodologies proposed by PacifiCorp and PGE estimate market costs to replace power not delivered due to default, we find them to be reasonable. We direct Idaho Power to modify its standard contract to provide for calculation of the amount of default security pursuant to one of these two methodologies.

f. Issue No. 5.a.v. (Definition of "Letter of Credit")

i. Overview

Section 1.17 of PacifiCorp's file standard contract defines the term, "Letter of Credit," as follows:

> "Letter of Credit" means an irrevocable standby letter of credit, from an institution that has a long-term senior unsecured debt rating of "A" or greater from S&P or "A2" or greater from Moody's, in a form reasonably acceptable to PacifiCorp, naming PacifiCorp as the party entitled to demand payment and present draw requests thereunder."

Issue No. 5.a.v. asks whether the definition of "letter of credit," in Section 1.17 of PacifiCorp's filed standard contract, is consistent with the use of that term in Order No. 05-584, at page 45.

ii. Positions

Sherman County and J. R. Simplot argue that PacifiCorp's definition of the term, "letter of credit," is inappropriate because it "goes beyond the security requirement[s]" set forth in Order No. 05-584.

Staff requested information from PacifiCorp about how it derived the definition, and PacifiCorp responded that the definition is commercially reasonable because it is consistent with definitions used in agreements utilized in the wholesale market. Based on this information, Staff concludes that Section 1.17 is reasonable.

iii. Resolution

As Staff correctly observes, we did not define the term, "Letter of Credit," in Order No. 05-584, thereby leaving it to the discretion of each utility to define this term. Consequently, this issue does not raise a specific issue of compliance, but rather involves

a question of whether PacifiCorp's definition is in keeping with the general spirit of Order No. 05-584.

In Order No. 05-584, we specifically declined to adopt a model standard contract.[9] In so doing, we directed each utility to draft its own standard contract. We expected that terms would differ across contracts, but intended that all terms would be consistent with Order No. 05-584, and other pertinent precedents. Our unstated intention was that standard contract terms would also be commercially reasonable.

No evidence is offered that Section 1.17 of PacifiCorp's filed standard contract is commercially unreasonable. Defining the term, "letter of credit," by specifying requirements for the issuer of the letter of credit, does not establish security requirements beyond those delineated in Order No. 05-584. We do not find Section 1.17 of PacifiCorp's filed standard contract to be non-compliant with Order No. 05-584.

2. Default and Termination Provisions

a. Issue Numbers 5.b.i., 5.b.ii. and 5.b.iv. (Minimum Delivery Requirements)

i. Overview

Each filed standard contract requires a QF entering into a contract to indicate upfront a minimum amount of energy to be delivered under the contract, on a monthly or yearly basis, to avoid default and penalties. Section 4.3 of PacifiCorp's filed standard contract requires a QF to specify a minimum annual delivery amount. PGE's filed standard contract also calls for a QF to specify a minimum annual delivery amount, with the caveat that the QF must deliver 75 percent of its average annual net output (as defined in PGE's filed contract), unless a QF provides sufficient documentation to justify an alternative minimum. Section 6.1 of Idaho Power's filed standard contract, however, requires a QF to specify a minimum monthly net energy amount for the year ahead. Issue Number 5.b.i. asks how the amount of energy that is "contracted for" should be determined, and whether the determination should be consistent across all of the utilities' standard contracts. Issue Number 5.b.ii. queries whether net delivery requirements in the filed standard contracts comply with the Commission's determination that firm and intermittent resources should be valued equally. Issue Number 5.b.iv. asks whether an alternative approach to establishing minimum delivery commitments should be implemented.

ii. Positions

Concerns about the utilities' minimum delivery requirements were primarily expressed with regard to Idaho Power's requirement that QFs specify a monthly amount. Projecting power production on a monthly basis for hydro and cogeneration QFs

[9] Order No. 05-584 at pp. 41-42.

would be difficult, Staff asserts. Additionally, Staff observes, monthly minimum delivery requirements increase the risk of contractual default. Since ODOE indicated that the SELP would not generally fund a QF if there is more than an incidental risk of default due to deliveries below minimum requirements, Staff argues that Idaho Power's monthly minimum delivery requirement is problematic because it potentially interferes with SELP funding. Consequently, Staff recommends that the Commission direct Idaho Power to revise its filed standard contract to require an annual minimal delivery requirement.

Idaho Power responds that it uniquely needs to know the amount of power it can expect, under a QF contract, on a monthly basis. Idaho Power explains that due to its heavy reliance on hydroelectric generation, Idaho Power has implemented a Risk Management Policy, as approved by the Idaho Public Utilities Commission, under which it makes energy purchases and sales on a monthly basis as part of a hedging strategy. Idaho Power asserts that firm contract commitments allow it to make better market purchase decisions. Idaho Power also argues that stricter performance requirements in its Idaho standard contract have not hindered the development of a robust QF market in Idaho, including the development of hydro and wind based QFs.

Staff responds to Idaho Power's comments by observing that factors in Idaho, such as a higher size threshold for standard contract eligibility, and the ability for large QFs to be partitioned to qualify for standard contract terms, may mean that larger QFs, with greater financing resources, may be bolstering statistics regarding the number of QFs operating in Idaho under standard contracts.

Due to concerns that compelling a QF to specify the minimum amount of energy that it will deliver under a contract will result in negotiations between the QF and the utility, ODOE proposes an approach for setting the "contracted for" amount of energy that is different than any methodology set forth in the filed standard contracts. ODOE recommends that the "contracted for" amount be based on a particular percentage, differentiated by the type of facility, of the nameplate capacity of a QF. ODOE proposes that the following percentages be applied to a QF's nameplate capacity: 5% for a solar facility; 10% for a hydro or wind facility; and 20% for geothermal, biomass or natural gas-fired cogeneration. ODOE further suggests that these percentages should be adjusted by the percentage of power a QF intends to use on its own site. ODOE makes this recommendation due to concerns that the amount of energy to be delivered under filed standard contracts will be subject to negotiation.

PacifiCorp responds to ODOE's proposal by asserting that it is better to allow individual QFs to designate minimum delivery obligation, since they are in the best position to take into account all influencing factors. PacifiCorp argues that it is reasonable to require every QF to make a good faith commitment as to a minimum amount of energy to deliver.

iii. Resolution

We did not directly address minimum delivery requirements in Order No. 05-584. Consequently, Issue Numbers 5.b.i., 5.b.ii and 5.b.iv. do not directly raise issues of compliance. Rather, we interpret these issues as inquiring whether the clauses at issue are generally in the spirit of Order No. 05-584.

Addressing Issue Number 5.b.iv., and ODOE's recommendation that a standardized approach to determining minimum delivery requirements be implemented, we decline to do so. We are not as concerned as ODOE that allowing each QF to commit to an individualized minimum delivery amount will lead to negotiation between the utilities and QFs. As utilities are required to purchase power from a QF under PURPA, and to do so under a standard contract when the QF is sized at 10 MW or less, utilities do not have any ability to negotiate a QF's power delivery commitment, other than being able to require that the QF provide a reasonable amount of documentation to support the specified minimum delivery amount.

With regard to Section 6.1 of Idaho Power's filed standard contract, and its requirement that QFs specify minimum amounts on a monthly basis, we determine that Idaho Power should revise its filed standard contract to provide for annual minimum delivery requirements. We do so primarily to provide QFs that rely on natural motive force with default protection, as further discussed in the next section of this order.

b. Issue Numbers 5.b.iii., 5.b.v. and 11 (Weather-Related Contingencies)

i. Overview

Issue Numbers 5.b.iii., 5.b.v. and 11 all consider whether contingencies due to weather should result in contractual default, or should instead be considered force majeure events. The issues also raise questions regarding implementation of a mechanical availability guarantee (MAG).

ii. Positions

The utilities assert that the effects of weather-related contingencies on QF contracts are more complicated than the question of whether or not such events should be considered events of default or force majeure. They explain that a QF's minimum delivery obligation should reflect expected adverse wind or water conditions, and that a QF should, therefore, be responsible for making reasonable forecasts of its operations, including taking into account, where pertinent, natural motive force availability in setting its minimum delivery obligation. Idaho Power further explains that reduced stream flow and reduced wind are events that are reasonably anticipated and modeled, observing that they are what Staff would identify as stochastic events. Conversely, force majeure events are limited to those that neither party could have anticipated—i.e., scenario risks. PacifiCorp states that none of its commercial wind transactions specify lack of wind as a

force majeure event, and argues that the Commission should hold QFs to the same commercially-reasonable force majeure standards, and default and termination provisions.

ODOE counters, however, that experience indicates that it is often difficult for QFs to predict the minimum availability of natural motive force and, therefore, to forecast delivery minimums on a weekly, monthly or yearly basis. Consequently, ODOE argues that a QF should not ever default or owe damages, due to unusual or severe weather conditions. ODOE indicates that its own loan documents do not include lack of natural motive force as a default event.

Sherman County and Simplot agree, arguing that wind or water droughts should be considered events of force majeure because QFs (and utilities) have no control over weather-related events. Sherman County and Simplot assert that QFs should be required to *estimate* monthly generating output for planning purposes, but should not be committed.

As avoided costs are based on a firm proxy resource, Staff asserts that a utility should be able to rely on being delivered a reasonable amount of QF energy over a year. However, Staff continues to take the position that, for natural motive force-based QFs, weather-related events should not trigger default. Instead, Staff advocates use of a MAG, based on annual production, as the basis for determining default for under-delivery. Recognizing that the Commission directed parties to further consider a MAG in the second phase of Docket UM 1129, Staff recommends that the Commission allow, but not require, the use of a MAG in a standard contract.

iii. Resolution

We did not define the term, "force majeure," in Order No. 05-584, nor did we otherwise directly address the scope of QF default and the effect of weather-related contingencies on natural motive force QFs. Consequently, Issue Numbers 5.b.iii. and 11 do not raise specific issues of compliance. Rather, the issues present the question of how the term, force majeure, should be defined in standard contracts to be consistent with the general spirit of Order No. 05-584.

The term, force majeure, is a legal term, and standard contracts should incorporate the common legal definition. As we understand it, force majeure is commonly understood to mean an unforeseeable event of superior or irresistible force that excuses performance. Under such a definition, it is unlikely that a Northwest wind or water drought would be considered a force majeure event.

Wind or water droughts need not be defined as force majeure events, however, in order to provide QFs with default protection in the event of a wind or water drought. Our direction, in this order, that standard contracts require *annual* delivery commitments (instead of monthly commitments) provides QFs with sufficient flexibility, we believe, to manage power deliveries to avoid default. QFs should be able to take into

account the possibility of wind or water droughts in estimating annual minimum delivery commitments and specify an amount that can be met yearly, even if a wind or water drought occurs during the year.

A QF and a utility are always free to negotiate a power contract, even if the QF qualifies for a standard contract. Thus, any QF and utility can implement a MAG in a power purchase contract. We find that the concept requires additional development, and, therefore, decline to mandate its use in standard contracts.

c. Issue Numbers 5.b.v., 5.b.vi., 5.b.vii. & 5.b.ix. (Delayed Operation)

i. Overview

Issue Number 5.b.v. generally inquires whether a QF's operational delay should result in default or breach. Issue Number 5.b.vi. asks whether it should matter if the utility is resource sufficient. In other words, should a QF default, potentially resulting in termination of a contract, if the QF fails to meet commercial operation dates, even though the utility is resource sufficient? Issue Number 5.b.ix. asks whether Section 11.4.1 reasonably imposes damages for under-delivery due to production delays when PacifiCorp is resource sufficient. Issue No. 5.b.vii. queries whether it is appropriate for Section 11.3.3 of PacifiCorp's filed standard contract to impose damages for termination, due to operational delay, when PacifiCorp is in a resource sufficient position.

ii. Positions

PGE and PacifiCorp take the position, that regardless of a utility's resource position, there are cost consequences if a QF does not deliver power in a timely manner under the contract. PGE argues that if PGE contractually expects a QF resource to become operational, the utility has planned to receive that power, irrespective of whether it is resource sufficient or deficient, and has acted on this expectation, by selling power on the market, for example, to achieve system balance. If the QF power is then not delivered, PGE asserts that it will need to take new actions, such as buying power on the market, to maintain system balance.

PacifiCorp argues that it is erroneous to assume that a utility and its customers are not harmed if a QF defaults on, or terminates, a contract when the utility is in a resource sufficient position. PacifiCorp explains that if the market price of energy at the time the QF defaults is greater than the contract price, PacifiCorp and its customers lose the value (or opportunity cost) of a sale of the QF energy.

ODOE responds that a QF should be subject to damages, to be paid on a future basis, when operation is delayed, but argues that a QF's contract should not be immediately terminated. ODOE asserts that a QF should be allowed time to work with its lender to cure project construction or operational problems, and that the lender should have time, in the event that cure is not possible, to foreclose on a project and make

improvements or repairs, in order to resell the project with a valid power purchase agreement in place. Otherwise, ODOE asserts that a project might not be able to be financed. Sherman County and Simplot observe that under Idaho Power's filed standard contract, if a QF makes diligent efforts to achieve commercial operation on schedule, failure to do so is not default. They recommend that all standard contracts so provide.

Staff takes the position that the Commission determined, in Order No. 05-584, that a utility and its ratepayers would not be harmed by a QF's operational delay when a utility is resource sufficient. Consequently, Staff asserts that standard contracts should except, from default and termination, a QF that fails to meet its commercial operational dates if the utility expects to be in a resource sufficient position as of the QF on-line date specified in the contract.

In testimony, Staff and ODOE raise an additional, related issue regarding pre-operation testing of QF facilities. For natural motive force QFs, Staff and ODOE worry that lack of natural motive force may impede testing prior to scheduled operation, resulting in a QF's default. Staff recommends that the Commission direct utilities to modify testing requirements in standard contracts to take into account the availability of natural motive force.

PGE responds that its filed standard contract does not restrict the QF with regard to testing attempts, allowing a QF to simply try again if the availability of natural motive force interferes with testing. PGE asserts that all testing should be completed, however, prior to the contractual start date.

iii. Resolution

In Order No. 05-584, we identified a delay by a QF coming on line as an event of default, and recognized that the utility would potentially need to replace the energy that the QF was under contract to deliver, at market prices exceeding the contract price. We observed, however, that if the utility is in a resource sufficient position, it may be that the utility could avoid replacing the energy *at any cost*. In other words, we deemed the risk to utilities and their ratepayers of operational delay by a QF when the utility was resource sufficient to be reduced. Consequently, we did not find a need to require the QF to provide *additional* security against default due to operational delay. Nevertheless, this finding did not imply the conclusion by Staff that a QF's operational delay when a utility is resource sufficient would cause *no* harm to a utility and its ratepayers.

Although energy may not be needed on a system basis, a utility may still be damaged. For example, in anticipation of receiving QF power, a utility may have already entered into a market arrangement to sell the power and will have to buy energy on the market to fulfill that obligation, or a utility may lose an opportunity to sell the power on the market at a price above the contract price. Consequently, we recognize that damages may be incurred when a QF's operation is delayed, even if a utility is resource sufficient. However, we would expect that a resource sufficient utility would be able to

minimize the damages on a going forward basis. Consequently, we determine that a QF's operational delay pursuant to a contract with a resource sufficient utility should result in default, but not in termination.

With regard to pre-operational testing, we advise QFs, particularly those that are natural motive force in nature, to allow sufficient time for multiple test opportunities when specifying an operational start date.

d. Issue No. 5.b.x. (Default Payment)

i. Overview

Issue Number 5.b.x. expresses support for Section 11.4.2 of PacifiCorp's filed standard contract, asking whether default payment provisions in the filed standard contracts of PGE and Idaho Power adequately take into account providing sufficient funding for continued QF operations.

Under Section 11.4.2 of PacifiCorp's filed standard contract, if the QF did not post default security because it met creditworthiness standards upfront, or if the amount of default security that a QF posted is exhausted, PacifiCorp pledges to work with the QF in good faith to establish the period for, and monthly amounts of, default payments that will allow the QF to continue operations. Under Section 7.5 of Idaho Power's filed standard contract, payments for damages begins the January 31st that follows the accrual of the damages, and continues for thirty-six months, in equal amounts. Section 4.3 of PGE's filed standard contracts recoups damages by reducing payments to the QF for power, in the year following the accrual of damages, to the off-peak energy price.

ii. Positions

Staff finds the default payment provisions in the filed standard contracts of PacifiCorp and Idaho Power to be reasonable. Staff expresses concerns that under PGE's payment plan, QFs may not have a sufficient revenue stream to pay operation and maintenance expenses, and other financial obligations, if the QF receives off-peak energy prices for all energy deliveries during the repayment period. ODOE indicated to Staff that flexibility is critical to working through a QF's low production period. Consequently, Staff recommends that PGE modify Section 4.3 of its filed standard contract to incorporate more flexibility with regard to structuring a QF's repayment of default damages. PGE responds that a QF has sufficient flexibility upfront to structure the contract to avoid onerous default situations.

iii. Resolution

In Order No. 05-584, we directed the utilities to provide in standard contracts that if a QF defaults, and market prices incurred to replace the energy that the QF fails to deliver are higher than the contract price, future payments to the QF, after the

default period ends, shall be commensurately reduced over a *reasonable* period of time to recoup the costs incurred by the utilities. Our direction that damages be paid over a reasonable period of time reflected our awareness of the need to maintain a QF's financial viability during the repayment period.

We anticipated that utilities would implement our direction by providing for case-by-case implementation, as envisioned by Section 11.4.2 of PacifiCorp's filed standard contract. Consequently, we direct PGE and Idaho Power to insert similar provisions in their standard contracts. We deem Section 4.3 of PGE's filed standard contract to not be compliant with Order No. 05-584, because it does not vary the period of repayment. We find that Section 7.5 of Idaho Power's filed standard contract also does not vary the repayment period. Although thirty-six months is a significant period of time, it may be insufficient as a repayment period, depending upon the QF's circumstances.

e. Issue No. 5.b.xi. (Opportunity to Cure)

i. Overview

Issue No. 5.b.xi. raises specific questions about contractual provisions in the filed standard contracts of PGE and PacifiCorp regarding an opportunity to cure, in the event of default: 1) Is Section 11.2.2 of PacifiCorp's contract, limiting the opportunity to cure to a time certain, reasonable? 2) Is the phrase, "commercially reasonable time" to limit the cure period, as used in Section 18.2.1 of Idaho Power's filed standard contract's use, more appropriate? 3) Should Section 10 of PGE's filed standard contract provide an opportunity to cure? 4) Should PGE's contract provide reciprocal default terms?

ii. Positions

Staff reviewed each contract's terms regarding a QF's opportunity to cure. Staff concluded that Section 11.2.2 of PacifiCorp's filed standard contract, allowing a QF to cure a default within 120 days, to be reasonable. Staff also found Section 18.2.1 of Idaho Power's filed standard contract, which provides for a 60-day cure period that can be extended if Idaho Power determines that the QF is making efforts to cure the default within a commercially reasonable time period, to be reasonable. Staff concluded that PGE's filed standard contract provides a built-in cure period for the first default, because the contract provides for termination only after two consecutive years of deliveries under a QF's minimum delivery obligations. PGE also agrees to modify Section 10 of its filed standard contract to provide for reciprocal default terms.

Sherman County and Simplot object, however, to Section 11.2.2 of PacifiCorp's filed standard contract. They object because PacifiCorp limits the opportunity to cure to 120 days, without providing any opportunity to extend the cure period, if commercially reasonable. PacifiCorp responds that it limits the cure period to a

time certain in order to avoid disputes about how long the cure period should be. Staff does not object to PacifiCorp's 120 day opportunity to cure period.

iii. Resolution

As PGE agrees to modify Section 10 of its filed standard contract to provide for reciprocity with regard to default terms, we do not discern any issue to resolve with regard to the provisions in PGE's filed standard contract regarding cure periods. As we did not address cure periods in the first phase of this proceeding, we do not find that the remaining questions under Issue Number 5.b.xi. directly involve matters of compliance. Rather, we interpret the questions as inquiring whether the clauses at issue are in the spirit of Order No. 05-584.

As Staff deems Section 18.2.1 of Idaho Power's filed standard contract to be reasonable, and we do not discern any challenge to its appropriateness, we do not deem it to be noncompliant. With regard to Section 11.2.2 of PacifiCorp's filed standard contract, we are not persuaded by Sherman County and Simplot that a period of four months is an insufficient period of time to cure a default. We do not find any reason, therefore, to declare Section 11.2.2 of PacifiCorp's filed standard contract to be noncompliant.

f. Issue Numbers 5.b.xii. and 5.b.xiii (QF Rights After Termination of a Standard Contract)

i. Overview

Issue 5.b.x.ii. questions whether Section 11.3.2 of PacifiCorp's filed standard is consistent with PURPA. The issue also questions whether the clause applies to a lender that forecloses on the facility. Finally, the issue questions the appropriateness of Section 10.4 of PGE's filed standard contract, which prohibits a QF with a terminated standard contract from entering into a new contract with new terms, during the period that the original contract would have run. Issue No. 5.b.xiii. queries whether it is reasonable, given requirements to purchase all of a QF's output and shortfall energy provisions that keep the utility whole, for § 6.3 of Idaho Power's filed standard contact to terminate a contract for failure to deliver a prescribed level of Net Energy, as it is defined therein in §§ 1.12 and 6.2, in any contract year.

ii. Positions

Section 11.3.2 of PacifiCorp's filed standard contract prohibits a QF, whose standard contract terminates due to default, from entering into a new standard contract during the period of time that the original contract would have run. Staff and ODOE express concern that such restrictions on a QF's ability to contract to sell energy may violate PURPA. ODOE further indicates that the clause clearly conflicts with the spirit of Order No. 05-584. ODOE also expresses concern that the clause would not allow ODOE to foreclose on, and sell, a project. As ODOE requires, as a condition of

financing, that it has the right to foreclose on a QF facility and to sell it to a new owner, with assignment of the original power purchase agreement, ODOE indicates that the clause will make QF projects that sell to PacifiCorp unacceptable for financing.

Staff approves of provisions in PGE's filed standard contract that allow a QF to enter into a new contract after termination of a prior contract. Section 10.4 of PGE's contract provides that when a QF seeks to enter into a standard contract following termination of a prior standard contract due to the QF's default, the QF must take the terms of the original contract during the new contract period that is concurrent with the original contract's term. Staff recommends that PacifiCorp replace Section 11.3.2 of its filed standard contract with a clause like Section 10.4 of PGE's filed standard contracts. PacifiCorp agrees to do so.

Staff also recommends that Idaho Power add such a clause to Section 6.3 of its filed standard contract. Idaho Power agrees to do so. Staff otherwise approves of Section 6.3. In response to concerns by ODOE that a hydroelectric QF may be unable to produce for a protracted period of time due to drought, Idaho Power also clarified that it would not use the clause to terminate a QF due to reduced resource availability resulting from adverse natural motive force conditions, unless the QF appeared to have permanently curtailed generation or was not making reasonable efforts to cure the problem.

iii. Resolution

PacifiCorp agrees to modify Section 11.3.2, as requested by Staff, and Idaho Power agrees to add a clause to its filed standard contract that provides, in the event that a QF default results in termination of a standard contract, and the QF seeks to enter into a new standard contract, the QF must enter into a new standard contract having the same terms as the original agreement during the period of time that the original contract would have run. In light of these agreements, we do not discern any unresolved issues to address.

3. Issue Number 5.c.i. – 5.c.iv. (Default and Termination Damages)

a. Overview

In Order No. 05-584, we authorized standard contracts to permit a QF to pay default damages on a forward basis. We stated, "in the event that a QF defaults and the market prices to replace the contracted for energy exceed the contract price, future payments after the default period ends shall be commensurately reduced over a reasonable period of time to recoup the costs incurred by the utilities." We did not further address how such damages would be calculated, but encouraged parties to address a cap on damages in the second phase of this docket. Issue Number 36, discussed later in this order, addresses such a cap.

Issue Number 5.c. addresses the calculation of damages, asking, generally, whether the foundations for calculating damages, as set forth in the utilities' filed standard contracts, are sound, and whether the levels of damages that would be imposed under the filed contracts are reasonable. Sub-issues inquire about the appropriateness of specific clauses, as follows: i) Is the definition of Net Replacement Power Costs in Section 1.25 of PacifiCorp's contract consistent with Order No. 05-584? ii) Should the Shortfall Energy Replacement Price be zero in Section 7.3 of Idaho Power's contract if the utility is energy surplus as defined in its Integrated Resource Plan; iii) Is it reasonable for Idaho Power to impose on Qualifying Facility interest expenses on recoupment power costs (Section 7.5)? iv.) Is the use of Net Energy Amount in Idaho Power's contract (Section 1.12 and Section 6.2) reasonable for determining the Shortfall Energy and damages (Article VII)? In discussion of these issues, other questions were raised, as well. We will address all questions collectively.

b. Positions

Each utility's filed standard contract contains provisions for imposing damages in the event of default. Under PacifiCorp's filed standard contract, a QF that defaults is responsible for paying the following: 1) if PacifiCorp purchases replacement power, the difference between the contract price for power and the replacement price for the power purchased, up to the QF's minimum annual delivery amount—PacifiCorp determines the replacement price based on the cost to buy power at the QF's point of delivery, plus administrative costs, plus any transmission costs that are reasonably incurred; or 2) if PacifiCorp does not purchase replacement power, damages based on the market price at the Mid-Columbia (Mid-C) trading hub, plus any additional costs incurred due to a QF's failure to deliver the minimum annual delivery amount. Under PGE's filed standard contract, no damages are imposed if PGE is in a resource sufficient position. If PGE is resource deficient, however, damages will be assessed for any portion of a QF's minimum annual delivery amount that is not delivered. The amount of damages will equal the amount of energy not delivered multiplied by the amount that average market prices for the year exceeded the average contract price. Under Idaho Power's filed standard contract, if a QF fails to meet its monthly minimum delivery amount, and if 85% of the current month's Mid-C market price, using a weighted average of daily on- and off-peak prices, exceeds the monthly contract price, the QF will pay the Mid-C market price. Idaho Power's filed standard contract also applies an annual interest rate of 7.8% to the unamortized balance of the accumulated repayment amount.

Each utility's filed standard contract also contains provisions for imposing damages in the event of termination. PacifiCorp's filed standard contract assesses, as damages for termination, the positive difference, if any, between the contract price and the replacement power price (based on forward market prices), for the QF's minimum annual delivery commitment for a period of twenty four months after the date of termination. The filed standard contracts of PGE and Idaho Power allow each utility to pursue all legal or equitable remedies.

Staff concludes that PacifiCorp's filed standard contract appropriately addresses default damages, including its definition of Net Replacement Power Costs (Issue No. 5.c.i.). With regard to default damages clauses in the utilities' filed standard contracts, Staff takes the following position: 1) consistent with Staff's position on Issue Number 5(b)(iv), Staff recommends that the Commission direct Idaho Power to require a minimum annual delivery commitment, and to assess damages on a yearly basis (Issue No. 5.c.iv.); and 2) Staff recommends that the Commission direct PGE to assess damages regardless of whether the company is resource sufficient or deficient (and to not direct Idaho Power to specify its replacement power price as zero during its resource sufficiency period as Issue No. 5.c.ii. suggests). In response to this recommendation, PGE agrees to remove the damages exception when the company is resource sufficient.

With regard to termination damages, Staff concurs with PacifiCorp's calculation of damages, because the methodology is transparent and verifiable. Staff also agrees with PacifiCorp's use of a 24-month replacement period (despite a disagreement about the *basis* for this period). To make all of the utilities' standard contracts consistent, Staff recommends that the Commission direct PGE and Idaho Power to include the following clause in their standard contracts: "If the contract is terminated due to the QF's default, the QF must pay the positive difference, if any, obtained by subtracting the contract price from projected forward market prices for 24 months beginning with the date of contract termination, for the minimum annual delivery amount specified in the contract."

PGE does not object to Staff's recommendation, but Idaho Power does, arguing that no "cap" should be placed on the company's ability to recover termination damages. Idaho Power does not object to calculating termination damages based on costs that a utility will actually incur to replace undelivered QF energy, but protests the limitation of the accrual of damages to twenty-four months. Idaho Power is concerned that such a "cap" will allow a QF to "game the system" by electing to terminate a contract and incur damages in order to sell power on the market, when market prices exceed avoided costs. Staff responds that its recommendation does not cap the amount of damages, only the time period over which damages accrue.

c. Resolution

The questions raised regarding the calculation of damages involve details that are far beyond those addressed in the first phase of this docket. Consequently, Issue Number 5.c. does not directly raise questions of compliance, but rather questions whether certain contractual clauses are in the spirit of Order No. 05-584.

We discern that only one issue remains unresolved, as Idaho Power continues to object to Staff's recommendation that the accrual of termination damages be limited to a period of twenty-four months. Idaho Power fails to present sufficient evidence that a position supported by PacifiCorp and Staff, and agreed to by PGE, is imprudent. We find that Idaho Power's concerns that a limit on the accrual of termination damages will allow a QF to "game the system" are tempered by the fact that

a QF will likely be unable to accurately forecast market prices for a period of more than twenty-four months to thereby determine the total amount of damages that may be accrued by termination. Consequently, we direct Idaho Power to revise its filed standard contract to be consistent with the contracts of PacifiCorp and PGE with regard to providing for a limitation on the accrual of termination damages to a period of twenty-four months.

4. Default Damages for QFs Under 100 kW

a. Overview

Although issues regarding the development of standard contracts specific to QFs sized at 100 kW or smaller (very small QFs) were excluded as outside the scope of this compliance proceeding, FRC raised issues regarding the application of default penalties to very small QFs.

b. Positions

FRC provided specific examples of situations in which penalties associated with under-deliveries, due to unplanned outages, severely hurt the viability of very small QFs. FRC also observed that previous long-term contracts did not contain default penalties.

Assessing power provided by very small QFs as *de minimis* to a utility system, Staff concludes that ratepayers need minimal protection with regard to variances in power deliveries by very small QFs. As PURPA requires standard contracts to be offered to QFs that are 100 kW or smaller, Staff argues that federal law recognizes the need to specially treat such QFs. Staff also observes that PacifiCorp previously offered, prior to the issuance of Order No. 05-584, a simplified standard contract for QFs that were 100 kW and smaller. The simplified contract included a clause providing for default only if a QF failed to deliver the specified minimum amount for two consecutive years. Consequently, Staff recommends that the Commission direct the utilities to modify standard contracts to provide that QFs, sized at 100 kW or less, not be subject to damages for under-delivery. Alternatively, Staff recommends that the Commission direct the utilities to modify standard contracts to provide that QFs, sized at 100 kW or less, be subject to damages only for the failure to deliver the minimum requirement for two consecutive years.

c. Resolution

This issue is outside the scope of the proceeding, as all issues regarding the development of standard contract terms specific to QFs sized at 100 kW or smaller were originally deemed beyond the realm of compliance, as we did not address such issues in the first phase of this proceeding. Nevertheless, to the extent that standard contract terms that are available to QFs that are sized at 100 kW or less were, in effect,

changed without the benefit of our consideration of the pertinent issues, we find it appropriate to consider whether such changes are appropriate.

FRC and Staff present evidence that power purchase contracts offered to very small QFs, in the past, did not contain terms imposing default damages, or in case of PacifiCorp, only did so if a QF failed to deliver a minimal amount for a two-year period. No party presents countervailing evidence; nor does any party present evidence that past terms were inappropriate. Rather, Staff indicates that the risks associated with excusing QFs sized at 100 kW or less from default damages are *de minimis*. Consequently, we direct each utility to retain terms relating to default damages contained in previous standard contract for QFs sized at 100 kW or below. New standard contracts for QFs sized at 100 kW or below should provide for default only if a QF fails to deliver the specified minimum amount for two consecutive years. .

5. Issue Number 5.e. (Indemnity Provisions)

a. Overview

Issue Number. 5.e. queries whether indemnity provisions in Section 12.1 of PacifiCorp's filed contract should be reciprocal in application.

b. Positions

Sherman County and Simplot raised the reciprocity concern because Section 12.1 requires a QF to indemnify PacifiCorp "to and at the point of delivery," whereas PacifiCorp is required to indemnify a QF only "after the point of delivery."

PacifiCorp and Staff respond that as a QF is responsible for the delivery of power up to, and including the point of delivery, the indemnification language appropriately reflects the QF's responsibility. Staff and PacifiCorp both observe that it would not "make sense" for both the QF and utility to be responsible for actions at the Point of Delivery.

c. Resolution

The issue addressed in the original phase of UM 1129 was whether or not standard contracts should include indemnity clauses; the phrasing of such clauses was not discussed. In Order No. 05-584, we stated:

> We affirm the appropriateness of including indemnity clauses in standard contracts. No party requested that we specify the wording of such clauses, and we discern no need to do so. We direct utilities to individually draft standard contract indemnity clauses.

We, therefore, do not consider Number 5.e. to directly raise an issue of compliance. Rather, we interpret Issue Number 5.e. as inquiring whether Section 12.1 of PacifiCorp's filed standard contract is in the spirit of Order No. 05-584.

The purpose of an indemnity clause is to protect a party that contracts with another party from assuming any liability for actions, by the other party, that are unrelated to the contract. Sherman County and Simplot provide insufficient evidence that Section 12.1 of PacifiCorp's filed standard contract inadequately protects QFs. As written, we conclude that the clause is consistent with the responsibility outlined in PacifiCorp's filed standard contract for delivery of power by the QF and PacifiCorp's possession of such power. Consequently, we do not deem Section 12.1 of PacifiCorp's filed standard contract to be inconsistent, or noncompliant, in any way with Order No. 05-584.

D. ISSUE NUMBER 6: TARIFFS

1. Overview

In Order No. 05-584, we stated that we expected tariffs to contain full details about the process to enter into a standard contract. Issue Number 6 addresses whether the utilities' filed tariffs regarding QF contracts should provide more detailed information about the contracting process.

2. Positions

Staff takes the position that tariffs should contain the following information:

(a) The number of days by which a utility will provide a draft power purchase agreement to the QF after receipt of all required QF information;
(b) The number of days by which a utility will respond to any written comments and proposals that a QF provides in response to draft agreements;
(c) The number of days, after a utility's receipt of any additional or clarifying project information, by which the utility will provide a final draft agreement to the QF; and
(d) The number of days by which a QF will receive a final, executable contract after agreement on all terms and conditions are reached.

Staff also recommends that tariffs should provide a list of specific project information required to inter into a power purchase agreement. Staff further asserts, with regard to negotiated contracts, that all Federal Energy Regulatory Commission (FERC) adjustment factors set forth in 18 C.F.R. § 292.304(e), should be set forth in tariffs.

Staff conducted a review of each tariff, finding that no tariff included all of the desired information. Staff and PacifiCorp ultimately agreed that PacifiCorp's tariffs should outline all steps, and specify a 15-business day timeline for each step.

Based on review of the utilities' filed tariffs, Staff concludes that: 1) PacifiCorp Schedule 37 provides a 15-business day timeline for (a) and a 14-calendar day timeline for (b), but fails to provide specific timelines for items (c) and (d); 2) PGE Schedule 201 does not provide any of the suggested information, other than information about how to contact PGE; and 3) Idaho Power Schedule 85 only provides minimal information abut contacting Idaho Power to obtain power purchase information and the FERC adjustment factors. Staff recommends that the Commission direct all three utilities to revise their tariffs to indicate a 15-business day timeline for steps (a) through (d). Staff also recommends that PGE and Idaho Power be directed to set forth the FERC adjustment factors in tariffs.

PacifiCorp agrees with the recommended timelines, so long as a tariff may indicate that the timelines will be extended if the QF seeks variations in the contract provisions, or has not provided all required information. Although PGE does not object to the recommended timelines, PGE asserts that providing all of the information recommended by Staff in tariffs may be confusing to persons consulting the tariffs.

3. Resolution

In Order No. 05-584, we indicated that tariffs should provide information about standard contracts, and the process to enter into a standard contract, that would not be contained in filed standard contracts. We stated:

> We expect tariffs to contain information including the following: (1) full details about the process to enter into a standard contract or a negotiated contract, including instructions to contact a utility for further information; (2) specification of avoided costs, including how they are calculated; (3) details about how non-standard contracts are negotiated, including a statement that the starting point for negotiation of prices is standard avoided costs, and that standard avoided costs may be modified to address specific factors mandated by federal and state law; (4) delineation of these factors; and (5) general information about pricing options.

To reiterate, we intended tariffs to provide *detailed* information about the process that a QF must undertake to enter into a power purchase agreement. Consequently, we find Staff's recommendations about the information that should be included in tariffs to be appropriate, and direct all three utilities to modify tariffs to include such information.

E. ISSUE NUMBER 7: VERIFICATION

1. Overview

Issue No. 7 asks whether the following proposed contract terms comply with the intent of Order No. 05-584: 1) a requirement that QFs hire a licensed professional engineer to verify that the facility operates as specified; and 2) Section 1.18 of PacifiCorp's filed standard contract, and Section 1.10 of PGE's filed standard contract, providing that the licensed engineer be unaffiliated with the QF.

2. Positions

Although Sherman County and Simplot agree that it is appropriate for a licensed professional engineer to certify the operability of a QF project, they assert that the engineer need not be unaffiliated with the QF, as any certifying engineer will assume professional insurance liability for the certification.

PGE and PacifiCorp argue that a professional engineer that examines and certifies the operability of a QF project should be unaffiliated with the project. Staff finds this requirement to be reasonable.

3. Resolution

As we did not address QF certification in the first phase of this proceeding, Issue Number 7 does not directly raise an issue of compliance. Rather, we interpret Issue Number 7 as inquiring whether the clauses at issue are in the spirit of Order No. 05-584.

Again, our overriding goals in this docket are to encourage QF development, while ensuring that ratepayers are indifferent to QF power. Verification of a QF's operability before a QF contract takes effect serves the latter goal. Consequently, we find a clause in a standard contract that requires a QF to have a licensed engineer certify that the facility operates as specified to be appropriate. Moreover, we conclude that verification of a facility by an independent engineer that does not have prior knowledge of the facility before conducting the examination is reasonable. We find, therefore, that Section 1.18 of PacifiCorp's filed standard contract and Section 1.10 of PGE's filed standard contract are appropriate.

F. ISSUE NUMBER 8: INCREASED OPERATIONS—QUALIFYING FOR STANDARD CONTRACT

1. Overview

If a QF, under a standard contract, increases power output due to a facility change, such as efficiency improvements or operation at a higher power factor, Issue Number 8 asks whether the QF should be compensated for power delivered above the

facility's originally designated nameplate capacity at avoided costs rates, and if so, whether the compensation should be at avoided costs rates that were effective when the underlying contract was executed, or at avoided costs rates that are effective at the time the QF is improved. Issue Number 8 also queries whether a QF that is operating under a standard contract can permanently change its nameplate rating under the contract, in the event that facility equipment is upgraded.

2. Positions

Sherman County and Simplot contend that standard contracts should permit a QF to upgrade its original nameplate capacity, and deliver power up to the revised capacity limit, at existing contract rates, so long as the facility's total output remains at, below, or "only slightly above" 10 MW. Sherman County and Simplot assert that an existing standard contract should be modified only if a facility's nameplate capacity is upgraded well above 10 MW (to 10.5 MW, for example).

Staff takes the position that a QF that is operating under an existing standard contract should receive the contract's avoided costs rates for power delivered up to, but not over, the nameplate capacity that is specified in the contract. If QF operations or equipment are modified, resulting in a power output upgrade above the original nameplate capacity, but at, or under, 10 MW, Staff argues that the existing contract should be amended to reflect the changed nameplate capacity, and that avoided costs rates for the additional power delivered by the upgraded QF would receive the avoided costs rates in effect at the time the upgrade is reflected in the amended standard contract. If a QF is upgraded to a new nameplate capacity exceeding 10 MW (by any amount), however, Staff asserts that a new non-standard contract should be negotiated between the QF and the utility that would pay new avoided costs rates for the power delivered over 10 MW.

PGE and PacifiCorp agree with Staff's position, but to aid the administration of accounting for, and paying a QF that is upgraded above 10 MW, they propose specific pricing methodologies. Under PGE's proposed method, if a QF increases its nameplate capacity by ten percent, output from the QF would thereafter be divided, with ten percent of the total output receiving an updated avoided cost rate, and the remaining ninety percent receiving the existing contract price. PacifiCorp proposes a methodology used in other power purchase contracts whereby a new contract price is calculated for the upgraded QF that is based on the weighted average of the existing capacity and/or energy of the QF at the avoided cost rates on the effective date of the original contract, and the capacity and/or energy at the avoided cost rates in effect at the time of the upgrade or improvement. Staff considers these methodologies to be nearly identical, and views them as clarifications to Staff's proposal.

3. Resolution

In Order No. 05-584, we determined that QFs with a nameplate capacity of 10 MW, or below, should be eligible for standard contracts. Pursuant to this decision,

we intended that a QF with a nameplate capacity *over* 10 MW, regardless of how much over the 10 MW limit, would need to negotiate a non-standard contract. It was not our intent to discourage QF operators from upgrading their facilities, however.

We determine that a QF may upgrade operations and continue to receive its existing contract price for all power delivered up to 10 MW, but if the QF project is upgraded to a capacity that is above 10 MW, a new contract must be negotiated to price any power delivered over 10 MW at updated avoided cost rates. In the event that a new contract is negotiated and a new pricing scheme needs to be applied to a QF's output on a going forward basis, we direct parties to implement the methodology proposed by PGE.

In order to minimize contractual disputes, we recognize that there must be an administratively simple method for pricing power delivered by an upgraded QF. We adopt PGE's proposed methodology. Under this methodology, if a QF increases the nameplate capacity of its facility by a certain percentage above 10 MW, then on a going forward basis, that percentage of the power delivered by the QF will receive new, negotiated pricing, while the remaining percentage of output will receive pricing under the pre-existing standard contract. We believe PGE's allocation methodology is appropriate given the difficulty of precisely tracking electrical power deliveries, and we direct the utilities to revise their filed standard contracts to implement it.

G. ISSUE NUMBER 9: INSURANCE

1. Overview

As we determined in Order No. 05-584, indemnity clauses requiring one or both parties to hold each other harmless are typical in most contractual arrangements, and are appropriate in standard contracts. We declined to specify the wording of such provisions, however. We also concluded that indemnity clauses were inextricably tied to liability insurance requirements, and determined that QFs that have a nameplate capacity of 200 kW or more should carry a prudent amount of liability insurance. We anticipated that the appropriate nature and scope of liability insurance might be an issue in this second phase of the proceeding.

Parties raised two issues regarding the quality of insurer that a utility can require a QF to obtain general liability insurance from. Issue Number 9.a. addresses whether utilities could require QFs to contract for liability insurance from insurers with certain quality ratings. Specifically, the issue queries whether PacifiCorp and Idaho Power could require QFs to obtain liability insurance from insurers rated no lower than "A-" by the A.M. Best Company, and whether PGE could require QFs to carry insurance only with companies rated no less than "A" by the A.M. Best Company? Issue Number 9.b. asked in the alternative, should utilities require QFs to use insurance companies "that are typically and reasonably used for the type of generating equipment used by the Facility."

2. Positions

In response to both questions, Staff asserts that a QF should be allowed to obtain insurance from any insurance company that writes insurance coverage in the state of Oregon. Staff takes the position that it is the role of the Oregon Department of Consumer and Business Services, Insurance Division (Insurance Division), working with the National Association of Insurance Commissioners, to assess the financial soundness of insurers, license them and monitor their solvency. Staff indicates that the Insurance Division does not use the A. M. Best ratings as licensing criteria, but observes that 76 of a sample of 77 licensed insurers in Oregon are rated "A-" or better by A. M. Best. (One company was not rated at all.) Staff argues that the strength of the ratings demonstrates adequate financial regulation of insurers by the Insurance Division, and opines that the A. M. Best rankings are unnecessary. Staff also observes that the Oregon Insurance Guaranty Association (OIGA) provides a damages fund up to $300,000 to protect insured entities when an insurer goes into liquidation and is unable to pay a claim. Although the amount is less than the one million dollar general liability insurance requirement contained in the standard contracts, Staff argues that the OIGA has a strong track record, in the recent past, of covering claims, having covered 1,103 claims of twelve insurance companies that liquidated between 2003 and 2005.

Should the Commission determine that it is appropriate to require QFs to be insured by insurers with a certain rating, Staff recommends that QFs be allowed to contract with any insurer with an A. M. Best rating of "B+", a rating that indicates that an insurer is considered to be financially "Very Good (Secure)," or higher. Staff asserts that this rating adequately addresses utilities' concerns that QFs should not carry insurance from insurers considered financially "vulnerable" by A. M. Best. Staff observes that a requirement that QFs obtain insurance from an insurer with a rating of "B+" or better would eliminate only a few insurers from the eligible list of insurers, thereby minimally reducing the supply of available insurers and mitigating the risk that insurance prices would rise due to reduced supply.

Observing that Order No. 05-584 specified only that QFs carry prudent *amounts* of general liability insurance, Sherman County and Simplot argue that the range of carriers available to serve QFs should not be too restricted, and agree with Staff's recommendations.

Idaho Power counters with the assertion that insurance carried by a QF needs to be generally prudent. Given that *all* entities that contract with Idaho Power are required to carry liability insurance with insurers that maintain an "Excellent" A.M. Best rating, Idaho Power argues that QFs should have the same requirements. Idaho Power asserts that it has signed eighty-six contracts with QFs that require one million dollars of general liability insurance from insurers that maintain an "Excellent" A.M. Best rating.

Observing that the A. M. Best Company is the oldest and most widely recognized, full-service rating agency specializing in the insurance industry, PacifiCorp asserts that its ratings are based on an insurer's ability to satisfy its obligation.

PacifiCorp states that insurers rated with a "B+" or higher are considered to have a level of financial strength that is not vulnerable to unfavorable changes in the business, economic or regulatory environments. PacifiCorp asserts that it is prudent to require QFs to carry insurance considered solidly secure. Similarly, PGE argues that a requirement that a QF obtain insurance from a carrier with an "A" rating merely requires a QF to have insurance considered solidly secure.

3. Resolution

We expressly acknowledged in Order No. 05-584 that we did not have the opportunity to consider the scope of general liability insurance that could be considered prudent for QFs to carry, and invited parties to raise the issue in the second phase of the docket. With regard to standard contracts, parties raised an issue regarding the appropriate quality of insurance required in this compliance phase. The issue is clearly not a question of compliance, however. Rather, it is a new question to be evaluated, with regard to Order No. 05-584, in terms of the spirit of that order.

In Order No. 05-584, we lamented the lack of specific evidence about the availability of insurance to QFs. Ultimately, we were "not persuaded that the absence of past incidents requiring QFs to rely on liability insurance indicates that insurance will not be needed in the future," and stated that it would be prudent for every QF to carry liability insurance. We concluded, however, that an exception was appropriate for QFs with a design capacity of 200 kW or less, due to concerns about the availability of insurance to QFs of that size.

In this phase of the docket, we are again confronted with arguments that the availability of affordable insurance might be limited if the utilities are allowed to impose a requirement that QFs obtain insurance only from insurers with a certain rating from the A. M. Best Company, a rating agency for the insurance industry. Again, as well, parties did not provide us with empirical evidence regarding the effect on the supply of reasonably priced insurance that rating requirements will have.

Staff argues that the A. M. Best Company rankings are unnecessary due to regulation of the insurance industry by OIGA. We find, however, that we have insufficient evidence regarding the role of insurance licensing by the State of Oregon versus financial assessment rankings by independent parties to conclude that the latter has no value. Instead, we observe that although Staff points out that the OIGA has covered a significant number of claims made by persons insured by insurers that went into liquidation, it is notable that twelve insurers have gone into liquidation in a period of only three years. Based on this fact, we conclude that the utilities are correct to be concerned about *some* risk regarding the financial security of insurers. Consequently, we deem it reasonable to require that any insurer providing general liability insurance to a QF be assessed as financially "secure" pursuant to industry standards. Consequently, we conclude that it is reasonable for the filed standard contracts to require that a QF obtain general liability insurance from an insurer with a rating of "B+," or higher, from the

A. M. Best Company. We direct each utility to revise its filed standard contract to so provide.

H. ISSUE NUMBER 12: OFF-SYSTEM STANDARD CONTRACTS

1. Overview

Issue Number 12 queries whether each utility should be required to file a standard contract that addresses issues related to the utility's purchase of power from a QF located out of the utility's service area, such that the wheeling of power over a third party's transmission facilities will be necessary.

2. Resolution

Issue number 12 was mooted when all three utilities filed standard contracts applicable to off-system QFs. Issues regarding these off-system filed standard contracts were moved to a separate phase of this docket.

I. ISSUE NUMBER 13: NET OUTPUT

1. Overview

Question No. 13 queries whether a QF can serve some, or all, of its own load, that is not "plant parasitic" to determine "net output." The question specifically inquires whether it is reasonable and appropriate for a QF to deduct load other than station use from its net output.

2. Positions

Sherman County and Simplot assert that a QF should be able to choose to serve some, or all, of non-parasitic, native load in order to determine net output. Both parties object to Section 1.24 of PacifiCorp's filed standard contract, and Section 1.14 of PGE's filed standard contract, arguing that PURPA requires a utility to purchase all net output, without deductions for any reason other than "station use."

Staff indicates that it requested that standard contracts provide that a QF may deduct from net output any on-site load that the QF will serve. Staff concludes that the filed standard contracts adequately address this issue. Staff asserts that the issues raised by Sherman County and Simplot are unfounded.

3. Resolution

In Order No. 05-584, we discussed the concept of a "net output" sale in terms of a simultaneous purchase and sale. There, we noted that FERC precedent firmly

establishes that a QF may sell its "net output," and no more, under PURPA.[10] We observed that the "net output" of a QF facility is defined by FERC as a facility's "send out after subtraction of the power used to operate auxiliary equipment in the facility necessary for power generation (such as pumps, blowers, fuel preparation machinery, exciters) and for other essential electricity uses in the facility from the gross generator output."[11] We concluded that pursuant to FERC precedent, a QF may sell the full net output of its facility. We indicated that a QF may negotiate a net output sale, but acknowledged that standard contracts, as then filed, only provided for a "surplus sale." Due to the lack of discussion by parties whether the avoided cost calculation required modification to accurately reflect a "net output sale," we declined to order standard contracts to provide for a "simultaneous purchase and sale option." Issue Number 13 is, therefore, not a question of compliance.

Staff, however, requested of the utilities that standard contracts provide for a QF to deduct, from net output, any on-site load that the QF will serve. Staff is satisfied that the filed standard contracts contain such provisions.

Although Sherman County and Simplot are concerned that the filed standard contracts improperly determine net output, we find that these concerns are inadequately developed. As the questions raised under this issue are not compliance related, in addition to being inadequately developed, we decline to further address them.

J. ISSUE NUMBER 14: MODIFYING A STANDARD CONTRACT

1. Overview

In Order No. 05-584, responding to a recommendation by certain parties that standard contracts allow some pricing flexibility, we indicated that the terms of a *standard* contract should not be subject to negotiation. Issue No. 14 queries whether a contract that results from negotiation between a utility and a QF that is eligible to enter into a standard contract, and which contains modifications to standard contract terms, is still considered a "PURPA contract."

2. Positions

Staff observes that a QF that is 10 MW or smaller is *eligible* to receive a standard contract, but is not prohibited from negotiating an alternate contract that would still be considered a contract entered into under PURPA. Staff states in a prudence review, the Commission would review whether the negotiated contract terms provide reasonably similar protection for ratepayers, as compared to standard contract terms.

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[10] *See Occidental Geothermal, Inc.*, 17 F.E.R.C. ¶ 61,231 (1981); *Power Developers, Inc.*, 32 F.E.R.C. ¶ 61,101 (1985); and *Penntech Papers, Inc.*, 48 F.E.R.C. ¶ 61,120 (1989).

[11] *Occidental Geothermal, Inc.*, 17 F.E.R.C. ¶ 61, 444 (1981).

ODOE takes the position that any QF and utility should be able to negotiate a mutually agreeable contact, including a modified standard contract. ODOE observes that since a utility is obligated to purchase power offered by a QF, any power purchase contract entered into between a QF and a utility enjoys any protections that may be provided by PURPA.

3. Resolution

As we discussed in Order No. 05-584, pursuant to PURPA and its implementing regulations, utilities are required to offer to purchase electric energy from QFs.[12] We interpret the term, "PURPA contract," as used in this proceeding, to be a contract that is entered into pursuant to PURPA. Consequently, we consider any power purchase contract that is entered into between a utility and a QF, whether it is a standard or negotiated contract, to be a "PURPA contract."

K. ISSUE NUMBERS 15 & 16

1. Overview

In Order No. 05-584, we addressed the forecasting of natural gas prices for the purpose of calculating avoided costs. After careful consideration of all the positions, we determined that the natural gas forecasts used in a utility's avoided cost filing should be consistent with those used by the utility to make resource decisions. Consequently, we declined to adopt a single forecast methodology, leaving it to each utility to specify, in its avoided cost filing, the hub, or the combination of hubs, and the natural gas price information, used to forecast natural gas market prices.

We reminded parties, however, that a utility's natural gas forecasts could be examined and challenged during review of the utility's avoided costs filing. Indeed, we encouraged parties to seek suspension of an avoided cost filing when necessary to address concerns about natural gas forecasts, or any other aspect of a utility's filing. We also observed that Staff, or any other party, could introduce, during a future investigation of a utility's avoided costs filing, an independent natural gas forecast for comparison purposes.

Staff and parties used the suspension of the utilities' avoided cost filings in this compliance proceeding to raise questions about the natural gas forecasts of PGE and PacifiCorp. Issue Number 15 generally questions whether the forecasts are reasonable. Issue Number 16 queries whether the forecasts of PGE and PacifiCorp are based on the appropriate hubs. We will address these two issues collectively. Issue Number 17 also addresses the utilities' forecast of natural gas prices, but we will address that issue separately.

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[12] Order No. 05-584 at 6, citing 16 U.S.C. § 824a-3(a).

2. Parties' Positions

As Staff was unable to perform an econometric analysis of the natural gas forecasts filed by PGE and PacifiCorp, due to the reliance of the utilities on third-party forecast models for which specific inputs and assumptions are not available, Staff developed three analytical devices to examine the forecasts, with regard to: 1) how the price for natural gas changes over time; 2) how the forecast prices compare with the natural gas market at the time of the forecast; and 3) how the forecast prices compare with the natural gas market in the years before the time of the forecast.[13] Staff's first analysis assesses the forecasted future prices in terms of real dollar value, using the dollar's value in March of 2005. Staff's second analysis evaluates real price gains or losses over time by comparing deflated monthly forecast price values to the adjusted spot market price for March 31, 2005, for the applicable hubs of PGE and PacifiCorp. As Staff concluded that the methodology used to choose hubs, and the actual hub selections by PGE and PacifiCorp, were both appropriate, Staff based its second analysis on the hub selections of PGE and PacifiCorp. Staff's third analysis considers longer-term price movements for natural gas by comparing deflated forecast data with deflated historical data. Staff acknowledges, however, that the value of this analysis is limited by the lack of historical data prior to April of 2001.

After applying these three analytical constructs to the natural gas price forecasts of PGE and PacifiCorp, Staff initially concluded that PGE's forecast was unreasonable, but that PacifiCorp's forecast provided a reasonably conservative, long-term appraisal of natural gas prices. Deeming PGE's forecast prices to be unreasonably low in comparison with real prices before Staff's base period, as well as the current price for that base period, Staff called for PGE to submit a new forecast or to file additional quantitative justification for the original forecast.

In rebuttal testimony, PGE provided additional information about its forecast. Discounting recent market shocks as an indicator of future price levels, PGE emphasized the long-term nature of its forecast. Comparing its forecast to a recent forecast by the Northwest Power and Conservation Council (NWPCC)[14], PGE indicates that its levelized forecasts exceed those of the NWPCC's forecasts for a 20-year time frame. PGE also criticized Staff's analysis for the following reasons: 1) its reliance on a single spot market daily price for comparison to a 20-year forecast; 2) its use of the Kingsgate hub, which is not liquid, for a proxy for AECO; 3) its failure to analyze the entire period of PGE's forecast; and 4) its use of raw data provided by PGE's consultant, instead of data from PGE's forecast, which utilizes NYMEX values to shape the annual data provided Cambridge Energy Research Associates (CERA) into monthly prices. After PGE responded in rebuttal testimony with additional supporting information for its original forecast,[15] Staff concluded that PGE's forecast is compliant.[16]

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[13] Staff's analyses used prices adjusted, as appropriate, to overall price levels (e.g., using the Consumer Price Index (CPI)), for comparison purposes.
[14] PGE referred to the NWPCC "Medium Case," prepared in May of 2005.
[15] *See* PGE/300.

Staff also rejects the recommendations of ODOE and Sherman County/Simplot, as further discussed below, regarding revision of the natural gas price forecasts of PGE and PacifiCorp to reflect market changes since the utilities made their compliance filings. Staff argues that updating avoided costs every time there is a change in circumstances would be burdensome and potentially unfair. Staff asserts that the merits of a utility's avoided cost filing should be examined at the time of filing, with market changes since the filing being addressed at the next filing, two years later.

ODOE argues that the natural gas price forecasts for both PGE and PacifiCorp are unreasonable, due to a shift in natural gas prices since the forecasts were originally filed in July of 2005. ODOE observes that the original filings were based on March 2005 data, making the current two-year avoided cost cycle more than half-way over. As evidence of a significant shift in gas prices, ODOE states that, for the eight month period preceding the middle of the month of July of 2005, Henry Hub spot prices on the New York Mercantile Exchange (NYMEX) ranged between $6.00 and $8.00 per MMBtu, whereas since August 1, 2005, NYMEX spot prices for the same hub have ranged from $8.00 to $14.00.

ODOE also challenges the utilities' use of private consultant forecasts, instead of NYMEX future prices. ODOE compares PGE's use of natural gas price forecasts for 2009 and 2010 at the Sumas hub, of $4.27 and $3.67 per MMBtu, respectively, to annual, average Henry Hub forward prices for the same years on the NYMEX, as of November 14, 2005, of $7.54, and $7.01, respectively. ODOE calculates a negative basis differential for Sumas of $3.00 and $3.31, respectively, which it calls "ridiculous." ODOE further states: "Although large basis differentials can occur for a single month or even a year due to specific regional problems, such as the recent hurricanes, no reputable forecast would predict long-run Sumas-Henry Hub basis differential this large."[17] Although ODOE acknowledges that PacifiCorp's forecasts "are closer to reality," ODOE indicates that they also "diverge from NYMEX prices" in a "significant" way.[18]

ODOE asserts that the Commission authorized parties, in Order No. 05-584, to request review of avoided cost rates on an unscheduled basis and offers criteria for when it is appropriate to do so. ODOE argues that after considering the

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[16] *See* Staff's Post-Hearing Brief at 22 ("While Mr. Chriss did not have an opportunity to file responsive testimony to PGE/300, he did review and analyze it, of course. Upon review of PGE's additional supporting information, Staff finds PGE's forecast while somewhat on the low-side, to be acceptable. Over the life of a long-term contract, a QF is not harmed by selling to PGE over PacifiCorp (and PacifiCorp's natural gas price forecast is reasonable).")

[17] ODOE/7, Carver/2 at 15-18. ODOE provides the following third-party negative basis differential calculation for Sumas as comparison: "The Northwest Power and [C]onservation Council (NWPCC) had negative basis differentials for Sumas that ranged from $0.51 to $0.69 for the Medium and High gas cases of its 5th Power Plan published in May of this year." *Id.* at 18-21.

[18] ODOE/7, Carver/3 at 12, 20-22.

following criteria, the Commission should determine that it is appropriate to revisit avoided costs:

1. Is the percentage change in spot prices large and persistent?
2. Do futures or forward markets indicate the price change is likely to persist for years?
3. How expensive or burdensome is it to update avoided costs?
4. Has sufficient time elapsed since the last avoided costs filing to judge the recent trends? [Also it is procedurally impractical to update avoided costs every few of [sic] months, so at least a few month[s] [sic] need to elapse, as is true now regarding the July filings.][19]

Based on the above criteria, ODOE calls for the Commission to direct the utilities to immediately file new avoided cost calculations using NYMEX forward curves, "updated at the latest available date with Commission specified basis differentials for regional gas hubs versus the Henry Hub," and escalated at nominal inflation rates. Specifically, ODOE recommends that the Commission direct the utilities to use the High Case basis differentials from the NWPCC Fifth Power Plan, which would set the Sumas, Opal and AECO hub prices below the Henry Hub by $0.69, $0.94 and $0.78, respectively. ODOE supports the High Case differentials, because experience has already made it "clear that the NWPCC Medium case price forecast and the associated differentials are inconsistent with what we see in the future markets." As the NYMEX does not provide forward prices beyond the year 2010, ODOE recommends that forecast gas prices for subsequent years be set at a flat real price of $7.00 per MMBtu.

Staff does not support ODOE's proposal, pointing to three specific problems with ODOE's methodology: 1) exclusive reliance on the NYMEX when it is not liquid enough on a long term basis to provide reliable price data; 2) using basis values from the Fifth Power Plan (May 2005) by the NWPCC, escalated by inflation—doing so ignores the seasonal variation of the basis for each hub combination and is static; and 3) using a flat real price of $7/MMBtu after 2011. PacifiCorp and PGE reiterate Staff's concerns.

Sherman County and Simplot also urge the Commission to direct the utilities to revise avoided cost rates by updating natural gas forecasts. Sherman County and Simplot ask, "how old is too old?"[20] Sherman County and Simplot argue that the utilities' forecasts are too old, as they do not reflect current market realities.

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[19] Oregon Department of Energy's Post-Hearing Brief (Phase 1 Compliance), p. 3, citing, generally, ODOE 7/Carver 1-7.

[20] *See* Post Hearing Brief of the J. R. Simplot Company and the Sherman County Court, p. 6.

ICNU concurs with the positions of ODOE, Sherman County and Simplot. ICNU observes that Staff's position that the merits of a utility's avoided costs filings should be examined in context of the time of filing is inapposite with regard to setting avoided cost rates now, as the Commission's review of the utilities' filed avoided cost rates has been so protracted. ICNU also argues that there is precedent, pointing to the resource valuation mechanisms of PGE and PacifiCorp, for setting power cost-related rates based on updates at the end of a case.

Taking issue with Staff's evaluation methodologies for various reasons, and comparing PGE's forecast with a forecast by the NWPCC, PGE argues that its natural gas forecast is both compliant with Order No. 05-584, and is reasonable. PGE also asserts that the positions of ODOE, Sherman County and Simplot do not comply with Order No. 05-584, as they continue to promote the adoption of a singular methodology for forecasting natural gas prices, a suggestion the Commission expressly rejected. In any case, PGE also observes that the positions of ODOE, Sherman County and Simplot are outside the realm of compliance and are not properly addressed in this phase of the docket.

Rebutting specific objections by ODOE, PacifiCorp also argues that its natural gas forecast is both compliant with Order No. 05-584, and reasonable. With regard to the shift in natural gas prices since the time PacifiCorp forecasted prices, PacifiCorp asserts that updating the forecast now is unworkable. PacifiCorp observes that due to the process to file and review natural gas price forecasts, forecasts will always be outdated.

3. Resolution

Parties raise two general objections to the natural gas forecasts of PGE and PacifiCorp: 1) ODOE challenges the utilities' use of private consultant forecasts, recommending, instead, that forecasts be based on NYMEX future prices; and 2) ODOE, ICNU, Sherman County and Simplot express concern that market conditions have changed too much since the utilities' forecasts were prepared, making the forecasts "stale" and unrepresentative of current prices. Although a question is also raised about whether the forecasts are based on appropriate natural gas hubs, we do not discern any specific objections to either forecast's hub orientation, and we with Staff's conclusion that the hubs used are appropriate.

ODOE asks us to direct PGE and PacifiCorp to file new forecasts using NYMEX forward curves and specific basis differentials. Although we considered ODOE's proposed methodology, we agree with Staff that it has inherent shortcomings, as it attempts to forecast natural gas prices on a long-term basis, despite illiquidity in the long term, and fails to account for seasonal price variations. Consequently, we do not adopt it.

With regard to arguments that the utilities' natural gas forecasts are stale, we acknowledge that significant time has passed since the forecasts were originally

prepared, but we observe that the passage of time, in and of itself, does not necessarily invalidate a forecast. If it did, the lengthy process to review avoided cost filings would lead to rejection of any forecast. We decline to deem the utilities' natural gas forecasts outdated, and remind parties that avoided costs will be recalculated, on schedule.

We are concerned about evidence indicating that PGE's forecast is "low." However, based on the company's analysis showing that its natural gas price forecast is higher than the comparable forecast by the NWPCC, as well as Staff's conclusion that PGE's forecast is "acceptable," we decline to direct PGE to prepare a new forecast at this time.

With regard to PacifiCorp's forecast, we do not discern any remaining objections. In any case, based on Staff's analysis that PacifiCorp's forecast provides a reasonably conservative, long-term appraisal of natural gas prices, we decline to direct PacifiCorp to prepare a new forecast.

Given the controversy in this proceeding regarding the utilities' natural gas forecasts, we have considered whether there should be another forum, other than in contested proceedings to review utilities' IRP or avoided cost filings, for ongoing discussion among interested persons about forecasting methodologies. We believe it would be beneficial for interested parties to periodically meet to discuss various forecasts, forecasting methods, forecasting services and other related topics. For example, we would like interested persons to initially address what criteria should be used to determine whether a particular forecast is reasonable. Consequently, we direct Staff to organize annual meetings to discuss long-term natural gas forecasts, with the first meeting to take place within 90 days of the date of this order. Beginning in 2007, we direct Staff to coordinate this discussion with the Natural Gas Outlook, scheduled in the early summer of every year.

L. ISSUE NUMBER 17: FORWARD PRICE PROJECTIONS

1. Overview

Issue Number 17 asks whether the forward price projection used by each utility to determine on-peak and off-peak avoided costs during their respective projected resource sufficiency periods is reasonable.

2. Positions

To price QF capacity based on forward market prices, PGE used the on- and off-peak forecasts for the Mid-Columbia (Mid-C) hub on the day of July 6, 2005. Staff evaluated the reasonableness of PGE's use of these forecasts in two ways: 1) Staff evaluated whether PGE's forward price projections were internally valid by analyzing whether prices on the forecast date were uncharacteristic of the range of prices two weeks before and after the forecast date; 2) Staff evaluated the external validity of PGE's

forward price projections by analyzing whether they were consistent with available market price reports. Based on these two analyses, Staff concludes that PGE's forward price projections are reasonable.

PacifiCorp used on- and off-peak forecasts for the Mid-C, California-Oregon Border (COB) and Palo Verde (PV) hubs on March 31, 2005, the day of its most recent Official Forecast, to derive a forward price curve representing a mix of the three hubs. Staff applied the same three analyses used to evaluate PGE's forward price projections to conclude that PacifiCorp's forward price projections are reasonable.

ODOE agrees that the forward price projections of PGE and PacifiCorp were reasonable when they were filed, but now calls for them to be updated and refiled. Sherman County and Simplot also argue that forecasts of initially declining natural gas prices do not reflect current market realities and should be revised.

Pointing to the Commission's direction, in Order No. 05-584, that all three utilities offer three pricing options, including the Gas Market Method, ICNU observes that only one method, the Fixed Price Method, is effectively offered during the resource sufficiency period of PGE and PacifiCorp. ICNU asserts that QFs should have the option of receiving gas market indexed rates during both the resource deficiency and sufficiency periods of PacifiCorp. ICNU proposes a specific methodology for doing so, but admits that further refinement of its methodology may be needed.

Staff acknowledged that ICNU's proposal may have merit, at least conceptually, but advises that refining the valuation of the capacity portion of avoided cost rates requires additional investigation beyond the scope of this compliance proceeding.

3. Resolution

ICNU's proposal for providing QFs with gas market index pricing during both a utility's deficiency and sufficiency periods is admittedly new and not fully developed. Clearly it is outside the realm of compliance. For these reasons, we decline to further address it. We advise ICNU to informally work with Staff, and other interested parties, to further develop the methodology. At a later time, ICNU may request that we open a proceeding, whether another phase of this docket or a new docket, to further address the methodology.

M. ISSUE NUMBER 18: DETERMINATION OF RESOURCE POSITION

1. Overview

Issue Number 18 raises numerous questions regarding the determination of a utility's resource position, as follows:

a. How are the periods defined?

b. What loads were used to compute the period?
c. Are the load forecasts recent and accurate?
d. Can a utility that is chronically short on capacity and continuously building capacity be considered sufficient?
e. Should capacity forecasts impact the sufficiency/deficiency periods?
f. *Question Withdrawn*
g. Is it appropriate to include short-term firm purchases in baseload capacity when calculating resource sufficiency?
h. Is it appropriate that PacifiCorp determines the resource sufficiency period for its avoided costs filing in a different manner than its resource needs in the Integrated Resource Planning process?
i. Is it appropriate that PacifiCorp's compliance filing uses CY 2010 as its deficit year for determining avoided costs when the filing shows a deficit of 561 MW in August 2005, growing to a 1,804 MW deficit in July 2009?
j. Issues related to how the utilities should forecast QF capacity in determining when the utility will be resource sufficient or resource deficient for the purposes of avoided cost calculations.

Rather than address these issues one by one, Staff and parties reviewed the resource position analyses of PacifiCorp and PGE with these questions in mind. We do the same.

2. Positions

PacifiCorp deems its system resource deficient when, on an annual basis, the forecast shows insufficient resources to meet both the annual average system energy requirement and the highest monthly capacity requirement of the year. Using the results of an April 2005 forecast of future monthly load and resource balances, and based on the highest monthly system peak load in July 2007, PacifiCorp forecasts a capacity deficit of 864 megawatts (MW) as of July 2006, growing to 2,406 MW by July 2010. On an annual energy basis, PacifiCorp forecasts that its system will experience its first energy deficit of 315 MWa in 2010. Based on this analysis, PacifiCorp concluded that it is resource sufficient through 2009. Consequently, PacifiCorp used forward market prices to set avoided cost for the period of 2005 though 2009, and used the fully allocated costs of a natural gas fueled combined cycle combustion turbine (CCCT) to set avoided costs for 2010 through 2025.

Staff considers PacifiCorp's determination of its sufficiency period to be appropriate, but recommends changes for future avoided cost filings. Observing that a natural gas-fired CCCT, the avoided resource proxy designated in Order No. 05-584, is a base load resource, Staff asserts that it is appropriate to determine the resource sufficiency period based on annual average energy use, together with highest monthly capacity requirements. Staff reasons that a utility would not be likely to acquire a base load resource until it forecasts both a significant annual energy deficit and a monthly capacity deficit in the same year. Staff also considers it appropriate for PacifiCorp to assess resource sufficiency based on information available at the time of its avoided costs filing. Moreover, Staff considers it appropriate that PacifiCorp included the energy and

capacity contributions of short-term, firm contract commitments entered into prior to the avoided costs filing. According to PacifiCorp, such "front office transactions" contribute the following: 1) 225 MWa of energy and 575 MW of capacity in July of 2006; 2) 225 MWa of energy and 200 MW of capacity in July of 2007; and 3) 14 MWa of energy and 100 MW of capacity in July of 2009. Staff reasons that these transactions reflect routine and reasonable transactions used to delay large, long-term acquisitions. Staff indicates, however, that PacifiCorp likely understated short-term, firm contract commitments in its determination of its sufficiency period. Staff points to PacifiCorp's 2004 Integrated Resource Plan (IRP) which forecasts transactions providing 550MW of capacity in 2007. Consequently, Staff recommends that the Commission direct PacifiCorp to include these 2004 IRP targets in its sufficiency period analysis.

Although Staff observes that there is no material effect on PacifiCorp's determination of its resource sufficiency period for this avoided costs filing, Staff advises that it would be more appropriate, in the future, for PacifiCorp to determine its capacity position based on a forecast of the month of the year that its system will experience the largest capacity deficit, rather than a forecast of the capacity deficit when its system is forecast to experience the highest peak load.

ICNU, Sherman County and Simplot assert that PacifiCorp should be considered resource deficient *now*, for two primary reasons: 1) PacifiCorp is resource deficient for summer peak (as of 2005), which is more significant than its winter peak; and 2) PacifiCorp is currently building new capacity, acquiring new resources and engaging in substantial short-term purchases. If PacifiCorp's available resources exceed summer peak load requirements in any given year, ICNU argues that PacifiCorp should be considered load sufficient. Sherman County and Simplot recommend that a utility resource position be determined based on a utility's forecasted trajectory of load, with a utility being considered resource sufficient only if utility load is actually decreasing. If a utility is adding resources in any form, they argue that utility load is increasing. Sherman County and Simplot argue that Staff's approach to analyzing PacifiCorp's resource position is faulty because it looks at the utilities' future estimates of significant shortfall of capacity and energy and not at the fact that the utilities are currently acquiring and planning to acquire resources that can be deferred.

PacifiCorp responds that parties' concerns about PacifiCorp's determination of its resource sufficiency period are largely based on inaccurate, invalid or inappropriate assumptions. Consequently, PacifiCorp urges the Commission to affirm the Company's determination that its sufficiency period will end in 2010, when a CCCT is projected to be added to the Company's resources. PacifiCorp asserts that this projection is consistent with the Company's 2004 IRP, which initially assumed that a new CCCT would be added in 2009, although an update indicates that a CCCT is now expected to be added in 2012. With regard to current construction of new baseload resources, PacifiCorp asserts that such resources have already been committed to, and cannot be avoided by, future QF purchases.

PGE estimates that its system will be resource sufficient through 2008. This determination is based on updates to the Final Action Plan of PGE's 2002 IRP which showed an energy deficit of 773 MWa and a capacity deficit of 1,910 MW in 2007. PGE calls the deficit anticipated by the Final Action plan "negligible," and asserts that when the analysis is updated for slower than anticipated load growth, PGE's system is expected to be resource sufficient through 2008.

Although Staff agrees with PGE's basic approach of updating the load and resource balances in 2002 IRP's Final Plan in order to determine PGE's sufficiency period, Staff recommends that PGE be directed by the Commission to further update its analysis in the following ways: 1) take into account known and measurable resource additions and exclude theoretical resource availability assumptions; 2) adjust expected plant availability for forced outages; 3) include 2002 IRP plans for short-term purchases of energy and capacity; and 4) exclude planning margins from load forecasts;

PGE responds that an update to its load-resource balance is unnecessary. Observing that the costs of a CCCT are not avoidable in the near term, PGE argues that the forecast of a deficiency period beginning in less than three years is reasonable. PGE expresses concern that Staff's recommendations to adjust PGE's load-resource projection divert attention from determining what costs are actually avoided. In the future, PGE recommends that determination of its load-resource balance be based on the utility's applicable integrated resource plan, with updates to reflect material changes in loads or resources.

Staff considers PGE's response inadequate, leaving the record lacking on the issues raised by Staff. For example, Staff considers the treatment of the Port Westward plant in PGE's analysis of resource sufficiency, which is under construction and not yet "used and useful," to not be fully explored. Staff observes that excluding Port Westward from PGE's load resource balance would result in a determination that PGE is resource deficient as of 2007. However, Staff also observes that if PGE's planned "front office transactions" are included in the analysis, while excluding the IRP planning reserve margin, PGE would be considered resource sufficient through 2008. Consequently, Staff gets to the same conclusion as PGE, albeit in a different manner, that PGE should be considered resource sufficient through 2008. Nevertheless, Staff indicates that PGE's failure to respond to Staff's issues is problematic, and suggests a need to further explore general issues about the determination of a utility's sufficiency.

Staff asks the Commission to provide guidance regarding a process to address issues, such as the following:

1) How should the Commission treat planned resources in future avoided cost filings?
2) Should the utilities include planned short-term purchases in the load-resource balances used to determine their resource sufficiency periods? and

3) Should the utilities exclude their IRP planning reserve margin from their load requirements?

Sherman County and Simplot argue that PGE should be considered resource deficient now, for the same reasons that they asserted PacifiCorp should be considered resource sufficient, primarily that PGE is currently acquiring resources.

3. Resolution

In Order No. 05-584, we considered, at length, issues regarding the calculation of avoided cost rates, including the topical question of whether the calculation should be differentiated to reflect a utility's resource position. We concluded that it is necessary, for the sake of accuracy, that avoided cost rates reflect a utility's resource position.[21] Consequently, we directed PacifiCorp and PGE, when in a resource deficient position, to continue to use the historical methodology, which renders rates that reflect the variable and fixed costs of a natural gas-fired CCCT. When in a resource sufficient position, however, we concluded that the calculation of avoided costs should reflect longer term resource decisions that are subject to deferral or avoidance due to QF power purchases.

We did not, however, address the issue of *when* a utility should be considered to be resource deficient. Rather, parties addressed whether the calculation of avoided costs would reflect whether a utility is considered to be resource deficient or sufficient. Consequently, we deem all of the questions raised under Issue Number 18 as beyond the scope of compliance, and decline to further address them or resolve them at this time. In the near future, however, we anticipate opening a new docket to consider these issues.

N. ISSUE NUMBER 19: PROXY UNIT CHARACTERIZATION

1. Overview

Issue No. 19 poses the following questions: 1) Are assumptions reasonable about the capacity factors of proxy CCCT units used in the avoided cost calculations of PGE and PacifiCorp; 2) Are assumptions reasonable about the costs of proxy CCCTs; 3) Should the altitude of new resource locations be considered in developing avoided costs; 4) Are the utilities' assignments of interconnection costs to the proxy plants reasonable?

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[21] We determined, however, that administrative efficiency interests justified making a continued exception for Idaho Power to use a methodology to calculate avoided costs that does not take into account the company's resource position.

2. Positions

Staff asserts the following positions: 1) Assumptions for each regarding capacity factors for proxy CCCTs for PGE and PacifiCorp are based on most recent Integrated Resource Plans (IRPs), and are reasonable; 2) Assumptions about costs for proxy CCCTs for PGE and PacifiCorp are based on most recent IRPs, and are reasonable; 3) If altitude causes a utility to incur a cost during plant development, then such costs should be factored into the calculation of avoided costs; 4) With regard to transmission and distribution costs factored into the calculation of avoided costs, Staff concluded that the transportation and distribution cost adjustments built into PacifiCorp's natural gas prices are outdated. However, Staff represents that, on a going forward basis, PacifiCorp will use the Current Creek burner-tip gas price which will more accurately reflect costs that may be avoided.

ICNU does not address any of the pre-identified issues, but rather discusses the value added to negotiation of *non-standard* contracts of documentation of assumptions underlying each utility's calculation. ICNU conducted discovery that resulted in documenting some of PacifiCorp's assumptions. ICNU requested that all utilities file such information. PacifiCorp did not further address the issue, nor did PGE, nor Idaho Power.

No other party addressed any issues regarding proxy units used to calculate avoided cost.

3. Resolution

We accept the conclusions by Staff about the assumptions the utilities made about proxy units in order to calculate avoided costs, and we find no aspect of noncompliance.

With regard to ICNU's position that value would be added to the negotiation of non-standard contracts, the issue is clearly outside the scope of a proceeding to address the compliance of *standard* contracts. Anticipating that ICNU raised the issue in the portion of this docket dedicated to developing negotiation guidelines for non-standard contracts, we defer any consideration of the issue.

O. ISSUE NUMBER 20: UNDERLYING ELEMENTS OF AVOIDED COST CALCULATIONS

1. Overview

Issue No. 20 queries whether the utilities' elements, conditions, computer model assumptions and inputs underlying the avoided cost calculations are reasonable.

2. Positions

Staff did not address the issue. However, Staff indicated that it was not necessary to address the issue because other issues provided an opportunity, as appropriate, to address particular elements of the utilities' avoided cost calculations.

No other party addressed the issue, either.

3. Resolution

Issue No. 20 appears to have been intended as a catch-all issue to raise miscellaneous questions related to avoided cost calculations. As it turned out, all such questions were addressed in other issues and Issue No. 20 was not needed. We find no reason to further address it.

P. ISSUE NUMBER 21: OWNERSHIP OF ENVIRONMENTAL ATTRIBUTES

1. Overview

Section 8.1 of Idaho Power's filed standard contract contains an explicit waiver to the environmental attributes associated with power delivered under the contract. Issue No. 21 queries whether all standard contracts should contain a similar waiver.

2. Positions

Staff states that Order No. 05-1229, entered on November 28, 2005, in Docket No. AR 495, provides that the owner of a renewable energy facility owns any non-energy attributes associated with the generation of electricity. To comply with this order, Staff asserts that all standard contracts should include a waiver of ownership to the non-energy attributes of power delivered under the contracts. Staff observes, however, that parties can negotiate alternate ownership of environmental attributes.

3. Resolution

In AR 495, we adopted rules assigning ownership of any non-energy attributes that are associated with a renewable facility to the owner of that facility, barring negotiation otherwise. We agree with Staff that standard contracts should acknowledge these rules, and direct PacifiCorp and PGE to revise their filed standard contracts. Section 8.1. of Idaho Power's filed standard contract is deemed to be appropriate. Should a utility and QF desire to negotiate alternate ownership of environmental attributes, they should negotiate a non-standard contract with the appropriate terms.

Q. ISSUE NUMBER 22: METERING ERRORS

1. Overview

Section 8.3 of PacifiCorp's filed standard contract provides that if testing, or inspection, of the metering equipment used to document QF power deliveries demonstrates errors exceeding two percent, whether the metering equipment is operating too quickly or slowly, a correction to the previous readings shall be made, and billings revised. Issue No. 22 queries whether Section 8.3 is reasonable, given that PacifiCorp designs, furnishes, installs, owns, inspects, tests, maintains and replaces all metering equipment, as provided in Section 8.1. Issue No. 22 also asks the same questions about Section 8.3 of PGE's filed standard contract.

2. Positions

As PacifiCorp is responsible for metering equipment, from designing, and installing it, to inspecting it, Sherman County and Simplot argue that it is unreasonable for the QF to pay for any metering errors that may be discovered.

PacifiCorp responds that Sherman County and Simplot incorrectly assume that PacifiCorp can prevent metering errors. PacifiCorp also contends that it would be unreasonable to require PacifiCorp to pay for power that has not been delivered. PacifiCorp also observes that Section 8.3 is consistent with similar provisions in other retail tariffs.

Staff indicates that the correction of all meter reading errors is standard industry practice, and is consistent with OAR 860-023-0015[22] and OAR 860-021-0135.[23]

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[22] OAR 860-023-0015, regarding the testing of gas and electric meters, provides: (1) All meters shall be tested before installation, or within 30 days thereafter. No meter will be placed in service or be allowed to remain in service which has an error in registration in excess of 2 percent under conditions of normal operation. These requirements may be waived by written agreement if the energy utility provides an approved random sampling technique for testing new meters. (2) New meters, repaired meters, and meters that have been removed from service shall be correct to within 2 percent fast or slow before being installed or reinstalled. (3) Each energy utility shall adopt schedules for periodic tests and repairs of meters. The length of time meters shall be allowed to remain in service before receiving periodic tests and repairs is to be determined from periodic analysis of the accuracy of meters tested. The schedules adopted shall be subject to the Commission's approval. (4) Whenever any meter is tested, the energy utility shall prepare a test record, including the information needed for identifying the meter, the reason for making the test, the reading of the meter, the result of the test, and all data taken at the time of the test in sufficiently complete form to permit the convenient checking of methods employed. The energy utility shall retain the current and immediately prior test records for all meters tested. (5) Each energy utility shall, unless specifically excluded by the Commission, provide such laboratory meter-testing equipment and other equipment and facilities as needed to make the tests required of it by these rules or other orders of the Commission. The apparatus and equipment so provided shall be subject to the Commission's approval.

[23] OAR 860-021-0135, regarding the adjustment of utility bills, provides: (1) When an underbilling or overbilling occurs, the energy or large telecommunications utility shall provide written notice to the customer detailing the circumstances, period of time, and amount of adjustment. If it can be shown that the

Staff concludes, therefore, that Section 8.3 of the filed standard contracts of PacifiCorp and PGE are reasonable.

3. Resolution

As we did not address questions regarding metering errors in the first phase of this proceeding, Issue No. 22 does not directly raise an issue of compliance. Rather, we must interpret Issue No. 22 as inquiring whether Section 8.3 of PacifiCorp's filed standard contract and Section 8.3 of PGE's filed standard contract are in the spirit of Order No. 05-584.

We conclude that Section 8.3 of PacifiCorp's filed standard contract does not violate the spirit of any directive in Order No. 05-584. Rather, the provisions appear to be consistent with standard industry practice, as well as with pertinent rules regarding metering and billing.

R. ISSUE NUMBER 24: AVOIDED COSTS IN OTHER JURISDICTIONS[24]

1. Overview

Issue Number 24 asks whether the avoided costs that PacifiCorp filed in this proceeding are consistent with filings in other jurisdictions.

2. Positions

No party presented evidence or argument on this issue.

3. Resolution

We decline to consider Issue Number 24 due to the lack of evidence presented.

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error was due to some cause and the date can be fixed, the overcharge or undercharge shall be computed back to such date. If no date can be fixed, the energy or large telecommunications utility shall refund the overcharge or rebill the undercharge for no more than six months' usage. In no event shall an overbilling or underbilling be for more than three years' usage. (2) The energy or large telecommunications utility may waive rebilling for underbillings when the costs to the utility of rebilling make it uneconomical. (3) No billing adjustment shall be required if an electric or gas meter registers less than 2 percent error under conditions of normal operation. (4) When a customer is required to repay an underbilling, the customer shall be entitled to enter into a time-payment agreement without regard to whether the customer already participates in such an agreement. If the customer and utility cannot agree upon payment terms, the Commission shall establish terms and conditions to govern the repayment obligation. The energy or large telecommunications utility shall provide written notice advising the customer of the opportunity to enter into a time-payment agreement and of the Commission's complaint process.

[24] Issue Number 23 was withdrawn.

S. ISSUE NUMBER 25: REVISED PROTOCOL

1. Overview

The Revised Protocol sets forth a methodology for allocating PacifiCorp costs, such as generation and transmission, across the multiple states in which PacifiCorp operates. In Order No. 05-021, we adopted the Revised Protocol. Idaho, Wyoming and Utah have also adopted the Revised Protocol.

Under the Revised Protocol, any costs associated with a new QF contract that are deemed to exceed the costs that PacifiCorp would incur to acquire comparable resources (defined to be resources with similar capacity factors, start-up costs and other output and operating characteristics) are assigned on a situs basis to the state approving the contract. The costs of a new QF contract that are deemed equal to, or less than, comparable resources costs are assigned on a system-wide basis.

Issue Number 25 anticipated that questions would be raised about the application of the Revised Protocol to the calculation of avoided costs. Although PacifiCorp contended that the Revised Protocol does not affect calculation of avoided costs under the methodology adopted in Order No. 05-584, the ALJ permitted Issue Number 25 to be considered, to the extent necessary, to clarify the intersection of PacifiCorp's Revised Protocol with the calculation of avoided costs.

2. Positions

Staff explains that this issue asks the Commission to determine whether the methodology used in Oregon to calculate avoided costs yields results that are consistent with costs for comparable resources. Staff argues that it does, as does ICNU. Staff emphasizes that the Commission is not being asked to equate avoided costs and comparable resources costs. ICNU also observes such a finding will not impact the Commission's review of the prudence of a specific resource acquisition.

PacifiCorp disagrees, explaining that the comparison of new QF contracts to comparable resources is a mechanism in the Revised Protocol that is designed to allow states to implement different pricing policies and methodologies for QF contracts, without shifting costs to other states. Deeming avoided costs to be equal to the cost of comparable costs would make the provision in the Revised Protocol meaningless, PacifiCorp argues. If other states follow suit, PacifiCorp asserts, no costs associated with new QF contracts would ever be assigned situs, since those states would simply deem QF prices to be equal to avoided cost.

3. Resolution

In her "Corrected Ruling," ALJ Kirkpatrick allowed parties to consider Issue No. 25 in this compliance proceeding, but only to the extent necessary to "clarify the intersection of PacifiCorp's Revised Protocol with the calculation of avoided costs."

We consider the discussion by Staff and parties to exceed this scope. Regardless, we also find the issue to be insufficiently developed. Consequently, we decline to resolve the issue. We anticipate that the issue may be more properly raised at a later time.

T. ISSUE NUMBER 30: LIENS AND ENCUMBRANCES[25]

1. Overview

Section 31.5 of PGE's filed standard contract states:

> During the Term of this Agreement, all of Seller's right, title and interest in and to the Facility shall be free and clear of all liens and encumbrances other than liens and encumbrances arising from third-party financing of the Facility.

Issue No. 30 queries whether the clause's prohibition of *all* liens or encumbrances on a QF project is too restrictive.

2. Positions

Because liens and encumbrances may be imposed on a QF in the normal course of doing business, Sherman County and Simplot argue that Section 31.5 of PGE's filed standard contract is too burdensome. They observe, for example, that construction contractors routinely apply liens prior to work.

Although PGE indicated to Staff that it is not a common business practice for contractors performing maintenance work to impose liens, Staff learned from ODOE that by law, any business, including all contractors and material suppliers, can file a statutory lien during construction or maintenance work performed on a generating facility. Based on this information, Staff recommended that PGE modify Section 31.5 to allow an exception for statutory liens. PGE agrees to do so.

3. Resolution

The parties resolved this issue in a satisfactory manner. As it agreed to do, PGE is directed to modify Section 31.5 to allow an exception for statutory liens.

[25] Issue Numbers 26 to 29 were withdrawn prior to the submission of testimony.

U. ISSUE NUMBER 31: MAINTENANCE

1. Overview

Section 6.2 of PGE's filed standard contract states, in part:

> Seller shall take all reasonable measures and exercise its best efforts to avoid unscheduled maintenance, to limit the duration of such unscheduled maintenance, and to perform unscheduled maintenance during Off-Peak hours.

Issue Number 31 queries whether it is reasonable for Section 6.2 of PGE's filed standard contract to restrict maintenance on QF facilities to off-peak hours, and requests more flexibility, by seeking to have the words, "when practicable," added to the end of the sentence, after "Off-Peak hours."

2. Positions

Sherman County and Simplot assert that a QF should have flexibility to perform maintenance when it is practicable to do so, observing that it may be expensive, for example, to perform maintenance after the primary hours of operation.

Staff deems Section 6.2 of PGE's filed standard contract to be reasonable as it is written, noting that the clause asks, but does not require, a QF to perform maintenance during off-peak hours. Staff also reports that PGE indicated that no penalties will be imposed on a QF that performs maintenance during on-peak hours.

3. Resolution

As we did not address issues regarding the on-going maintenance of a QF under contract in Order No. 05-584, Issue Number 31 does not directly raise an issue of compliance. Rather, we interpret Issue Number 31 as inquiring whether Section 6.2 of PGE's filed standard contract is in the spirit of our order.

As Staff observes, the clause merely asks a QF to take all reasonable measures and exercise its best efforts, but does not *require* the QF, to perform maintenance during off-peak hours. We find this clause to be reasonable and in keeping with our directives in Order No. 05-584 and, therefore, we do not deem it to be noncompliant.

V. ISSUE NUMBER 32: BLANKET RELEASE

1. Overview

Section 20.2 of PGE's filed standard contract provides:

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

Issue Number 32 questions the reasonableness of this provision.

2. Positions

Sherman County and Simplot indicate that they do not understand the purpose of the broad release, and express concern that the clause is far too broad to be justifiable.

In response, PGE clarifies that the primary intent of the clause is to address third-party claims, as opposed to claims by a QF, arising prior to the effective date of a standard contract. For the sake of clarity, PGE proposes to modify Section 20.2, as follows:

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

Staff asserts that the clause, as modified, is reasonable. Staff observes that PGE should not have liability for any third party claim against a QF that originates prior to any contractual relationship between PGE and a QF.

3. Resolution

As we did not address boiler-plate contract provisions, such as a release of prior claims, in Order No. 05-584, Issue Number 32 does not directly raise an issue of compliance. Rather, we interpret Issue Number 32 as inquiring whether Section 20.2 of PGE's filed standard contract are in the spirit of our order.

PGE's explanation of the purpose for Section 20.2 of its filed standard contract, and PGE's revisions to that clause, clarify that the clause's applicability is to third party claims arising prior to the contract's effectiveness. This type of release is typical in contracts, and does not violate the spirit of any directive in Order No. 05-584. We direct PGE to revise Section 20.2 of its filed standard contract as it has already agreed to.

W. ISSUE NUMBER 33: FERC LICENSING

1. Overview

Issue Number 33 queries whether it is reasonable for Section 3.3 of Idaho Power's filed standard contract to require a QF to have, at the time a standard contract is executed, a FERC license, instead of requiring that a QF warrant that it will have a FERC license prior to operation under the contract.

2. Positions

Because a QF developer may not want to expend the time and money to obtain a FERC license without first having a contractual agreement to provide power, Sherman County and Simplot assert that Idaho Power should only require that a QF warrant, at the time a standard contract is executed, that it will have a FERC license prior to the operation date of the QF.

Based on information obtained from Idaho Power and ODOE, Staff concludes that Section 3.3 of Idaho Power's filed standard contract is reasonable. ODOE indicated that in the past, in order to obtain funding by the SELP, a QF was required to have a FERC license at the time a loan closed, Staff states. Staff represents that Idaho Power explained that small hydro projects can either obtain a FERC license using a short form, or a license exemption, making the requirement that a QF have a FERC license at execution of a standard contract not onerous. No other party presented testimony on the issue.

3. Resolution

As we did not address FERC licensing in the first phase of this proceeding, Issue Number 33 does not directly raise an issue of compliance. Rather, we interpret Issue Number 33 as inquiring whether Section 3.3 of Idaho Power's filed standard contract is in the spirit of Order No. 05-584.

Pursuant to Order No. 05-584, any QF with a nameplate capacity under 10 MW can enter into a standard contract, without any negotiation, with a utility to sell power. Thus, a QF developer of a project that is planned to have a capacity of 10 MW or less should have sufficient assurance of a future contract to justify the time and expense to obtain a FERC license for the project at the start of development. Consequently, we conclude that Section 3.3 of Idaho Power's filed standard contract does not violate the spirit of Order No. 05-584, and we do not deem it to be noncompliant.

X. ISSUE NUMBER 34: RIGHTS OF WAY

1. Overview

Issue Number 34 queries whether it is reasonable for Sections 13.2 through 13.4 of Idaho Power's filed standard contract to seek to acquire rights-of-way on the site of a QF project for utility purposes that are alleged to be unrelated to the QF's operations.

2. Positions

Sherman County and Simplot argue that it is unreasonable for Idaho Power to require a QF to "donate" access over the project site, as a condition of doing business. Observing that a QF site may be leased under terms that do not allow the QF to authorize rights-of-way to third parties, Sherman County and Simplot contend that the provisions could interfere with the ability of a QF to contract with Idaho Power.

Idaho Power responds that Sherman County and Simplot have misinterpreted Sections 13.2 through 13.4 of its filed standard contract. The clauses do not seek to acquire private easements on the site of a QF's operations, Idaho Power asserts. Rather, Idaho Power explains, they relate to public utility easements associated with the QF site, such as the rights-of-way adjacent to public roads. Idaho Power indicates that the clauses' purpose, as already in use in 75 existing standard contracts with QFs, is to avoid future conflicts regarding use of the public rights-of-way that might cause Idaho Power to have to build duplicate transmission and distribution facilities.

Staff concludes that Sections 13.2 through 13.4 of Idaho Power's filed standard contract are appropriate for the same reasons articulated by Idaho Power. Sherman County and Simplot ultimately withdrew original comments, leading Staff to conclude the issue is resolved.

3. Resolution

As we did not address the rights-of-way provisions in standard contracts in the first phase of this proceeding, Issue No. 34 does not directly raise an issue of compliance. Rather, we interpret Issue No. 34 as inquiring whether Sections 13.2 through 13.4 of Idaho Power's filed standard contract are in the spirit of Order No. 05-584.

It seems that Idaho Power's clarification that Sections 13.2 through 13.4 of its filed standard contract pertain to existing, public rights-of-way mitigated the concerns of Sherman County and Simplot, thereby mooting the issue. In any case, we conclude that Sections 13.2 through 13.4 of Idaho Power's filed standard contract do not violate the spirit of any directive in Order No. 05-584 and, therefore, we find them to be compliant.

Y. ISSUE NUMBER 36: CAP ON DAMAGES

1. Overview

In Order No. 05-584, we encouraged parties to further consider a cap on default losses in the second phase of this docket. In order to make standard contracts available sooner, Staff and parties took up the issue, as applied to standard contracts, in this compliance phase of the docket. Consequently, Issue Number 36 addresses whether there should be a cap, for standard contracts, on the amount of default losses that can be recouped by a utility, by reducing future payments to a QF, in the event that a QF defaults due to under-deliveries of power, or a failure to start operations on-time due to construction delays.

2. Positions

To facilitate QF funding, ODOE and Staff assert that the scope of damages that may be assessed on a QF, under a standard contract, for under-deliveries, must be known upfront. ODOE represents that the SELP can finance small QF projects, which are likely to have minimal financial reserves, only if the project obtains a power purchase contract with limited risk of disruptions to the project's revenue stream. Consequently, both ODOE and Staff recommend that a cap be placed on contract damages that may be imposed, under a standard contract, in the event a QF defaults.

Staff initially proposed to cap default losses at 110% of forward market prices at contract execution. Staff ultimately rejected its original proposal, finding it too risky with regard to extreme default events. Staff revised its position to propose the following methodology to cap damages: cap default losses for standard contracts at 100% of the QF contract price multiplied by the amount of energy the QF fails to deliver, based on its minimum delivery obligation for the year in which the event of default occurs. Based on analysis of different cap methodologies, Staff concludes that this approach provides enough certainty about damages to facilitate financing, while posing minimal risk to ratepayers. Staff determined that a utility would not fully recover default losses under its proposed methodology in extreme circumstances only, such as default by a QF on all deliveries in a year, during a period of very high market prices—e.g., at $250 per MWh (the highest price allowed by FERC).

ODOE originally proposed the methodology now recommended by Staff, but asserted that the methodology should be combined with ODOE's recommendation, with regard to Issue Nos. 5.b.i., 5.b.ii. and 5.b.iv., that minimum delivery requirements be based on specific capacity factors for each type of QF technology. Should the Commission not adopt ODOE's recommendation regarding minimum delivery requirements, however, ODOE urges the Commission to adopt Staff's original proposal, to cap default losses at 110% of forward market prices at contract execution.

With regard to default losses due to construction delays, Staff recommends that a cap, using its final proposed methodology for caps on default losses

due to under-deliveries, be applied, but advises that there should be two differences in implementation: 1) assuming that all three utilities determine minimum delivery obligations on an annual basis (because the Commission directs Idaho Power to do so), Staff advises that the utilities should pro-rate a QF's annual delivery requirement to account for operational delay; and 2) no damages should accrue if the utility expects to be in a resource sufficient position on the operational start date, in the QF contract.

All three utilities oppose any cap on default losses related to a delay in QF operations or under-deliveries by a QF. The utilities are primarily concerned that a cap will shift contract risk from the defaulting QF to utilities and their ratepayers. They argue that all costs associated with a QF's default should be borne by the QF, not the utility and its customers.

If the Commission concludes that a cap is necessary, however, Idaho Power suggests an alternative methodology, that would impose a cap equal to the maximum of default losses that a utility could incur, and that a QF could feasibly repay over the remaining term of the QF's contract, or fifteen years, whichever is longer.

Staff worries that such a cap would be prone to disputes regarding what amount a QF could pay over the relative time period. Staff also observes that such a cap would fail to fulfill a cap's primary purpose—i.e., providing certainty regarding the amount of total damages that could be imposed.

PGE also proposes an alternative cap methodology that would impose a cap equal to 100% of the cost of replacement power, based on the forward market price curve, or the Mid-C index, as applicable at the time of the default.

3. Resolution

In Order No. 05-584, we lamented the lack of empirical evidence presented regarding the risks associated with QF default. In this phase of UM 1129, however, we are presented with empirical evidence that it is unlikely, except in extreme circumstances (such as the effective termination of a standard contract by a QF during a market crisis), that utilities and their ratepayers will need to cover a QF's default losses. We are also presented with testimony that the SELP, a primary source of funding for QFs with capacity ratings of 10 MW or less, cannot fund a QF unless a cap on potential default losses is instituted.

As we have already reiterated, our intent is to facilitate the development of QFs of all sizes, while keeping ratepayers indifferent to the development of QF power, versus other power sources. Given evidence that QFs with capacity ratings of 10 MW or less may need funding by the SELP in order to have any opportunity to develop, and empirical evidence that ratepayers are unlikely to be harmed by QF defaults except in extreme market circumstances when ratepayers would be subject to numerous risks from all types of power sources, we conclude that capping a QF's default losses, as proposed by Staff, at 100% of the QF contract price multiplied by the amount of the energy the QF

failed to deliver in the previous year, based on its annual minimum delivery obligation, to be reasonable. We direct the utilities to revise filed standard contracts to insert a clause that implements the cap.

We are also persuaded that a cap, using the methodology adopted to cap general default losses, should be placed on default losses incurred due to construction delays, with one modification proposed by Staff: that a QF's annual delivery requirement should be prorated to account for operational delay. We decline to adopt Staff's other proposed modification, that no damages should accrue if the utility is resource sufficient on the operational start date. As we already discussed , a QF's operational delay when a utility is resource sufficient may harm a utility and its ratepayers. We direct the utilities to revise filed standard contracts accordingly.

ORDER

IT IS ORDERED that:

1. Within thirty days of the effective date of this order, each electric utility shall file by application, and serve upon all parties to this proceeding, one or more revised standard contract forms that set forth standard rates, terms and conditions that are consistent with the policy decisions made in this order.

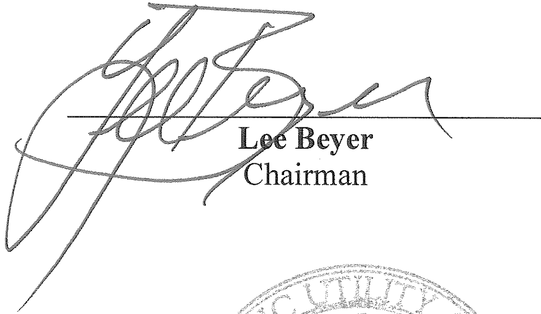
2. The standard contract form shall become effective 30 days after the date of filing, unless otherwise suspended by the Commission. Prior to effectiveness, the standard contract forms shall be considered initial offers.

3. Any QF or electric utility which signs an initial offer may not modify such offer until the term of the resulting contract expires. Any later modifications to a standard contract form will be prospective only, and will not alter the terms of the initial offer.

4. To the extent necessary, each electric utility shall also file, with its revised standard contract forms, revised tariffs that implement the resolutions made in this order.

5. Tariffs shall become effective 30 days after the date of filing, unless otherwise suspended by the Commission.

Made, entered, and effective SEP 20 2006.



Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.