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December 10, 2015

VIA ELECTRONIC

PUC Filing Center
Public Utility Commission of Oregon
PO Box 1088
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Re: UM 1725 – In the Matter of IDAHO POWER COMPANY Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term

Attention Filing Center:

Attached for filing is Idaho Power Company's Post-Hearing Brief.

Please contact this office with any questions.

Very truly yours,

Sharon Cooper

Sharon Cooper
Legal Assistant

Attachment

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1725

In the Matter of IDAHO POWER COMPANY Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Charge, and for Change in Resource Sufficiency Determination.	**IDAHO POWER COMPANY'S POST-HEARING BRIEF**

I. INTRODUCTION

Pursuant to the October 5, 2015, Prehearing Conference Memorandum issued by Administrative Law Judge (ALJ) Allan J. Arlow, Idaho Power Company (Idaho Power or Company) submits this Post-Hearing Brief to the Public Utility Commission of Oregon (Commission). This brief responds to the Prehearing Briefs filed by Staff, the Renewable Energy Coalition (Coalition), the Community Renewable Energy Coalition (CREA), and Renewable Northwest and NW Energy Coalition (RN and NWEC). Idaho Power has presented substantial evidence and persuasive legal and policy arguments supporting each of its three requests in this case. Based on the evidentiary record and legal briefing, the Commission should grant the following relief:

- Lower the eligibility cap for standard contracts to 100 kW for wind and solar Qualifying Facilities (QFs) under the Public Utility Regulatory Policies Act (PURPA).
- Reduce the contract term to two years for all negotiated QF contracts (*i.e.*, contracts with all QFs that are ineligible for standard contracts).

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- Update the Company's resource sufficiency period to 2021 to reflect the addition of significant demand response resources.

The Company's requests are intended to remedy significant deficiencies in the Commission's existing PURPA implementation *as it is applied to Idaho Power under today's circumstances*. As the testimony establishes, the pace and volume of QF development on the Company's system has increased dramatically since the Commission set the current 10 MW standard contract threshold cap, and the 20-year contract term.[1] As a result, the avoided costs calculated under the existing framework are significantly overstated, resulting in harm to Idaho Power's customers.

By adopting all three of Idaho Power's recommendations, the Commission can ensure that Idaho Power is not required to enter into substantial long-term contracts that exceed the Company's actual avoided costs,[2] at a time when no new generation is needed to reliably serve customers. Idaho Power's proposals would also align Oregon's and Idaho's policies, which is particularly important given that the vast majority of the Company's customers are in Idaho, and the ease at which prospective development can jump across state lines. Consistent policies will allow efficient administration of the Company's PURPA obligations and eliminate the opportunity for regulatory arbitrage between jurisdictions. Consistency between Oregon and Idaho, across Idaho Power's service territory, will limit the opportunity for developers to game the system to the detriment of Oregon customers.

The Commission has long recognized that its obligations under PURPA and Oregon's parallel statutes require it to first and foremost protect customers through

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[1] *Re Applications to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Charge, and for Change in Resource Sufficiency Determination*, Docket No. UM 1725, Order No. 15-199 at 7 (June 23, 2015).

[2] Order No. 15-199 at 6.

policies that produce accurate avoided cost prices.[3] Each of the Company's requests works in tandem and is required to advance this primary goal. Reducing the contract term eliminates speculative long-term forecasting, while a lower eligibility cap results in more accurate individually negotiated prices. Moreover, because the Company's requests are narrowly-tailored to protect customers, they do not constitute an unreasonable burden on QF developers.

The parties argue that the Company's requests are illegal under Oregon and federal law. However, a clear reading of each of the applicable statutes and regulations demonstrates that the Commission has both the authority and the obligation to grant the Company's requested relief to protect customers from the systematic harm of excessive avoided cost prices.

First, contrary to parties' claims, there is no ambiguity in either Oregon law or Federal Energy Regulatory Commission (FERC) regulations—nether mandate a particular contract term or in any way preclude a two-year negotiated contract term. The lack of ambiguity is confirmed by over thirty years of Commission precedent establishing varying contract terms, including terms with less than 20-years of fixed prices. The Company has presented compelling evidence and legal and policy argument demonstrating that the requested two-year term is necessary to protect customers from the harm resulting from the inability to accurately forecast long-term avoided cost prices.

Second, the Commission can lower the standard contract eligibility cap without violating Oregon law or policy. Indeed, both state and federal law require accurate avoided cost prices, even if more accurate prices make it more difficult for QF developers to obtain standard contracts. Moreover, in their briefs, parties did not dispute the evidence

[3] *Proposed Amendments to Rules Relating to Cogeneration and Small Power Production Facilities*, Docket No. AR 102, Order No. 84-742 at 3 (Sept. 24, 1984); *Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 11 and 19 (May 13, 2005).

in this case that today's QF developers do not require access to standard contracts in order to finance and construct their projects. The market barriers that previously supported a 10 MW cap are simply no longer there. Thus, the Commission should approve the proposed 100 kW cap for wind and solar QFs.

Third, Idaho Power's request to update its resource sufficiency period is a straightforward modification that makes the Company's avoided costs consistent with its 2013 Integrated Resource Plan (IRP) and the subsequent Commission-approved implementation of demand response programs.[4] There is no dispute that the Company is resource sufficient *at least* until 2021 and there is no dispute that failing to account for this fact produces significantly inaccurate avoided cost prices. To protect customers until the Company's next avoided cost update in mid-2016, the Commission should approve this request.

II. ARGUMENT

A. ORS 758.525 does Not Require 20-Year Fixed Price Contracts.

Idaho Power has requested that the Commission approve a two-year term for its negotiated PURPA contracts. The Company has not proposed any change to the term of standard contracts, which would therefore continue to include a 20-year term, with 15-years of fixed prices. Thus, any QF developer can receive a 20-year standard contract if they satisfy the eligibility requirements for a standard contract.

CREA, the Coalition, RN, and NWEC claim that ORS 758.525(1) and (2)(b) require the Commission to provide every QF with a minimum 20-year fixed price contract.[5] They argue that the statute is clear and unambiguous and that this intent is confirmed by the

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[4] *Re Idaho Power Company 2013 Integrated Resource Plan*, Docket LC 58, Order No. 14-253 at 11 (July 8, 2014); *In Re Staff Evaluation of Demand Response Programs*, Docket No. UM 1653, Order No. 13-482 at Appendix A, page 3 (December 19, 2013).

[5] Pre-Hearing Brief of the Community Renewable Energy Association at 11; Renewable Energy Coalition Prehearing Brief at 8; Renewable Northwest & NW Energy Coalition Prehearing Brief at 3.

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legislative history. On the contrary, on its face, ORS 758.525(1) and (2)(b) do not explicitly require a contract term of any particular length. Moreover, the legislative history is not as clear cut as the limited excerpts provided by the parties and, in any event, cannot overcome the plain meaning of the statute.

1. The Plain Meaning of ORS 758.525 does Not Mandate a Particular Contract Term.

When interpreting a statute, the Commission must look first and foremost to the text and context of the statute itself.[6] The Commission cannot "insert what has been omitted, or . . . omit what has been inserted"[7] and the Commission cannot rewrite the law, even when lawmakers make a clear error.[8] Here, the plain text of ORS 758.525 does not require fixed price contracts of any particular term.

ORS 758.525(1) requires that every two years a utility must file its "forecasted incremental cost of electric resources over at least the next 20 years." ORS 758.525(2) provides a QF the option to select avoided cost prices based on either "the avoided costs calculated at the time of delivery" or the "projected avoided costs calculated at the time the legal obligation to purchase the energy and capacity is incurred." What the statute ***does not*** dictate is the term over which either of these sets of prices may be locked in. And the QFs are not entitled to read a mandatory minimum term into a statute where the legislature did not see fit to include it. Indeed, it appears that the legislature intended to require utilities to provide forecasted avoided costs over a 20 year period to allow QFs an opportunity to estimate what price they might receive for their generation over a significant

[6] *State v. Gaines*, 346 Or 160, 171–172 (2009).

[7] ORS 174.010.

[8] *State v. Vasquez-Rubio*, 323 Or 275, 282–283 (1996) (courts will not rewrite a clear statute based solely on conjecture that legislature intended a particular result).

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time period, but left it to the Commission to determine the term over which prices would be locked in.[9]

This interpretation of ORS 758.525 is consistent with the parallel FERC regulations, which also do not provide a minimum fixed price contract term.[10] Like ORS 758.525(1), 18 C.F.R. § 292.302 requires utilities to file estimated avoided costs with state regulators at least every two years. The estimated avoided costs must reflect the estimated energy and capacity costs avoided over a 10-year period.[11] FERC adopted this requirement specifically so that QFs will be able to "estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility."[12] And like ORS 758.525(2), 18 C.F.R. § 292.304(d)(2) provides each QF the option to sell electricity "pursuant to a legally enforceable obligation . . . over a specified term." At the QF's option, the avoided cost price can be determined at the time of delivery or "calculated at the time the obligation is incurred."[13] FERC adopted this provision to allow certainty for QF developers that their contractual rates will not change over time.[14] Although both of these provisions—which are substantively the same as ORS 758.525(1) and (2)(b)—were intended to provide information and price certainty to a QF developer, FERC has never found that they entitle QFs to a fixed price contract of any particular term.

Moreover, there is nothing inconsistent or otherwise ambiguous about requiring a utility to file a 20-year forecast of avoided cost prices without entitling a QF to a 20-year

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[9] ORS 758.535(2)(a) (terms and conditions of PURPA transactions established by Commission).

[10] *International Paper Co. v. PacifiCorp*, Docket No. UM, Order No. 09-439 at 2 (Nov. 4, 2009) ("Oregon has enacted legislation [including ORS 758.525] governing small power producers and has administrative rules that parallel PURPA and its regulations.").

[11] 18 C.F.R. § 292.302(a)(1)-(2).

[12] *Small Power Production and Cogeneration Facilities: Regulations Implementing Section 210 of the Public Utility Regulatory Policy Act of 1978,* Order No. 69, 45 Fed.Reg. 12,214, 12,218 (Feb. 19, 1980) (hereinafter "Order No. 69").

[13] 18 C.F.R. § 292.304(d)(2).

[14] Order No. 69 at 12,224.

fixed price contract.[15] FERC has specifically explained that its filing requirement is intended to inform potential QF developers of forecasted prices, ***not guarantee fixed price contracts of a particular term.***[16] The Washington Utilities and Transportation Commission (WUTC) also requires utilities to provide general information to potential QFs by filing forecast avoided cost prices that exceed the fixed price term of available contracts.[17] And, since 1991 the Commission has required utilities to file avoided cost estimates that extend beyond the fixed price term of contracts.[18] Indeed, Idaho Power is currently required to file a 25-year price schedule even though no QF is entitled to a 25-year fixed price contract.[19]

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[15] *See* Pre-Hearing Brief of the Community Renewable Energy Association at 13 (claiming there is little reason to require a 20-year estimate if QFs are not entitled to a 20-year contract). In addition, the Oregon Court of Appeals decision in *Snow Mountain Pine Company v. Maudlin*, significantly undermines CREA's argument. In that case, the court addressed the requirements of ORS 758.525 to determine the avoided cost prices for a negotiated QF contract. *Snow Mountain Pine Co. v. Maudlin*, 84 Or. App. 590, 600-01 (1987). The circuit court found that the QF was entitled to the avoided cost prices on file with the Commission pursuant to ORS 758.525(1) at the time the QF created a legally enforceable obligation. The Court of Appeals reversed, finding that the avoided cost prices filed pursuant to ORS 758.525(1) are "not binding" and that a QF is not entitled to those "estimates." *Id.* at 600. Rather, as required by the Commission's rules and policies in effect at the time, a QF that is ineligible for a standard contract is entitled to a utility's "actual avoided costs," which must be "projected" from the "forecasts" filed under ORS 758.525(1) based on the characteristics of the particular QF. *Id.* While the case did not focus on the term of the QF contract, the court explicitly undermined CREA's understanding that subsection (2)(b) entitles QFs to a contract that includes the 20-year avoided cost estimates filed under subsection (1).

[16] Order No. 69 at 12,218.

[17] *WUTC v. PacifiCorp*, Docket UE-144160, Order 04 ¶ 15 (Nov. 12, 2015); *WUTC v. PacifiCorp*, Docket UE-130043, Order 05 ¶ 106 (Dec. 4, 2013) ("PacifiCorp's standard contract includes an avoided cost price stream over 10 years, but states expressly that the listed avoided cost prices are fixed for only five years."). The WUTC observed that the avoided cost filings can also inform negotiated contracts. Both FERC's regulations and the Commission's rules state that QFs and utilities can agree to "rate[s], terms, or conditions related to any purchase" that "differ from the rate or terms or conditions" that would otherwise apply under the Commission's policies, provided that the agreement does not "burden the public utility's customers." OAR 860-029-0005(2); 18 C.F.R. § 292.301(b)(1). Thus, a QF that was not entitled to a 20-year fixed price contract could potentially negotiate one provided the contract did not burden the utility's customers. The 20-year filing requirement in ORS 758.525(1), like Washington's and FERC's similar requirement, could inform this negotiation process.

[18] *Competitive Bidding by Investor-Owned Electric Utility Companies*, Docket No. UM 316, Order No. 91-1383 at 16, 127 P.U.R.4th 306, 1991 WL 501921 (Oct. 18, 1991).

[19] https://www.idahopower.com/AboutUs/RatesRegulatory/Tariffs/tariffPDF.cfm?id=269

2. Commission Precedent Confirms that the Plain Meaning of ORS 758.525 does not Entitle All QFs to a Minimum 20-Year Fixed Price Contract.

Upon the passage of House Bill 2320 (HB 2320), which was codified as ORS 758.525, the Commission conducted a rulemaking and a generic investigation to implement the bill's requirements. Although CREA claims that one of the primary purposes of HB 2320 was to establish a minimum 20-year fixed price contract, the Commission's contemporaneous orders do not support CREA's claims. In docket AR 102, the Commission identified the "three major impacts" of HB 2320: (1) removal of jurisdiction over non-investor owned utilities; (2) replacement of the "base rate" with the "index rate" that would apply if a utility fails to make a good faith effort to wheel a QF's electricity; and (3) requirement that the Commission adopt criteria for designation as a QF.[20] Notably absent from this list is a statement that HB 2320 mandated 20-year fixed price contracts for all QFs. Moreover, the Commission's rules adopted in that case did not include any requirement that utilities provide QFs with a minimum term.[21]

In the concurrent policy case, docket UM 21, the Commission required utilities to file 35-year projections of avoided cost prices, noting that the 20-year requirement in HB 2320 was a minimum only.[22] However, the Commission did not provide every QF with a right to a 35-year fixed price contract. On the contrary, the Commission found that it was not "practicable" to require standard QF "contracts of a length longer than one year. . ."[23] Thus, standard contracts, which at the time were subject to a 100 kW eligibility cap, had one-year fixed price terms. Taken together, the Commission's orders in dockets AR 102

[20] Order No. 84-742 at 1-2.

[21] The only reference in the Commission's rules to the 20-year requirement in ORS 758.525(1) is found in OAR 860-029-0080(2) and applies to only nonregulated utilities. *See* Order No. 84-742, Appendix A at 12.

[22] *Re Investigation of Avoided Costs and Cost-Effective Fuel Use and Resource Development*, Docket No. UM 21, Order No. 84-720 at 8, 62 P.U.R.4th 397, 1984 WL 1022595 (Sept. 12, 1984).

[23] Order No. 84-720 at 23.

and UM 21 confirm the Commission's view that ORS 758.525 does not require a 20-year contract for every QF.

Subsequent orders also confirm the Commission's interpretation that ORS 758.525 does not require 20-year contracts for all QFs.[24] For example, in Order No. 91-1383, the Commission affirmed its 35-year filing requirement from Order No. 84-720, while eliminating any guaranteed fixed-price contract term.[25]

Recognizing that the Commission precedent does not support its position, CREA argues that the terms of ORS 758.525 are not delegative and therefore the Commission's interpretation of the statute's requirements does not matter.[26] However, the issue here is not whether the relevant terms are delegative or not—there is no dispute that the statute requires utilities to file 20-year avoided cost estimates and there is no dispute that a QF can receive projected avoided cost prices calculated at the beginning of its contract. The question is whether these two provisions together mandate minimum 20-year fixed price contracts. As the Commission has consistently found, it does not.

3. The Legislative History of ORS 758.525 is Not Dispositive.

CREA, the Coalition, RN, and NWEC also claim that that the legislative history supports its view that the statute requires a 20-year minimum contract term.[27] However, their argument, which is based upon testimony from ***a single legislator and one***

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[24] *See e.g.*, Order No. 05-584 at 10 (in 1996 contract terms reduced to five years due to "significant risk" to customers); *id.* at 20 (in 2005 standard contracts set at 20 years with 15 years of fixed prices); *Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 07-360 at 11 (Aug. 20, 2007) (negotiated contracts have terms that can exceed 20 years but to mitigate risk longer-term contracts can have market-based prices).

[25] Order No. 91-1383 at 16 ("length of the contract a utility and a winning project sponsor agree to should result from their negotiations rather than from a Commission fiat . . . [this] policy should apply regardless of whether the QF resource is acquired through competitive bidding or under provisions contained in ORS Chapter 758 and OAR Chapter 860, Division 29.").

[26] Pre-Hearing Brief of the Community Renewable Energy Association at 16.

[27] Pre-Hearing Brief of the Community Renewable Energy Association at 11; Renewable Energy Coalition Prehearing Brief at 8; Renewable Northwest & NW Energy Coalition Prehearing Brief at 3.

nonlegislator witness made during a single committee meeting, is unpersuasive. First, when the statute is unambiguous, as it is here, the Commission must give no weight to the legislative history. Second, the limited excerpts take from the voluminous legislative history of HB 2320 are insufficient to establish the legislature's intent, particularly when there are contradictory witness statements also in the legislative record.

When a statue is unambiguous, "no weight can be given to legislative history that suggests—or even confirms—that legislators intended something different."[28] Legislative history "cannot create an ambiguity in a statute that is not ambiguous on its face"[29] and a "party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it."[30] As discussed above, ORS 758.525 is not ambiguous—it contains no entitlement to 20-year fixed price contracts. Even if the legislature intended to mandate 20-year fixed price contracts, this fact cannot overcome the plain meaning of the statute.

Further, the limited legislative history relied on by the parties does not prove the legislature intended to mandate 20-year contracts. "Cherry-picked quotations from single legislators or of nonlegislator witnesses, are likely to be given little weight, as the likelihood that such scraps of legislative history represent the views of the institution as a whole is slim."[31] Moreover, "isolated statements made in committee are not necessarily indicative

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[28] *Gaines*, 346 Or at 172-73; *Doe 1 v. State,* 164 Or App 543, 559 (1999). While it is true that courts will consider the legislative history even in if the statute is not ambiguous, the court determines the weight, if any, to give the history. ORS 174.020.

[29] *Doe 1,* 164 Or App at 559; *Jones v. GMC*, 139 Or App 244, 269 (1996) (Landau, J., concurring) (legislative history cannot "*create* meaning; it can only *clarify* the meaning of words actually enacted by the legislature"); *Eslamizar v. American States Ins. Co.,* 134 Or App 138, 146 n 3 (1995) (court cannot ignore statutory language and If the statutory language was "not what the legislature intended, then the legislature has made a mistake, and only the legislature may remedy it.").

[30] *Gaines*, 346 Or at 172-73.

[31] *State v. Kelly*, 229 Or App 461, 466-67 (2009*); Errand v. Cascade Steel Rolling Mills, Inc.*, 320 Or 509, 539 n. 4 (Graber, J., dissenting), *quoted in Gaines,* 346 Or. at 172–73 n. 9 (reliance on "the beliefs of a single legislator or witness" is "fraught with the potential for misconstruction"); *State v. Stamper,* 197 Or App 413, 424–25, *rev. den.*, 339 Or. 230 (2005); *Linn–Benton–Lincoln Ed. v.*

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of the intent of the entire legislature."[32] Statements made by nonlegislators are particularly suspect; the Supreme Court has noted that it is "hesitant to ascribe to the Legislative Assembly as a whole the single remark of a single nonlegislator at a committee hearing."[33] Rather, legislative history is most reliable if it includes "themes [that] are consistently reflected in both houses and throughout the legislative process, and therefore are more likely to reveal the intentions of the legislature as a whole."[34]

The legislative history of ORS 758.525 is hundreds of pages long, and yet, the parties were able to find only two statements supporting the claim that ORS 758.525 was intended to create a minimum 20-year fixed price contract. There is no evidence that the limited excerpts reflected the views of the entire legislature or even that the entire legislature was aware of the testimony cited by the parties. Indeed, the legislative history contains contradictory statements regarding the intended term of QF contracts.[35] Thus, the Commission should give little weight to the legislative history provided by the parties.

Linn–Benton–Lincoln ESD, 163 Or App 558, 569 (1999) ("we are reluctant to draw decisive inferences concerning legislative intent [because] * * * the statements were made by witnesses and are not direct expressions of legislative intent").

[32] *Davis by & Through Davis-Toepfer v. O'Brien*, 320 Or 729, 745 (1995); *Matter of Marriage of Denton*, 145 Or App 381, 399 (1996) *aff'd in part, rev'd in part*, 326 Or 236 (1998) ("Drawing conclusions as to legislative intent largely from colloquies in committee hearings always is risky business.").

[33] *Stamper,* 197 Or App at 424–425; *State v. Guzek,* 322 Or 245, 261 (1995), *modified,* 342 Or 345 (2007) ("It is curious that the dissent relies so heavily on the testimony of one witness.").

[34] *Denton*, 145 Or App at 400; *see also Gaines,* 346 Or 160, 172–173 n 9 ("In general, an examination of legislative history is most useful when it is able to uncover the manifest general legislative intent behind an enactment.")

[35] When testifying about an earlier version of the bill that included the 20-year avoided cost reporting requirement that eventually became ORS 758.525(1), a Pacific Power witness explicitly stated that the bill had no requirement for a long-term contract. Or. House Comm. on Environment and Energy, Subcomm. on HB 2320, Exh. C, Comments of Pacific Power & Light Co. 4 (Mar. 29, 1983) ("During the hearing a question arose whether a utility would be required to sign a contract for purchases from a qualifying facility with set prices over a long term. While HB 2320 does not address that point specifically, an electric utility has such an obligation to a FERC-certified qualifying facility."). The earlier version of the bill had no language similar to ORS 758.525(2)(b), but that language is the same as FERC regulations in effect at the time. 18 C.F.R. § 292.304(d)(2). So the eventual inclusion of ORS 758.525(2)(b) in the bill could not have created a mandatory 20-

4. 20-Year Fixed Price Contracts Violate PURPA's Strict Customer Indifference Standard and therefore ORS 758.525 is Preempted to the Extent it Requires Long-Term Contracts.

If the Commission concludes that ORS 758.525 mandates minimum 20-year fixed price contracts, that requirement is preempted to the extent that long-term fixed price contracts violate PURPA's avoided cost requirement.[36] Section 210 of PURPA imposes a federal obligation on utilities to purchase the energy and capacity from QFs at rates that are just and reasonable to consumers, not discriminatory, and not in excess of the utilities' avoided costs.[37] In setting this standard, FERC intended that utility customers should be neither helped nor harmed by the utility's purchase of QF power, and, in fact, should remain "indifferent as to whether the utility used more traditional sources of power or the newly-encouraged alternatives."[38] The avoided cost requirement also ensures that QFs are not subsidized at ratepayers' expense.[39]

To implement PURPA, Congress "expressly directed [FERC], and not the states, to prescribe rules governing QF rates."[40] FERC adopted regulations reiterating the avoided cost requirement. Section 292.304(a)(2) of FERC's regulations states unequivocally that "[n]othing in this subpart requires any electric utility to pay more than the avoided costs for purchases."[41] When FERC's rules were challenged, the U.S. Supreme Court upheld the rules, concluding that PURPA "sets full avoided cost as the *maximum* rate that [FERC]

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year fixed price term because the obligation imposed on utilities by ORS 758.525(2)(b) already applied.

[36] U.S. Const. art. VI ("the laws of the United States . . . shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."); *Re So. Calif. Edison Co.*, 70 F.E.R.C. ¶ at 61,677 (California's determination of avoided costs found "unlawful under PURPA" and therefore preempted).

[37] *See* 16 U.S.C. §§ 824a-3(b), (d).

[38] *So. Cal. Ed. Co.*, 71 F.E.R.C. ¶ 61,269, 62,079 (F.E.R.C. 1995).

[39] *Indep. Energy Producers Ass'n v. California Pub. Utilities Comm'n*, 36 F.3d 848, 858 (9th Cir. 1994).

[40] *Connecticut Light & Power Co.*, 70 F.E.R.C. ¶ 61,012, 61,027 (1995).

[41] 18 C.F.R. § 292.304(a)(2).

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may prescribe."[42] The states' role in PURPA is limited—Congress "gave the states responsibility *only* for 'implement[ing]' [FERC's] rules."[43]

Idaho Power has presented substantial, and largely unrebutted, evidence that the use of long-term fixed price contracts has systematically harmed customers by inflating the avoided cost prices paid to QFs.[44] The record demonstrates that it is not possible to accurately forecast avoided cost prices 20 years into the future in a way that complies with federal law. Thus, if 20-year forecasts cannot comply with PURPA's avoided cost requirement, as is established in the factual record here, then ORS 758.525 is preempted and any mandate for 20-year contracts is unenforceable.

It is true that FERC has found that PURPA allows long-term contracts. However, FERC's conclusion that long-term forecasts can comply with PURPA's avoided cost requirement was based on a factual assumption that over time overestimates and underestimates of avoided cost would tend to cancel out.[45] Given that this factual assumption is no longer valid for Idaho Power, FERC's prior support for long-term forecasts of avoided cost prices is no basis to conclude that PURPA authorizes long-term forecasts under all circumstances.

B. FERC's Regulations do Not Mandate Long-Term Fixed Price Contracts.

CREA argues that FERC's rules entitle a QF unfettered discretion to select a contract term of any length and that therefore the Commission cannot place any limit on QF contract length.[46] CREA's novel interpretation of FERC's rules fails to withstand

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[42] *American Paper Institute, Inc. v. American Elec. Power Service Corp.*, 461 U.S. 402, 413, 103 S. Ct. 1921, 1928, 76 L. Ed. 2d 22 (1983) (emphasis added).

[43] *Connecticut Light & Power Co.*, 70 F.E.R.C. at 61,027 (emphasis in original); *Re So. Calif. Edison Co.*, 70 F.E.R.C. ¶ 61,215, 61,676-77 (1995) (emphasis in original).

[44] *See e.g.*, Idaho Power/100, Allphin/4-5.

[45] Order No. 69 at 12,224.

[46] Pre-Hearing Brief of the Community Renewable Energy Association at 6-7.

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scrutiny. In fact, FERC's regulations say nothing about a specific contract term and the Commission is fully authorized to adopt contract term limits, as it has done for at least the last 30 years.

CREA claims that 18 C.F.R. § 292.304(d)(2),[47] which creates legally enforceable obligations, "provides the QF with the option to determine the length of the specified contract."[48] That rule states that QFs have the option of selling electricity "pursuant to a legally enforceable obligation for the delivery of energy or capacity **over a specified term**."[49] CREA's entire argument rests on its claim that the ability to sell "over a specified term" means that the QF is entitled to choose the "specified term" and neither the utility nor the Commission can limit the QF's options. But nowhere does FERC's regulation state, or even imply, that the QF has the unilateral authority to select the "specified term." Instead, the regulation leaves the term up to the Commission to determine.[50]

CREA's interpretation of FERC's regulations is further undermined by the Fifth Circuit's decision in *Exelon Wind 1, L.L.C. v. Nelson*.[51] In that case, the court upheld a state rule that required wind QFs to provide firm power to establish a legally enforceable

[47] 18 C.F.R. § 292.304(d) states: Purchases "as available" or pursuant to a legally enforceable obligation. Each qualifying facility shall have the option either:

(1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:

(i) The avoided costs calculated at the time of delivery; or

(ii) The avoided costs calculated at the time the obligation is incurred.

[48] Pre-Hearing Brief of the Community Renewable Energy Association at 6-7.

[49] 18 C.F.R. § 292.304(d) (emphasis added).

[50] *Connecticut Light & Power Co.*, 70 F.E.R.C. at 61,027 (PURPA requires states to implement FERC's rules).

[51] 766 F.3d 380 (5th Cir. 2014).

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obligation. In other words, under the state rule, QFs generating non-firm power were categorically ineligible for contracts of any term and were required to sell their output on an "as available" basis. The court reiterated its prior finding that the plain text of FERC's regulation does not mandate that every QF is entitled to a contract.[52] The court observed that if FERC had intended for its regulation to include more specific requirements—*e.g.*, a requirement that every QF was eligible for a contract—"it could have done so."[53] Because FERC's regulations did not entitle every QF to a contract, states were free to impose requirements, such as the requirement that the QF provide firm power.[54] Importantly, the court also rejected the argument that FERC precedent supported a different interpretation of the rule. Because the rule was unambiguous, the court found that FERC's interpretations received no deference.

Here, CREA's argument assumes that every QF is entitled to a contract, which therefore entitles every QF to choose the "specified term" of the contract.[55] But the Fifth Circuit's holding squarely contradicts this argument. If FERC's rules allow a state to limit access to a contract, then they certainly allow a state to limit access to a long-term contract.

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[52] *Id.* at 396-97 (citing *Power Res. Grp., Inc. v. Pub. Util. Comm'n of Texas*, 422 F.3d 231, 239 (5th Cir. 2005) (upholding rule requiring a QF to guarantee power delivery within 90 days to establish a legally enforceable obligation)).

[53] *Id.* The court reasoned that, "Subsection (d)(1) of FERC's Regulation allows a Qualifying Facility to provide power to the utility only on an as-available basis, and requires the Qualifying Facility to price the power at the moment of delivery. Subsection (d)(2) gives a Qualifying Facility this *exact same option* to sell power to the utility on an as-available basis, and also provides a Qualifying Facility with a second option to choose to fix the price 'at the time the obligation is incurred.' Under the reading advocated by Exelon and adopted by the district court, every Qualifying Facility must have the option to form a Legally Enforceable Obligation, and thus to select between the two pricing options available under subsection (d)(2). If every Qualifying Facility may take advantage of the choice provided by subsection (d)(2), it is hard to understand why Congress or FERC would also include a separate subsection limiting Qualifying Facilities to one pricing option." (internal citations omitted).

[54] *Id.* at 396.

[55] Pre-Hearing Brief of the Community Renewable Energy Association at 6.

CREA was unable to cite any other state that where the QF has the unilateral authority to specify the term of a PURPA contract. Indeed, the only precedent CREA musters in support of its novel interpretation is FERC's decision in *Hydrodynamics, Inc.,*[56] a case involving a challenge to two aspects of Montana's implementation of PURPA. First, Montana had adopted a rule that allowed QFs greater than 10 MW to obtain long-term avoided cost prices only if the QF won an all source competitive solicitation.[57] Second, Montana adopted a 50 MW installed capacity limit applicable to wind QFs between 100 kW and 10 MW. Once the capacity limit was reached, wind QFs between 100 kW and 10 MW could obtain non-forecasted energy-only contracts, even though the 50 MW limit had no relationship to whether the QF allowed the utility to avoid capacity.

FERC found that these limitations violated PURPA. Specifically, the competitive bidding requirement imposed an "unreasonable obstacle to obtaining a legally enforceable obligation" because the competitive solicitations were rarely held and under the rule a utility could refuse to negotiate with the QF, effectively precluding access to a contract.[58] The capacity limit violated 18 C.F.R. § 292.304(d)(2) because it precluded wind QFs from obtaining **forecasted** avoided cost prices.[59] FERC also found that 50 MW capacity limit precluded wind QFs from receiving compensation for capacity because the QFs were eligible for energy-only rates that were not based on a determination that the utility had no demand for capacity.

CREA insistence that *Hydrodynamics, Inc.* establishes a QFs' right to a long-term contract is entirely unfounded. Instead, that case holds that a QF is entitled to a contract that includes **forecasted** avoided cost prices, but did not specify the term over which the

[56] *Hydrodynamics, Inc.*, 146 F.E.R.C. ¶ 61,193 (F.E.R.C. 2014).

[57] *Id.* at P 32.

[58] *Id.*

[59] *Id.* at P 34; *see also id.* n. 25 (clarifying that each of the options available to the wind QFs did not include *forecasted* prices even though one of the options was a fixed price contract).

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forecasting must occur. Idaho Power's proposal here is entirely consistent with FERC's holding.

In addition, when describing the contracts at issue in *Hydrodynamics, Inc.*, FERC described a contract that was longer than 19 months as a "long-term contract," while contracts up to 18 months were described as "short-term contracts."[60] Thus, even if CREAs argument had merit and FERC's regulations mandate long-term contracts, FERC's dicta in *Hydrodynamics, Inc.* suggests that a two-year contract is "long-term."

C. Idaho Power's Proposal to Shorten the Negotiated Contract Term Appropriately Compensates QFs for Deferred Capacity.

CREA argues that a two-year contract will allow Idaho Power to "evade the requirement to provide a capacity credit to the QF merely by refusing to enter into a contract of sufficient length to provide such credit to the QF."[61] The Coalition makes a similar argument.[62] Not only does this argument mischaracterize Idaho Power's proposal, it is legally incorrect.

Under the Company's proposal, its two-year negotiated contracts will include both the forecasted energy and capacity costs avoided during the term of the contract. If the Company will be resource sufficient in the next two years, as is currently the case, then the QF will not receive a capacity payment, which is consistent with the Commission's determination that during a utility's resource sufficiency period, its demand for capacity is

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[60] *Id.* at P 34 (describing a "short-term . . . agreement of up to 18 months"); *id.* at P 14 (describing "long-term contracts ranging from 19 months to 25 years").

[61] Pre-Hearing Brief of the Community Renewable Energy Association at 9 (internal quotations omitted).

[62] Renewable Energy Coalition Prehearing Brief at 10.

zero.[63] CREA fails to understand that setting the capacity cost to zero is not the same as denying a capacity payment when the QF allows the utility to avoid a capacity cost.[64]

Moreover, the Company's proposal would allow QFs to obtain capacity payments for future two-year contracts based on the Company's resource deficiency determination made at the time of the QF's first contract.[65] CREA argues that this proposal is unworkable because future Commission's cannot be bound by a decision today adopting this proposal.[66] Thus, Idaho Power's proposal "fails to provide the QF with the right to enter into a legally enforceable obligation *today* to sell capacity at a future date."[67] Again, this argument mischaracterizes a QF's right to receive a capacity payment, which exists only if the QF will allow the utility to avoid capacity costs over the life of the contract.[68]

D. A Shorter Negotiated Contract Term Reasonably Balances the Interests of Customers and QF Developers.

Staff argues that the Commission should maintain the current negotiated contract term because a two-year contract will preclude a QF from obtaining financing.[69] Staff argues that a 15-year fixed price term appropriately balances the interests of customers and QF developers. Idaho Power disagrees. In Order No. 05-584, the Commission stated that its "**primary goal** in this proceeding is to accurately price QF power."[70] That primary goal was balanced against a secondary goal of ensuring that QFs had "viable

[63] Order No. 05-584 at 26.

[64] *See e.g.*, *Hydrodynamics, Inc.*, 146 F.E.R.C. ¶ 61,193 at P. 35 ("when the demand for capacity is zero, the cost for capacity may also be zero.").

[65] Idaho Power/400, Allphin/15.

[66] Pre-Hearing Brief of the Community Renewable Energy Association at 10.

[67] Pre-Hearing Brief of the Community Renewable Energy Association at 10.

[68] Order No. 84-720 at 11; Order No. 69 at 12,225.

[69] Staff Prehearing Brief at 8.

[70] Order No. 05-584 at 19 (emphasis added).

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opportunities to enter into a standard contract."[71] To achieve this secondary goal, the Commission adopted a standard contract term "appropriate to financing for a QF project."[72] The Company's proposed negotiated contract term reasonably balances these two goals, while prioritizing the **primary goal** of protecting customers from excessive avoided cost prices.

As discussed above, long-term forecasted avoided cost prices have been systematically excessive and harmful to customers. The Company's recommendation to reduce the contract term is designed to allow more accurate forecasting and thereby ensure that customers remain truly indifferent to QF generation, as required by federal law. In addition, a shorter contract term will not preclude QF development. Indeed, the record in this case demonstrates that QF development can continue and even thrive with less than 15-year fixed price contracts.[73] Thus, the Commission can still achieve its secondary goal with a contract term with less than 15-year fixed prices.

RN and NWEC argue that customers benefit from long-term fixed price contracts because it provides "rate stability and helps businesses better project their energy costs over a longer period of time."[74] This argument cannot be reconciled with the record in this case that the long-term rates have been systematically excessive. While rate stability is certainly a valid regulatory policy, PURPA does not allow long-term avoided cost prices if the "stable rates" are excessive.

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[71] *Id.*

[72] *Id.*

[73] *See* Idaho Power' Prehearing Brief at 15 (describing QF development under shorter contract terms).

[74] Renewable Northwest & NW Energy Coalition Prehearing Brief at 5.

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E. Lowering the Eligibility Cap to 100 kW is Consistent with Oregon Law and Supported in the Record.

In opposition to the Company's proposal to lower the standard contract eligibility cap to 100 kW for wind and solar QFs, CREA, RN, NWEC, and the Coalition advance several unpersuasive arguments.

CREA, RN, and NWEC claim that reducing the eligibility cap to 100 kW "would contradict" ORS 758.515(3), which requires the Commission to increase the marketability of QFs and establish a uniform policy for QFs.[75] However, these parties fail to identify any authority supporting its argument that any action that decreases the marketability of QFs is contrary to state policy. On the contrary, the Commission has been clear that its obligation to promote QF development must be balanced by its obligation to protect customers.[76] Indeed, another provision of ORS 758.515 specifically requires that "rates for purchases . . . shall . . . be just and reasonable to the electric consumers of the electric utility, the qualifying facility, and in the public interest."[77] Thus, the Commission's fundamental objective under PURPA is to accurately price QF power to ensure that customers remain indifferent to QF generation.[78] Reducing the eligibility cap produces more accurate avoided cost prices based on current conditions and the QF's individual characteristics, while reducing the contract term eliminates speculative long-term forecasting. Therefore, the Company's recommendations are consistent with the Commission's obligations under both PURPA and state law.[79]

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[75] Pre-Hearing Brief of the Community Renewable Energy Association at 5; Renewable Northwest & NW Energy Coalition Prehearing Brief at 2.

[76] Order No. 05-584 at 11 and 19.

[77] ORS 758.515(2)(b).

[78] Order No. 05-584 at 11 (emphasis added).

[79] *See* Order No. 05-584 at 16; Order No. 69 at 12,223.

Moreover, Idaho Power has nearly doubled its executed PURPA contracts since the eligibility cap was lowered to 3 MW.[80] And Idaho Power has executed numerous contracts in Idaho under that state's 100 kW eligibility cap. Thus, there is no factual support for the claim that lowering the cap will stifle QF development in contradiction of Oregon law.

CREA further claims that instead of lowering the eligibility cap, the Commission should send more accurate price signals to QFs by adjusting the avoided cost calculation.[81] The Company's recommendations in this case, however, are intended to specifically send more accurate price signals to QFs—negotiated avoided cost prices send more accurate price signals to QFs because they account for a multitude of factors that are not included in the calculation of standard prices and reduced contract terms eliminate speculative forecasting. The incremental steps to create more accurate avoided cost prices adopted in Order No. 14-058 are insufficient to protect customers from standard avoided cost prices that do not ensure customer indifference.

The Coalition argues that there is no evidence that the Company's proposed 100 kW eligibility cap is superior to a cap of 3 MW or 5 MW.[82] The Company's experience under the interim 3 MW cap, however, provides specific evidence that even with a 3 MW cap, QF developers were able to disaggregate their projects in an attempt to gain access to standard contracts.[83]

III. CONCLUSION

The Commission should grant Idaho Power's requested relief in this case. First, the Commission should reduce the contract term for wind and solar QFs to two years. Neither Oregon law nor FERC's regulation prohibit a two-year negotiated contract term and

[80] Idaho Power/400, Allphin/8-9.

[81] Pre-Hearing Brief of the Community Renewable Energy Association at 5.

[82] Renewable Energy Coalition Prehearing Brief at 11.

[83] *See* Idaho Power's Motion for Clarification (July 8, 2015).

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reducing the contract term will result in more accurate avoided cost prices through more accurate forecasting over a shorter time period. The undisputed evidence shows that customers have been systematically and substantially harmed by long-term contracts.

Second, the Commission should lower the eligibility cap for wind and solar standard contracts to 100 kW. Reducing the eligibility cap for wind and solar QFs is a narrowly-tailored remedy that is consistent with state law and results in more accurate avoided cost prices by accounting for significant factors that are not included in standard avoided cost prices.

Third, the Commission should update the Company's resource sufficiency period to 2021 based on the undisputed evidence in the record that the Company's current sufficiency period is incorrect.

Adoption of these recommendations will protect customers from harm, as required by both federal and state law, and align the implementation of PURPA across Idaho Power's Idaho and Oregon service territory, preventing jurisdictional arbitrage.

Moreover, granting Idaho Power's relief will not put an end to PURPA development in Oregon. Idaho Power's own experience demonstrates that QF development can thrive even with a lower eligibility cap and shorter contract term. When balancing the competing interests of customers and QF developers, the Commission must put customers first and can do so in this case by granting Idaho Power's requested relief.

Respectfully submitted this 10th day of December, 2015.

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