NewSun ENERGY

September 24, 2021

Via Efiling

Oregon Public Utility Commission Staff
Attention: Stephanie Andrus, Caroline Moore
201 High Street, Suite 100
Post Office Box 1088
Salem, OR 97308-1088

Re: AR 631 Informal Rulemaking Comments

Dear Staff:

NewSun Energy LLC (NewSun) submits these comments in response to the workshop held by Staff on September 22, 2021 and on the draft rules circulated by staff on September 3, 2021 (Draft Rules) in the informal process of this rulemaking. NewSun appreciates Staff taking additional time to further work on these rules informally and looks forward to continuing to engage in this process.

This rulemaking should facilitate decarbonization. This year, Oregon passed legislation (HB 2021) requiring significant reductions in carbon emissions from the state's largest investor-owned utilities, and over a year prior to that, the Oregon Governor issued executive order 20-04 directing agencies including the Oregon Public Utility Commission (Commission) to exercise any and all discretion to facilitate greenhouse gas (GHG) reductions as well as to consider and integrate climate change and the state's GHG reduction goals into their policy decisions. When the Public Utility Regulatory Policies Act of 1978 (PURPA) was first passed, one primary goal was to reduce the country's reliance on fossil fuels by encouraging the development of more efficient co-generation facilities and renewable qualifying facilities (QFs). To this day, PURPA can still be a powerful tool to facilitate and accelerate decarbonization. The PUC should not miss this opportunity to create sound PURPA policies in this state that will "encourage" QFs[1] and that will "[p]romote the development of a diverse array of permanently sustainable energy resources . . . to the highest degree possible."[2]

NewSun is concerned that many proposals embodied in the Draft Rules do not encourage or promote the development of permanently sustainable QFs and that the rules will instead discourage decarbonization in this state by making it more difficult for QFs to acquire financing, to achieve commercial operations, and to comply with contract terms. Specific examples include provisions that force QFs into unreasonably narrow performance or development parameters or that give the purchasing utility an unreasonable ability to terminate the contract where a payment

[1] 16 USC §824a-3(a).
[2] ORS 758.515(1)(a).

of damages may be sufficient. Rather, the rules should be stated in broad policy language that facilitates flexibility, ensures compliance with federal PURPA requirements, and that states clear parameters of utility-QF interactions to reduce the potential for disputes.

In these comments, NewSun details a few policy recommendations as well as in the attached matrix. Further, there are additional clean-up edits proposed in the attached redline, which are generally aimed at removing inconsistencies with Federal law, reducing internal inconsistencies and redundancies, improving readability and clarity, and minimizing potential disputes. While none of these recommendations are intended to be totally comprehensive and may require some tweaks to the language still, we hope that these and continued conversations with Staff and stakeholders will continue to move the ball forward towards creating a uniform set of rules that will create clear expectations and reduce potential litigation.

Policy Recommendations

Several of NewSun's proposals are detailed below but the full list of proposals including specific proposed language for the rules are included in the attached matrix.

1. QF's Right to Sell *Any* Output

The rules should clarify that a QF may sell any output that it makes available to the purchasing utility. Under 18 CFR 292.303(a) the utility has an obligation to purchase "any energy and capacity which is made available from a qualifying facility." This means the QF could sell only energy or only capacity or only a portion of its energy or capacity. It can sell whatever it "makes available." Some provisions such as the definition of Commercial Operation Date appear to require that the QF sell its entire Net Output (as defined). This should be remedied, and generally applicable provisions should be added to clarify this concept and avoid conflict with federal law and potential litigation. Further, to the extent that a QF is not offering capacity attributes either entirely or in part, the purchasing utility should not have the right to impose minimum delivery requirements. As such, the following provisions should be added to OAR 860-029-0020 or 0030:

- A qualifying facility may offer to sell any energy, capacity, environmental, and other attributes which the qualifying facility makes available to the purchasing utility.
- A public utility has an obligation to compensate a QF for any environmental or other attributes that are made available from a qualifying facility and that may be used for any of the utility's regulatory compliance obligations.
- To extent a qualifying facility is not offering capacity attributes either entirely or in part, a public utility shall not have the right to burden/fine or otherwise impose minimum delivery requirements.

It is useful to recall that many initial PURPA projects were co-generation facilities that, under PURPA, have no size cap and could be quite large, but that often only delivered surplus power when it was available. The utility's mandatory purchase obligation is not contingent upon the firmness of the power, but only on whether the facility can get the power to the utility system.

With this context in mind, the rules should be carefully reviewed and structured to not create any conflicts with Federal PURPA requirements and this traditional PURPA contracting structure.

2. Time to Reach Commercial Operation: 1-3-5-7 Proposal

NewSun continues to believe that a simplified approach to the "Development Period" or the time to reach commercial operation for standard PPAs is appropriate. NewSun previously detailed its "1-3-5-7 Proposal" in prior comments, which in essence allows a QF:

- one year from contract execution within which to terminate the contract for any reason;
- three years from contract execution within which to achieve commercial operations and that it may come online at any point during those three years and coordinate such date in good faith with the utility and provide the utility with notice of certain milestones (with the caveat that the QF must update the utility with its expected commercial operation date (COD) on the second anniversary of contract execution or 6 months prior to the expected COD, whichever is earlier);
- five years (i.e., an extension of 2 years from the standard 3) from contract execution within which to achieve commercial operations and keep the full purchase period (i.e., it does not cut into the fixed price period) if the QF has a "for cause" reason for extension meaning any reasonable cause for delay related to interconnection, transmission, purchasing utility actions, force majeure, or supply disruption (but that if an extension is needed not "for cause" then the QF may post security and the extension would shorten the fixed-price period); and
- seven years within which to achieve commercial operations if the QF has an additional "for cause" extension for any reasonable cause for delay related to interconnection, transmission, purchasing utility actions, force majeure, or supply disruption (but that the extension would shorten the fixed-price period).

This approach allows flexibility for reasonable delays that are beyond the QFs control and reflects the current and likely future reality that interconnection and transmission buildouts can and do take longer than 3 years. Transmission is constrained in the northwest and new transmission lines can take a decade or more to plan, permit, and construct. Transmission and interconnection issues are likely to be the primary limiting factor in determining when projects can come online, and therefore a reasonable amount of flexibility is not only reasonable but necessary to achieve decarbonization.

3. Utility Obligations to Keep Records and Communicate Transparently

It is important for utilities to keep accurate records and communicate with transparency. The below generally applicable changes would improve the status quo:

- **Records:** NewSun recommends that utilities keep and retain records for all qualifying facilities until at least 4 years after the conclusion of any applicable contracts or communication. Previously, in docket UM 2001, utility record keeping became an issue because at least one utility did not retain certain records from only a few years prior.

Better record keeping requirements would ensure the Commission and stakeholders have access to appropriate information when necessary.

- **Communications:** Additionally, NewSun recommends that utilities identify the name and title of any sender on all communications, to provide editable drafts of contracts and not prohibit any QF from proposing and submitting redlines. Utilities have previously sent emails to QFs from a generic email address which makes it difficult to know who you are communicating with. It would be a lot easier and more transparent if, in such communications, the utility identifies the sender. Further, the utility should not be the only entity with "the power of the pen" in contract drafting. By prohibiting the QF from simply submitting redlines to a contract, the utility greatly increases the burden on the QF to negotiate a contract. This is so because the QF will need to copy over text from the contract, write out which page/section the language is in, and then describe the edit in words. This runs a higher risk of miscommunication, delay, and potential litigation, whereas simply allowing the QF to submit a redline, the QF can easily and clearly show the change it wants to the contract. These simple changes will make QF contracting more transparent, smoother, quicker and will help avoid disputes.

4. Rules Should Avoid Detailed Contract-Like Language

The rules should be phrased to set out the parameters of utility-QF interactions instead of specific contract-like language. NewSun is concerned that stating specific contract-like language in the rules will result in future disputes because (1) the rules are less able to adapt to changing conditions and industry trends, (2) the specific rule language may be incomplete in representing the range of conditions that could arise, and (3) even if the specific language at issue is limited to standard contracts, it could be used by a utility to argue for inclusion of particular language in a non-standard contract. If, instead, the rules adopt broader language that clearly sets boundaries around a particular issue, the parties can be assured that any contract language must be within those parameters, even if the exact phrasing gets into further specificity.

For example, the proposed rule regarding force majeure events is extremely detailed and resembles the type of language that would be in a contract. However, in UM 1129, the Commission concluded that "[t]he term, force majeure, is a legal term, and standard contracts should incorporate the common legal definition."[3] Rather than attempting to articulate all of the possible scenarios that would constitute a force majeure event, the rule should simply state that contracts shall include a force majeure provision that is commercially reasonable and that does not discriminate against QFs. NewSun would also note, that if a detailed force majeure provision is to be included in the rules, this section requires a careful review and several edits.

5. QF Damages and Utility Penalties

The Draft Rules appear to only address damages in the event of a QF default; however, the rules should include explicitly that a QF may, in addition to any specified contractual remedies, pursue any and all other remedies available at law, in equity, or in any administrative forum and that a utility may be subject to penalties or disallowance of rate recovery for certain expenses (for

[3] Order No. 06-538 at 24

example, its PURPA litigation expense) in the event of utility misbehavior. The PURPA mandatory purchase obligation was designed, in part, in response to the reluctance of traditional utilities to purchase power from or sell power to non-utility generators. This reluctance has not changed, and the rules should not create incentives for utility bad behavior. Rather the rules should clearly signal to utilities that they should act reasonably or be subject to ramifications.

Clean-Up Edits

The attached redline includes several proposed clean-up edits which are generally aimed at removing inconsistencies with Federal law, reducing internal inconsistencies and redundancies, improving readability and clarity, and minimizing potential disputes.

For example, Staff should consider merging OAR 860-029-0043 with and/or reconciling the differences between that section and 860-029-0080 and -0085 as the sections are quite duplicative but use slightly different language that could create ambiguity or disputes in the future. In a post-IRP avoided cost update, 860-029-0080(3) largely overlaps with 860-029-0085(1) & (3) except that -0085(3) makes clear that the Commission may suspend the rates during review whereas -0080(3) just states that they will be effective 30 days after filing. Similarly, regarding out-of-cycle avoided cost updates, 860-029-0080(8) largely overlaps with 860-029-0085(5), but -0085(5) makes clear that such a request may be made by a someone other than a public utility. It is not entirely clear how the rules resulted in virtually identical sections with slightly different language, but to avoid potential litigation over the inconsistencies, the sections should be merged or cleaned up to avoid these issues.

These and similar edits are included in the attached redline along with brief comments. Should Staff have any questions regarding any recommendation, NewSun is happy to discuss.

Conclusion

For the complete list of policy proposals and clean-up edits, please review the attached matrix and rule redline. This rulemaking is a work-in-progress and NewSun looks forward to continuing to work on these proposals, reform the language, and engage with Staff, other stakeholders and the Commission to reach an outcome here that will accelerate decarbonization, and that is robust, durable, and that will minimize litigation. We hope that the above and attached recommendations will help move this discussion forward. Thank you

Sincerely,

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NewSun Policy Proposals Matrix

Issue	Proposed Language	Citation
QF's Right to Sell Any Output	• A qualifying facility may offer to sell any energy, capacity, environmental, and other attributes which the qualifying facility makes available to the purchasing utility. • A public utility has an obligation to compensate a QF for any environmental or other attributes that are made available from a qualifying facility and that may be used for any of the utility's regulatory compliance obligations. • To extent a qualifying facility is not offering capacity attributes either entirely or in part, a public utility shall not have the right to burden/fine or otherwise impose minimum delivery requirements.	860-029-0020 or -0030
Utility Reasonableness Requirement	In carrying out its obligations under these rules, wherever a public utility is given discretion, the public utility must act reasonably in exercising that discretion, unless the rule otherwise specifies that in a particular instance the public utility has unfettered discretion.	860-029-0030
Utility Obligation to Meet Required Deadlines	Public utilities must meet all required deadlines. To the extent that a public utility has failed to meet a required deadline before contract execution, the qualifying facility may move the date upon which it formed a legally enforceable obligation by the same amount of time on a day-for-day basis that the public utility delayed its performance. To the extent that a public utility has failed to meet a required deadline after contract execution or otherwise delayed its performance, the qualifying facility may extend its scheduled commercial on-line date and fixed-price period by the same amount of time on a day-for-day basis that the public utility delayed its performance.	860-029-0030
Utility Obligation to Purchase all Scheduled Output	A public utility has an obligation to purchase all output scheduled by the qualifying facility or authorized representative. Scheduling provisions should be consistent with typical industry practice and netting should be on a monthly basis.	860-029-0030
Utility Obligations to Keep Records and Communicate Transparently	• A public utility must maintain records of all contracts with qualifying facilities, memoranda, communications, and revisions for 4 years after expiration or until the conclusion of any contract disputes pertaining to such records, whichever is later. • In exchanging draft contracts, a public utility must provide a qualifying facility with an editable version of the draft contract and shall not prohibit the qualifying facility from to proposing and submitting proposed redlines to the draft contract. • In all communications with qualifying facilities, a public utility must identify the name and title of the sender.	860-029-0030
QF Damages and Utility Penalties	A qualifying facility may, in addition to any specified contractual remedies, pursue any and all other remedies available at law, in equity, or in any administrative forum and that a utility may be subject to penalties or disallowance of rate recovery for certain expenses (for example, its PURPA litigation expense) in the event of utility misbehavior.	860-029-0020

Issue	Proposed Language	Citation
QF right to Provide Back-up Power and Resiliency Benefits	A qualifying facility may reserve the right in its power purchase agreement to provide back-up power and resiliency benefits to any electric utility (including consumer-owned utilities) prior to the purchase term (e.g., if the QF comes online too early), during any period where the QF is prevented from delivering to the purchasing utility by an event of force majeure (for example, when a transmission line is down due to wildfire etc.) or during any period where purchasing utility in default.	860-029-0020
LEO Rule	A legally enforceable obligation is formed when the qualifying facility signs a final draft of an executable contract that includes a scheduled commercial on-line date and information regarding the minimum and maximum annual deliveries, thereby obligating itself to provide power or be subject to penalty for failing to deliver energy on the scheduled commercial on-line date, or as may otherwise be determined by the Commission on a case-by-case basis. Formation of a legally enforceable obligation locks in the avoided cost prices in effect at the time of the LEO. A qualifying facility entering into a power purchase agreement need not provide all information that a utility may request to include as exhibits to the power purchase agreement to form a legally enforceable obligation, so long as the information required above is provided and the QF continues to timely deliver the remainder of the information required for the power purchase agreement.	OAR 860-0290-0020
Avoided Cost Updates	• Remove Acknowledged IRP Update inputs from the May 1 annual avoided cost update (OAR 960-029-0080 – Remove subsection (7)(a)(D); OAR 960-029-0085 – Remove subsection (4)(a)(D)) • Should merge or otherwise remove duplication and resolve inconsistencies between OAR 860-029-0043; -0080 and -0085 as the sections are quite duplicative but use slightly different language that could create ambiguity/disputes in the future.	860-029-0043 860-029-0080 860-029-0085
Contract Process for PPA	• The site control requirement should be modified or clarified to reflect that: 1) The purchasing utility does not have unilateral unfettered discretion in determining what a "sufficient size" site is; 2) That the QF does not need sufficient rights to "exclusively" occupy the site (some solar operations may have other on-sit operations from other agricultural uses, for example); 3) The purchasing utility may not unreasonably withhold consent to updates to the site as development progresses, so long as it does not materially affect the point of receipt (for example, minor adjustments may be needed if cultural/archeological resources are discovered in a particular portion of the site); and 4) Deviations from specified site do not subject to QF to any further security, damages, or terminations. • The 12x24 requirement should be modified or clarified to reflect	New Rule #3

Issue	Proposed Language	Citation
	that: 1) Deviations 12x24 estimate do not subject to QF to any further security, damages, or terminations; and 2) The 12x24 may be updated by the QF in good faith in its sole discretion.	

Time to Construct Facility
 	
(NewSun's 1-3-5-7 Proposal)
	• Modify OAR 860-029-0120(7)(a)-(c) to allow termination within 1 year for any reason and remove damages if done within that time.
	• A qualifying facility has an obligation to achieve commercial operations within 3 years of the date of contract execution of a standard power purchase agreement or date of formation of a legally enforceable obligation, or to otherwise in good faith, coordinate its on-line date with the public utility by providing the public utility with an update as to its expected on-line date not less than 6 months prior to the expected on-line date or the second anniversary of the date of contract execution or formation of the legally enforceable obligation, whichever is earlier.
	• A qualifying facility with an executed power purchase agreement or legally enforceable obligation has an obligation to provide notice to the public utility when:
	  • The qualifying facility executes an interconnection agreement;
	  • The qualifying facility executes an engineering and procurement agreement;
	  • The qualifying facility issues a full notice to proceed to the engineering procurement and construction contractor;
	  • The qualifying facility executes long-term firm transmission service agreement, if applicable; and
	  • The qualifying facility closes on its construction financing.
	• The public utility has an obligation to extend the commercial on-line date up to the 5th anniversary of the date of contract execution or formation of the legally enforceable obligation for any reasonable cause related to interconnection, transmission, purchasing utility actions, force majeure, or supply disruption. Any other cause requiring an extension of the commercial online date up to the 5th anniversary requires the QF to post reasonable security and the extension shortens the fixed-price term by the amount of the delay beyond the original scheduled commercial online date.
	• The public utility has an obligation to extend the commercial on-line date up to the 7th anniversary of the date of contract execution or formation of the legally enforceable obligation for any reasonable cause related to interconnection, transmission, purchasing utility actions, force majeure, or supply disruption and the extension shortens the fixed-price term by the amount of the delay beyond the original scheduled commercial online date. Longer extensions may be allowed on a case-by-case basis where there are special circumstances of purchasing utility violations warranting further
		860-029-0120

Issue	Proposed Language	Citation
	extensions.	
Contract Term	Recommend allowing a QF to select a fixed-price term of up to 25 or 30 years commencing on actual (not scheduled) COD, consistent with RFPs. (Montana currently has 25-year contract terms,[1] and Arizona has a minimum 18-year contract term.[2])	860-029-0120
Ability to come online prior to Scheduled COD	A utility may not reject a sale from a QF. There should be a clarification that if the QF comes online outside of the 180/90-day time frames, it may do so and get the "as available" pricing.	New Rule #4 (4)
Eligibility for Standard PPA – Size	Recommend 20 MW size eligibility threshold for Standard PPAs	New Rule #2
Eligibility for Standard PPA – Same site	Recommend removal of 5-Mile rule At a minimum, the change made in response to Joint Utilities' request should be removed and the rule language should simply mirror the language from the UM 1129 stipulation, which reads as follows: "the term 'same person(s)' or 'affiliated person(s)' means a natural person or persons or any legal entity or entities sharing common ownership, management or acting jointly or in concert with or exercising influence over the policies or actions of another person or entity."	New Rule #2
Modifications to QF prior to and after COD	Adopt changes proposed by QF Trade Associations	860-029-0120(14)
MAG/MDG	Adopt changes proposed by QF Trade Associations.	860-029-0120(10)-(13)
FERC certification	Recommend simply deleting this section. Given that FERC oversees QF status determinations, there is already an appropriate venue to resolve those concerns and no need to duplicate here. It is also unreasonable to require the QF to prove its continued eligibility no more than once every 24 months, when there have been no changes in the intervening years. When a QF makes a material change, it is required to re-certify with FERC anyway and submit notice to the utility, so there is no need for this provision.	860-029-0120(18)
Obligation for Costs to Accept Deliveries from Off-System QFs for Standard PPAs	Recommend removing this rule until after resolution of UM 2032 because it concerns the core issue being litigated in UM 2032 regarding whether the QF should always be required to pay for the costs of network upgrades to deliver their power to load without reimbursement. This rule would require use of NRIS, which UM 2032 may change. Because the purchasing utility can choose to send the QF power to load or elsewhere, this is inconsistent with PURPA. At a minimum, the definition of Network Upgrades should be clarified	New Rule #1

[1] https://www.natlawreview.com/article/montana-supreme-court-rejects-public-service-commission-s-reduction-avoided-cost

[2] https://www.utilitydive.com/news/arizona-approves-18-year-term-purpa-contracts-solar-aps-renewables-competition/569036/#:~:text=The%20Arizona%20Corporation%20Commission%20(ACC,to%20build%20capital%20from%20investors.

Issue	Proposed Language	Citation
	to apply to off-system QFs rather that QFs interconnecting with the purchasing utility.	
Force Majeure	Adopt changes proposed by QF Trade Associations	New Rule #5
Violations	Recommend that Staff re-insert the "Violations" section from its prior version of the rules and add: g) Failure to achieve commercial operations where construction has begun and major financial commitments have been undertaken such as executed long-term firm point-to-point transmission service contracts; closed on construction financing; expended over $[X] MM or [Y]% of facility costs; fully funded interconnection or engineering and procurement agreements (or executed such agreements with a funding schedule); and posted security at time of schedule request in the amount of $[__]/KW.	

Note: this matrix is not necessarily comprehensive. Rather this is intended to highlight a few issues, and facilitate further discussion and dialogue.

DIVISION 29
REGULATIONS RELATED TO AGREEMENTS BETWEEN ELECTRIC UTILITIES AND ELECTRIC COGENERATION AND SMALL POWER PRODUCTION FACILITIES

860-029-0005
Applicability of Rules

(1) These rules apply to all interconnection, purchase, and sale arrangements between a public utility and qualifying facilities as defined herein. Provisions of these rules do not supersede contracts existing before the effective date of this rule. At the expiration of such an existing contract between a public utility and a cogenerator or small power producer, any contract extension or new contract must comply with these rules.

(2) Nothing in these rules limits the authority of a public utility or a qualifying facility to agree to a rate, terms, or conditions relating to any purchase, which differ from the rate or terms or conditions that would otherwise be provided by these rules, provided such rate, terms, or conditions ~~do not burden the public utility's customers~~ are consistent with applicable standards required by the Public Utility Regulatory Policies Act of 1978.

(3) Within 30 days following the initial contact between a prospective qualifying facility and a public utility, the public utility must submit informational documents, approved by the Commission, to the qualifying facility which state:

(a) The public utility's internal procedural requirements and information needs;

(b) Any contract offered by the public utility is subject to negotiation, unless an eligible qualifying facility chooses to enter the Standard Power Purchase Agreement;

(c) Avoided costs are subject to change pursuant to OAR 860-029-0080(3), except where a qualifying facility has executed a binding power purchase agreement or formed a legally enforceable obligation that includes a fixed-price term; and

(d) Avoided costs actually paid to a qualifying facility depend on the quality and quantity of power to be delivered to the public utility. The avoided costs may be recalculated to reflect stream flows, generating unit availability, loads, seasons, or other conditions.

(4) Upon request or its own motion, the Commission may waive any of the Division 29 rules for good cause shown. A request for waiver must be made in writing, unless otherwise allowed by the Commission.

860-029-0010
Definitions for Division 029 Rules

Commented [A1]: This mirrors the language in ORS 758.535(3)(b). The language "do not burden" appears inconsistent with FERC directives that rates for purchases not discriminate against QFs and be just and reasonable to the electric consumer and in the public interest. 18 CFR 292.304(a). This inconsistency could result in litigation and should be resolved.

Commented [A2]: A minor change to this language is necessary since Standard PPAs are not subject to negotiation if the QF does not want to negotiate.

Commented [A3]: This clarification appears necessary because avoided costs cannot change if there is a contract or legally enforceable obligation.

(x) "AC" means alternating current.

(1) "Avoided costs" means the electric utility's incremental costs of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, the electric utility would generate itself or purchase from another source, including any costs of interconnection of such resource to the system.

(2) "Back-up power" and "stand-by power" mean electric energy or capacity supplied by a public utility to replace energy ordinarily generated by a qualifying facility's own generation equipment during an unscheduled outage of the facility.

(3) "Capacity" means the average output in kilowatts (kW) committed by a qualifying facility to an electric utility during a specific period.

(4) "Capacity costs" mean the costs associated with supplying capacity; they are an allocated component of the fixed costs associated with providing the capability to deliver energy.

(x) "Certified qualifying facility" means a qualifying facility that is certified as such under 18 C.F.R. Part 292.

(5) "Cogeneration" means the sequential generation of electric energy and useful heat from the same primary energy source or fuel for industrial, commercial, heating, or cooling purposes.

(6) "Cogeneration facility" means a facility which produces electric energy and steam or other forms of useful energy (such as heat) by cogeneration that are used for industrial, commercial, heating, or cooling purposes.

(7) "Commercial operation date" means the date after start-up testing is complete and the qualifying facility has satisfied the criteria necessary to commence operation and begins to deliver output ~~its Net Output, is fully operational and capable of delivering output.~~

(8) "Commission" means the Public Utility Commission of Oregon.

(x) "Development period" means the time period commencing on the power purchase agreement Effective Date and ending 24:00 PPT the day before the scheduled commercial operation date.

(x) "Contract price" means for the fixed price term, the applicable fixed price for On-Peak Hours and Off-peak Hours specified in the power purchase agreement ~~purchasing utility's avoided cost price schedule~~, and during the subsequent non-fixed price term, the purchasing utility's applicable Index Price in effect when the energy is ~~generated~~delivered.

(9) "~~Costs of~~ interconnection costs" mean~~s~~ the reasonable costs of connection, switching, dispatching, metering, transmission, distribution, equipment necessary for system protection, safety provisions, and administrative costs incurred by an electric utility directly related to

Commented [A4]: The change from "delivering output" to "Net Output" creates ambiguity for a QF that chooses not to sell its full Net Output. The definition of "Net Output" is such that it would not comply with FERC's rules if the QF chose to make less output available to the purchasing utility.
"Net Output" means all energy and capacity produced by the qualifying facility, less station use and losses, and other adjustments flowing through the Point of Interconnection."

Commented [A5]: Recommend using power purchase agreement instead of avoided cost price schedule because the applicable price schedule should be attached to or included in the PPA and this clarifies that the "Contract Price" does not change when the "price schedule" is updated but is fixed by the PPA. Also, the term "price schedule" is not defined and appears to refer to the standard avoided cost prices which are inapplicable as far as these definitions apply to QFs not eligible for standard prices.

Commented [A6]: Suggest use of the word "delivered" here to accommodate storage QFs that may not "generate" energy per se, and may in fact store generated energy and deliver it at a later period.

installing and maintaining the physical facilities necessary to permit purchases from a qualifying facility.

(10) "Demand" means the average rate in kilowatts at which electric energy is delivered during a set period, to be determined by mutual agreement between the electric utility and the customer.

(11) "Effective ~~d~~Date" means the date on which a power purchase agreement is executed by both the qualifying facility and the public utility.

(12) "Electric utility" means a nonregulated utility or a public utility as defined in ORS 758.505.

(13) "Energy" means electric energy, measured in kilowatt hours (kWh).

(14) "Energy costs" means:

(a) For nonfirm energy, the incremental costs associated with the production or purchase of electric energy by the electric utility, which include the cost of fuel and variable operation and maintenance expenses, or the cost of purchased energy;

(b) For firm energy, the combined allocated fixed costs and associated variable costs applicable to a displaced generating unit or to a purchase.

(x) "Existing QF" means a QF that is or has been operational before the effective date of a power purchase agreement.

(x) "Facility" means all equipment, devices, associated appurtenances, owned, controlled, operated and managed by a qualifying facility in connection with, or to facilitate, the production, storage, generation, transmission, delivery, or furnishing of electric energy by the qualifying facility to the purchasing public utility and required to interconnect with the System.

(x) "FERC" means the Federal Regulatory Commission.

(15) "Firm energy" means a specified quantity of energy committed by a qualifying facility to an electric utility.

(16) "Fixed ~~rate~~ price term" means for qualifying facilities electing to sell firm energy or firm capacity or both, the period of a power purchase agreement during which the public utility is contracted to pay the qualifying facility avoided cost rates determined either at the time of contracting or at the time of delivery.

(x) "Force Majeure" is defined at OAR 860-029-XXXX [New Rule #].

(x) "Generator Interconnection Agreement" means the generator interconnection agreement between the qualifying facility and qualifying facility's interconnection provider.

Commented [A7]: This term "Costs of interconnection" only appears in the rules in reference to the utility's avoided costs of interconnection and this definition refers to a QFs costs of interconnection which is discussed in -0060 and referred to as "interconnection costs". It could lead to unnecessary disputes without this clarification.

AR 631 – FIRST DRAFT STAFF RULES

(x) "Forced Outage" means NERC Event Types U1, U2 and U3, and specifically excludes any Maintenance Outage or Planned Outage.

(17) "Index rate" means the lowest avoided cost approved by the Commission for a generating utility for the purchase of energy or energy and capacity of similar characteristics including on-line date, duration of obligation, and quality and degree of reliability.

(18) "Interruptible power" means electric energy or capacity supplied by a public utility to a qualifying facility subject to interruption by the electric utility under certain specified conditions.

(19) "Maintenance power" means electric energy or capacity supplied by a public utility during scheduled outages of a qualifying facility.

(x) "Maintenance Outage" means NERC Event Type MO, as provided in attached Exhibit J, and includes any outage involving ten percent (10%) of the Facility's Net Output that is not a Forced Outage or a Planned Outage.

(x) "MW" means megawatt.

(x) "MWh" means megawatt-hour.

(20) "Nameplate ~~c~~Capacity Rating" means the maximum installed instantaneous power production capacity of the completed Facility, expressed in MW (AC), and measured at the point of interconnection, when operated in compliance with the Generation Interconnection Agreement and consistent with the recommended power factor and operating parameters provided by the manufacturer of the generator, inverters, energy storage devices, or other equipment within the Facility affecting the Facility's capability to deliver useful electric energy to the grid at the point of interconnection. ~~full-load electrical quantities assigned by the designer to a generator and its prime mover or other piece of electrical equipment, such as transformers and circuit breakers, under standardized conditions, expressed in amperes, kilovoltamperes, kilowatts, volts, or other appropriate units. Nameplate capacity is usually indicated on a nameplate attached to the individual machine or device~~.

(x) "NERC" means the North American Reliability Corporation.

(x) "Net Output" means all energy and capacity produced by the qualifying facility, less station use and losses, and other adjustments flowing through the Point of Interconnection.

(x) "Network Upgrades" means an addition, modification, or upgrade to the transmission system of a transmission provider required at or beyond the point of at which the generator interconnects to the transmission system of the transmission provider to accommodate the interconnection of one (1) or more generation facilities to the transmission system of the transmission provider.

Commented [A8]: What are "certain specified conditions"? A clarification could be useful here.

Commented [A9]: This definition is in conflict with FERC rules to the extent it may apply to QFs that choose to sell led than the full "Net Output" and should be modified accordingly or only carefully used in the rules to apply to the narrow scenario where a QF actually chooses to sell its full Net Output.

Commented [A10]: The term is used in the new rule #1 section which pertains to "off system" QFs, so I'm a little confused why the definition refers to the need to accommodate the "interconnection of" the generator when the off-system project is not interconnecting to the purchasing utility and Rule #1 refers to "transmission service related network upgrades necessary for transmission service." The ambiguity could create disputes.

Also, only off-system QFs are obligated to obtain transmission rights. For on-system QFs, that obligation is on the utility's merchant function. Some of the language here seems a bit unclear with respect to who has these obligations in the on-system v. off-system scenarios and could result in unnecessary litigation.

(x) "New qualifying facility" means a qualifying facility that is not an existing qualifying facility.

(21) "Nonfirm energy" means energy to be delivered by a qualifying facility to an electric utility on an "as available" basis; or energy delivered by a qualifying facility in excess of its firm energy commitment. The rate for nonfirm energy may contain an element representing the value of aggregate capacity of nonfirm sources.

(x) "Non-fixed price term" means the portion of the purchase term of a power purchase agreement that begins after the fixed-price term has ended, during which the qualifying facility receives pricing equal to the purchasing public utility's index rate for comparable deliveries of energy. The length of the non-fixed price term is selected by the qualifying facility and specified in the power purchase agreement.

(22) "Nonregulated utility" means an entity providing retail electric utility service to Oregon customers that is a people's utility district organized under ORS Chapter 261, a municipal utility operating under ORS Chapter 225, or an electric cooperative organized under ORS Chapter 62.

(x) "Off-peak hours" means all hours other than On-peak hours.

(x) "On-peak hours" means the hours designated as such in the purchasing public utility's avoided cost price schedule.

(x) "Permits" mean the permits, licenses, approvals, certificates, entitlements and other authorizations issued by Governmental Authorities required for the construction, ownership or operation of the Facility or occupancy of the site it is located.

(x) "Planned Outage" means NERC Event Type PO and specifically excludes any Maintenance Outage or Forced Outage. A "Planned Outage" is also known as a "Scheduled Outage".

(x) "Point of Delivery" means for agreements with off-system qualifying facilities, the point on the purchasing public utility's distribution or transmission system where the qualifying facility and purchasing public utility have agreed the qualifying facility will deliver energy to the purchasing public utility as may apply during the term of the power purchase agreement, provided that the purchasing utility may not refuse to provide a Point of Delivery. For on-system qualifying facilities, the Point of Delivery is the point of interconnection.

(x) "Point of Interconnection" means the point where the qualifying facility is electrically connected to ~~a public utility's~~the interconnection provider's transmission or distribution system, as may apply at any given point in time.

(23) "Primary energy source" means the fuel or fuels used for the generation of electric energy. The term does not include minimum amounts of fuel required for ignition, start-up, testing, flame stabilization, and control uses; the term does not include minimum amounts of fuel

Commented [A11]: The POD could change, and this definition shouldn't prohibit redirected energy, esp if BPA curtails a path.

Commented [A12]: Interconnection provider may not be a public utility. BPA

Commented [A13]: Point of interconnection can change and that should not be prohibited

required to alleviate or prevent unanticipated equipment outages and emergencies which directly affect the public health, safety, or welfare.

4(24) "Purchase" means the purchase of electric energy or capacity or both, and/or environmental or other attributes from a qualifying facility by an electric utility.

(25) "Public utility" means a utility regulated by the Commission under ORS Chapter 757, that provides electric power to customers.

(x) "Purchase period" means, for a qualifying facility subject to a power purchase agreement, the period of a power purchase agreement after operation of the Facility commences and during which the qualifying facility is required to sell power to the public utility and the public utility is required to purchase power offered for sale.

(27) "Qualifying facility" means a cogeneration facility or a small power production facility as defined in 18 C.F.R. Part 292. Unless otherwise specified, "qualifying facility" includes proposed qualifying facilities, (e.g., entities that intend to obtain certification as a qualifying facility but that have not yet done so). ~~by these rules~~.

(x) "Qualifying facility's cost to cover" means the positive difference, if any, between (a) the contract price per MWh and other lost revenue to the qualifying facility, such as revenue from sale of renewable energy certificates, environmental or other attributes and production or investment tax credits, and (b) the net proceeds per MWh actually realized by qualifying facility for the output not purchased by the public utility as required by a power purchase agreement.

(28) "Rate" means any price, charge, or classification made, demanded, observed, or received with respect to the sale or purchase of electric energy or capacity or any rule, regulation, or practice respecting any such price, charge, or classification.

(x) "Renewable energy certificate" or "REC" has the meaning given that term in OAR 330-160-0015(8) (effective September 3, 2008).

(29) "Renewable Portfolio Standard" or "RPS" is the standard for large electric utilities in ORS 469A.052(1) or the standard for small electric utilities in ORS 469A.055 ~~in effect as of October 23, 2018~~.

(x) "Renewable qualifying facility" means a qualifying facility that generates electricity that may be used for compliance with the RPS.

(30) "RPS attributes" means all attributes related to the net output generated by the qualifying facility that are required to provide the public utility with "qualifying electricity" as that term is defined in Oregon's Renewable Portfolio Standard Act, ORS 469A.010~~, in effect as of October 23, 2018~~. RPS attributes do not include environmental attributes that are greenhouse gas offsets from methane capture not associated with the generation of electricity.

Commented [A14]: "Purchase period" or "purchase term" – these terms appear to be used interchangeably and it is unclear whether they are intended to mean different things or the same thing.

We recommend "Purchase Period," since "term" can mean either the length of a contract or a particular provision in a contract.

Commented [A15]: Intended to distinguish that some QFs may sell not subject to an executed PPA

Commented [A16]: This definition should include all reasonably anticipated revenue streams, not just payments for energy and capacity.

Commented [A17]: Should keep this generic to reflect that the RPS ORS changes over time and to avoid the need to update the rules every time there is a statutory change. There are also changes necessary to ensure compliance with HB 2021.

(31) "Sale" means the sale of electric energy or capacity or both by a public utility to a qualifying facility.

(x) “Schedule” means the purchasing public utility’s schedule filed with the Commission setting forth terms and prices for standard power purchase agreements and prices.

(32) "Scheduled commercial operation date" means the date selected by the qualifying facility on which the qualifying facility intends to be fully operational and reliable and able to commence the sale of energy or energy and capacity to the public utility.

(33) "Small power production facility" means a facility ~~which~~ that produces electric energy using as a primary energy source biomass, waste, solar energy, wind power, water power, geothermal energy, or any combination thereof. Only small power production facilities which, with any other facilities located at the same site, have power production capacities of 80 megawatts AC or less, are covered by these rules.

(x) “Start-Up Testing” means the start-up testing required by the manufacturer or reasonably required by interconnection provider consistent with NERC, WECC, and FERC rules that establish that the Facility is reliably producing electric energy.

(34) "Supplementary power" means electric energy or capacity supplied by a public utility, regularly used by a qualifying facility in addition to that which the facility generates itself.

(x) “System” means the electric transmission and distribution system owned or operated by the purchasing public utility.

(35) "System emergency" means a condition on a public utility’s system which is likely to result in imminent, significant disruption of service to customers, in imminent danger of life or property, or both.

(x) “Test energy” means electric energy generated by the Facility during the Test Period, and RECs, environmental or other attributes and capacity rights associated with such electric energy.

(x) “Test period” means a period during which Start-Up Testing is conducted.

(36) "Time of delivery" means:

(a) In the case of capacity, when the generation is first on-line and capable of meeting the capacity commitment of the qualifying facility to the electric utility under the terms of its contract or other legally enforceable obligation.

(b) In the case of firm energy and depending upon the contract between the parties, either:

(A) When the first kilowatt-hour of energy is able to be delivered under the commitment of the qualifying facility; or

(B) When each kilowatt-hour is delivered under the commitment of the qualifying facility.

(37) "Time the obligation to purchase the energy capacity or energy and capacity is incurred" means the earlier of:

(a) The date on which a binding, written obligation is entered into between a qualifying facility and a public utility to deliver energy, capacity, or energy and capacity; or

(b) The date determined by the Commission.

(x) "Total output" means all energy produced by the Facility.

(x) "Total term" is the total duration of a power purchase agreement starting on the Effective Date and ending the final day of the purchase period.

860-0290-0020

Obligations of Qualifying Facilities to the Electric Utility

The conditions listed in this rule apply to all qualifying facilities that sell or intend to sell electricity to a public utility under this Division:

(1) The owner or operator of a qualifying facility purchasing or selling electricity pursuant to these rules must execute a written agreement with the public utility.

(2) Contracts:

(a) All contracts between a qualifying facility and a public utility for energy, or energy and capacity must include language that which substantially conforms to the following: This agreement is subject to the jurisdiction of those governmental agencies and courts having control over either party or this agreement. The public utility's compliance with the terms of this contract is conditioned on the qualifying facility submitting to the public utility and to the Public Utility Commission of Oregon, before the date of initial operation, certified copies of all local, state, and federal licenses, permits, and other approvals required by law.

Commented [A18]: This language has been the subject of litigation and should be deleted.

(b) Under subsection (2)(a) of this rule, the public utility shall bear no obligation to identify which approvals are required by law, or to verify the approvals were properly obtained, or that the project is maintained pursuant to the terms of the approvals.

(3) To ensure system safety and reliability of interconnected operations, all interconnected qualifying facilities must be constructed and operated in accordance with all applicable federal, state, and local laws and regulations.

(4) The qualifying facility must furnish, install, operate, and maintain in good order and repair, and without cost to the public utility, switching equipment, relays, locks and seals, breakers, automatic synchronizers, and other control and protective apparatus ~~as shown by the public~~

~~utility to be~~ reasonably necessary to operate the qualifying facility in parallel with the public utility's system consistent with NERC and WECC rules, or may contract for the public utility to do so at the expense of the qualifying facility. Delivery must be at a voltage, phase, power factor, and frequency consistent with NERC and WECC rules~~as specified by the public utility~~.

(5) Switching equipment capable of isolating the qualifying facility from the public utility's system must be accessible to the public utility at all times.

(6) The qualifying facility must allow the public utility the option of operating the switching equipment, described in section (4) of this rule if, in the sole opinion of the public utility, continued operation of the qualifying facility in connection with the public utility's system may create or contribute to a system emergency. Such a decision by the public utility is subject to the Commission's verification pursuant to OAR 860-029-0070. The public utility must endeavor to minimize any adverse effects on the qualifying facility of the operation of the switching equipment.

(7) Any agreement between a qualifying facility and a public utility must provide for the degree to which the qualifying facility must assume responsibility for the safe operation of the interconnection facilities.

(8) At its option, the public utility may require a qualifying facility to report periodically the amount of deliveries and scheduled deliveries to the public utility, as shown to be reasonably necessary for the public utility's system operations and reporting.

860-029-0030
Obligations of the Public Utility to Qualifying Facilities

(1) Obligations to purchase from qualifying facilities: Each public utility must purchase, in accordance with OAR 860-029-0040, any energy and capacity in excess of station service (power necessary to produce generation) and amounts attributable to conversion losses that are made available from a qualifying facility:

(a) Directly from a qualifying facility in its service territory; or

(b) Indirectly from a qualifying facility in accordance with section (4) of this rule.

(2) Obligation to sell to qualifying facilities: Each public utility must sell to any qualifying facility, in accordance with OAR 860-029-0050, any energy and capacity requested by the qualifying facility on the same basis as available to other customers of the public utility in the same class who do not generate electricity.

(3) Obligation to interconnect: Each public utility must interconnect with any qualifying facility as may be necessary to accomplish purchases or sales under this division. The obligation to pay for any interconnection costs shall be determined under OAR 860-029-0060.

(4) Option to wheel power to other electric utilities or to the Bonneville Power Administration: At the request of a qualifying facility, a public utility (which would otherwise be obliged to purchase energy or capacity from such qualifying facility) may transmit (wheel) energy or capacity to any other electric utility or to the Bonneville Power Administration, at the expense of the qualifying facility. Use of a public utility's transmission facilities shall be consistent with FERC rules and the utility's OATT~~on a cost-related basis~~.

Commented [A19]: Not clear what "cost-related basis" means.

(5) Parallel operation: Each public utility must offer to operate in parallel with a qualifying facility, provided that the qualifying facility complies with the standards established in accordance with OAR 860-029-0020.

(6) When the generating portion of the qualifying facility consumes more electric energy than it produces, the public utility shall cease purchases.

(7) Within 30 days of the execution of any purchase agreement with a qualifying facility, the public utility must file with the Commission a true copy or summary of the terms of the executed agreement. If a summary is filed, the summary must identify the quantity and quality of the power and the price being paid. A true copy of the executed contract must be made available upon request for Commission staff review.

860-029-0040
Rates for Purchases

Commented [A20]: Note I copied this section back into Staff's version as it was removed from Staff's most recent version, and I think the below clarifications/reconciliations would be helpful.

(1) Rates for purchases by public utilities must:

(a) Be just and reasonable to the public utility's customers and in the public interest; and

(b) Be in accordance with this rule, regardless of whether the public utility making such purchases is simultaneously making sales to the qualifying facility.

(2) Establishing rates:

(a) Except for qualifying facilities in existence before November 8, 1978, and except when a public utility fails to make a good faith effort to comply with the request from a qualifying facility to wheel, a purchase rate satisfies the requirements of section (1) of this rule if the rate equals the avoided costs after consideration of the factors set forth in section (5) of this rule.

(b) If a public utility fails to make a good faith effort to comply with the request from a qualifying facility to wheel, the public utility must purchase at a rate which is the public utility's avoided cost or the index rate, whichever is higher. A good faith effort will be demonstrated by the public utility's publication of a generally applicable reasonable policy of the public utility to use the public utility's transmission facilities on a cost-related basis.

(c) When the purchase rates are based upon estimates of avoided costs over a specific term of the contract or other legally enforceable obligation, the rates do not violate these rules if any payment under the obligation differs from avoided costs.

(d) Nothing in these rules will be construed as requiring payment of avoided-cost prices to qualifying facilities in existence before November 1978, provided, however, that prices for such purchases shall be sufficient to encourage continued power production.

(3) Rates for purchases — time of calculation: Each qualifying facility has the option to:

(a) Provide nonfirm energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases must be based on the purchasing public utility's nonfirm energy avoided cost or if subsection (2)(b) of this rule is applicable, in effect when the energy is delivered; or

(b) Provide firm energy and/or capacity pursuant to a legally enforceable obligation for the delivery of energy and/or capacity over a specified term, in which case the rates for purchases must be based on:

(A) The avoided costs calculated at the time of delivery, or, if subsection (2)(b) of this rule is applicable, the index rate in effect at the time of delivery; or

(B) At the election of the qualifying facility, exercised at the time the obligation is incurred, the avoided costs, or the index rate then in effect if subsection (2)(b) of this rule is applicable, projected over the life of the obligation and calculated at the time the obligation is incurred.

(4) Standard rates for purchases shall be implemented as follows:

(a) In the same manner as rates are published for electricity sales, each public utility shall file with the Commission, within 30 days of Commission acknowledgement of its integrated resource plan, standard rates for purchases from eligible qualifying facilities to become effective 30 days after filing. The publication shall contain all the terms and conditions of the purchase.

(b) If a public utility fails to make a good faith effort to comply with the request from a qualifying facility to wheel, the public utility shall purchase at a rate which is the public utility's standard rate or the index standard rate, whichever is higher. A good faith effort shall be demonstrated by the public utility's publication of its generally accepted reasonable policy to use the public utility's transmission facilities on a cost-related basis.

(c) The public utility's standard rates may differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.

(5) Factors affecting rates for purchases: In determining avoided costs and for determining the index rate the following factors will, to the extent practicable, be taken into account:

(a) The data provided pursuant to OAR 860-029-0080(3) and the Commission's evaluation of the data; and

(b) The availability of energy or capacity from a qualifying facility during the system daily and seasonal peak periods, including:

(A) The ability of the public utility to dispatch output of the qualifying facility;

(B) The expected or demonstrated reliability of the qualifying facility;

(C) The terms of any contract or other legally enforceable obligation;

(D) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the public utility's facilities;

(E) The usefulness of energy and/or capacity supplied from a qualifying facility during system emergencies, including its ability to separate its load from its generation;

(F) The individual and aggregate value of energy and capacity from qualifying facilities on the public utility's system; and

(G) The smaller capacity increments and the shorter lead times available, if any, with additions of capacity from qualifying facilities.

(c) The relationship of the availability of energy and/or capacity from the qualifying facility as derived in subsection (5)(b) of this rule, to the ability of the public utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use; and

(d) The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility if the purchasing public utility generated an equivalent amount of energy itself or purchased an equivalent amount of energy and/or capacity.

(6) Each public utility that is currently complying with Oregon's renewable portfolio standard or clean energy targets must offer renewable and non-renewable avoided cost rates to eligible qualifying facilities.

860-029-0043
Standard Rates for Purchase

(1) Each public utility must offer standard non-renewable avoided cost rates to eligible qualifying facilities.

Commented [A21]: Should consider merging this section with and or reconciling the differences between this section and OAR 860-029-0080 and -0085 as the sections are quite duplicative but use slightly different language that could create ambiguity/disputes in the future.

~~(2) Each public utility that acts to comply with Oregon's renewable portfolio standard must offer standard renewable avoided cost rates to eligible qualifying facilities.~~

~~(3) Qualifying facilities with a nameplate capacity of 100 kW and less are eligible for standard avoided cost rates.~~

(4) Each public utility must file standard avoided cost rates that differentiate between qualifying facilities of different resource types by taking into account the contributions to meeting the utility's peak capacity of the different resource types.

(5) Each public utility must update its standard avoided costs in accordance with OAR 860-029-0085.

860-029-0080
Electric Utility System Cost Data

(1) Each public utility must provide sufficient data concerning its avoided costs and costs of interconnection to allow the owner or operator of a qualifying facility to estimate, with reasonable accuracy, the payment it could receive from the utility if the qualifying facility went into operation under any of the purchase agreements provided for in these rules.

(2) By January 1 of each odd-numbered year, each nonregulated utility must prepare and file with the Commission a schedule of avoided costs equaling the nonregulated utility's forecasted incremental cost of resources over at least the next 20 years.

(3) Each public utility must file with the Commission draft avoided-cost information at the time it files its integrated resource plan and file final avoided-cost information within 30 days of a Commission decision of acknowledgement of the integrated resource plan to be effective 30 days after filing. The information submitted will be maintained for public inspection and include the following data for calculating avoided costs:

(a) The estimated avoided costs on its system, solely with respect to the energy component, for expected levels of purchases from qualifying facilities. The levels of purchases will be stated in blocks of not more than 100 megawatts for systems with peak demand of 1,000 megawatts or more and in blocks equivalent to not more than 10 percent of the system peak demand for systems of less than 1,000 megawatts. The avoided costs will be stated on a cents-per-kWh basis, during peak and off-peak periods, by year, for the current calendar year and each of the next twenty-five years; and

(b) The public utility's estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kW, and the associated energy costs of each addition or purchase, expressed in cents per kWh. These costs will be expressed in terms of individual generating resources and of individual, planned firm purchases.

Commented [A22]: This is duplicative of OAR 860-029-0085(2)

Commented [A23]: Note I copied this section back into Staff's version as it was removed from Staff's most recent version, and I think the below clarifications/reconciliations would be helpful.

Commented [A24]: Consider merging or otherwise reconciling some or all of this with OAR 860-029-0085. There is language here that largely mirrors the language there but with some slight inconsistencies. Merging would keep all this information in one place and avoid confusion.

Commented [A25]: This overlaps with but is slightly different than the language in OAR 860-029-0085(1) and (3). For example, OAR 860-029-0085(3) makes clear that the Commission may suspend the rates during review whereas this section just states that they will be effective 30 days after filing.

Commented [A26]: To reflect current practice.

(4) Each public utility contracting to purchase nonfirm energy from a qualifying facility under OAR 860-029-0040(3)(a) must file with the Commission each quarter its nonfirm energy avoided cost.

(5) Nothing in these rules shall preclude the determination of avoided costs:

(a) As the average avoided costs over an appropriate period of time; or

(b) To reflect variations in avoided costs due to changes in stream flows, generating unit availability, loads, seasons, or other conditions.

(6) State review: Any data submitted by a public utility under this rule shall be subject to review and approval by the Commission. In any such review, the public utility has the burden of supporting and justifying its data.

(7)(a) On May 1 of each year, a public utility must file with the Commission updates to the avoided cost information filed under section (2) of this rule to be effective within 60 days of filing to reflect:

(A) Updated natural gas prices;

(B) On- and off-peak forward-looking electricity market prices; and

(C) Changes to the status of Production Tax Credit~~; and~~

~~(D) Any other action or change including changes to the capital costs of a proxy resource in an acknowledged IRP update that is relevant to the calculation of avoided costs.~~

(b) In the event a utility's integrated resource plan is acknowledged within 60 days of May 1 in a particular year, the utility may seek a waiver of either the May 1 update or the post IRP-acknowledgement filing.

~~(8) A public utility may propose or the Commission may require a public utility to file the data described in OAR 860-029-0080(3) anytime during the two-year period between filing integrated resource plans to reflect significant changes in circumstances, including, but not limited to, the acquisition of a major block of resources or the completion of a competitive bid. Such a revision will become effective 90 days after filing.~~

(9) At least every two years, the public utility must file with the Commission the data described in OAR 860-029-0040(4) and 860-029-0080(3).

860-029-0085
Requirements for Standard Avoided Cost Rates

Commented [A27]: Should consider removing this given HB 2021 aimed at phasing out all gas.

Commented [A28]: This overlaps with but is slightly different than the language in OAR 860-029-0085(4)

Commented [A29]: This is an area for utility cherry picking of what inputs to update and a breeding ground for disputes. It should be eliminated.

Commented [A30]: This overlaps with but is slightly different than the language in OAR 860-029-0085(5). The slight difference is that OAR 860-029-0085(5) makes clear that such a request may be made by a someone other than a public utility.

(1) Each public utility must file with the Commission standard avoided cost rates within 30 days of a Commission decision regarding acknowledgement of the public utility's integrated resource plan.

(2) Each public utility currently complying with Oregon's renewable portfolio standard must file both "renewable" and "non-renewable" standard avoided cost rates.

(3) The standard avoided cost rates filed by a public utility under sections (1) and (2) of this rule are subject to review and approval as well as modification by the Commission. The Commission may suspend the standard avoided cost rates during review. In any such review, the public utility has the burden of supporting and justifying its standard avoided cost rates. The standard avoided cost rates will be effective 30 days after filing unless otherwise determined by the Commission.

(4)(a) On May 1 of each year, a public utility must file with the Commission updates to its standard avoided cost rates under sections (1) and (2) of this rule to reflect:

(A) Updated natural gas prices;

(B) On- and off-peak forward-looking electricity market prices; and

(C) Changes to the status of Production Tax Credit~~; and~~

~~(D) Any other actions or changes that are acknowledged by the Commission upon review of an IRP Update and that are relevant to the calculation of avoided costs.~~

Commented [A31]: Same comments as above

(b) In the event a utility's integrated resource plan is acknowledged within 60 days of May 1 in a particular year, the utility may seek a waiver of either the May 1 update or the post IRP-acknowledgement filing.

(c) Updates filed under this section are subject to review and approval as well as modification by the Commission. The Commission may set the effective date of the standard avoided cost rates during review. In any such review, the public utility has the burden of supporting and justifying its standard avoided cost rates Standard avoided cost rates filed under this section will be effective within 60 days of filing.

(5)(a) Upon request or its own motion, the Commission may consider updates to avoided cost rates to reflect significant changes in circumstances including, but not limited to, the acquisition of a major block of resources or the completion of a competitive bid process.

(b) An update under this section may be considered at any time.

(c) Updates to avoided cost rates under this section are subject to review and approval by the Commission and will become effective within 90 days after filing.

860-029-00XX [New Rule #1]

Commented [A32]: See comments for additional recommendations

Obligation for Costs to Accept Deliveries from Off-System Qualifying Facilities

(1) If the public utility has access to information that the proposed Point of Delivery in an off-system qualifying facility's request for a draft standard power purchase agreement may be unavailable due to transmission capacity constraints or competing uses of reserved transmission, the public utility will provide the qualifying facility with written notice of the possible constraint or reserved use and if applicable, the public utility's decision to decline the qualifying facility's proposed Point of Delivery. A public utility must act reasonably and without discrimination in declining the qualifying facility's proposed Point of Delivery. Nothing in this subsection prevents the public utility from proposing an alternate Point of Delivery or requires the public utility to undertake informational or other studies or to change its standard study processes to seek information not reasonably in its possession during the contracting process.

(2) If the qualifying facility proposes an alternate Point of Delivery in response to a public utility's written notice under subsection (1), the public utility will have fifteen (15) business days to complete its review of proposed alternate Point of Delivery and provide the notification described in subsection (1).

(3) Notwithstanding subsections (1) and (2), the standard power purchase agreement for an off-system qualifying facility may, at the public utility's discretion, include a provision specifying that costs to construct transmission-service related Network Upgrades necessary for transmission service for a qualifying facility's output may be allocated to the qualifying facility by Commission order after the process described in subsections (4), (5), and (6) of this rule.

(4) If the public utility chooses to include a transmission-service cost-allocation provision in the standard power purchase agreement for an off-system qualifying facility, the public utility must:

(a) Specify in the power purchase agreement that the development period in the standard power purchase agreement does not commence until after the processes in subsection (4), (5), and if applicable, subsection (6), are complete.

(b) No later than five (5) business Days after the Effective Date of the standard power purchase agreement, submit an application to the appropriate transmission provider requesting designation of the qualifying facility as a network resource and requesting network transmission service for the purpose of transmitting the power purchased from qualifying facility to the public utility's load.

(c) Request an effective date for commencement of network transmission service for the qualifying facility that is (i) 180 days prior to the scheduled commercial operation date, or (ii) as soon as practicable after the Effective Date of the executed standard power purchase agreement if the scheduled commercial operation date is less than 180 days following the Effective Date.

(d) No later than five (5) business days after the public utility's receipt of a response to the application submitted under subsection (b), inform the qualifying facility of the transmission provider's response.

(e) No later than fifteen (15) business days after the public utility's receipt of a response to the application submitted under subsection (b), notify the qualifying facility in writing whether it is submitting a request for a Network Upgrade cost allocation determination to the Commission and if applicable, file the request for cost allocation determination with the Commission.

(5) Upon receipt of a request for a cost allocation determination under subsection (4)(e), the Commission will conduct a Notice and Comment proceeding at which the public utility and qualifying facility will each have opportunity to present their respective positions to the Commission as to the proper allocation of the costs of transmission service Network Upgrades. After providing notice and opportunity to comment regarding a request filed under subsection (5), the Commission will issue an order regarding the appropriate allocation of costs of transmission service Network Upgrades

(6) After receipt of notice under subsection (4)(e) of this section that the public utility is seeking a cost allocation determination, but no later than 14 days after any Commission order allocating costs of transmission service-related Network Upgrades to the qualifying facility, the qualifying facility may terminate the power purchase agreement upon written notice to the public utility. The qualifying facility's timely termination of the standard power purchase agreement under this subsection will not be an event of default, and no damages or other liabilities under the power purchase agreement will be owed by or to either party.

(7) Notwithstanding the other subsections in this rule, nothing prevents the purchasing public utility and qualifying facility from agreeing to amend the standard power purchase agreement to address transmission-related Network Upgrade costs or to substitute a new Point of Delivery.

860-029-XXXX [New Rule #2]

Commented [A33]: See comments for additional recommendations

Eligibility for Standard Avoided Cost Prices and Purchase Agreements

(1) Solar qualifying facilities with a nameplate capacity of three (3) MW and less, and all other qualifying facilities with a nameplate capacity of ten (10) MW and less, are eligible for standard avoided cost prices.

(2) All qualifying facilities with a nameplate capacity of ten (10) MW and less are eligible to enter into a standard power purchase agreement.

(3) Renewable qualifying facilities that satisfy the criteria of subsection (1) are eligible to select the purchasing public utility's standard renewable avoided cost prices. A renewable qualifying facility choosing the standard renewable avoided cost prices must cede all RECs generated by the Facility to the purchasing public utility while the qualifying facility is

receiving deficiency-period pricing from the purchasing public utility and during any other period of the power purchase agreement ordered by the Commission.

(4) The determination of nameplate capacity for purposes of determining whether a qualifying facility meets the size criteria in subsections (1) and (2) is based on the cumulative nameplate capacity of the qualifying facility seeking the standard avoided cost prices or power purchase agreement and any other Facilities owned by the same person(s) or affiliates(s) located on the same site.

(a) Facilities are located on the same site as a qualifying facility if the Facilities are located within a five-mile radius of the qualifying facility and use the same source of energy or motive force to generate electricity as the qualifying facility or, are otherwise associated with, the qualifying facility.

(b) For purposes of this section:

(A) Person(s) are natural persons or any legal entities.

(B) Affiliate(s) are persons sharing common ownership or management, acting jointly or in concert with, exercising influence over, the policies of another person or entity, or wholly owned subsidiaries that do not have common ownership.

(C) To the extent a person or affiliate is a closely held entity, a "look through" rule applies so that project equity held by LLCs, trusts, estates, corporations, partnerships, and other similar entities is considered to be held by the owners of the look through entity.

(c) Notwithstanding subsections (4)(a) and (b), the qualifying facility seeking standard prices or a standard power purchase agreement, and other Facilities within the same five-mile radius, will not be considered owned or controlled by the same person(s) or affiliate(s) if the person(s) or affiliate(s) in common are passive investors whose ownership interest is primarily for obtaining value related to production tax credits, green tag values, or MACRS depreciation, and the qualifying facility and other Facilities at issue are "family-owned" or "community-based" project(s).

(A) **Family-owned.** A project will be considered "family owned" if, after excluding the ownership interest of those who qualify as passive investor(s) under (4)(c), five or fewer individuals hold at least 50 percent of the project entity, or fifteen or fewer individual entities hold at least 90 percent of the project entity. For purposes of counting the number of individuals holding the remaining share (i.e., determining whether there are five or fewer individuals or 15 or fewer individuals) an individual is a natural person. Notwithstanding the foregoing, an individual, his or her spouse, and his or her dependent children, will be aggregated and counted as a single individual even if the spouse and/or dependent children also hold equity in the project.

(B) **Community Based.** A community-based (or community-sponsored) project must include participation by an established organization that is located either in the county in which the qualifying facility is located or within 50 miles of the qualifying facility and that either:

(i) has a genuine role in developing, or helping to develop, the qualifying facility and intends to have a significant continuing role with, or interest in, the qualifying facility after it is completed and placed in service, or

(ii) is a unit of local government that will not have an equity ownership interest in or exercise any control over the management of the qualifying facility and whose only interest is a share of the cash flow from the qualifying facility, that may not exceed 20 percent without prior approval of the Commission for good cause.

(d) Notwithstanding subsections (4)(a) and (b), two or more qualifying facilities that otherwise are not owned or operated by the same person(s) or affiliates(s) or are not otherwise associated will not be determined to be a single qualifying facility because they are developed by a single entity or have a shared interest or agreement regarding interconnection facilities, interconnection-related system upgrades, or any other infrastructure not providing motive force or fuel.

(5) The existence of a prior standard power purchase agreement between a qualifying facility and public utility does not preclude the qualifying facility from entering into future non-standard power purchase agreements, nor require the renegotiation of the standard power purchase agreement for incremental facilities beyond the initial contract.

860-029-XXXX [New Rule #3]

Commented [A34]: See comments for additional recommendations

Process for Procuring Standard Power Purchase Agreement

(1) Each public utility must file with the Commission a schedule outlining the process for acquiring a standard power purchase agreement that is consistent with the provisions of OAR 860 division 029 and Commission policy and that satisfies the requirements of this section.

(2) Upon request, each public utility must provide a draft standard power purchase agreement to an eligible qualifying facility after the qualifying facility has provided the public utility, in written form:

(a) An executed standard form of interconnection study agreement and evidence that all related interconnection study application fees have been paid, or evidence that no study is required;

(b) Documentary evidence that the qualifying facility has taken meaningful steps to seek site control of the proposed location of the qualifying facility including, but not limited to, documentation demonstrating:

(A) an ownership of, a leasehold interest in, or a right to develop, a site of sufficient size to construct and operate the qualifying facility;

(B) an option to purchase or acquire a leasehold interest in a site of sufficient size to construct and operate the qualifying facility; or

(C) another document that clearly demonstrates the commitment of the grantor to convey sufficient rights to the developer to ~~exclusively~~ occupy a site of sufficient size to construct and operate the qualifying facility, such as an executed exclusivity agreement to negotiate an option to lease or purchase the site.

Commented [A35]: At a minimum, site control doesn't need to be exclusive.

Note: The provision of a letter of intent or other non-binding documentation of site control, such as an indication of interest to lease, or a qualitative description of the state of site control development, in and of themselves or together, are not sufficient to satisfy this required site control evidence.

(c) The following information regarding the proposed qualifying facility:

(A) demonstration of ability to obtain certified qualifying facility status prior to commercial operation,
(B) demonstration of eligibility for standard power purchase agreement and pricing under OAR 860-029- XXXX [New Rule # 2],
(C) design capacity (MW),
(D) estimate of station service requirements and net amount of power to be delivered to public utility's electric system,
(E) generation technology and other related technology applicable to the site,
(F) estimate of 12 x 24 delivery schedule,
(G) motive force or fuel plan,
(H) proposed operation date,
(I) proposed contract term,
(J) proposed pricing provisions,
(K) Point of Delivery or Interconnection,
(L) latitude and longitude of proposed facility and site layout,
(M) for a qualifying facility with battery storage system, description of the storage design capacity, description of technology used by battery storage system, storage system duration, and net power output, and
(N) Other information specified in the utility's avoided cost rates schedule or standard power purchase agreement approved by the Commission.

Estimates of the net amount of power to be delivered to the public utility's electric system and the 12 x 24 delivery schedule are subject to revision until the date the qualifying facility commences commercial operation.

(3) Once a qualifying facility has asked for a draft power purchase agreement and provided the information required under subsection (2), the public utility has fifteen (15) business days to provide the qualifying facility a draft power purchase agreement including current standard avoided cost prices and/or other optional pricing mechanisms as approved by the Commission.

(4) After receipt of a draft power purchase agreement, the qualifying facility may submit comments to the public utility regarding the draft agreement or request that the public utility prepare a final executable power purchase agreement.

(5) If the qualifying facility submits comments to the public utility or asks for revisions to the draft purchase agreement, in writing, the public utility has ten (10) business days to (i) notify the qualifying facility it cannot make the requested changes, (ii) notify the qualifying facility it does not understand the requested changes or requires additional information, or (iii) provide a revised draft power purchase agreement. However, the public utility will have fifteen (15) business days to respond or provide a revised draft standard power purchase agreement when the qualifying facility requests a change to the Point of Delivery.

(6) The process outlined in subsections (4) and (5) will continue until both the qualifying facility and public utility agree to the terms of the draft standard power purchase agreement, i.e., neither the qualifying facility not the purchasing public utility have outstanding issues, corrections, or comments regarding the draft power purchase agreement.

(7) After the parties concur on the terms of the draft standard power purchase agreement, the qualifying facility can submit a written request to the public utility for a final executable version of the purchase agreement. The public utility has ten (10) business days from the receipt of the written request to provide a final executable form of the purchase agreement to the qualifying facility.

(8) Upon receipt of the final executable form of the purchase agreement signed executed by the qualifying facility, the purchasing public utility has five (5) business days in which to sign the final executable agreement.

860-029-0120
Standard Power Purchase Agreements

Commented [A36]: See comments for additional recommendations

(1) Each public utility must offer standard power purchase agreements to eligible qualifying facilities. Each public utility must submit all forms of standard power purchase agreements to the Commission for approval.

~~(2) Each public utility must file with the Commission a schedule outlining the process for acquiring a standard power purchase agreement that is consistent with the provisions of OAR 860 division 029 and Commission policy that satisfies the requirements of this rule.~~

(~~3~~)(2) Qualifying facilities have the unilateral right to select a purchase term of up to 20 years for a standard power purchase agreement. Qualifying facilities electing to sell firm output at fixed-prices have the unilateral right to a fixed-price term of up to 15 years, subject to the reduction specified in subsection (6) for a development period that exceeds three years, and may select a non-fixed price term of up to five years.

(3) The total term of a standard power purchase agreement is any development period followed by the purchase period~~term~~. The total term starts on the date the power purchase agreement is executed by both parties and ends the last day of the purchase ~~term~~period.

(4) The development period of a standard power purchase agreement begins on the Effective Date, which is date the power purchase agreement is executed by both parties, unless the start of the development period is delayed by the initiation of the Network Upgrade cost allocation process in OAR 860-029-XXXX [Rule #1], by an event of Force Majeure, by excused delay, by agreement with the purchasing utility, or by any other event permitting an extension of the development period provided in the power purchase agreement. The development period ends at 24:00 P.T. the day before the scheduled commercial operation date specified in the standard power purchase agreement. In the event the development period is extended for any event specified in this subsection, the length of the purchase period shall not be reduced.

(5) The purchase term of a standard power purchase agreement begins on the scheduled commercial operation date.

~~Note: The scheduled commercial on-line date may be delayed by an excused delay, Force Majeure, or extended by agreement of the purchasing public utility and the qualifying facility or under subsection (7) of this section. In these cases, the purchase period commences on the delayed or extended scheduled commercial on-line date. In any event, the purchase period of a standard power purchase agreement will start on the scheduled commercial operation date even if the qualifying facility does not begin deliveries on the scheduled commercial operation date.~~

~~(4)~~(6) A qualifying facility may specify a scheduled commercial operation date for a standard power purchase agreement subject to the following requirements:

(a) Anytime within three years from the date of agreement execution; or

~~(b) Anytime later than three years after the date of agreement execution if the qualifying facility establishes to the utility that a later scheduled commercial on-line date is reasonable and necessary and the utility agrees~~.

(b) Anytime between three years and four years after the Effective Date of the standard power purchase agreement if:

(A) The qualifying facility has received an interconnection-related system impact study report, cluster study report, or facilities study report indicating interconnection will take longer than three years from the Effective Date of the standard power purchase agreement; or

(B) The qualifying facility demonstrates to the public utility it cannot reasonably be expected to achieve commercial operation within three years from the Effective Date and the utility consents to a scheduled commercial operation date more than three years from the Effective Date, which consent shall not be unreasonably withheld.

Commented [A37]: See note below

Commented [A38]: This should be in the rule itself, not in a note.

(c) Except for circumstances identified in subsection (4), for~~In~~ any standard power purchase agreement with a scheduled commercial operation date more than three years after the Effective Date, the fixed-price term will be reduced one day for every day of the construction period after three-year anniversary of the Effective date, with the reduction taken from the end of the fixed-price term.

Example: A standard power purchase agreement with a construction period of three years and six months will have a fixed-price term of fourteen years and six months The fixed-price term will begin on the scheduled commercial operation date and will end after 14 years and 6 months.

(d) A qualifying facility entering into a standard power purchase agreement may not select a scheduled commercial operation date more than four years from the Effective Date except upon demonstration of circumstances identified in subsection (4).

(7) Modification of Scheduled Commercial Operation Date or Termination

(a) Anytime within six (6) months after the Effective Date of a standard power purchase agreement, the qualifying facility may terminate the standard power purchase agreement or modify the scheduled commercial operation date in the standard power purchase agreement if the qualifying facility receives an interconnection study report that is completed after the Effective Date that:

(i) includes an estimate of time to interconnect that longer than development period in the executed standard power purchase agreement; or

(ii) includes an estimate of costs to interconnect that render the project uneconomic in the qualifying facility's opinion.

(b) A qualifying facility that chooses to modify the scheduled commercial operation date under subsection (7)(a) may not select a new scheduled commercial operation date more than four years from the date the standard power purchase agreement was executed.

(c) If a qualifying facility terminates the standard power purchase agreement under subsection (7)(a), it is liable for damages incurred by the public utility, which may be taken from the Project Development Security posted by the qualifying facility.

(d) In the event the qualifying facility is delayed in reaching commercial operation because of an event of Force Majeure or the public utility's default under the standard power purchase agreement or under any agreement related to the interconnection of the qualifying facility to the purchasing utility's system, including interconnection study agreements and interconnection agreements, the scheduled commercial operation date in the standard power purchase agreement will be extended commensurately with the delay caused by the event of Force Majeure or the public utility's default, except for periods of delay that could have been prevented had qualifying facility taken mitigating actions using commercially reasonable efforts. An extension of the scheduled commercial operation date under this subsection is not

subject to the fixed-price term reduction in subsection (6)(c) or the four-year limitation in subsection (6)(d).

~~(5)~~ (8) Unless otherwise excused under the standard power purchase agreement or the circumstances specified in Section (4), the utility is authorized to issue a Notice of Default if the qualifying facility does not meet the scheduled commercial ~~on-line~~ operation date in the power purchase agreement. If a Notice of Default is issued for failure to meet the scheduled commercial ~~on-line~~ operation date in the standard power purchase agreement, the qualifying facility has one year in which to cure the default for failure to meet the scheduled commercial ~~on-line~~ operation date, during which the public utility may collect damages for failure to deliver.

(a) Damages for failure to meet the scheduled commercial operation date are equal to the positive difference between the utility's replacement power costs less the prices in the standard power purchase agreement during the period of default, determined on a daily basis with positive differences aggregated and invoiced as a monthly sum, plus costs reasonably incurred by the utility to purchase replacement power and additional transmission charges, if any, incurred by the utility to deliver replacement power to the point of delivery.

(b) If the qualifying facility would have been required by the standard power purchase agreement to transfer Renewable Energy Credits to the public utility during the period when the qualifying facility is in default under this subsection, damages owed to the public utility will include the public utility's cost to acquire replacement Renewable Energy Credits.

~~(9) Point of Delivery. The qualifying facility may propose the Point of Delivery for a standard power purchase agreement. The purchasing public utility must agree to the Point of Delivery before it is included in standard the power purchase agreement. The purchasing public utility may not unreasonably withhold agreement.~~

Commented [A39]: This is redundant with the POD provisions above and also gives the utility too much discretion to deny a requested POD.

~~(7)~~ (10) The standard power purchase agreement must include a mechanical availability guarantee (MAG) for ~~intermittent~~ wind qualifying facilities as follows:

(a) ~~For wind facilities, a~~ A 90 percent overall guarantee starting three years after the commercial operation date for qualifying facilities with new contracts or one year after the commercial operation date for qualifying facilities that renew contract or enter into a superseding contract, subject to an allowance for 200 hours of planned maintenance per turbine per year that does not count toward the calculation of the overall guarantee.

(b) A qualifying facility may be subject to damages for failure to meet the MAG calculated by:

(A) Determining the amount of the "shortfall" for the year, which is the difference between the projected average on- and off-peak net output from the project that would have been delivered had the project been available at the guaranteed availability for the contract year and the actual net output provided by the qualifying facility for the contract year;

(B) Multiplying the shortfall by the positive difference, if any, obtained by subtracting the Contract Price from the price at which the utility purchased replacement power and additional transmission costs to deliver replacement power to the point of delivery, if any; and

(C) Adding any reasonable costs incurred by the utility to purchase replacement power and additional transmission costs to deliver replacement power to the point of delivery, if any.

~~(8)~~ (11) A public utility may issue a Notice of Default, and subsequently terminate a standard power purchase agreement pursuant to its terms and limitations, for failure to meet the MAG if the qualifying facility does not meet the MAG for two consecutive years if such failure is not otherwise excused by the power purchase agreement.

(12) The standard purchase agreement will include an annual minimum delivery guarantee (MDG) for solar, geothermal, biomass, and baseload hydro qualifying facilities equal to 90 percent of the qualifying facility's expected energy for the year.

(a) The qualifying facility will owe damages for failure to meet the MDG equal to:

(i) the product of the deficiency for such period and the utility's cost to cover;

(ii) the cost of any replacement energy procured by the utility as a result of the qualifying facility's failure to meet the MDG and any resulting incremental ancillary services and transmission costs; and

(iii) the cost of replacement Renewable Energy Credits.

(b) The 90 percent MDG will be reduced on a pro rata basis for any portion of the annual period the qualifying facility was prevented from generating or delivering electricity for reasons of Force Majeure.

(13) A public utility may issue a Notice of Default, and subsequently terminate a standard power purchase agreement pursuant to its terms and limitations, for failure to meet the MDG if the qualifying facility does not meet the MDG for three consecutive years if such failure is not otherwise excused by the standard power purchase agreement.

(14) Incremental Utility Upgrades.
(a) At any time after the commercial operation date and with no less than six months' written notice, the qualifying facility may increase the Facility Nameplate Capacity Rating or expected net output of the Facility from what is specified in the standard power purchase agreement, but only to the extent any such increase is due to operational efficiency improvements or the replacement of damaged or defective equipment. The qualifying facility may not increase the Facility Nameplate Capacity Rating or the expected Net Output of the Facility from what is specified in the standard power purchase agreement by any other means, including installing additional generating units, replacing equipment that results in an increase in Net Output due to reasons other than operational efficiency improvements, or modifying inverter settings.

Commented [A40]: QFs small enough to qualify for a Standard PPA should not be subject to a MDG, and if one is to be used, there needs to be a reasonable amount of flexibility for extreme weather events that are beyond the control of the QF and interfere with a QFs ability to meet the MDG.

Further, if an MDG is to be used, it should only apply to Solar QFs that are actually offering capacity and clarify that QFs have the flexibility to not offer capacity. And the damages should be calculated based only on the capacity portion of the payment.

Commented [A41]: If this means 90% of P50, that is unreasonable and inconsistent with commercial practice. 90% is within the normal range of solar variability and it will be unduly punitive and likely to result in disputes.

(b) If any upgrades or other modifications made to the Facility in accordance with subsection (14)(a), result in an increase to the Facility's Nameplate Capacity, the qualifying facility and public utility will amend the standard power purchase agreement to reflect the change, provided that the increase does not cause the qualifying facility to fail to meet the eligibility requirements for either the standard power purchase agreement or standard prices.
(c) If the qualifying facility increases the Nameplate Capacity Rating above the size limit for a standard power purchase agreement or standard prices, the qualifying facility will no longer be eligible for the standard power purchase agreement or standard prices, or both, whichever is applicable.

(d) A qualifying facility that no longer meets the eligibility criteria for either a standard power purchase agreement or standard prices due to an increase under subsection (14)(a) may choose to negotiate a new non-standard power purchase agreement or non-standard prices. A qualifying facility that chooses to negotiate a new power purchase agreement under this subsection will not be liable for damages for failing any default caused by its failure to maintain eligibility for a standard power purchase agreement.

(15) Project Development Security. A qualifying facility entering into a standard power purchase agreement must post Project Development Security for the purchasing public utility's benefit within 30 days of the Effective Date of the standard power purchase agreement. The amount of required Project Development Security will be set forth in the purchasing public utility's form of standard power purchase agreement approved by the Commission. The obligation to maintain the Project Development Security will expire once the qualifying facility commences commercial operation. The qualifying facility may use either of the following options to post Project Development Security:

(a) Cash Escrow Security. The qualifying facility shall deposit in an escrow account established by the purchasing utility in a banking institution acceptable to both the qualifying facility and purchasing utility, Project Development Security. Such sum shall earn interest at the rate applicable to money market deposits at such banking institutions from time to time. To the extent the purchasing utility receives payment from the Project Development Security for damages in the event of default, the qualifying facility will, within 15 days, restore the Project Development Security as if no such deduction had occurred.

(b) Letter of Credit Security. The qualifying facility shall post and maintain in an amount equal to the Project Development Security: (a) a guaranty from a party that satisfies the Credit Requirements, in a form acceptable to the public utility in its discretion, or (b) a Letter of Credit in favor of the purchasing public utility. To the extent the public utility receives payment from the Project Development Security for damages in the event of default, the qualifying facility will, within 15 days, restore the Project Development Security as if no such deduction had occurred.

(16) Default Security. A qualifying facility that has executed a standard power purchase agreement that does not meet the public utility's credit worthiness requirements must post

Default Security prior to commencing commercial operation. The utility's credit requirements and the amount of required Default Security will be set forth in the public utility's form of standard power purchase agreement approved by the Commission. The qualifying facility may use one of the following options to post Default Security:

(a) Cash Escrow Security. The qualifying facility shall deposit in an escrow account established by the purchasing utility in a banking institution acceptable to both the qualifying facility and purchasing utility, Default Security. Such sum shall earn interest at the rate applicable to money market deposits at such banking institutions from time to time. To the extent the purchasing utility receives payment from the Default Security for damages in the event of default, the qualifying facility will, within 15 days, restore the Default Security as if no such deduction had occurred.

(b) Letter of Credit Security. The qualifying facility shall post and maintain in an amount equal to the Default Security: (a) a guaranty from a party that satisfies the Credit Requirements, in a form acceptable to the public utility in its discretion, or (b) a Letter of Credit in favor of the purchasing public utility. To the extent the public utility receives payment from the Default Security for damages in the event of default, the qualifying facility will, within 15 days, restore the Default Security as if no such deduction had occurred.

(17) Insurance requirements. The standard power purchase agreement must specify that a qualifying facility with a nameplate capacity rating greater than 200 kW must secure and maintain general liability insurance coverage that complies with the following:

(a) The insurance provider must have a rating no lower than "A-" by A.M. Best Company.
(b) Insurance coverage will include:
  (A) general commercial liability insurance covering bodily injury and property damage in the amount of $1,000,000 each occurrence combined single limit, or greater if desired by the qualifying facility; and
  (B) Umbrella insurance in the amount of $5,000,000, or greater if desired by the qualifying facility.

Commented [A42]: These limits are unnecessarily high for small generators who might have less than 3 MW capacity.

(18) Any qualifying facility that has entered into a standard power purchase agreement with a public utility under PURPA will not make any changes in its ownership, control or management that would cause the qualifying facility to fail to satisfy the eligibility requirements for entering into the standard power purchase agreement or receipt of standard pricing reflected in the agreement. No more than once every 24 months, at the request of the public utility, the qualifying facility will provide documentation and information reasonably requested by the public utility to establish the qualifying facility's continued compliance with eligibility requirements for the standard power purchase agreement executed by the qualifying facility and public utility. The public utility shall take reasonable steps to maintain the confidentiality of any such documentation and information the qualifying facility identifies as confidential, provided that the public utility may provide all such information to the Commission in a proceeding before the Commission.

(19) All standard power purchase agreements between a qualifying facility and a public utility for energy, or energy and capacity must include language that substantially conforms to the following: This agreement is subject to the jurisdiction of those governmental agencies and courts having control over either party or this agreement. The public utility's compliance with the terms of this contract is conditioned on the qualifying facility submitting to the public utility and to the Public Utility Commission of Oregon, before the date of initial operation, certified copies of all local, state, and federal licenses, permits, and other approvals required by law.

Commented [A43]: This is redundant. Also, see above for comment re removing this language as it has resulted in significant litigation.

860-029-XXXX [New Rule #4]
Delivery and Purchase under Standard Power Purchase Agreement

Commented [A44]: See comments for additional recommendations

(1) Commencing on the scheduled commercial operation date of the standard power purchase agreement and continuing until the end of the total term (the "purchase period"), the qualifying facility will be obligated to deliver and sell, and the purchasing public utility will be obligated to receive and purchase, the Net Output delivered to the Point of Delivery or Point of Interconnection, subject to other relevant requirements in this division.

(2) The public utility must accept but is not obligated to pay for excess energy. For purposes of this rule excess energy means:

(a) for on-system qualifying facilities, net output at the Point of Delivery that exceeds the qualifying facility's Nameplate Capacity Rating;

(b) for off-system qualifying facilities, energy delivered to the Point of Delivery in excess of scheduled amounts, netted over a monthly period.

[Stakeholders should comment on how excess output/deliveries should be defined and whether and how it should be compensated.]

(3) Title and risk of loss related to the energy shall transfer from the qualifying facility to the purchasing public utility at the Point of Delivery, except that title to RECs transferred under a power purchase agreement shall transfer to the purchasing utility when generated.

(4) A qualifying facility may not commence commercial operation any sooner than 180 days before the scheduled commercial operation date of the standard power purchase agreement unless the public utility consents to early operation. A public utility may require a qualifying facility to wait to commence commercial operation until no sooner than 90 days prior to the scheduled commercial operation if the public utility is unable to accept delivery from the qualifying facility.

(5) The public utility will pay the qualifying facility the index rate for Test Energy delivered prior to the scheduled commercial operation date.

860-029-XXXX [New Rule #5]
Force Majeure

(1) Every power purchase agreement shall include a Force Majeure provision that complies with the requirements of this section.

(2) "Force Majeure" means an event that prevents a party to the power purchase agreement (hereinafter referred to as "party") from performing an obligation under a power purchase agreement and that:

(a) is not reasonably anticipated as of the effective date of the power purchase agreement,

(b) is not within the reasonable control of the party affected by the event,

(c) is not the result of such party's negligence of failure to act, and

(d) could not be overcome by the affected party's use of due diligence in the circumstances.

(3) Force majeure includes events of the following types (but only to the extent that such an event, in consideration of the circumstances, satisfies the requirements in subsection (2)); environmental disasters, civil disturbance, sabotage, strikes, lock-outs, work stoppages, and action or restraint by court order or Governmental Authority.

(4) Notwithstanding subsections (2)-(3), none of the following constitute Force Majeure:

(a) the qualifying facility's ability to sell, or the public utility's ability to purchase energy or capacity at a more advantageous price than is provided under the power purchase agreement,

(b) the cost or availability of fuel or motive force to operate the Facility.

(c) economic hardship, including lack of money or increased cost of electricity, steel, labor, or transportation,

(d) any breakdown or malfunction of the Facility's equipment (including any serial defect) that is not caused by an independent event of Force Majeure,

(e)The imposition upon either qualifying facility or purchasing public utility of costs or taxes,

(f) delay or failure of qualifying facility to obtain or perform any required facility document unless due to a Force Majeure event;

Commented [A45]: See comments for additional recommendations

Commented [A46]: Does Staff intend for this to apply to all PPAs or only Standard PPAs? Staff made changes to the other New Rules to narrow application to only Standard PPAs but did not make a comparable change here.

(g) any delay, alleged breach of contract, or failure by the transmission provider or interconnection provider unless due to a Force Majeure event as defined in any agreement with the transmission provider or interconnection provider,

(h) maintenance upgrade(s) or repair(s) of any facilities or right of way corridors constituting part of or involving the interconnection facilities, whether performed by or for the qualifying facility, or other third parties (except for repairs made necessary as a result of an event of Force Majeure;

(i) the qualifying facility's failure to obtain, or perform under, the Generation Interconnection Agreements, or its other contracts and obligations to transmission owner, transmission provider or interconnection provider, unless due to a Force Majeure event; or

(j) any event attributable to the use of interconnection facilities for deliveries of Net Output to any party other than the purchasing public utility.

(5) If either qualifying facility or purchasing public utility is rendered wholly or in part unable to perform its obligation under the power purchase agreement because of a Force Majeure, the affected party shall be excused from whatever performance is affected by the Force Majeure to the extent and for the duration of the event of Force Majeure, after which such party will recommence performance of such obligation, provided that the non-performing party:

(a) provides the other party written notice describing the Force Majeure, no later than two weeks after its occurrence,

(b) ensures its failure to perform is of no greater scope and of no longer duration than what is required by the Force Majeure, and

(c) uses its best efforts to remedy its inability to perform.

(6) No obligation of either the qualifying facility or public utility that arose before the Force Majeure causing suspension of performance will be excused as a result of Force Majeure.

860-029-XXX/Default, Damages and Termination [New Rule #6]

Commented [A47]: See comments for additional recommendations

(1) The following events may constitute a default under a standard power purchase agreement:

(a) failure to begin power deliveries by scheduled commercial operation date,
(b) failure to provide Project Development or Default Security,
(c) failure to maintain status as a certified qualifying facility once power deliveries have commenced,
(d) failure of the qualifying facility to sell entire net output to the purchasing public utility,
(e) failure to make a payment when due under the power purchase agreement, if amount of payment is not the subject of good faith dispute,
(f) abandonment of the Facility,

(g) failure to satisfy applicable Minimum Availability Guarantee for two (2) consecutive years,
(h) failure to satisfy applicable Minimum Delivery Guarantee for three (3) consecutive years,
(i) failure to receive or purchase all or part of Net Output, or
(j) failure to provide a timely notice of early termination under OAR 860-029-XXX [New Rule #1].

(2) Unless otherwise excused under the standard power purchase agreement by Excused Delay, Force Majeure, or otherwise, the non-defaulting party is authorized to issue a Notice of Default upon any of the events described in subsection (1).

(3) Cure periods

(a) If a Notice of Default is issued under subsection (1)(a), the qualifying facility has one year in which to cure the default for failure to meet the scheduled commercial operation date.

(b) If a Notice of Default is issued under subsection (1)(b), (1)(c), (1)(d), 1(e), 1(f), or 1(i), the non-defaulting party has thirty (30) days in which to cure the event of default.

(c) There is no cure period for a Notice of Default issued under subsection (1)(g) or (1)(h).

(4) Imposition of damages.

(a) The public utility may impose damages after issuing a Notice of Default under subsection (1)(a) or (1)(d) as specified in OAR 860-029-0120(7).

(b) If damages are imposed, they must be remitted to the non-breaching party no later than 30 days after the breaching party received an invoice for damages. The invoice for damages must include a written statement explaining in reasonable detail the calculation of the damages amount.

(5) Subject to the cure periods in subsection (3), the non-defaulting party may issue a Notice of Termination to terminate a standard power purchase agreement for a default under subsection (1).

(6) The non-defaulting party must provide the defaulting party a Notice of Termination at least 30 days prior to date of Termination. The notice period for termination may run concurrently with the default period.

(7) Termination of Duty to Buy. If a standard power purchase agreement is terminated because of an Event of Default by the qualifying facility and the qualifying facility wishes to sell Net Output to the purchasing public utility following such termination, the public utility may

require the qualifying facility do so subject to the terms of the terminated agreement, including but not limited to the contract price, until the termination date. The qualifying facility may not take any action or permit any action to occur the result of which avoids or seeks to avoid the restrictions in subsection through use or establishment of a special purpose entity or other Affiliate.

(8) Termination Damages. If the standard power purchase agreement is terminated by the public utility as a result of an event of default by the qualifying facility, termination damages owed by the qualifying facility to the public utility will be the positive difference, if any, between (a) the public utility's estimated costs to secure replacement power and Renewable Energy Credits, if applicable, for a period of twenty four (24) months following the date of termination or the remaining term of the power purchase agreement, if less than 24 months, including any associated transmission necessary to deliver such replacement power; and (b) the contract price for such twenty four (24) month period or the remaining term of the power purchase agreement, if less than 24 months ("Termination Damages"). The public utility must calculate the Termination Damages on a monthly basis and in a commercially reasonable manner and provide to the qualifying facility a written statement explaining in reasonable detail the calculation of Termination Damages in the Notice of Termination. Termination damages are due by qualifying facility within thirty days of receipt of the written Notice of Termination from the public utility.

(9) Duty/Right to Mitigate. Both the public utility and qualifying facility have a duty to mitigate damages and will use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance under a standard power purchase agreement.

(10) Security. If a standard power purchase agreement is terminated because of the qualifying facility's default, the public utility may, in addition to pursuing any and all other remedies available at law or in equity, proceed against any security held by the public utility in whatever form to reduce the amounts that the qualifying facility owes the public utility arising from such default. If the power purchase agreement is terminated because of the purchasing utility's default, the qualifying facility may, in addition to any specified contractual remedies, pursue any and all other remedies available at law, in equity, or in any administrative forum.

(11) Cumulative Remedies. Except in circumstances in which a remedy provided for in the power purchase agreement is described as a sole or exclusive remedy, the rights and remedies provided to the parties in the standard power purchase agreement are cumulative and not exclusive of any other rights or remedies of the parties.

860-029-XXXX [New Rule #7]

Commented [A48]: See comments for additional recommendations

Coordination between qualifying facility and public utility under standard power purchase agreements.

(1) Coordination with System. The qualifying facility's delivery of electricity to purchasing public utility under a standard power purchase agreement must be at a voltage, phase, power

factor, and frequency consistent with NERC and WECC standards ~~as reasonably specified by purchasing public utility~~. The qualifying facility will furnish, install, operate, and maintain in good order and repair, and without cost to the purchasing public utility, such switching equipment, relays, locks and seals, breakers, automatic synchronizers, and other control and protective apparatus ~~determined by the public utility to be~~ reasonably necessary under NERC and WECC standards for the safe and reliable operation of the Facility in parallel with the System, or the qualifying facility may contract with the purchasing public utility to do so at the qualifying facility's expense. The purchasing public utility must at all times have access to all switching equipment capable of isolating the Facility from the System.

(2) Planned Outages in standard power purchase agreements.

(a) The qualifying facility must provide the purchasing public utility with an annual forecast of Planned Outages for each year of the purchase period at least one month, but no more than three months, before the first day of that year, and may update such Planned Outage forecast as necessary to comply with Prudent Electrical Practices. Any such update to the Planned Outage forecast must be promptly submitted to the public utility.

(b) The public utility may specify in the power purchase agreement two (2) calendar months in each year in which the qualifying facility may not schedule planned outages ("High Demand Months") except to the extent reasonably required to enable a vendor to satisfy a guarantee requirement. The public utility may change either or both High Demand Months with no less than twelve (12) months advance notice to the qualifying facility.

(3) Maintenance Outages in standard power purchase agreements.

(a) If the qualifying facility reasonably determines that it is necessary to schedule a Maintenance Outage, the qualifying facility must notify the purchasing public utility of the proposed Maintenance Outage as soon as practicable but in any event at least five (5) days before the outage begins. The qualifying facility must take all reasonable measures consistent with Prudent Electrical Practices to not schedule any Maintenance Outage during the High Demand Months identified by the public utility.

(b) Notice of a proposed Maintenance Outage by the qualifying facility must include the expected start date and time of the outage, the amount of generation capacity of the Facility that will not be available, and the expected completion date and time of the outage. The purchasing utility will promptly respond to such notice and may request reasonable modifications in the schedule for the outage. The qualifying facility must use all reasonable efforts to comply with any request to modify the schedule for a Maintenance Outage provided that such change has no substantial impact on the qualifying facility.

(c) Once the Maintenance Outage has commenced, the qualifying facility must keep the public utility apprised of any changes in the generation capacity available from the Facility during the Maintenance Outage and any changes in the expected Maintenance Outage completion date and time. As soon as practicable, any notifications given orally must be confirmed in writing. The qualifying facility may must take all reasonable measures consistent

with Prudent Electrical Practices to minimize the frequency and duration of Maintenance Outages.

(4) Forced Outages in standard power purchase agreements. The qualifying facility must promptly notify the purchasing public utility orally, via telephone to a number specified by the public utility (or other method approved by the public utility), of any Forced Outage resulting in more than ten percent (10%) of the Nameplate Capacity Rating of the Facility being unavailable. This report from qualifying facility must include the amount of the generation capacity of the Facility that will not be available because of the Forced Outage and the expected return date of such generation capacity. The qualifying facility must promptly update the report as necessary to advise the public utility of changed circumstances. As soon as practicable, any oral report of a Forced Outage must be confirmed in writing to the public utility.

(5) Notice of Emergency Deratings and Outages in standard power purchase agreements. Notwithstanding the requirements of subsections (4)-(6), the qualifying facility will inform the purchasing public utility, via telephone to a number specified by public utility (or other method approved by public utility), of any limitations, restrictions, deratings or outages reasonably predicted by qualifying facility to affect more than five percent (5%) of the Nameplate Capacity rating of the Facility for the following day and will promptly update such notice to the extent of any material changes in this information.