BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

IN THE MATTER OF PACIFICORP, dba PACIFIC POWER's Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap	)	CASE NO. UM 1734 POST-HEARING OPENING BRIEF OF THE COMMUNITY RENEWABLE ENERGY ASSOCIATION

I. INTRODUCTION AND BACKGROUD

The Community Renewable Energy Association ("CREA") hereby submits its post-hearing opening brief to the Public Utility Commission of Oregon ("OPUC or "Commission") in the above-captioned case. As stated in CREA's pre-hearing brief, CREA's position in this docket is the same as its position in the recently concluded Phase I of docket UM 1610 and in the ongoing docket UM 1725: (1) the Commission should maintain the eligibility cap at 10 megawatts ("MW") for all qualifying facility ("QF") resource types under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), and (2) the Commission should *increase* the length of the contract term for fixed avoided cost rates to 20 years. CREA demonstrated in its pre-hearing brief that maintaining the eligibility cap at 10 MW is necessary to provide small QFs an opportunity to sell their output, and a 20-year term of fixed rates is both reasonable and legally required under Oregon law. CREA's position has not changed since the hearing. Thus, CREA directs the Commission to its pre-hearing brief and will not repeat those arguments in this brief. Instead, this brief will respond to arguments made by other parties in their pre-hearing briefs.

II. ARGUMENT

The Commission should reject both of PacifiCorp's proposals on policy grounds alone because a lower eligibility cap and three-year contracts would leave no realistic opportunity for small renewable generators to sell their output in Oregon's monopsony wholesale or monopoly retail electricity markets. Furthermore, the Commission should reject PacifiCorp's proposal to shorten the contract term because doing so would violate federal and state law. In fact, the Commission should *increase* the period of fixed prices to at least 20 years to bring its policies into compliance with state law. PacifiCorp does not meaningfully dispute that its goal is to drastically retract its PURPA obligation. The problem with PacifiCorp's proposals is that they directly contradict the directives of federal and state law.

A. The Commission Should Maintain the 10 MW Eligibility Cap for All QF Resources.

PacifiCorp fails to grapple with the fact that Oregon law specifically charges the Commission with implementing policies that will "[i]ncrease the marketability of electric energy produced by qualifying facilities located throughout the state for the benefit of Oregon's citizens" and "[c]reate a settled and uniform institutional climate for qualifying facilities in Oregon." ORS 758.515(3). The Federal Energy Regulatory Commission's ("FERC") regulations provide the State of Oregon with discretion to lower the eligibility cap for standard rates to a level below 10 MW. But nothing in Oregon law suggests that the Commission should implement the bare minimum federal standard of 100 kilowatts ("kW") for wind and solar resources.

PacifiCorp suggests, without any supporting evidence, that wind and solar QFs will still

be able to obtain non-standard contracts by negotiating a rate with PacifiCorp even if the eligibility cap is lowered to 100 kW. *PacifiCorp's Pre-Hearing Brief* at 18. According to PacifiCorp's brief, PacifiCorp has "received three PPA requests for larger solar projects totally [sic] 147 MW." *Id.* Based on this assertion, PacifiCorp proclaims, "setting the eligibility threshold to 100 kW will not preclude larger QFs from receiving avoided cost prices." *Id.* There are multiple problems with this argument.

First, PacifiCorp does not, and apparently cannot, assert that it actually provided avoided cost prices to the three QFs who sought non-standard rates. It merely asserts that three QFs requested non-standard rates. This assertion contained only in PacifiCorp's brief, and therefore not tested on cross examination, fails to establish the conclusion that any QFs over the eligibility threshold will be able to obtain executed contracts containing the full avoided cost rates – as federal and state law require.

Second, the record demonstrates that there are almost no Oregon QFs above the eligibility cap that have successfully negotiated a contract and rates. *See* REC/300, Lowe/3 (noting only two QFs over the eligibility size threshold are operating in Oregon). Nothing in the record provides any basis to conclude that PacifiCorp has ever negotiated in good faith with Oregon QFs over the eligibility threshold, or that it will start doing so now. Instead, the Commission should conclude that no Oregon QFs will be able to negotiate fair terms and rates with PacifiCorp, which has demonstrated its extreme hostility to long-term PURPA contracts through this docket and through its efforts to repeal PURPA at the federal level. *See* Tr. at 28-29.

Third, while QFs have been able to negotiate non-standard terms and rates successfully in other states, Oregon's current implementation of PURPA is materially different than that in other states and is not amenable to non-standard rates and contracts. For example, in Idaho, there was brief success in negotiating non-standard PURPA rates and contracts before the contract term was shortened to two years, but the Idaho Public Utilities Commission ("Idaho PUC") approves all PURPA contracts. *Idaho Power Co. v. Idaho Pub. Util. Commn.*, 316 P.3d 1278, 1287 (Idaho 2013). Likewise, in Utah, where PacifiCorp also alleges significant activity for large solar QF contracts, the Utah Public Service Commission approves the non-standard contracts and rates.[1] The pre-approval of the rates and terms by the state commission provides a rate-recovery assurance, and mitigates the utility's legitimate concern of a potential disallowance. *See, e.g.,* Order No. 05-584 at 55 ("PacifiCorp opines that prevalent perceptions that utilities are reluctant to contract with QFs may be due to utilities' efforts to mitigate exposure to regulatory disallowance."). While the rates and terms for Oregon's standard contracts are effectively set by the OPUC, no rate recovery assurance exists with non-standard contracts in Oregon, which are never approved. *See* Order No. 05-584 at 56 (declining to approve individual QF contracts). Thus, even if PacifiCorp were not inherently hostile to PURPA, the inability to obtain Commission approval of the non-standard contracts and rates in Oregon provides the utility with a legitimate disincentive to good-faith contracting.

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[1] PacifiCorp's Utah Schedule 38 is available online at: https://www.rockymountainpower.net/content/dam/rocky_mountain_power/doc/About_Us/Rates_and_Regulation/Utah/Approved_Tariffs/Rate_Schedules/Qualifying_Facility_Procedures.pdf. It provides: "Company must submit power purchase agreement to Commission for approval within seven (7) days of execution."

Staff ignores this problem and suggests that the dispute resolution and complaint processes are substitute for standard contracts. *Staff's Pre-Hearing Brief* at 7. But that would create a dysfunctional policy. Staff does not propose to actually review and approve each PURPA contract that must be individually negotiated for QFs over the eligibility threshold. Instead, Staff suggests that if a QF is unable to obtain the utility's good-faith cooperation (which will invariably be the case for a non-standard contract), that QF should file a complaint. The obvious practical effect of the new policy – where only non-standard contracts are available – will be a significant increase in the filing of complaints by QFs that are unable to obtain reasonable contract terms and rates.

Oregon's current policy of providing standard contracts and rates to QFs up to 10 MW in size is reasonable. Unlike other states, Oregon's QF development consists almost exclusively of these projects sized 10 MW and under, which must be separated by five miles if they share common ownership. CREA/100, Skeahan/7. Staff argues that there continues to be "disaggregation" by certain developers. *Staff's Pre-Hearing Brief* at 4-5. The Commission should seriously consider whether the projects depicted in Staff's brief are really each a single "disaggregated" large project when they must in fact be separated by at least five miles under the Commission's current rules. *See* Order No. 14-058 at 26-27. It appears that the true concern is that larger corporate entities with more sophisticated expertise are taking advantage of Oregon's beneficial policies for 10 MW projects by obtaining multiple such projects throughout the state. If that is the true concern, the response should be tailored to the perceived problem. For example, the Commission could direct that for Oregon's standard rates and contracts, a single

corporate family can only enter into contracts for standard rates for 10 MW of capacity for each resource type per year, or some other similar limitation. That would require entities that seek to develop in excess of 10 MW of a particular resource in the state –which appears to be the identified problem – to negotiate rates and terms for capacity in excess of 10 MW.

Finally, the Commission should take note that the current policy encourages developers to pursue dispersed projects of 10 MW and smaller as opposed to multiple, larger projects up to 80 MW each. Under FERC's regulations, a single owner/developer could exercise its right to obtain multiple 80 MW projects, each separated by only one mile, 18 C.F.R. § 292.204, and it may be reasonable to expect more parties to exercise that right if left with no option but incurring the expense to negotiate non-standard rates. Incenting widely dispersed 10 MW projects discourages sophisticated entities from exercising their federal right to develop much larger projects. The Commission should maintain its reasonable policies of promoting small QFs by reinstating the eligibility cap of 10 MW for all QFs types.

B. The Commission Should Reject the Proposal to Shorten Contract Terms.

CREA demonstrated in its pre-hearing brief that PacifiCorp's proposal to shorten the contract term to three years for all QFs is inconsistent with federal and state law. *See CREA's Pre-Hearing Brief* at 8-21. PacifiCorp essentially confirms in its pre-hearing brief that its intent is to eliminate the requirement that it acquire capacity from QFs by shortening the contract terms to a length that will never compensate QFs for capacity. *PacifiCorp's Pre-Hearing Brief* at 10 (arguing the Commission should shorten the contract term to limit acquisition of QF capacity). As we demonstrated, however, FERC's regulations require PacifiCorp to contract for both QF

energy *and* capacity. *CREA's Pre-Hearing Brief* at 8-12. Additionally, both PacifiCorp and Staff ignore the mandates of Oregon's own PURPA statute, which requires that forecasted rates be made available to all QFs for a period of at least 20 years. *Id.* at 12-21.

However, because PacifiCorp and Staff's pre-hearing briefs have not addressed the critical legal issues, CREA will not repeat its pre-hearing brief arguments here and reserves the right to reply on additional legal points as necessary in the final briefing.

III. CONCLUSION

For the reasons set forth above and CREA's prior filings, the Commission should maintain the eligibility cap at 10 MW for all resource types, and the Commission should increase the length of the contract term for fixed avoided cost rates to 20 years.

RESPECTFULLY SUBMITTED this 12th day of February, 2015.

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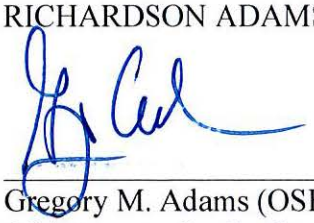

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