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VIA ELECTRONIC FILING

Public Utility Commission of Oregon
201 High Street SE, Suite 100
Salem, OR 97301-1166

Attn: Filing Center

RE: UM 1734—PacifiCorp's Opening Brief

PacifiCorp d/b/a Pacific Power encloses for filing in the above-referenced docket its Opening Brief.

If you have questions about this filing, please contact Erin Apperson, Manager of Regulatory Affairs, at (503) 813-6642.

Sincerely,

R. Bryce Dalley
Vice President, Regulation

Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

In the Matter of: PACIFICORP, d/b/a PACIFIC POWER Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap.	**UM 1734**

PACIFICORP'S OPENING BRIEF

February 12, 2016

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1 ## I. INTRODUCTION

2 PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) respectfully submits this
3 Opening Brief to the Public Utility Commission of Oregon (Commission). This brief
4 responds to the prehearing briefs filed by Staff, the Renewable Energy Coalition (Coalition),
5 the Community Renewable Energy Association (CREA), Renewable Northwest (RNW), and
6 the Sierra Club.

7 PacifiCorp's proposals refine two aspects of the Commission's implementation of the
8 Public Utility Regulatory Policies Act (PURPA) in order to better ensure that customers are
9 truly indifferent to the purchase of energy and capacity from Qualifying Facilities (QFs).
10 First, the Company has requested a shorter contract term for both standard and negotiated QF
11 contracts. The three-year term recommended by PacifiCorp mitigates customer risk resulting
12 from the inherently speculative nature of long-term avoided cost forecasts and ensures, to the
13 extent possible, that customers pay no more than PacifiCorp's actual avoided costs for QF
14 energy and capacity.

15 Second, the Company has requested a lower eligibility cap for wind and solar
16 standard QF contracts. PacifiCorp's recommended 100 kW cap will help ensure that the
17 avoided cost prices paid to most wind and solar QFs appropriately account for each project's

individual characteristics and impact on PacifiCorp's system. A lower eligibility cap will also produce more economically efficient QF development by minimizing developers' ability to disaggregate projects to take advantage of more favorable standard contract terms.

This case is fundamentally about protecting customers by appropriately pricing QF contracts and mitigating customer exposure to long-term fixed price contracts. Contrary to the parties' claims, this case is not about terminating PacifiCorp's must-buy obligation or limiting renewable development in Oregon. Indeed, neither of PacifiCorp's recommendations will alter its fundamental obligation to purchase energy and capacity from QFs in Oregon—as long as the QF is generating, PacifiCorp will enter into a contract. What will change is that QFs will be paid a more accurate avoided cost price and developers will assume risks that were previously borne by customers.

Neither the Federal Energy Regulatory Commission's (FERC) regulations nor Oregon law requires a contract term of a particular length or in any way prohibit the Company's recommendation to reduce the contract term to three years. On the contrary, both state and federal law require that avoided cost prices be just and reasonable and no greater than a utility's avoided costs. The record here demonstrates that 15-year fixed price contracts no longer meet these legal standards. The Commission must therefore take action to protect customers from the harm caused by excessive PURPA contract prices.

Similarly, neither FERC's regulations nor Oregon law prohibit the imposition of a 100 kW eligibility cap for wind and solar QF resources. Reducing the cap creates more accurate avoided cost prices, without unreasonably limiting the ability of QF developers to obtain PURPA contracts. The market barriers that previously supported the current 10 MW

cap do not apply to today's sophisticated and well-funded developers, who have both the financial and technical resources to negotiate a QF contract.

II. ARGUMENT

A. PacifiCorp's Proposed Three-Year Standard Contract Term is Consistent with PURPA and FERC's Implementing Regulations.

1. FERC's Regulations do Not Mandate Long-Term Standard Contracts.

CREA argues that FERC's rules entitle a QF unfettered discretion to select a contract term of any length and that the Commission cannot place any limit on QF contract length.[1] CREA's novel interpretation of FERC's rules fails to withstand 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),[2] which creates legally enforceable obligations, "provides the QF with the option to determine the length of the specified contract."[3] 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**."[4] 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

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[1] Pre-Hearing Brief of the Community Renewable Energy Association at 9.

[2] 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.

[3] Pre-Hearing Brief of the Community Renewable Energy Association at 9.

[4] 18 C.F.R. § 292.304(d) (emphasis added).

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.[5]

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*.[6] In that case, the court upheld a state rule that required wind QFs to provide firm power to establish a legally enforceable 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.[7] 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."[8] Because FERC's regulations did not entitle every QF to a contract, states were free to impose conditions and restrictions, such as the requirement that the QF provide firm power.[9] Importantly, the court also rejected the argument that FERC precedent supported a different

[5] *Connecticut Light & Power Co.*, 70 F.E.R.C. at 61,027 (PURPA requires states to implement FERC's rules).
[6] 766 F.3d 380 (5th Cir. 2014).
[7] *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)).
[8] *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).
[9] *Id.* at 396.

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.[10] 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 the term of a contract.

Importantly, CREA was unable to cite any other state allowing QFs 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.*,[11] addressing a challenge to two aspects of Montana's implementation of PURPA.[12] 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.[13] Second, Montana had 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. Hydrodynamics argued that both these requirements violated the utility's obligation to provide PURPA contracts with forecasted avoided cost prices.

FERC agreed with Hydrodynamics. Specifically, FERC found that the competitive bidding requirement imposed an "unreasonable obstacle to obtaining a legally enforceable

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[10] Pre-Hearing Brief of the Community Renewable Energy Association at 9.
[11] *Hydrodynamics, Inc.*, 146 F.E.R.C. ¶ 61,193 (F.E.R.C. 2014).
[12] Pre-Hearing Brief of the Community Renewable Energy Association at 10.
[13] *Hydrodynamics, Inc.*, 146 F.E.R.C. ¶ 61,193 at P 32.

1 obligation" because the competitive solicitations were rarely held and under the rule a utility
2 could refuse to negotiate with the QF, effectively precluding access to a contract.[14] In
3 addition, FERC found that the capacity limit violated 18 C.F.R. § 292.304(d)(2) because it
4 precluded wind QFs from obtaining **forecasted** avoided cost prices.[15] FERC also found that
5 50 MW capacity limit precluded wind QFs from receiving compensation for capacity
6 because the QFs were eligible for energy-only rates that were not based on a determination
7 that the utility had no demand for capacity.
8 Thus, while *Hydrodynamics ,Inc.,* confirms that a QF is entitled to a contract that
9 includes **forecasted** avoided cost prices, it does not specify the term over which the
10 forecasting must occur. Thus, CREA insistence that *Hydrodynamics, Inc.* establishes a QFs'
11 right to a long-term contract is entirely unfounded.
12 In addition, when describing the contracts at issue in *Hydrodynamics, Inc*., FERC
13 described a contract that was longer than 19 months as a "long-term contract," while
14 contracts up to 18 months were described as "short-term contracts."[16] Thus, even if CREAs
15 argument had merit and FERC's regulations mandate long-term contracts, FERC's dicta in
16 *Hydrodynamics, Inc*. suggests that a three-year contract is "long-term."
17 Finally, CREA argues that even if FERC's legally enforceable obligation regulation is
18 ambiguous, FERC's interpretation receives deference and QFs are entitled to long-term
19 contracts.[17] This argument misses the mark for two reasons. First, there is no ambiguity in

[14] *Id.*
[15] *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).
[16] *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").
[17] Pre-Hearing Brief of the Community Renewable Energy Association at 11.

1 the rule—it does not provide for a specified contract term.[18] Second, even if there were
2 ambiguity, FERC has never interpreted the rule to require a long-term contract.[19] FERC's
3 regulations require **forecasted** avoided cost prices but are silent as to the term of the forecast.

4 **2. Three-Year Contracts Appropriately Compensate for Capacity.**

5 CREA, the Coalition, and the Sierra Club argue that a three-year contract term is
6 illegal because QFs will not be compensated for capacity.[20] These parties reason that
7 PacifiCorp is currently resource sufficient until 2028 and therefore QFs will be deprived of
8 their right to sell capacity under a three-year contract. But QFs have no "right to sell
9 capacity" if the purchasing utility is not avoiding capacity as a result of the purchase. The
10 Commission has been clear that a QF receives a "capacity payment to the extent the QF can
11 reasonably demonstrate that it is sufficiently reliable and dispatchable to permit a reduction
12 in the utility's capacity costs."[21] FERC has likewise been clear that QFs are not entitled to
13 capacity payments if they do not allow a utility to avoid capacity.[22] As FERC explained, a
14 QF is "entitled to receive rates based on the capacity costs that a utility can avoid as a result
15 of its obtaining capacity from the [QF]" only if the QF allows the utility to defer or avoid the
16 acquisition of new capacity resources.[23]

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[18] *Exelon Wind 1, L.L.C.*, 766 F.3d at 397-98.
[19] *See e.g. Hydrodynamics, Inc.*, 146 F.E.R.C. ¶ 61,193.
[20] Pre-Hearing Brief of the Community Renewable Energy Association at 11-12; Renewable Energy Coalition Prehearing Brief at 3; Sierra Club's Prehearing Brief at 9-11.
[21] *Re Investigation of Avoided Costs and Cost-Effective Fuel Use and Resource Development*, Docket No. UM 21, Order No. 84-720, 62 P.U.R.4th 397, 1984 WL 1022595 at *7 (Sept. 12, 1984).
[22] *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, 12,225 (Feb. 19, 1980) (if there are no avoided capacity costs rates for purchase should be "based on the utility system's avoided incremental cost of energy") (hereinafter "Order No. 69").
[23] Order No. 69 at 12,225.

1 If the Company will be resource sufficient in the next three years, as is currently the
2 case, then the QF will not receive a capacity payment, which is consistent with the
3 Commission's determination that during a utility's resource sufficiency period, its demand
4 for capacity is zero.[24] The parties fail to understand that setting the capacity cost to zero is
5 not the same as denying a capacity payment when the QF allows the utility to avoid a
6 capacity cost.[25]

7 These parties also fail to acknowledge that there are situations where a QF would
8 receive a capacity payment if the sufficiency period is less than three years, which has
9 occurred in the past and will likely occur in the future. Therefore, QFs are not categorically
10 denied a capacity payment under PacifiCorp's proposal.[26]

11 Moreover, this argument ignores the fact that both the Commission and FERC have
12 recognized that the firm market price paid to QFs when a utility is resource sufficient
13 includes an embedded capacity cost.[27] Therefore, even during the resource sufficiency
14 period, QFs are compensated for capacity.

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[24] *Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 26 (May 13, 2005).

[25] *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.").

[26] The Coalition takes this argument a step further, and claims that the avoided cost prices must include a capacity payment "[u]nless a utility has no need for capacity over the long-term." Renewable Energy Coalition Prehearing Brief at 3. In other words, even a three year contract requires capacity payments if, at any point in the future, PacifiCorp will need capacity. To support this argument, the Coalition cites a number of FERC cases. None of those cases, however, stand for the proposition that QFs are entitled to a capacity payment even if a utility does need capacity during the term of the contract. There is simply no legal support for the Coalitions broad claim.

[27] Order No. 05-584 at 28 (using market prices during sufficiency period "embeds the value of incremental QF capacity in the total market-based avoided cost price"); Order No. 69 at 12,225 (purchases of firm power include a capacity component reflecting the seller's fixed generation costs).

1 **B. Oregon Law does Not Mandate 20-Year Fixed Price Contracts.**

2 CREA and the Coalition argue that ORS 758.525(1) and (2)(b) requires that QFs 3 receive at least a 20-year fixed price contract.[28] They argue that the statute is clear and 4 unambiguous and that this intent is confirmed by the legislative history. On the contrary, on 5 its face, ORS 758.525(1) and (2)(b) do not explicitly require a contract term of any particular 6 length. Moreover, the legislative history is not as clear cut as the limited excerpts provided 7 by the parties and, in any event, cannot overcome the plain meaning of the statute.

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

10 When interpreting a statute, the Commission must look first and foremost to the text 11 and context of the statute itself.[29] The Commission cannot "insert what has been omitted, or . 12 . . omit what has been inserted"[30] and the Commission cannot rewrite the law, even when 13 lawmakers make a clear error.[31] Here, the plain text of ORS 758.525 does not require fixed 14 price contracts of any particular term.

15 ORS 758.525(1) requires that every two years a utility must file its "forecasted 16 incremental cost of electric resources over at least the next 20 years." ORS 758.525(2) 17 provides a QF the option to select avoided cost prices based on either "the avoided costs 18 calculated at the time of delivery" or the "projected avoided costs calculated at the time the 19 legal obligation to purchase the energy and capacity is incurred." What the statute ***does not*** 20 dictate is the term over which either of these sets of prices may be locked in. And the QFs

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[28] Pre-Hearing Brief of the Community Renewable Energy Association at 12; Renewable Energy Coalition Prehearing Brief at 2.
[29] *State v. Gaines*, 346 Or 160, 171–172 (2009).
[30] ORS 174.010.
[31] *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).

1 are not entitled to read a mandatory minimum term into a statute where the legislature did not
2 see fit to include it. Indeed, it appears that the legislature intended to require utilities to
3 provide forecasted avoided costs over a 20 year period to allow QFs an opportunity to
4 estimate what price they might receive for their generation over a significant time period, but
5 left it to the Commission to determine the term over which prices would be locked in.[32]
6 This interpretation of ORS 758.525 is consistent with the parallel FERC regulations,
7 which also do not provide a minimum fixed price contract term.[33] Like ORS 758.525(1), 18
8 C.F.R. § 292.302 requires utilities to file estimated avoided costs with state regulators at least
9 every two years. The estimated avoided costs must reflect the estimated energy and capacity
10 costs avoided over a 10-year period.[34] FERC adopted this requirement specifically so that
11 QFs will be able to "estimate, with reasonable certainty, the expected return on a potential
12 investment before construction of a facility."[35] And like ORS 758.525(2), 18 C.F.R. §
13 292.304(d)(2) provides each QF the option to sell electricity "pursuant to a legally
14 enforceable obligation . . . over a specified term." At the QF's option, the avoided cost price
15 can be determined at the time of delivery or "calculated at the time the obligation is
16 incurred."[36] FERC adopted this provision to allow certainty for QF developers that their
17 contractual rates will not change over time.[37] Although both of these provisions—which are
18 substantively the same as ORS 758.525(1) and (2)(b)—were intended to provide information

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[32] ORS 758.535(2)(a) (terms and conditions of PURPA transactions established by Commission).
[33] *International Paper Co. v. PacifiCorp*, Docket No. UM 1449, 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.").
[34] 18 C.F.R. § 292.302(a)(1)-(2).
[35] *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").
[36] 18 C.F.R. § 292.304(d)(2).
[37] Order No. 69 at 12,224.

1 and price certainty to a QF developer, FERC has never found that they entitle QFs to a fixed
2 price contract of any particular term.

3 Moreover, there is nothing inconsistent or otherwise ambiguous about requiring a
4 utility to file a 20-year forecast of avoided cost prices without entitling a QF to a 20-year
5 fixed price contract. FERC has specifically explained that its filing requirement is intended
6 to inform potential QF developers of forecasted prices, **not guarantee fixed price contracts**
7 **of a particular term**.[38] The Washington Utilities and Transportation Commission (WUTC)
8 also requires utilities to provide general information to potential QFs by filing forecast
9 avoided cost prices that exceed the fixed price term of available contracts.[39] And, since 1991
10 the Commission has required utilities to file avoided cost estimates that extend beyond the
11 fixed price term of contracts.[40] Indeed, PacifiCorp currently files a 27-year price schedule
12 even though no QF is entitled to a 27-year fixed price contract.[41]

13 CREA also argues that the Commission cannot adopt a contract term that is less than
14 20 years because ORS 758.525 does not unambiguously grant the Commission authority to

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

[39] *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.

[40] *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).

[41] https://www.pacificpower.net/content/dam/pacific_power/doc/About_Us/Rates_Regulation/Oregon/Approved_Tariffs/PURPA_Power_Source_Agreement/Schedule_37_Avoided_Cost_Purchases_From_Qualifying_Facilities_of_10000_kW_or_Less.pdf

1 do so.[42] This argument assumes that ORS 758.525 dictates a particular contract term, which
2 it does not, and ignores the Commission's specific statutory authority to establish the terms
3 and conditions for the sale of energy and capacity from QFs to utilities.[43] The Commission
4 also has been granted "the broadest authority—commensurate with that of the legislature
5 itself—for the exercise of [its] regulatory function," including its implementation of
6 PURPA.[44] The legislature has clearly granted the Commission authority to adopt a contract
7 term of whatever length is necessary to meet PURPA's requirements.

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

10 CREA argues that the "Commission's own interpretation of the legislation in 1984
11 [that was codified as ORS 758.525] confirm that 20 years of fixed pricing is the minimum
12 length the statute requires."[45] CREA's argument misrepresents Commission precedent.

13 Upon the passage of House Bill 2320 (HB 2320), which was codified as ORS
14 758.525, the Commission conducted a rulemaking and a generic investigation to implement
15 the bill's requirements. Although CREA claims that one of the primary purposes of HB 2320
16 was to establish a minimum 20-year fixed price contract, the Commission's
17 contemporaneous orders do not support CREA's claims. In docket AR 102, the Commission
18 identified the "three major impacts" of HB 2320: (1) removal of jurisdiction over non-
19 investor owned utilities; (2) replacement of the "base rate" with the "index rate" that would
20 apply if a utility fails to make a good faith effort to wheel a QF's electricity; and (3)

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[42] Pre-Hearing Brief of the Community Renewable Energy Association at 18-19 (relying on *SIF Energy, LLC v. Department of Energy*, 275 Or App 809 (2015)).
[43] ORS 758.535(2).
[44] *Pacific Northwest Bell Tel. Co. v. Sabin*, 21 Or App 200, 214, *rev den* (1975).
[45] Pre-Hearing Brief of the Community Renewable Energy Association at 17 (emphasis in original).

1 requirement that the Commission adopt criteria for designation as a QF.[46] Notably absent
2 from this list is a statement that HB 2320 mandated 20-year fixed price contracts for all QFs.
3 Moreover, the Commission's rules adopted in that case did not include any requirement that
4 utilities provide QFs with a minimum term.[47]

5 In the concurrent policy case, docket UM 21, the Commission required utilities to file
6 35-year projections of avoided cost prices, noting that the 20-year requirement in HB 2320
7 was a minimum only.[48] However, the Commission did not provide every QF with a right to a
8 35-year fixed price contract. On the contrary, the Commission found that it was not
9 "practicable" to require standard QF "contracts of a length longer than one year. . ."[49] Thus,
10 standard contracts, which at the time were subject to a 100 kW eligibility cap, had one-year
11 fixed price terms. Taken together, the Commission's orders in dockets AR 102 and UM 21
12 confirm the Commission's view that ORS 758.525 does not require a 20-year contract for
13 every QF.[50]

14 Recognizing that the Commission precedent does not support its position, CREA
15 argues that the terms of ORS 758.525 are not delegative and therefore the Commission's

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

[47] 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.

[48] *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).

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

[50] Subsequent orders also confirm the Commission's interpretation that ORS 758.525 does not require 20-year contracts for all QFs. *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). 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. 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.").

1 interpretation of the statute's requirements does not matter.[51] However, the issue here is not
2 whether the relevant terms are delegative or not—there is no dispute that the statute requires
3 utilities to file 20-year avoided cost estimates and there is no dispute that a QF can receive
4 projected avoided cost prices calculated at the beginning of its contract. The question is
5 whether these two provisions together mandate minimum 20-year fixed price contracts. As
6 the Commission has consistently found, it does not.

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

8 CREA and the Coalition also claim that that the legislative history supports their view
9 that the statute requires a 20-year minimum contract term.[52] However, their argument, which
10 is based upon testimony from *a single legislator and one nonlegislator witness made during*
11 *a single committee meeting*, is unpersuasive for two reasons. First, when the statute is
12 unambiguous, as it is here, the Commission must give no weight to the legislative history.
13 Second, the limited excerpts taken from the voluminous legislative history of HB 2320 are
14 insufficient to establish the legislature's intent, particularly when there are contradictory
15 witness statements also in the legislative record.

16 When a statue is unambiguous, "no weight can be given to legislative history that
17 suggests—or even confirms—that legislators intended something different."[53] Legislative
18 history "cannot create an ambiguity in a statute that is not ambiguous on its face"[54] and a

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[51] Pre-Hearing Brief of the Community Renewable Energy Association at 14.
[52] Pre-Hearing Brief of the Community Renewable Energy Association at 14; Renewable Energy Coalition Prehearing Brief at 2-3; Prehearing Brief of Renewable Northwest at 3-5.
[53] *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.
[54] *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

1 "party seeking to overcome seemingly plain and unambiguous text with legislative history
2 has a difficult task before it."[55] As discussed above, ORS 758.525 is not ambiguous—it
3 contains no entitlement to 20-year fixed price contracts. Thus, even if the legislature
4 intended to mandate 20-year fixed price contracts, this fact cannot overcome the plain
5 meaning of the statute.

6 Further, the limited legislative history relied on by the parties does not prove the
7 legislature intended to mandate 20-year contracts. "Cherry-picked quotations from single
8 legislators or of nonlegislator witnesses, are likely to be given little weight, as the likelihood
9 that such scraps of legislative history represent the views of the institution as a whole is
10 slim."[56] Moreover, "isolated statements made in committee are not necessarily indicative of
11 the intent of the entire legislature."[57] Statements made by nonlegislators are particularly
12 suspect; the Supreme Court has noted that it is "hesitant to ascribe to the Legislative
13 Assembly as a whole the single remark of a single nonlegislator at a committee hearing."[58]
14 Rather, legislative history is most reliable if it includes "themes [that] are consistently

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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.").

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

[56] *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. 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").

[57] *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.").

[58] *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.").

reflected in both houses and throughout the legislative process, and therefore are more likely to reveal the intentions of the legislature as a whole."[59]

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.[60] Thus, the Commission should give little weight to the legislative history provided by the parties.

To bolster its reliance on limited excerpts from the legislative history, CREA argues that the single legislator was the bill's sponsor and the non-legislative witness was extensively involved in developing the bill.[61] These facts alone, however, are insufficient to demonstrate that the legislative intent. In the only case cited by CREA to support its argument, the Court of Appeals noted that, "[i]n some cases, statements of individual legislators and even nonlegislators may be entitled to some weight."[62] The court continued that the "amount of weight will depend on the extent to which a case can be made that they

[59] *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.")

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

[61] Pre-Hearing Brief of the Community Renewable Energy Association at 19-20.

[62] *State v. Kelly*, 229 Or. App. 461, 467 (2009).

are reflective of the intentions of the legislature as a whole."[63] CREA has failed to make the case that its reliance on limited excerpts from only two witnesses reflect the intentions of the legislature as a whole, particularly when the statements were made to only one committee in the Senate, were made by a non-legislative witness that neither prepared nor sponsored the bill,[64] and were contradicted by other testimony in the record.

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.[65] 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.[66] 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-

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[63] *Id.*

[64] *See, e.g., Ram Technical Services, Inc. v. Koresko,* 346 Or. 215, 234–35 (2009) (relying on testimony of the representative of the Oregon Law Commission, which proposed the legislation at issue); *Zidell Marine Corp. v. West Painting, Inc.,* 322 Or. 347, 357–58, 906 P.2d 809 (1995) (construing terms in the statutes governing the writ of continuing garnishment and relying on testimony of representatives of the Oregon Collectors Association, which proposed the bill).

[65] 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).

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

1 encouraged alternatives."[67] The avoided cost requirement also ensures that QFs are not
2 subsidized at ratepayers' expense.[68]
3 To implement PURPA, Congress "expressly directed [FERC], and not the states, to
4 prescribe rules governing QF rates."[69] FERC adopted regulations reiterating the avoided cost
5 requirement. Section 292.304(a)(2) of FERC's regulations states unequivocally that
6 "[n]othing in this subpart requires any electric utility to pay more than the avoided costs for
7 purchases."[70] When FERC's rules were challenged, the U.S. Supreme Court upheld the
8 rules, concluding that PURPA "sets full avoided cost as the *maximum* rate that [FERC] may
9 prescribe."[71] The states' role in PURPA is limited—Congress "gave the states responsibility
10 *only* for 'implement[ing]' [FERC's] rules."[72]
11 PacifiCorp has presented substantial evidence that the use of long-term fixed price
12 contracts has systematically harmed customers by inflating the avoided cost prices paid to
13 QFs.[73] The record demonstrates that it is not possible to accurately forecast avoided cost
14 prices 20 years into the future in a way that complies with federal law.[74] Thus, if 20-year
15 forecasts cannot comply with PURPA's avoided cost requirement, as is established in the
16 factual record here, then ORS 758.525 is preempted and any mandate for 20-year contracts is
17 unenforceable.

[67] *So. Cal. Ed. Co.*, 71 F.E.R.C. ¶ 61,269, 62,079 (F.E.R.C. 1995).
[68] *Indep. Energy Producers Ass'n v. California Pub. Utilities Comm'n*, 36 F.3d 848, 858 (9th Cir. 1994).
[69] *Connecticut Light & Power Co.*, 70 F.E.R.C. ¶ 61,012, 61,027 (1995).
[70] 18 C.F.R. § 292.304(a)(2).
[71] *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).
[72] *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).
[73] *See e.g.* PAC/100, Griswold/29; PAC/200, Griswold/10, 12.
[74] PAC/100, Griswold/29; PAC/200, Griswold/10, 12.

1 PacifiCorp acknowledges that FERC has previously expressed support for long-term
2 standard contracts.[75] Indeed, in this case, Sierra Club adopted FERC's rationale, arguing
3 that, "[w]hile "it is true that forecasts may, as PacifiCorp contends, be too high, there is a
4 similar risk that those same forecasts will be too low, which would result in a windfall to
5 ratepayers."[76] Sierra Club was unable, however, to provide any evidence supporting this
6 assumption, which has, in fact, proven to be incorrect.[77] Given that this factual assumption is
7 no longer valid for PacifiCorp, FERC's prior support for long-term forecasts of avoided cost
8 prices is no basis to conclude that PURPA authorizes long-term forecasts under all
9 circumstances.

10 **C. Shorter Term Standard Contracts Serve the Public Interest.**

11 The current 20-year fixed price contract term results inherently speculative avoided
12 cost prices that unreasonably increase customer risk. This is particularly true in today's
13 market where avoided cost prices are falling and the Company is resource sufficient for the
14 foreseeable future.[78] The Company's proposal to shorten the contract term reasonably
15 balances customer and QF interests by producing more accurate avoided cost prices.
16 Moreover, the Company's proposal recognizes, and accounts for, the fact that QF resources

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[75] *See e.g.* Order No. 69 at 12,224.

[76] Sierra Club's Prehearing Brief at 4; Order No. 69 at 12,224.

[77] *See PURPA: Making the Sequel Better than the Original* at 17 (prepared by Frank Graves, Philip Hanser, Greg Basheda of the Brattle Group for the Edison Electric Institute Dec. 2006) (available at http://www.eei.org/issuesandpolicy/stateregulation/Documents/purpa.pdf) ("Long-term estimates of avoided or marginal costs are inherently subject to error. In the preamble to its PURPA regulations, FERC argued, in supporting the provision that allowed avoided costs to be established at the time the purchase obligation was incurred, that over time, Experience with PURPA suggested that this was not likely to be the case. As noted above, mid-1980s vintage oil and natural gas price forecasts, almost without exception, significantly overstated actual oil and natural gas prices during the 1990s. Hence, mid-1980s vintage long-term PURPA contracts with fixed payments were likely to overstate a utility's actual avoided costs. Long-term contracts based on the estimated cost of a baseload coal plant also were likely to overstate a utility's avoided cost during the 1990s because, during that decade, most of the new generating capacity built was gas-fired generation, given the (then) low natural gas prices and efficiency (heat rate) improvements in gas-fired generating technologies.").

[78] PAC/100, Griswold/31.

1 are not comparable to conventional resources, which are acquired only after a comprehensive

2 public planning and procurement process.[79] Rather, QFs are more akin to hedges, which, due

3 to the risks inherent in hedging, do not extend beyond a three-year term.[80] A shorter contact

4 term also recognizes that the QF market is not subject to conventional market dynamics

5 because of the must-buy obligation and therefore the QF market is not self-regulating and

6 requires Commission intervention to protect customers from runaway development.[81]

7 **1. A Shorter Contract Term Appropriately Balances Customer and**
8 **Developer Interests.**

9 Much of the opposition to PacifiCorp's proposal focuses on the claim that QFs will be

10 unable to obtain financing if the contract term is shortened to three years and therefore a

11 reduced term will inhibit QF development.[82] In making this argument, the parties ask the

12 Commission to place the interests of QF developers ahead of the interests of customers—

13 something that the Commission has made clear it will not do.

14 In 1984 avoided cost prices were so low that the Commission observed that "many

15 types of facilities are no longer economically feasible."[83] In this context, QF developers *and*

16 the Oregon Department of Energy asked the Commission to exercise its authority under state

17 law to adopt QF contract prices "in excess of avoided costs to ensure that the legislature's

18 goal of renewable resource development is attained."[84] In other words, these parties

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[79] PAC/200, Griswold/14.
[80] PAC/200, Griswold/4.
[81] PAC/100, Griswold/20 (PacifiCorp relies on Commission to regulate customer exposure to QF risk).
[82] *See e.g.* Sierra Club's Prehearing Brief at 22; Staff Prehearing Memorandum at 10-12; Renewable Energy Coalition Prehearing Brief at 4; Renewable Northwest Prehearing Brief at 5.
[83] *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).
[84] *Id.* at 3. At that time, FERC had indicated that states could adopt QF contract prices that exceeded a utility's avoided costs if the excess price was based on state law. FERC has since clarified that states are strictly limited to avoided cost prices. *Connecticut Light & Power Co.*, 70 F.E.R.C. ¶ 61,012 (1995).

1 suggested that the in implementing PURPA, the Commission should give effect to that
2 statute's goal of furthering development, even at the expense of the requirement to hold
3 customers indifferent. The Commission rejected this argument. In so doing, the
4 Commission acknowledged that higher prices requested by these parties "would make more
5 projects feasible"; nevertheless the Commission rejected the request, finding that it conflicted
6 with its obligation to "obtain service for ratepayers at reasonable rates."[85] Here, long-term
7 forecasted avoided cost prices have been systematically excessive and harmful to
8 customers.[86] Therefore, customer indifference requires shorter contract terms.

9 Conversely, a shorter contract term will not preclude QF development. The record in
10 this case demonstrates that developers can obtain financing even if the contract term is three
11 years.[87] While three year contracts may make financing more expensive and create
12 additional risk for QF developers, it is reasonable for developers, not customers, to bear these
13 costs and risks, particularly given the sophisticated nature of the QF developers in today's
14 market.

15 **2. QFs are Not Comparable to Other Utility Resources.**

16 Sierra Club contends that the risk of inflated avoided cost prices is "no greater than
17 the risks associated with other long-term utility decisions."[88] Similarly, the Coalition argues
18 that 20 year contracts are reasonable because they coincide with the Integrated Resource
19 Planning (IRP) horizon and thus allow comparable treatment between QFs and utility

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[85] *Id.* ("The Commission believes that the best balance between the two goals [QF development and reasonable rates] is to set rates equal to avoided costs. In periods of surplus, such as now, fewer projects are needed. When deficits are projected, avoided costs will rise and opportunities for profitable facility development will expand. Therefore, as a general policy, the Commissioner endorses adherence to avoided costs as the best pricing method.").

[86] PAC/100, Griswold/29; PAC/200, Griswold/10.

[87] PAC/200, Griswold/8-9; Tr. 76:1-77:1 (Griswold).

[88] Sierra Club Prehearing Brief at 4.

1 resources.[89] These arguments, however, ignore the significant differences between QFs and
2 all other utility resources.

3 First, utility resource decisions are made in the context of a utility IRP, which
4 examines in a thorough and comprehensive public process the costs and risks associated with
5 the Company's options for meeting future load.[90] QF resources are not subject to the IRP, or
6 any other planning process. If a QF requests a contract, the Company must oblige regardless
7 of the need for the resource and without any consideration for how the resource fits into the
8 Company's resource planning process.

9 Second, before any utility resource can be acquired, it must be selected through a
10 competitive bidding process, which is subject to extensive scrutiny by the Commission and
11 interested parties.[91] QFs are never subject to competitive bidding—the Company pays the
12 administratively determined avoided cost price and their competitiveness with alternative
13 renewable generation is never tested by the market.

14 Third, utility resources are subject to the Company's dispatch control.[92] QFs, on the
15 other hand, are must-take resources that the Company cannot reject even when the QF
16 contract price exceeds the Company's marginal cost.[93] Additionally, because the Company
17 cannot dispatch the QF resource, it must be prepared at all times to transmit the QF output,
18 even if the QF fails to generate as expected.[94] This imposes further costs on customers that
19 would not be incurred with a utility resource.

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[89] Renewable Energy Coalition Prehearing Brief at 4.
[90] PAC/100, Griswold/19-20, 25; PAC/200, Griswold/14.
[91] PAC/200, Griswold/11.
[92] PAC/200, Griswold/14.
[93] PAC/200, Griswold/14.
[94] PAC/200, Griswold/15.

3. PacifiCorp's Comparison of QF Contracts to Hedges is Apt.

Sierra Club also takes issue with PacifiCorp's comparison of QF resources to hedges, arguing that QFs are actually generation resources.[95] This argument misses the mark. As the Company described, QF resources are fixed price contracts and therefore act as hedges in a utility portfolio.[96] And like any hedge, a fixed price QF contract creates risk related to future market fluctuations in commodity prices.[97] In fact, a QF contract is actually riskier than a typical hedge because it imposes volume risk, in addition to price risk.[98] The comparison of fixed price QF contracts to hedges is meaningful because the Company cannot engage in commodity hedges with greater than a three-year term because they are too risky.[99] If the Company cannot engage in a 15-year hedge due to the level of risk, there is no reasonable basis for it to engage in a riskier 15-year fixed price QF contract.

4. The QF Market in Oregon is Not Self-Limiting.

Sierra Club argues also argues that there is no need for the Commission to revise its implementation of PURPA as requested by PacifiCorp, because there is no flood of QF projects, and that the market is self-limiting, *i.e.*, as avoided cost prices decrease fewer QFs will be developed.[100] In fact, the Commission has suggested to the contrary, finding that, "there has been significant growth in QF development in [PacifiCorp's] territory."[101] In making this finding, the Commission specifically acknowledged the likelihood that some of

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[95] Sierra Club Prehearing Brief at 5.
[96] PAC/100, Griswold/20-25; PAC/200, Griswold/13. Sierra Club has specifically argued that renewable QFs act as hedges against market spikes. Sierra Club Brief at 6.
[97] PAC/200, Griswold/13.
[98] PAC/200, Griswold/13.
[99] PAC/200, Griswold/13.
[100] Sierra Club Prehearing Brief at 5.
[101] *Re PacifiCorp's Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap*, Docket No. UM 1734, Order No. 15-241at 3 (Aug. 14, 2015).

1 the QFs would not be built, but nonetheless found that "[i]nterim relief is appropriate to

2 protect ratepayers from the possibility of being charged more than PacifiCorp's avoided

3 power costs during the pendency of our review."[102]

4 Moreover, the recent QF development has all occurred while avoided cost prices have

5 been steadily declining.[103] Thus there is no evidence to support Sierra Club's claim that

6 declining avoided cost prices produce a self-limiting market. Given the recent extension of

7 the investment tax credit, it is particularly unlikely that QF development will become self-

8 limiting without Commission intervention.[104]

9 **5. QFs do Not Provide the Customer Benefits Sierra Club Claims.**

10 Sierra Club argues that renewable QFs provide customer benefits that are not

11 accounted for in the avoided cost price. Therefore, additional QF development is a "good

12 deal for Oregon ratepayers."[105] Sierra Club specifically claims that renewable QFs provide

13 RECs, act as a hedge against fuel price volatility, and encourage economic development.[106]

14 In so doing, Sierra Club exaggerates the customer benefits QFs provide.

15 First, not all renewable QFs provide the Company with RECs[107] and even when they

16 do, the value of those RECs does not offset the risks of a 15-year contract. Indeed, this

17 benefit would accrue to customers regardless of the contract term. Second, QFs provide a

18 hedging value only if prices increase above the fixed price in the QF contract. Historically,

19 this has not occurred and fixed price contracts have provided a hedging value to developers,

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[102] Order No. 15-241 at 3.
[103] Tr. 72:25-73:18 (Griswold).
[104] Tr. 80:17-82:1 (Griswold).
[105] Sierra Club Prehearing Brief at 6.
[106] Sierra Club Prehearing Brief at 6.
[107] PAC/200, Griswold/22-23.

while harming customers.[108] Third, the benefits associated with economic development are irrelevant here and there is no basis in this record to conclude that QFs provide a greater benefit than non-QFs.[109]

D. Reducing the Standard Contract Eligibility Cap Protects Customers and Allows Economically Efficient QF Development.

PacifiCorp has presented substantial and compelling evidence demonstrating that the current 10 MW eligibility cap harms customers through excessive avoided cost prices and that the market barriers the Commission previously identified in support of the current cap are no longer present.[110] The Commission should therefore reduce the standard contract edibility cap for wind and solar QFs to 100 kW.

1. A 100 kW Eligibility Cap will not End QF Development.

Several parties claim that a lower eligibility cap will stifle QF development by unreasonably increasing transactional costs.[111] These parties, however, cannot dispute that QF development has thrived in jurisdictions with a lower cap.[112]

The Coalition also claims that the lack of QFs larger than 10 MW in Oregon demonstrates that QFs will not be developed if they are required to negotiate contracts.[113] This argument is wrong for two reasons. First, it ignores the fact that development can continue even with a lower cap, which provides compelling evidence that the cap is not the barrier the Coalition claims.[114]

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[108] PAC/200, Griswold/23.
[109] PAC/200, Griswold/24.
[110] *See e.g.* PAC/100, Griswold/33-35.
[111] *See e.g.* Renewable Energy Coalition Prehearing Brief at 5.
[112] PAC/101, Griswold/2 (demonstrating robust QF development in Idaho).
[113] Renewable Energy Coalition Prehearing Brief at 5.
[114] *See e.g.* PAC/101, Griswold/2.

1 Second, the fact that QFs have been sized at 10 MW is evidence of improper
2 disaggregation, *not evidence of a barrier*. The Commission has long held that its policy is to
3 implement PURPA "in a manner that encourages the *economically efficient* development of
4 [QFs] in Oregon." However, the evidence indicates that the current 10 MW cap has
5 encouraged large projects to disaggregate into smaller projects to take advantage of higher
6 standard prices.[115] Thus, the design, siting and construction of QF resources is being unduly
7 influenced by the requirements for a standard contract rather than a desire to optimize the
8 resource, necessarily resulting in economically *inefficient* development. Requiring wind and
9 solar QFs to negotiate individual agreements based on each project's true size and
10 characteristics will result in efficiently-sited, constructed, and priced QF development.

11 **2. Reducing the Eligibility Cap is Consistent with Oregon Law and Policy.**

12 CREA and RNW argue that lowering the eligibility cap for wind and solar QFs
13 "would contradict ORS 758.515 "by decreasing the marketability of QFs and creating a non-
14 uniform institutional climate.[116] However, these parties fail to identify any authority
15 supporting its argument that any action that decreases the marketability of QFs is contrary to
16 state policy. The Commission has been clear that its obligation to promote QF development
17 must be balanced by its obligation to protect customers.[117] Indeed, another provision of ORS
18 758.515 specifically requires that "rates for purchases . . . shall . . . be just and reasonable to
19 the electric consumers of the electric utility, the qualifying facility, and in the public
20 interest."[118] Thus, the Commission's fundamental objective under PURPA is to accurately

[115] Staff/100, Andrus/19.
[116] Pre-Hearing Brief of the Community Renewable Energy Association at 7; Renewable Northwest Prehearing Brief at 5-6.
[117] Order No. 05-584 at 11 and 19.
[118] ORS 758.515(2)(b).

1 price QF power to better ensure that customers remain indifferent to QF generation.[119]

2 Reducing the eligibility cap produces more accurate avoided cost prices based on current

3 conditions and the QF's individual characteristics, while reducing the contract term

4 eliminates speculative long-term forecasting. Therefore, the Company's recommendations

5 are consistent with the Commission's obligations under both PURPA and state law.[120]

6 **3. Reducing the Eligibility Cap Sends Accurate Price Signals to Developers.**

7 CREA also argues that rather than reducing the eligibility cap, the standard avoided

8 cost prices should be adjusted to send the correct price signal to QF developers.[121] The

9 Company's recommendations in this case, however, are intended to specifically send more

10 accurate price signals to QFs—negotiated avoided cost prices send more accurate price

11 signals to QFs because they account for a multitude of factors that are not included in the

12 calculation of standard prices and reduced contract terms eliminate speculative forecasting.

13 The incremental steps to create more accurate avoided cost prices adopted in Order No. 14-

14 058 are insufficient to protect customers from standard avoided cost prices that do not ensure

15 customer indifference.

16 **4. The Commission's Guidelines for Negotiating QF Contracts will Protect**
17 **QFs.**

18 The Coalition argues that if more QFs are required to negotiate a contract, then

19 PacifiCorp will be able to insist upon unreasonable contract terms or rates.[122] This argument

20 ignores the Commission's comprehensive guidelines for negotiating QF contracts and the

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[119] Order No. 05-584 at 45 ("we recognize that the primary aim is to ensure that ratepayers remain indifferent to the source of power that serves them.").
[120] *See* Order No. 05-584 at 16; Order No. 69 at 12,223.
[121] Pre-Hearing Brief of the Community Renewable Energy Association at 7.
[122] Renewable Energy Coalition Prehearing Brief at 5.

1 Commission's dispute resolution process.[123] The Commission has adopted these measures
2 specifically to address the Coalition's concern and there is no basis to conclude that these
3 measures will be ineffective if more QF contracts are negotiated.

4 **5. A 100 kW Eligibility Cap is Necessary to End Improper Disaggregation.**

5 Staff supports a lower eligibility cap to discourage QF disaggregation.[124] But rather
6 than the Company's proposed 100 kW cap, Staff recommends a cap of 2 to 4 MW, which
7 would theoretically allow a developer of a single wind turbine QF to obtain a standard
8 contract.[125] Staff's arguments in support of its proposed cap are unpersuasive. The QF
9 development in Oregon since the Commission temporarily lowered the eligibility cap for
10 PacifiCorp and Idaho Power Company provides specific evidence that even with a 3 MW
11 cap, QF developers were able to disaggregate their projects in an attempt to gain access to
12 standard contracts.[126] Thus, if a lower eligibility cap is intended to prevent disaggregation, as
13 Staff agrees it should, then a cap of 2 to 4 MW is too high. Moreover, Staff presented no
14 evidence that single turbine wind QFs have been or will be developed in Oregon. Thus, their
15 rationale has no support in the record. Finally, Staff failed to explain why it recommends a 2
16 to 4 MW cap here, while supporting a 100 kW cap in docket UM 1725.[127]

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[123] *See* Order No. 07-360.
[124] Staff Prehearing Brief at 5.
[125] Staff Prehearing Brief at 5; *see also* Renewable Energy Coalition Prehearing Brief at 6 (arguing there is no evidence that 100 kW is the right cap).
[126] *See 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, Idaho Power's Motion for Clarification (July 8, 2015).
[127] *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, Staff Prehearing Brief (Nov. 12, 2015).

1 **III. CONCLUSION**

2 The Commission should approve both of PacifiCorp's recommendations in this case.
3 First, the Commission should reduce the contract term for all QFs to three years. Second, the
4 Commission should lower the standard contract eligibility cap for wind and solar QFs to 100
5 kW. Approving these recommendations better ensures customer indifference to QF
6 generation, as required by federal law.

Respectfully submitted this 12th day of February, 2016.

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