OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2018-5

The Honorable Michael J. Teague
Secretary of Energy & Environment
204 N. Robinson, Suite 1010
Oklahoma City, OK 73102

June 26, 2018

This office has received your request for an Official Attorney General Opinion in which you ask, in effect, the following questions:

1. **In Oklahoma, is it lawful for a third-party owner of a distributed electrical generation source to (a) lease facilities capable of distributed electrical generation to a utility consumer, or (b) generate electricity for use by a utility consumer via a power purchase agreement?**

2. **Would the third-party owned distributed generation source described in Question #1 qualify as a small power producer or cogenerator pursuant to OAC 165:40-1-2?**

3. **May the Oklahoma Corporation Commission require incumbent electric utilities to accept power generated from a third-party owned distributed generation source?**

4. **Would the third-party owner who enters into a either a power purchase agreement or a lease agreement with an Oklahoma consumer be considered a "utility" under 17 O.S.2011, § 151, as construed by OAC 165:35?**

I.
BACKGROUND

Before turning to your questions, it is helpful to begin with a discussion of what "distributed generation" entails and an overview of the distributed generation market. Broadly, distributed generation refers to electric generation that occurs near or where the electricity will be consumed and it is used in both the residential and business sectors. *See, e.g.,* Richard L. Revesz & Burcin Unel, *Managing the Future of the Electricity Grid: Distributed Generation and Net Metering*, 41 HARV. ENVTL. L. REV. 43 (2017). In Oklahoma, distributed generation has been statutorily defined for certain purposes as meaning:

a. a device that provides electric energy that is owned, operated, leased or otherwise utilized by the customer,

b. is interconnected to and operates in parallel with the retail electric supplier's grid and is in compliance with the standards established by the retail electric supplier,

c. is intended to offset only the energy that would have otherwise been provided by the retail electric supplier to the customer during the monthly billing period,

d. does not include generators used exclusively for emergency purposes,

e. does not include generators operated and controlled by a retail electric supplier, and

f. does not include customers who receive electric service which includes a demand-based charge.

17 O.S.Supp.2017, § 156(A)(1).[1] Distributed generation can be used at a single home or business or as part of a larger "microgrid" that supports multiple houses or businesses. *See* Z. YE, ET AL., NAT'L RENEWABLE ENERGY LAB., FACILITY MICROGRIDS (May 2005). While solar photovoltaic technology is the most common energy source for distributed generation, small wind turbines or geothermal wells may also be utilized. *See* SAMANTHA DONALDS, CLEAN ENERGY STATES ALLIANCE, DISTRIBUTED GENERATION IN STATE RENEWABLE PORTFOLIO STANDARDS 3 (July 2017). Distributed generation can be contrasted with the traditional model of electric service, in which a utility generating electricity at a sometimes far away power plant uses transmission lines to carry the generated electricity to local distribution lines and eventually to the customer's meter.

Often, distributed generation consumers utilize a third-party business to provide, install, and maintain the distributed generation system, and, in some instances, finance the purchase of the necessary equipment. Two popular arrangements for distributed generation systems are leases and power purchase agreements. Under a lease, the third-party owner retains title to the system, but conveys to the consumer the right of possession and use of the system. *See* BLACK'S LAW DICTIONARY 972 (9th ed. 2009). A power purchase agreement is simply "a long-term agreement to buy power from a company that produces electricity." ALBERT THUMANN & ERIC A. WOODROOF, ENERGY PROJECT FINANCING: RESOURCES AND STRATEGIES FOR SUCCESS 93 (2009) (hereafter, "ENERGY PROJECT FINANCING"). In this scenario, the third party "will provide the capital to build, operate, and maintain" the system and assume the risks and responsibilities of ownership, while the "host customer is only responsible for purchasing the electricity produced" by the system. *Id.* at 93-94. Two benefits to consumers of these third-party ownership schemes are that they (i) require less initial capital from the consumer, and (ii) can shift some risks of ownership to the third-party owner. *See* CARL LINVILL, ET AL., DESIGNING DISTRIBUTED GENERATION TARIFFS WELL, RAP ENERGY SOLUTIONS 21 (Nov. 2013).

[1] This definition was enacted in 2014 as part of Senate Bill 1456, which requires "retail electric suppliers" to implement a "tariff" on customers who also utilize distributed generation, as necessary "to recover the full costs necessary to serve [such] customers[.]" 2014 Okla. Sess. Laws ch. 93; *see also* Exec. Order No. 2014-07 (describing S.B. 1456 as "requiring retail electric suppliers to bring a tariff application to the Oklahoma Corporation Commission to determine the appropriate way to account for the infrastructure cost of distributed generation").

II.
DISCUSSION

Your questions touch on several issues regarding the permissibility of third-party ownership schemes for distributed generation. The answers to your questions vary depending on (i) whether the third-party ownership scheme is a lease agreement or a power purchase agreement, and (ii) whether the distributed generator is located in an incorporated or unincorporated area.

A. In unincorporated areas of Oklahoma, the legality of third-party owned distributed generation systems depends on whether the third party qualifies as a "retail electric supplier" under the Retail Electric Supplier Certified Territory Act.

To determine the legality of third-party ownership of distributed generation in unincorporated areas of the State,[2] we must consider whether such an arrangement would violate the Retail Electric Supplier Certified Territory Act ("RESCTA"). Enacted in 1971, RESCTA provides that:

> ***It is hereby declared to be in the public interest that***, in order to encourage the orderly development of coordinated statewide retail electric service, to avoid wasteful duplication of distribution facilities, to avoid unnecessary encumbering of the landscape of the State of Oklahoma, to prevent the waste of materials and natural resources, for the public convenience and necessity and to minimize disputes between retail electric suppliers which may result in inconvenience, diminished efficiency and higher costs in serving the consumer, ***the state be divided into geographical areas, establishing the unincorporated areas within which each retail electric supplier is to provide the retail electric service as provided in this act.***

17 O.S.2011, § 158.23 (emphasis added). RESCTA grants the exclusive right to supply retail electric service within the retail electric supplier's certified territory:

> Except as otherwise provided herein, each retail electric supplier shall have the ***exclusive right*** to furnish retail electric service to ***all*** electric-consuming facilities located within its certified territory, and shall not furnish, make available, render or extend its retail electric service to a consumer for use in electric-consuming facilities located within the certified territory of another retail electric supplier....

Id. § 158.25 (emphasis added). RESCTA defines retail electric supplier, retail electric service, certified territory, and electric consuming facility as follows:

> The term "retail electric supplier" means any person, firm, corporation, association or cooperative corporation, exclusive of municipal corporations or beneficial trusts thereof, engaged in the furnishing of retail electric service.

[2] For the purposes of this discussion, an unincorporated area is a "geographical area outside the corporate limits of cities and towns." 17 O.S.2011 § 158.22(5).

> The term "retail electric service" means electric service furnished to a consumer for ultimate consumption, but does not include wholesale electric energy furnished by an electric supplier to another electric supplier for resale.
>
> The term "certified territory" shall mean the unincorporated areas as certified by and pursuant to Section 158.24 of this title.
>
> The term "electric consuming facilities" means everything that utilizes electric energy from a central station source.

Id. § 158.22.

RESCTA prohibits retail electric suppliers from furnishing retail electric service to a consumer in an unincorporated area that is within the certified territory of another retail electric supplier. 17 O.S.2011, § 158.25. Thus, a determination of whether the third-party owner of a distributed generation source would be in violation of RESCTA by supplying electricity to an Oklahoma consumer will depend on whether the third-party owner (1) meets the definition of "retail electric supplier" and (2) furnishes "retail electric service" within the unincorporated certified territory of another retail electric supplier.

1. **A third-party owner of a distributed generation source that sells electricity to a consumer pursuant to a power purchase agreement would be a "retail electric supplier" under RESCTA.**

As noted above, in a power purchase agreement, the third-party owner builds, operates, maintains, and retains ownership of the distributed generation source, while the "host customer is only responsible for purchasing the electricity produced" by the system. ENERGY PROJECT FINANCING 93-94. Because the third-party owner in such an arrangement is plainly "engaged in the furnishing of retail electric service"—defined simply as "electric service furnished to a consumer for ultimate consumption"—the third-party owner would meet the RESCTA definition of "retail service provider." 17 O.S.2011, § 158.22. As such, the third-party owner would be in violation of the RESCTA if it is operating a distributed generation source pursuant to a power purchase agreement within the certified territory of another retail electric supplier. *Id.* § 158.25.

2. **The third-party owner of a distributed generation source that leases equipment to a consumer would not be a "retail electric supplier" under RESCTA.**

With regard to lease agreements, the answer is less clear. The pivotal question is whether the third-party owner, as lessor, is furnishing "retail electric service." As defined by RESCTA, "retail electric service" means only "electric service furnished to a consumer for ultimate consumption," 17 O.S.2011, § 158.22(4), which would seem not to cover leasing situations where the consumer, as lessee, holds an ownership interest in "possessing and using" the distributed generation system to produce electricity for itself. *See* BLACK'S LAW DICTIONARY 972; *see also* D.R. CARMICHAEL & LYNFORD GRAHAM, VOLUME 2: ACCOUNTANTS' HANDBOOK, SPECIAL INDUSTRIES AND SPECIAL TOPICS 36 (2012) (When "a contract 'conveys the right to use property, plant, and equipment,' the

contract should be accounted for as a lease." (citing Accounting Standards Codification Topic 840-10)). However, the question of whether the third-party owner, as lessor of a distributed generation source, would meet the RESCTA definition of a "retail electric supplier" may largely depend on the terms of the lease (*i.e.*, whether the agreement is a true lease or a disguised power purchase agreement).[3] *See* CARMICHAEL & GRAHAM: ACCOUNTANTS' HANDBOOK 36 (noting that characterizing an agreement as a lease is not conclusive of whether it is indeed a true lease rather than a power purchase agreement).

Based on the foregoing, the question of whether any particular contractual arrangement is a true lease or a disguised power purchase agreement is not answerable in an Attorney General opinion. Nevertheless, where a lease agreement is a true lease, a third-party owner of a distributed generation source, as lessor, would be outside the scope of the RESCTA. The lessor would not be furnishing electric current to the consumer for ultimate consumption. The lessor is merely leasing facilities to the consumer and whether the consumer chooses to produce electric current with the facilities for its own consumption is its prerogative and outside the scope of the RESCTA.

3. In incorporated areas of Oklahoma, third-party owned distributed generation systems are lawful, but a franchise may be required if public streets or other public ways are used to operate or maintain the facilities.

Because RESCTA's restrictions only apply to the unincorporated areas of the State, third-party ownership of distributed generation systems are permissible in the incorporated areas under both a lease agreement and power purchase agreement. However, such arrangements may be subject to municipal franchise requirements. A franchise grants the holder the right and privilege of utilizing public streets and ways to conduct a business. For instance, laying electrical distribution lines to carry electricity from transmission lines to a residential home would require a franchise if it uses public streets or ways.[4]

Whether the third-party owner must obtain a franchise depends on whether the distributed generation system will make use of municipal streets or public ways. As the Oklahoma Supreme Court held in *Oklahoma Gas & Electric Company v. Total Energy, Inc.*:

> a franchise, granted by a municipality in compliance with Article 18, § 5 (a) of the Constitution, grants the holder a right to use public streets, and other public ways, for the purpose of maintaining and operating a business affected with a public

[3] We do not consider in this opinion the scenario where a lease agreement between a lessor and a lessee is actually a security agreement disguised as a lease. *See, e.g., In re Tulsa Port Warehouse Co., Inc.*, 690 F.2d 809 (10th Cir. 1982). For an understanding of how a lease and a security agreement are distinguishable, *see generally* 12A O.S.2011, § 1-203.

[4] Though a franchise is generally not relevant when considering individual use, it may be relevant in the context of micro-grids. Micro-grids are self-contained power systems, which are usually relatively small in size. A micro-grid may serve a number of businesses or residences and can be powered by one or more sources of distributed generation. A micro-grid may service a hospital, a condo-plex, and a grocery store on the same grid or it may service a small residential development. For example, Alcatraz Island, home to Alcatraz Prison has its own micro-grid that connects and powers all the building on the small island.

> interest within the municipality, and embraces the privilege of conducting such business. ***However, if streets or other public ways are not used in maintaining and operating such business a franchise is not required to generate, distribute and sell electricity within a municipality.***

1972 OK 108, ¶ 33, 499 P.2d 917, 922 (emphasis added); *see also Bartlesville Elec. Light and Power Co. v. Bartlesville Interurban Ry. Co.*, 1910 OK 116, ¶ 7, 109 P. 228, 229-30 ("Its right to sell light and power is not dependent upon any franchise, but its right to use the streets and public grounds of the city for that purpose does depend upon the consent of the city"). So long as the third-party owner does not make use of municipal streets or other public ways to generate, distribute, or sell electricity, it need not obtain a franchise to operate within the municipality.[5]

B. A third-party owned distributed generation source qualifies as a small power producer or cogenerator within the meaning of OAC 165:40-1-2 so long as it qualifies under the Public Utility Regulatory Policies Act and is not more than 50-percent owned by a utility.

Having determined the general legality of third-party ownership schemes in Oklahoma, we now turn to your more specific questions regarding (i) whether third-party owned distributed generation facilities qualify as "small power producers" or "cogenerators" under rules promulgated by the Oklahoma Corporation Commission, and (ii) whether consumers are entitled to sell electricity generated from a third-party owned distributed generation source to their incumbent utility. To answer these questions, an understanding of the federal Public Utility Regulatory Policies Act ("PURPA") and Commission rules is necessary.

1. PURPA and federal regulations have defined small power producer and cogenerator, and federal law places certain obligations on incumbent electric utilities with regard to such producers.

Section 210 of PURPA ***requires*** electric utilities to allow "eligible on-site generating facilities"—referred to under federal law as qualifying facilities—access to the transmission grid and ***requires*** utilities to purchase the qualifying facilities' excess power. 16 U.S.C. § 824a-3; *see also* 18 C.F.R. Part 292. Absent these requirements, a utility generally has no obligation to purchase power from a small power producer or cogenerator at wholesale. *See, e.g., Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (indicating that wholesale sales are voluntary under the Federal Power Act, which would apply absent PURPA's requirements to buy from qualifying facilities); *see also* 16 U.S.C §§ 791(a) – 825(r).

A qualifying facility, which is entitled under PURPA to sell excess electricity to the incumbent utility, is defined by the Federal Energy Regulatory Commission ("FERC") as a "small power production facility" or a "cogeneration facility." 18 C.F.R. § 292.101. A cogeneration facility is

[5] Additionally, the fact that a utility has obtained a franchise does not mean that the utility has the right to be free from competition. The Oklahoma Supreme Court has held that "franchises do not grant a monopoly or render competition illegal… Such franchises have elements of property but confer no contractual or property right to be free of competition." *Oklahoma Gas & Elec. Co. v. Oklahoma Elec. Coop.*, 1973 OK 158, ¶ 14, 517 P.2d 1127, 1132-33.

"equipment used to produce electric energy and forms of useful thermal energy (such as heat or steam), used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy." 18 C.F.R. § 292.202; *see also* 16 U.S.C. § 796(18). To be a qualified cogeneration facility, the producer must meet certain requirements for operation, efficiency, and use of energy output, and be certified as a qualifying facility by FERC. *See* 18 C.F.R. §§ 292.203(b); 292.205; 292.207. A small power production facility is a small power generator of 80 megawatts or less using a renewable source of energy. 16 U.S.C. § 796(17). To be a qualified small power production facility, the producer must meet requirements for size and fuel type, and must also be certified by FERC as a qualifying facility. *See* 18 C.F.R. §§ 292.203 (a), (c); 292.204; 292.207.

2. The Oklahoma Corporation Commission has promulgated rules implementing the requirements of PURPA.

Pursuant to the authority granted under Title 17, Section 34.1 of the Oklahoma Statutes, the Oklahoma Corporation Commission (the "Commission") has enacted rules implementing PURPA in the State of Oklahoma. 17 O.S.2011, § 34.1 (authorizing the Commission "to implement and administer [PURPA…and] adopt such rules and regulations as are necessary to implement the purpose of all federal laws which are administered or enforced by [the Commission]"); *see also* OAC 165:40; 165:35-29. Chapter 40 of the Commission's rules provides standard contract terms for utility purchases from small power producers and cogenerators of 100 kw or less. OAC 165:40-1-1. Additionally, Chapter 40 contains an optional net metering[6] provision applicable to small power producers and cogenerators with an annual energy output of 25,000 kWh or less.[7] OAC 165:40-9.

In Chapter 40, the Commission defined a small power producer as a "facility qualified under Section 201 of [PURPA] as a small power production facility."[8] OAC 165:40-1-2. However, the

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[6] "The 'traditional' net metering approach is functionally equivalent to having a single meter that runs forwards when the customer needs more power than she produces, and backward when she sends excess power to the grid because she produces more power than she needs." Revesz & Unel, *Managing the Future of the Electricity Grid*, 41 HARV. ENVTL. L. REV. at 46-47. PURPA defines net metering as "service to an electric consumer under which electric energy generated by that electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period." 16 U.S.C. § 2621(d)(11).

[7] In most instances, the utility purchase from small power producers and cogenerators will take place according to the rules found in Chapter 40. Under a power purchase agreement, a third-party owner produces electricity from a qualified facility—either a small power production facility or cogeneration facility. The customer uses the electricity it needs and sells the excess electricity to the utility. Under a lease, the customer produces the electricity itself, uses what it needs, and sells the excess to the utility.

[8] The Commission defines cogenerators and small power producers as follows:

"'Cogenerator' means a producer qualified under [PURPA] as a cogeneration facility. A facility's power production capacity:

(A) Must be used to produce both electrical and useful thermal energy for industrial commercial, heating or cooling purposes, through the sequential use of energy.
(B) Must meet the applicable standards as to fuel use and efficiencies.

definition also enumerates the requirements of a small power producer under PURPA and FERC regulations as they existed when the Commission adopted the definition in 1988. *Id.* Importantly, the Commission's definitions of "small power producer" and "cogenerator" specifically ***exclude*** facilities "owned by a person primarily engaged in the generation or sale of electricity." *Compare* OAC 165:40-1-2 *with* 16 U.S.C. §§ 796(17)(C)(ii), (18)(B)(ii); 18 C.F.R. § 292.206. FERC previously interpreted this exclusion to mean that the facility cannot be more than 50% owned by an "electric utility or utilities, or by an electric utility holding company, or companies, or any combination thereof." 18 C.F.R. § 292.206(b) (2005); *see also So. Cal. Edison Co. v. F.E.R.C.*, 443 F.3d 94, 96–97 (D.C. Cir. 2006) (describing PURPA requirement and FERC interpretation). This utility ownership exclusion was eliminated by later amendments to PURPA.[9]

The utility ownership exclusion that remains in the Commission's definition in Chapter 40 mirrors the original federal exclusion because the Commission intended to mirror the requirements under federal law at the time the rules were enacted. Indeed, when interpreting administrative regulations, the "same rules of construction apply" as would otherwise apply when interpreting statutes, *Dolese Bros. v. State ex rel. Okla. Tax Comm'n*, 2003 OK 4, ¶ 9, 64 P.3d 1093, 1098, and the intent of a particular legislative enactment is the linchpin for interpreting its meaning. *See Parsons v. Dist. Ct. of Pushmataha Cty.*, 2017 OK 97, ¶ 23, 408 P.3d 586, 596. In this instance, both the purpose of Chapter 40 and its definitions of "cogenerator" and "small power producer"

(C) May not be owned by a person primarily engaged in the generation or sale of electrical power.
(D) Shall be qualified by FERC."

> "'Small power producer' means a facility qualified under [PURPA] as a small power production facility. A facility's power production capacity must be owned by the same person at the same location and be less than eighty (80) megawatts, must derive more than fifty percent (50%) of its total energy input from biomass, wastes, renewable resources, or any combination, may not derive more than twenty-five percent (25%) of its total energy from oil, natural gas, and/or coal, and the facility may not be owned by a person primarily engaged in the generation or sale of electrical power."

OAC 165:40-1-2.

[9] Prior to 2005, PURPA specified ownership requirements for qualified status. The requirements were codified in the Federal Power Act and provided that a qualifying facility must be "owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely produced from cogeneration facilities or small power production facilities)." 16 U.S.C. §§ 796(17)(C)(ii), (18)(B)(ii). Additionally, FERC implemented this requirement in its rules. 18 C.F.R. § 292.206. In 2005, however, Congress passed the Energy Policy Act of 2005 ("EPAct"), which eliminated the utility ownership exclusion for qualifying facilities. See The Energy Policy Act, Pub. L. No. 109-58, 119 Stat. 594 (2005); *see also So. Cal. Edison Co.*, 443 F.3d at 97 (noting repeal of requirement in Energy Policy Act of 2005). Following the amendment, FERC also removed the requirement from its regulations. *See* Revised Regulations Governing Small Power Production and Cogeneration Facilities, 71 Fed. Reg. 7852, 7864 (Feb. 15, 2006) (deleting 18 C.F.R. § 292.206). The Commission's rules have not been updated to reflect the elimination of utility ownership exclusion by the EPAct. We do not in this opinion examine any potential constitutional argument under the Supremacy Clause of the United States Constitution. For an understanding of how federal law may preempt Commission regulations that are contrary to the purpose of PURPA, *see generally Smith Cogeneration Mgmt., Inc. v. Corp. Comm'n*, 1993 OK 147, 863 P.2d 1227. Additionally, this opinion does not consider whether it is outside the Commission's statutory authority, under Title 17, Section 34.1, to maintain rules that conflict with the purpose of PURPA.

indicate the Commission's intent to enact rules consistent with federal requirements as they stood in 1988. *See* OAC 165:40-1-1; OAC 165:40-1-2.

Even though Congress and FERC have repealed the utility ownership exclusion, the Commission has not removed corresponding language from Chapter 40, and the exclusion therefore remains substantially equivalent to the prior federal exclusion as interpreted by FERC.[10] Thus, a third-party owned distributed generation source qualifies as a small power producer or cogenerator within the meaning of OAC 165:40-1-2 so long as it qualifies under PURPA and is not more than 50% owned by a utility.[11]

C. Electric utilities must accept excess electric power produced by a third-party owned distributed generation facility, so long as the facility is a qualified small power production facility or cogeneration facility under PURPA, FERC regulations, and Commission rules.

You also ask whether the Commission can require electric utilities to accept power generated by a third-party owned distributed generation facility. As discussed above, a utility's obligation to accept power from a qualifying facility, either an eligible small power producer or a cogenerator, is derived from federal law as implemented by the Commission. *See* 16 U.S.C. § 824a-3; *see also* 18 C.F.R. Part 292; 17 O.S.2011, § 34.1. PURPA requires electric utilities to accept power from qualifying facilities and the Commission has already promulgated rules implementing this requirement. *See* OAC 165:40; 165:35-29. If the small power producer or cogenerator qualifies as a qualifying facility under PURPA, FERC regulations, and Commission rules, then the electric utility is required to purchase the qualifying facility's power in accordance with the Commission's procedures. OAC 165:40; *see also* OAC 165:35-29.

D. The Oklahoma Corporation Commission has excluded qualified small power producers and cogenerators from its definition of a utility.

Finally, you ask whether a third-party owner of a distributed generation system would be a utility as contemplated by Title 17, Section 151 of the Oklahoma Statutes, and therefore subject to utility

[10] Likewise, the omission in OAC 165:40 of parenthetical language from PURPA—that a qualifying facility must be "owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely produced from cogeneration facilities or small power production facilities)"—does not render the definition in OAC 165:40 any different. There is no evidence in the terms of the Commission's rules that it intended to depart from the prevailing definition under PURPA, and it is the intent of the Commission that controls. *See Parsons*, 2017 OK 97, ¶ 23, 408 P.3d at 596; *Dolese Bros.*, 2003 OK 4, ¶ 9, 64 P.3d at 1098.

[11] The Commission has also implemented PURPA through a separate chapter of its administrative regulations. Specifically, Chapter 35 contains rules enacting PURPA's general requirement that electric utilities must sell power to small power producers and cogenerators and buy their excess power. 16 U.S.C. § 824a-3. OAC 165:35-29-1 provides that "[p]urchases under this Section shall be from cogenerators and small power producers (producers) as defined and qualified under Section 201 of [PURPA]." Thus, for the purposes of Chapter 35, the Commission defined small power producers and cogenerators as those terms are defined under PURPA—period. Unlike OAC 165:40, OAC 165-35-29 does ***not*** include additional, specifically enumerated requirements as part of that definition. Because OAC 165-35-29 defines small power producers and cogenerators simply as they are defined under PURPA, and the EPAct amended PURPA to eliminate the utility ownership exclusion, there is no such exclusion applicable to the definition of small power producer or cogenerator with regard to OAC 165:35-29.

regulation by the Commission. A "public utility" is defined under Oklahoma law to mean any entity or person that may "own, operate, or manage any plant or equipment, or any part thereof, directly or indirectly for public use, or may supply any commodity to be furnished to the public," including "[f]or the production, transmission, delivery or furnishing of electric current for light, heat or power." 17 O.S.2011, § 151. The Commission has promulgated rules regulating public utilities pursuant to its authority under the Oklahoma Constitution and associated statutes. *See* OKLA. CONST. art. IX, § 18. Specifically in regard to producers—small power producers and cogenerators—the Commission's rules provide that such producers "shall not be utilities as defined elsewhere in [Chapter 35]." OAC 165:35-29-1. So long as producers are eligible cogenerators or small power producers as defined by 16 U.S.C. §§ 796(17)(C) and (18)(B), they are excluded from utility regulation under OAC 165:35. *See Cox v. Dawson*, 1996 OK 11, ¶ 8, 911 P.2d 272, 277 (Where "the legislature has not expressed its disapproval with the agency's construction, the legislature's silence may be regarded as acquiescence in the agency's construction of the statute.").

It is, therefore, the official Opinion of the Attorney General that:

1. **The permissibility of a third-party owned distributed generation source depends on whether the source is operating in unincorporated or incorporated areas of the State of Oklahoma:**

    a. **If the distributed generation system is operated in an unincorporated area pursuant to a power purchase agreement, the third-party owner would be a "retail electric supplier" and prohibited by the Retail Electric Supplier Certified Territory Act from providing retail electric servic in the certified territory of another retail electric supplier. *See* 17 O.S.2011, § 158.25.**

    b. **If the distributed generation system is operated in an unincorporated area pursuant to a lease agreement, the third-party owner would not be a "retail electric supplier" subject to the Retail Electric Supplier Certified Territory Act. *See* 17 O.S.2011, § 158.25. However, the question of whether a specific contractual arrangement is a true lease will depend on the terms of the contract and is beyond the scope of this opinion.**

    c. **A distributed generation system operated in an incorporated area pursuant to either a lease or a power purchase agreement is lawful, but a municipal franchise may be required if municipal streets or other public ways are used to operate or maintain the facilities. *See Okla. Gas & Elec. Co. v. Total Energy, Inc.*, 1972 OK 108, ¶ 33, 499 P.2d 917, 922.**

2. **A third-party owned distributed generation facility would be a small power producer or cogenerator within the meaning of OAC 165:40 so long as it is qualified under the Public Utility Regulatory Policies Act and is not more than 50-percent owned by an electric utility. *See* 16 U.S.C. §§ 796(17)(C), (18)(B); 18 C.F.R. Part 292; OAC 165:40-1-2.**

3. **Under the Public Utility Regulatory Policies Act and rules promulgated by the Oklahoma Corporation Commission, electric utilities are required by the Federal Energy Regulatory Commission and the Oklahoma Corporation Commission to accept power from qualified small power producers and cogenerators, to the extent that they are qualified under the Public Utility Regulatory Policies Act and are not more than 50-percent owned by an electric utility. 16 U.S.C. § 824a-3, 796(17)(C), (18)(B); 18 C.F.R. Part 292; OAC 165:40-1-2.**

4. **If a third-party owned distributed generation system is a qualified small power production facility or cogeneration facility under the Public Utility Regulatory Policies Act, *see* 16 U.S.C. §§ 796(17)(C), (18)(B); 18 C.F.R. Part 292, the third-party owner would not be a "utility" under Oklahoma Corporation Commission rules. *See* OAC 165:35-29-1(a).**

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