

1 the Community Renewable Energy Association (CREA), Portland General Electric Company
2 (PGE), PacifiCorp, and Idaho Power Company (Idaho Power Company) objected to Staff's
3 approach, citing the short time for review, the length of the document, and the inclusion of rule
4 changes that some view as being outside the scope of this rulemaking.

5 Based on stakeholder comments, Staff agreed that it was appropriate to allow additional
6 time for stakeholder review of and comment on the draft rules. Staff gave a status report to the
7 Commission at the June 19, 2018 meeting indicating that Staff intended to meet with
8 stakeholders to discuss the proposed rules. Staff also stated that it would return to the
9 Commission at its July 17, 2018 public meeting and ask the Commission to initiate the "formal
10 rulemaking," by providing notice of proposed rulemaking under ORS 183.335.

11 Following informal comments by parties and a workshop, Staff eliminated most if not all
12 of the proposed revisions stakeholders believed to be outside the scope or that presupposed the
13 outcome to pending litigation. Staff circulated a revised draft of the proposed rule revisions to
14 stakeholders on July 3, 2018, (hereinafter referred to as "Revised Draft") and subsequently
15 submitted the Revised Draft to the Commission and recommended that the Commission open the
16 formal rulemaking.

17 The Commission considered Staff's recommendation at the public meeting on July 17,
18 2018. RNW, CREA, REC, PGE, PacifiCorp, and Idaho Power did not oppose opening the
19 formal rulemaking process and indicated that they would work with Staff to refine the proposed
20 revisions and analyze whether additional revisions are appropriate.

21 Staff held a workshop on August 15, 2018, to discuss the proposed revisions.
22 Representatives of CREA, REC, RNW, PGE, PacifiCorp, and Idaho Power attended the
23 workshop. Staff circulated a second revised draft of the proposed rules (hereinafter referred to as
24 the "Second Revised Draft") to parties on August 17, 2018, and subsequently filed the Second
25 Revised Draft with the Commission. Parties filed comments with the Commission on August 21
26 and a hearing on the proposed rules was held on August 23, 2018.

1 The three drafts of proposed rules that Staff has filed with the Commission include an
2 explanation of Staff's proposed revisions to OAR Chapter 860, Division 029. Most of the
3 proposed revisions in the Second Revised Draft are not opposed by any party and Staff relies on
4 its previous explanations to support these rule changes. In these comments, Staff addresses the
5 comments filed by the Joint Utilities² and Joint QF Parties³ filed on August 21, 2018, or made at
6 the hearing on August 23, 2018.

7 **II. Discussion of parties' comments regarding the Second Revised Draft.**

8 In this section, Staff will discuss parties' comments regarding the Second Revised Draft.
9 Staff will discuss proposals for other parties' proposed changes that are not included in the
10 Second Revised Draft in section III.

11 **A. OAR 860-029-0010(1) Definition of "avoided costs".**

12 Staff recommends that the Commission make no change to the definition of "avoided costs"
13 in OAR 860-029-0010(1), which is as follows:

14 "Avoided costs" means the electric utility's incremental costs of electric energy
15 or capacity or both which, but for the purchase from the qualifying facility or
16 qualifying facilities, the electric utility would generate itself or purchase from
17 another source and shall include any costs of interconnection of such resource to
18 the system.

19 In Staff's Revised Draft filed with the Commission on July 10, 2018, Staff proposed to omit
20 the following language from the definition of avoided costs, "and shall include any costs of
21 interconnection of such resource to the system" because this language is not included in the
22 definition of avoided costs at 16 C.F.R. § 292.101(b)(6) or ORS 758.505(1).

23 During the August 15, 2018 workshop, it was pointed out that the calculation of avoided
24 costs in Oregon did in fact include costs to interconnect the proxy resource. Staff subsequently
25 concluded that removing the language was not warranted and the Second Revised Draft that Staff

26 ² The Joint Utilities are PacifiCorp, PGE, and Idaho Power Company.

³ The Joint QF Parties are CREA and REC.

1 filed with the Commission on August 21, 2018, restores the language regarding interconnection
2 costs to the definition of “avoided costs.”

3 The Joint Utilities urge the Commission to omit the language regarding interconnection
4 costs from the definition of “avoided costs” for the reasons originally relied on by Staff and
5 because they believe it creates some ambiguity to specifically call out one element of avoided
6 costs.⁴ Staff continues to believe the change to the definition is not warranted.

7 First, the definition is not inconsistent with Oregon statute or federal rule. The
8 interconnection costs referred to in the definition of “avoided costs” are the costs to connect the
9 avoided resource. The states have broad authority to implement PURPA and “play the primary
10 role in calculating avoided costs[.]”⁵

11 The Commission has authority to require utilities to include costs to interconnect a proxy
12 resource in the calculation of avoided cost prices, and no party suggests otherwise. The fact the
13 definition of avoided cost in the administrative rules specifically references one element of
14 avoided costs does not make it inconsistent with the federal and Oregon statutory definitions that
15 are broad enough to include this cost element.

16 Staff acknowledges the Joint Utilities’ concern that specifically calling out this one cost
17 element can be confusing. However, Staff is concerned that removing the reference to
18 interconnection costs could have unintended consequences because removal may suggest that the
19 Commission has changed its position on the inclusion of avoided interconnection costs in the
20 calculation of avoided costs.

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25 ¹ Joint Utilities’ Initial Comments Regarding Proposed Rules, p. 2.

26 ⁵ *Independent Energy Producers Ass’n v. California Public Utilities Commission*, 36 F.3d 848
(9th Cir. 1994).

1 The definition of “avoided costs” remains as it has been since the Commission first adopted
2 rules to implement PURPA in 1981.⁶ The Commission has not issued an order that changes the
3 definition. Staff recommends the Commission keep the definition as is.

4 **B. OAR 860-029-0040(6), 0043(2) & 0085(2) Requirement to Offer Renewable**
5 **Avoided Cost Rates.**

6 The Joint Utilities note that each of the three rules in the Second Revised Draft that
7 includes a description of which utilities must offer renewable avoided cost prices has a slightly
8 different description of the utilities.⁷ The Joint Utilities recommend that all three rules use
9 consistent language and that revisions to 860-029-0043(2) and 860-029-0085(2) be modified so
10 that all three rules refer to utilities “currently complying with Oregon’s renewable portfolio
11 standard.” The Joint Utilities note this language is used in 860-029-0040(6) and is the most
12 specific and accurate articulation of the requirement.⁸

13 Staff supports the Joint Utilities’ recommendation.

14 **C. OAR 860-029-0080(7)(b) Waiver of an Avoided Cost Update Requirement**
15 **that Occurs Within 60 Days of an Avoided Cost Update.**

16 In Order No. 14-058, the Commission ordered the utilities to do annual limited updates to
17 avoided costs in addition to the updates done after acknowledgment of an integrated resource
18 plan (IRP).⁹ The Commission ordered that utilities could ask to waive the requirement to submit
19 a post-IRP avoided cost update if the Commission issued its acknowledgment order within 60
20 days of the due date for the annual update, which is May 1. In practice, the Commission has
21 granted a utility’s request to waive the requirement to file an annual update rather than the post-
22 IRP acknowledgment.

23 ⁶ *In the Matter of the Investigation into Electric Utility Tariffs for Cogeneration and Small*
24 *Power Production Facilities* (R-58), Order No. 81-755.

25 ⁷ Joint Utilities’ Initial Comments Regarding Proposed Rules, p. 2.

26 ⁸ Joint Utilities’ Initial Comments Regarding Proposed Rules, p. 3.

⁹ *In the Matter of Public Utility Commission of Oregon Investigation into Qualifying Facility*
Purchasing and Contracting (UM 1610), Order No. 14-058, pp. 25-26.

1 In the Second Revised Draft, Staff proposed two alternate rules to address the utility's
2 ability to seek a waiver of an avoided cost filing when the Commission issues an order
3 acknowledging an IRP within 60 days of May 1. One alternative allows utilities to seek waiver
4 of the annual update and the other alternative allows utilities to seek waiver of the post-IRP-
5 acknowledgment update.

6 The Joint Utilities recommend the Commission adopt the alternative that allows waiver
7 of the annual update.¹⁰ At the hearing on August 23, 2018, REC and CREA recommended a
8 third alternative – a rule that authorizes the utility to seek a waiver of either the May 1 update or
9 the post-IRP-acknowledgment filing. The Joint QFs noted that this alternative would be
10 consistent with the Commission's decision in Order No. 14-058 regarding waiver of the post-
11 IRP-acknowledgment and its order waiving the requirement for a utility to file the May 1 update.

12 Staff supports the third alternative offered by the Joint QFs for the reasons discussed in
13 their comments at the August 23, 2018 hearing.

14 **D. OAR 860-029-0120(4) Scheduled Commercial Online Date Requirement for**
15 **Standard Power Purchase Agreements.**

16 OAR 860-029-0120(4) is intended to codify the Commission's decision in Order No. 15-
17 130 that QFs have a unilateral right to select a scheduled commercial on-line (COD) date
18 anytime within three years of the date of execution of a contract. The Joint Utilities do not
19 object to codifying this requirement, but note that the language of the proposed rule suggests that
20 each utility's standard contract must include specific language about the right to select the
21 scheduled COD. The Joint Utilities recommend language that would clarify that the rule
22 requires utilities to include the right to select the scheduled COD as ordered by the Commission,
23 but that it does not require the utilities to include in their standard contracts the exact language
24 that is in the rule.¹¹

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26 ¹⁰ Joint Utilities' Initial Comments Regarding Proposed Rules, p. 4.

¹¹ Joint Utilities' Initial Comments Regarding Proposed Rules, p. 3.

1 Staff supports the Joint Utilities' recommendation and their recommended revision.

2 **E. OAR 860-029-0130(3) Scheduled Commercial Online Date Requirement for**
3 **Nonstandard Power Purchase Agreements.**

4 The Second Revised Draft includes the provision regarding the QFs' right to a scheduled
5 commercial on-line date anytime within three years of contract execution in the rule relating to
6 nonstandard power purchase agreements, OAR 860-029-0130. The Joint Utilities point out that
7 there is no Commission order specifying that QFs entering into nonstandard power purchase
8 agreements have this right.¹² The Joint Utilities are correct. Both Order No. 15-130 and the
9 stipulation underlying that order refer specifically to this right in the context of standard
10 contracting. Because including this provision in OAR 860-029-0130 would not be codifying a
11 Commission order, it is outside the scope of this proceeding. Accordingly, the proposed
12 subsection (3) in OAR 860-028-0130 in the Second Revised Draft should not be adopted.

13 **F. OAR 860-029-0043 Standard Rates for Purchase.**

14 The Joint QFs do not object to language in newly proposed OAR 860-029-0043(4)
15 specifying that "[e]ach public utility will file standard avoided cost rates that differentiate
16 between qualifying facilities of different resource types by taking into account the contribution to
17 meeting the utility's peak capacity of the different resource types." However, the Joint QFs ask
18 "that the Commission confirm that this rule language is not meant to require a specific rate be
19 established for each type of facility."¹³

20 Staff supports the Joint QFs' recommendation.

21 **G. OAR 860-029-0085 Requirements for Standard Avoided Cost Rates.**

22 In the first and Revised Drafts of proposed rules, Staff's newly proposed OAR 860-029-
23 0085 included subsection (5)(c) specifying that out-of-cycle updates to standard avoided cost
24 rates would be effective 90 days after filing. This proposed subsection was based on the current

25 ¹² Joint Utilities' Initial Comments Regarding Proposed Rules, p. 3.

26 ¹³ Renewable Energy Coalition and Community Renewable Energy Association's Joint
Comment, p. 9.

1 rule OAR 860-029-0080(7), which provides “[a] public utility may propose or the Commission
2 may require a public utility to file the data described in OAR 860-029-0080(3) during the two-
3 year period between filing least-cost data plans pursuant to Order No. 89-507 to reflect significant
4 changes in circumstances, such as the acquisition of a major block of resources or the completion
5 of a competitive bid. Such a revision will become effective 90 days after filing.”

6 Notably, OAR 860-029-0080(7) refers to filing of avoided cost data as opposed to avoided
7 cost prices.¹⁴ However, the Commission has relied on this rule to review mid-cycle updates to
8 standard avoided cost prices, suggesting the Commission applies this rule to standard avoided
9 cost prices as well as avoided cost data.¹⁵ For this reason, the Revised Draft included a provision
10 regarding the 90-day effective date for out-of-cycle updates of standard avoided cost prices.
11 However, although the Commission has allowed out-of-cycle updates to standard avoided costs
12 rates, the Commission has not adhered to the 90-day effective date rule with respect to these
13 updates.

14 In absence of a specific Commission order applying this 90-day period to out-of-cycle
15 standard avoided cost rate updates, Staff now recommends that the Commission not adopt
16 subsection (5)(c) in OAR 860-029-0085 that is currently included in the Second Revised Draft.

17 **III. Staff comments regarding revisions proposed by other parties.**

18 **A. OAR 860-029-0020 Obligations of Qualifying Facilities to the Electric Utility.**

19 The Joint QFs recommend removing subsection (2)(a) from OAR 860-029-0020. This
20 subsection requires all QFs contracts to include language indicating “this agreement is subject to
21 the jurisdiction of those governmental agencies and courts having control over either party to this

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23 ¹⁴ The Joint QFs argue that restricting the application of the 90-day effective date rule to avoided
24 cost “data” begs the question of “how does data become effective?” (Joint QF Comments, p. 10.)
25 Contrary to the Joint QFs’ skepticism, avoided cost data does become effective, just like avoided
26 cost rates. The avoided cost data could serve as the basis for non-standard avoided cost prices.
But, a utility would not be allowed to calculate nonstandard prices using the updated avoided
cost data until it has become effective under the Commission’s rules.

¹⁵ See Order No. 16-129 (reviewing Idaho Power’s request for out-of-cycle update to standard
avoided cost prices).

1 agreement.” The Joint QFs argue the Commission is impermissibly expanding its jurisdiction
2 through this rulemaking by re-codifying the currently proposed language in light of recent
3 Commission orders that have redefined that language in an unlawful manner in Docket Nos. UM
4 1894 and UM 1931.¹⁶ In its July 10, 2018 filing, CREA explained that in light of recent
5 Commission orders redefining section (2)(a) as a forum-selection clause that confers jurisdiction
6 over contract disputes on the Commission, this section of the draft proposal is now controversial,
7 uncertain, and should therefore be deleted.

8 Staff disagrees with the Joint QFs’ recommendation. Retaining the language is consistent
9 with the Commission’s current orders. Staff acknowledges that the QFs have challenged at least
10 one the Commission’s orders regarding the meaning of this subsection. The fact remains,
11 however, that there is no current Commission order under which removal of this subsection is
12 appropriate.

13 **B. Large QF Negotiating Guidelines from Order No. 07-360.**

14 The original and Revised Draft of proposed rules include some but not all of the 17
15 "Guidelines for the Negotiation of Non-Standard Contracts" (Guidelines) found in Order No. 07-
16 360, Appendix A.¹⁷ These codified Guidelines are Guidelines 3-6, and 12. They are found in a
17 newly proposed rule, OAR 860-029-0130, Nonstandard Power Purchase Agreements and all of
18 concern terms of the nonstandard PPA.

19 CREA and REC take issue with Staff’s proposal to not include the Commission’s policies
20 “wholesale” into the rules.¹⁸ After re-evaluating the Guidelines, Staff concluded that one
21 additional Guideline (Guideline 17) should be included and added it to the Second Revised Draft

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23 ¹⁶ Renewable Energy Coalition and Community Renewable Energy Association’s Joint
Comments, pp. 5-9.

24 ¹⁷ *In the Matter of Public Utility Commission of Oregon Staff Investigation Relating to Electric
Utility purchases from Qualifying Facilities* (UM 1129), Order No. 07-360, App. A.

25 ¹⁸ Renewable Energy Coalition and Community Renewable Energy Association’s Joint
26 Comment, p. 15.

1 as OAR 860-029-0130(7)(a)-(d). Guideline 17, like the other Guidelines already included in the
2 Second Revised Draft, concerns the terms of the nonstandard power purchase agreements.

3 With the inclusion of Guideline 17, all but two of the Guidelines concerning contract
4 provisions are included in the Second Revised Draft. One of the two remaining Guidelines not
5 included is unnecessary and outdated and Staff disagrees that it is appropriate to include it in the
6 administrative rules:¹⁹

7 Guideline No. 1: The utility should not impose terms and conditions beyond
8 what is standard practice. The Edison Electric Institute master agreement is a
9 useful starting point in negotiating QF agreements.²⁰

10 The other remaining Guideline that is not included and that concerns contracting is
11 Guideline 2. This Guideline concerns the obligations and timelines in negotiations. Staff does
12 not think it is appropriate to include these Guidelines in the administrative rule for a couple of
13 reasons. First, the Guideline specifies that the starting point for the calculation of nonstandard
14 avoided cost prices is the standard avoided cost price. This is no longer the case for and Idaho
15 Power and PacifiCorp's nonstandard nonrenewable avoided costs. Second, the Commission will
16 be investigating the negotiating timelines in its upcoming investigation into PURPA
17 implementation.

18 Staff also does not believe it is appropriate to include any other of the remaining
19 Guidelines in the administrative rules (Guidelines 7-11 and 13-16). These Guidelines concern the
20 calculation of nonstandard avoided cost prices. The existing rule regarding the calculation of
21 avoided cost rates, OAR 860-029-0040 Rates for Purchase is very similar to the federal rule
22 regarding factors that may be considered when calculating avoided costs and applies to the
23 calculation of both nonstandard and standard avoided cost prices. Including specific provisions

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25 ¹⁹ Staff notes that while the Joint QFs assert that policies such as the Guidelines should be
26 incorporated wholesale into the rules, the Joint QFs do not specifically argue that Guideline Nos.
1 and 2 should be included.

²⁰ Order No. 07-360, App. A, p. 1.

1 regarding the calculation of non-standard rates could create some ambiguity as to the calculation
2 of standard avoided cost rates.

3 Although it would be possible to draft two new rules, one that addresses the calculation of
4 standard rates and one that addresses the calculation of nonstandard rates, Staff does not
5 recommend doing so. As noted above, the rule regarding the calculation of rates is similar to the
6 federal rule and provides the Commission flexibility. Staff does not think it is appropriate at this
7 point to include these specific provisions that address some but not all of the elements of
8 nonstandard rates.

9 **C. OAR 860-029-0085 Requirements for Standard Avoided Cost Rates.**

10 OAR 860-029-0085(a) codifies a decision in Order No. 14-058 specifying when out-of-
11 cycle updates to avoided cost rates are appropriate.²¹ Newly proposed OAR 860-029-0085(a)
12 provides:

13 Upon request or on own motion, the Commission may consider updates to
14 avoided cost rates to reflect significant changes in circumstances such as the
15 acquisition of a major block of resources or the completion of a competitive bid
process.

16 The Joint QFs ask the Commission modify this subsection to codify the Commission's
17 observations in Order No. 14-058 regarding the burden of proof for out-of-cycle updates.
18 Specifically, the Joint QFs ask that the following statements be incorporated into the rule: "in
19 light of our decision here to require annual updates in addition to updates following IRP
20 acknowledgment, we caution stakeholders that the 'significant change' required to warrant an
21 out-of-cycle update will be very high[,]" and "[w]e expect the parties to use this option
22 infrequently."²²

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24 ²¹ *In the Matter of Public Utility Commission of Oregon Investigation into Qualifying Facility
Purchasing and Contracting* (UM 1610), Order No. 14-058, pp. 25-26.

25 ²² Renewable Energy Coalition and Community Renewable Energy Association's Joint
26 Comment, pp. 12-13.

1 The language at issue, which “cautions” stakeholders and notifies parties of the
2 Commission’s expectations, would be unusual in an administrative rule. Staff disagrees with the
3 Joint QFs’ recommendation to include this language in the rule.

4 **D. OAR 860-029-0100 Resolution of Disputes for Proposed Power Purchase**
5 **Agreements and OAR 860-029-0130 Nonstandard Power Purchase**
6 **Agreements.**

7 The Joint QFs propose a definition for “firm energy” that is intended to deter utilities or
8 other stakeholders from asserting that intermittent resources do not produce “firm energy” and
9 therefore do not qualify for a fixed-price term contract. This proposal is in response to
10 definitions for “firm energy” and “non-firm energy” adopted by the Texas Public Utility
11 Commission. These definitions result in an administrative scheme in which only QFs able to
12 both forecast when they will deliver energy to the utility and deliver energy as forecasted are
13 eligible for a fixed-price contract.²³ And, those QFs with non-firm power that cannot guarantee
14 such delivery may charge the utility only the current or “as-available” market price for the
15 power.²⁴

16 The Joint QFs’ proposal is not within the scope of this rulemaking because it does not
17 codify a Commission order.

18 **E. OAR 860-029-0100 Alternative Dispute Resolution Process.**

19 The Joint QFs urge the Commission to remove this rule because it “appears unused and
20 irrelevant.” This proposal is not within the scope of the rulemaking because it does not codify a
21 Commission ruling.

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25 ²³ See *Exelon Wind I, L.L.C. v. Nelson*, 766 F.3d 380, 387 (5th Cir. 2014)(holding it is within the
26 TPUC’s authority to define “firm energy” in such a way as to make it difficult or impossible as a
practical matter, for intermittent resources to enter into a fixed-price term PURPA contract.”)

²⁴ *Id.*

