BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1734

In the Matter of PACIFICORP, dba PACIFIC POWER Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap.	STAFF REPLY BRIEF

I. Introduction.

PacifiCorp asks the Commission to modify two of its policies implementing the Public Utility Regulatory Policy Act (PURPA). PacifiCorp asks the Commission to lower the cap for eligibility for standard contracts (Eligibility Cap) for solar and wind qualifying facilities (QFs) from 10 MW to 100 kW and to shorten the term of all PURPA contracts from 20 years to three years. Staff recommends that the Commission reduce the Eligibility Cap for standard contracts for solar and wind QFs to between two and four MWs and deny PacifiCorp's request to shorten the term of PURPA contracts. Both policies are intended to balance ratepayer protection and facilitation of QF development. Staff believes the 20-year contract term with a fixed-price term continues to appropriately balance interests of ratepayers and QFs, but believes the same is not true of the 10 MW Eligibility Cap for solar and wind QFs.

/ / /

/ / /

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4520 / Fax: (503) 378-3784

II. Argument.

A. Staff recommends that the Commission lower the Eligibility Cap to somewhere between 2 and 4 MWs for solar and wind QFs.

When the Commission decided adopt the 10 MW Eligibility Cap in in 2005, the Commission noted the need to eliminate barriers for smaller QFs.[1] The Commission explained that standard contracts do not take into account individual QFs cost characteristics that result in actual avoided costs that differ from the standard avoided cost rates, and that the risk that future avoided costs may differ from the fixed prices in a PURPA contract is greater for a large QF than a small one.[2]

In the last 18 months, a few developers have each executed multiple contracts for solar QFs in PacifiCorp territory. Within a one week period in June 2015, one developer executed standard contracts with PacifiCorp for seven 10 MW solar facilities and one 8 MW solar facility.[3] Another developer executed five standard contracts for 36.5 MW of solar on the same day in May 2015, and executed another two contracts for 19.9 MW one month later.[4] And, three other developers have each executed multiple standard contracts within the last 18 months for multiple facilities that are each below the l0 MW cap.[5] In contrast, in the same period, there is only one instance in which PacifiCorp executed a standard contract with a QF developing only one solar facility.

Similarly, between 2008 and 2014, a single developer executed standard contracts with PacifiCorp for eight wind QFs at and below the 10 MW Eligibility Cap and another executed two

---

[1] Order No. 05-848 at 14-15.

[2] *Id.* at 15.

[3] Staff 100, Andrus/17.

[4] Staff/100, Andrus/17.

[5] Staff/100, Andrus/17-18.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4520 / Fax: (503) 378-3784

standard contracts for two wind QFs, one sized at 9.9 MW and the other at 6.5 MW.[6] In this same time period, PacifiCorp executed three standard contracts for single wind QFs.[7]

In light of this pattern of QF contracting, Staff believes it is appropriate to reduce the Eligibility Cap for solar and wind QFs to discourage developers from disaggregating their proposed solar and wind facilities into multiple QFs to obtain the standard prices available to QFs with a nameplate capacity of 10 MW and lower. It is not necessary to lower the Eligibility Cap for other types of QFs because other resource types are not as easily disaggregated as solar and wind facilities.

CREA and REC oppose lowering the Eligibility Cap for solar and wind QFs and the Oregon Department of Energy (ODOE) opposes lowering the Eligibility Cap for wind QFs. CREA notes that in Docket No. UM 1610, the Commission relied on testimony that a QF developer may only have access to financing after a PPA has been signed and that small QFs under 10 MW may lack the resources to negotiate complex modeling and inputs with a utility."[8] CREA notes that relying on this testimony the Commission adjusted the calculation methodologies for standard rates but maintained the eligibility cap at 10 MW for all resource types.[9]

The critical point underlying Staff's recommendation to lower the Eligibility Cap now is that the most recent contracting activity for solar QFs does not show that the Eligibility Cap is benefiting small solar QFs. Instead, the Eligibility Cap is benefiting sophisticated developers planning multiple QF facilities at or near the 10 MW Cap. Staff acknowledges that there may be small solar QFs that need the protection of the Eligibility Cap in order to obtain a PURPA

---

[6] Staff/200, Andrus/5.

[7] Staff/200, Andrus/7-8.

[8] Post-Hearing Opening Brief of the Community Renewable Energy Association 2, *quoting* Order No. 15-048 at 7.

[9] Post-Hearing Opening Brief of the Community Renewable Energy Association 2, *citing* order No. 15-048 at 7-8.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4520 / Fax: (503) 378-3784

contract. However, the Commission has never designed its PURPA policies to protect *all* potential developers of QF facilities no matter the potential harm to ratepayers. Instead, the Commission has attempted to create policies that balance interests of QFs and ratepayers, accepting some risk of harm to ratepayers when the risk is appropriately balanced by benefits to QFs.

CREA asserts that the Commission should attempt a different solution, such as ordering that a single corporate family can execute contracts with standard rates for 10 MW per year for each resource type, is not an appropriate solution. REC similarly argues that the Commission could cap eligibility for standard contracts for solar and wind QFs at 50 MW total, or at 50 MW per developer. [10] None of these solutions adequately address the issue.

It is not necessarily simple to discern whether multiple QFs are owned by the same corporate family. And, the utilities should not be put in the position of policing the ownership of QFS. With respect to REC's proposal to cap the eligibility for standard contracts at 50 MW, this proposal would still allow one entity to obtain five standard contracts for a disaggregated 50 MW solar project each year. The point of reducing the Eligibility Cap is to prevent large solar and wind QFs from obtaining standard prices that do not take into account the individual characteristics of the QF. REC's proposal would not accomplish this.

CREA asserts that lowering the Eligibility Cap for solar and wind QFs will put an end to contracting for solar and wind QFs because it is difficult if not impossible to negotiate a non-standard contract with PacifiCorp. CREA asserts that "[n]othing 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."[11]

CREA has not supported its assertion with documentation of PacifiCorp's failure to negotiate in good faith. And, if PacifiCorp is failing to adhere to the Commission's policies

---

[10] Renewable Energy Coalition Opening Brief 3.

[11] Post-Hearing Opening Brief of the Community Renewable Energy Association 3.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4520 / Fax: (503) 378-3784

regarding negotiation of QF contracts, the appropriate remedy is a complaint filed under ORS 756.500 or a request for expedited dispute resolution as allowed under Commission rules.

Finally, CREA urges the Commission to retain the 10 MW Cap so as to not prompt large QFs to locate in Oregon. CREA asserts that 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 l 0 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 l 0 MW for all QFs types.[12]

CREA misunderstands the rationale underlying Staff's recommendation. Staff's recommendation is intended to make it more difficult for large QFs to disaggregate for the purpose of obtaining standard avoided cost prices that do not take into account the individual characteristics of the contracting QF. Staff's recommendation is not intended to dissuade QFs from locating in Oregon. 80 MW QFs contracting with PacifiCorp would not be entitled to standard avoided cost prices. Instead, avoided cost prices for an 80 MW QF would be based in part on the individual characteristics of the QF. Accordingly, CREA's threat that Staff's recommendation to lower the Eligibility Cap for wind and solar QFs would induce multiple 80 MW solar facilities to locate in Oregon is not relevant.

ODOE believes that it is reasonable to lower the Eligibility Cap for solar QFs, and "offers a three MW threshold for consideration." ODOE testifies that "[a]ccording to the

[12] Post-Hearing Opening Brief of the Community Renewable Energy Association 6.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4520 / Fax: (503) 378-3784

interconnection standard for Oregon6, projects having a nameplate capacity greater than or equal to three MW are responsible for installing more complex communications and telemetry equipment so the system operator can monitor real-time generation. This requirement points to three MW as a logical breakpoint for solar."[13]

ODOE opposes reducing the Eligibility Cap for wind QFs, noting that geographic limitations associated with siting wind facilities mean that the five-mile minimum distance between projects with the same owners is much more likely to affect developers' ability to site multiple wind projects than it would affect the ability to site multiple solar projects.[14] ODOE also notes that given economies of scale and the expense of contract negotiation and interconnection, a 10 MW wind QF made up of four 2.5 MW turbines may be a feasible option for a developer such as a small farm or school district, whereas a wind QF with less than 4 MW nameplate capacity would not. [15]

Notwithstanding the geographic factors that may diminish a large wind QF's ability to disaggregate into multiple projects that are eligible for standard avoided cost prices, two developers have done so in the past several years. And, the QF's interconnection costs are the same whether the QF is eligible for a standard contract or not. Accordingly, the fact that interconnection costs may be prohibitive for a one-turbine QF is not particularly pertinent to whether the Eligibility Cap should be lowered. Staff recognizes that other costs associated with QF contracting will likely be higher for a non-standard contract, but is not convinced the difference is so great that Staff's recommendation to lower the Eligibility Cap to somewhere between two and four MWs should be rejected.

---

[13] ODOE/200, Broad and Carver/5.

[14] ODOE/200, Broad and Carver/4.

[15] ODOE/200, Broad and Carver/4.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4520 / Fax: (503) 378-3784

Finally, Staff disagrees with PacifiCorp that the Eligibility Cap should be lowered to 100 kW. Staff did recommend a 100 kW Eligibility Cap for Idaho Power, but that was primarily because the Idaho Public Utilities Commission had lowered its Eligibility Cap to 100 kW and Staff thought consistency with Idaho given that only five percent of Idaho's total service territory is in Oregon.

Staff acknowledges that a 100 kW Eligibility Cap could be more effective at deterring disaggregation. However, Staff believes that the benefit obtained by lowering the Eligibility Cap to 100 kW for PacifiCorp, rather than somewhere between two and four megawatts, is not so great as to warrant the additional decrement.

B. Staff recommends that the Commission deny PacifiCorp's request to shorten the term of all PURPA contracts to three years.

1. Maintaining the contract at 20 years with a fixed-term of 15 years is the appropriate policy choice.

When adopting a 20-year contract with a fixed-price term of 15 years for standard contracts, the Commission explained that a 20-year term with fixed prices for 15 years balanced two goals, the need to accurately price power in the later years of a contract and the need to facilitate financing for a QF project: "[O]ur fundamental objective is to establish a maximum standard contract term that enables eligible QFs to obtain adequate financing but limits the divergence of standard contract rates from actual avoided costs."[16] Staff believes the current contract term of 20 years with a 15-year fixed-price term continues to strike the appropriate balance between incenting QF development and protecting ratepayers. The same considerations underlying the Commission's determination that a 20-year contract is appropriate—QF access to reasonable financing—still exist. And, evidence presented in this proceeding reflects that

/ / /

[16] Order No. 05-581 at 19-20.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4520 / Fax: (503) 378-3784

shortening the maximum term of a PURPA contract to three years would likely have a detrimental effect on the ability of QFs to obtain financing at reasonable terms.[17]

2. The Commission's discretion to maintain the current contract term is not limited by statute or PURPA.

CREA, Renewable Northwest, and REC argue that under ORS 758.525, the Commission must require 20-year fixed-term PURPA contracts. And, CREA and REC assert that 20-year fixed price contracts are also required under the Federal Energy Regulatory Commission (FERC)'s regulations implementing PURPA. Staff disagrees with both assertions.

With respect to the statutory argument, ORS 758.525 includes no express limitation on the Commission's authority to determine the appropriate term for PURPA contracts. And, the Commission should not infer such a limitation when it is not found in the plain language of the statute.[18]

CREA and REC's argument that a 20-year contract is required under PURPA is similarly unavailing. REC's argument relies primarily on FERC's opinion in *Hydrodynamics Inc. v. Montana Marginal Energy, Inc., et al.*, in which four QFs the challenged Montana Public Service Commission (MPSC)'s implementation of PURPA. REC's reliance is misplaced.

At issue in *Hydrodynamics* was whether the MPSC could limit the opportunities for QFs over 10 MW to enter into PURPA contracts to periodic competitive solicitations or cap the total amount of installed capacity for QFs between 100 kW and 10 MW at 50 MW.[19] Under this latter rule, once the 50 MW installed-capacity limit was reached, all QFs between 100 kW and 10 MW were only eligible for "as-available" contracts or a fixed-price short-term contract that compensated the QF only for energy.

---

[17] See Staff Opening Brief 10, citing testimony presented by ODOE and CREA.

[18] *State v. Hess*, 342 OR 647, 661 (2007) ("We are reluctant to infer from the legislature's silence an intent to deprive the court of its traditional authority * * * ").

[19] 146 FERC 61,193 (2014 WL 1097409).

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4520 / Fax: (503) 378-3784

FERC concluded the Montana rule limiting the opportunities for QFs over 10 MW to secure long-term contracts violated the QFs right to sell its energy and capacity when it is made available to the utility.[20] Notably, the question before FERC was whether the MSPC could significantly limit the opportunity for QFs over 10 MW to obtain *any* contract. Accordingly, FERC's opinion regarding the competitive solicitation limitation offers no guidance on what would constitute a "long-term contract."

FERC also concluded that MPSC's installed capacity limit "fails to implement the Commission's regulations requiring an electric utility to purchase any capacity which is made available from a QF, and at a rate that, at the QF's option, is a forecasted avoided cost rate."[21] FERC acknowledged that "the avoided cost rate need not include capacity unless the QF purchase will permit the purchasing utility to avoid building or buying future capacity." FERC noted, however, that no party had demonstrated that the 50 MW limit had a clear relationship to the utility's need for a capacity and that a capacity limit would have to "represent the point at which [the utility's] demand for capacity equals zero."[22] FERC's decision on the 50 MW capacity limit also has no bearing on the length of contract to which a QF is entitled.

///

///

///

///

///

///

///

///

---

[20] *Id.* at 9.

[21] *Id.*

[22] *Id.* at 9-10.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4520 / Fax: (503) 378-3784

III. Conclusion.

Staff recommends that the Commission lower the Eligibility Cap for solar and wind QFs to somewhere between two and four MWs and deny PacifiCorp's request to shorten the term of all PURPA contracts to three years.

DATED this 17th day of February 2016.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

Stephanie S. Andrus, #92512
Senior Assistant Attorney General
Of Attorneys for Staff of the Public Utility Commission of Oregon

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4520 / Fax: (503) 378-3784