BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1610

In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Investigation Into Qualifying Facility Contracting and Pricing	COMMENTS OF OBSIDIAN RENEWABLES, LLC

Obsidian Renewables, LLC ("Obsidian") respectfully submits these comments on PacifiCorp's renewable, non-standard avoided cost rates for qualifying facilities ("QF"). For the reasons stated below, the Commission should adopt the Staff report and confirm that PacifiCorp is required to offer a renewable option for non-standard QFs under its Schedule 38. The renewable non-standard price stream should be based on the renewable standard price stream. In the alternative, the Commission may choose to open a new investigation into how PacifiCorp establishes prices for non-standard, renewable QFs. While such investigation is pending, the Commission should require PacifiCorp to use its standard renewable prices as the starting point for non-standard renewable prices.

I. INTRODUCTION

On or about July 12, 2016, PacifiCorp submitted a compliance filing purportedly revising its avoided-cost price schedules consistent with Commission Order 16-174. Staff objected to PacifiCorp's compliance filing to the extent that it failed to include a renewable price-stream for non-standard QFs as required in Order 11-505. PacifiCorp's response is that, by approving the PDDRR computer model for non-standard prices, Order 16-174 *implicitly* reversed PacifiCorp

legal obligation to provide a renewable price stream for non-standard QFs. PacifiCorp argues that Order 16-174 "rendered moot" its obligation to offer non-standard renewable prices under Order 11-505. PacifiCorp further argues that the Commission may not even consider Staff's objection to its compliance filing because this is a contested case proceeding between litigants, rather than a substantive policy matter, and Staff's argument was not previously made on the record.

PacifiCorp's position on this matter is troubling. Assuming that PacifiCorp intended all along for the PDDRR methodology to repeal its obligation to provide a renewable price-stream for non-standard QFs, PacifiCorp failed to fully disclose this intent or the import of its proposal. In its testimony in support of the PDDRR methodology, PacifiCorp apparently meant, without so stating, that: "If the Commission approves this methodology we will never offer a renewable price stream to non-standard QFs, notwithstanding any prior Commission orders to the contrary." PacifiCorp declined to share this pertinent testimony, and with good reason. Had PacifiCorp explained that this was its end-game, Staff likely would not have supported this portion of PacifiCorp's proposal.

By omitting the fact that it was covertly trying to kill the renewable price stream for non-standard projects, PacifiCorp was able to induce Staff to support the PDDRR proposal. Having secured Staff's approval of PDDRR by providing incomplete information about its intentions, whether deliberate or otherwise, PacifiCorp now asserts that Staff is not entitled to correct or clarify its understanding as to the impact of the PDDRR methodology on non-standard renewable QFs. In other words, PacifiCorp views Staff's support of the PDDRR proposal as both absolute and irreversible, and PacifiCorp believes that the Commission is not entitled to hear any evidence to the contrary.

II. THE COMMISSION CAN AND SHOULD CONSIDER STAFF'S OBJECTIONS

The Commission must reject PacifiCorp's assertion that the Commission should "disregard" Staff's objections. In its October 24 Response Comments, PacifiCorp argues that the only issue now before the Commission is whether its compliance filing is consistent with Order 16-174. PacifiCorp argues that this is a "narrow procedural question" rather than a substantive debate. PacifiCorp further complains that Staff's objection to its compliance filing is based on arguments that were not presented until after Order 16-174 had been issued. PacifiCorp concludes: "Staff's position that extra-record considerations justify rejecting a compliance filing conflicts with bedrock principles of administrative law . . ."

PacifiCorp is wrong when it asserts that "Staff has failed to point to any inconsistencies between PacifiCorp's compliance filings and the terms of Order 16-174." To the contrary, that is *exactly* was Staff has asserted. Staff objected to PacifiCorp's compliance filing on the grounds that Order 16-174 does not expressly repeal the obligation to provide a renewable price stream for non-standard projects. In other words, PacifiCorp's proposed implementation of Order 16-174 in its compliance filing is inconsistent with the Commission's express language in Order 16-174. Staff's objection to PacifiCorp's compliance filing is both procedurally appropriate and substantively accurate.

The Commission also should reject PacifiCorp's argument that Staff's objection to the compliance filing is improper because it raises a new argument not in the record. The fact that Staff did not anticipate and address the inconsistency in PacifiCorp's compliance filing prior to Order 16-174 does not bar it from doing so now. Taken to its logical conclusion, PacifiCorp's argument is that it may take a position in a compliance filing that is completely unhinged from the underlying Commission Order so long as no party had previously anticipated and objected on

the record to such position. This would be a nonsensical outcome, and one that the Commission need not and should not reach.

PacifiCorp also misstates the nature of the issues raised by Staff. In footnote 14 of its compliance filings, PacifiCorp asserts that this is a "trial-like" proceeding that must be resolved based strictly on the "evidentiary record" before the Commission. To the contrary, the Commission has repeatedly stated that, in establishing and reviewing its PURPA policies, it is "acting in a legislative capacity, rather than enforcing or interpreting an agreement between litigants . . .." Order 15-241. In Order 15-209, the Commission explained:

> Because this Commission acts in a legislative capacity when it establishes general policies to implement PURPA, we are not precluded from revisiting those policies when the conditions under which they were adopted may have changed. To the contrary, we have a duty to reexamine all PURPA policies, when necessary, to promote QF development while also ensuring that ratepayers pay no more than a utility's avoided costs.

Here, Staff has raised a substantive question as to whether or not the Commission implicitly repealed PacifiCorp's obligation to offer a renewable price stream to non-standard QFs. PacifiCorp's assertion that the Commission is legally precluded from considering Staff's arguments to the extent that they were raised after Order 16-174 cannot be squared with the Commission's long-standing practice—indeed its *duty*—to revisit prior PURPA policy decision in light of current evidence.

III. ORDER 16-174 DID NOT REPEAL PACIFICORP'S OBLIGATION TO PROVIDE NON-STANDARD RENEWABLE RATES

1. Staff did not support PacifiCorp use the PDDRR method to kill non-standard renewable prices.

PacifiCorp argues that the Commission has no choice but to approve its compliance filing implementing the PDDRR methodology *in its entirety* because Staff submitted testimony in

support of the PDDRR methodology. PacifiCorp complains that Staff's objection to the compliance filing is "flagrantly inconsistent with its testimony in this proceeding, and should be disregarded." PacifiCorp further states that "Staff unequivocally supported PacifiCorp's proposal to adopt the PDDRR methodology for calculating non-standard avoided cost prices." PacifiCorp apparently believes that, having expressed support of the PDDRR methodology, Staff somehow waived its right to comment on PacifiCorp's implementation of that methodology.

In fact, Staff never testified that the Commission's acceptance of the PDDRR methodology for non-standard prices would automatically repeal the renewable price stream for non-standard QFs. In its report on PacifiCorp's compliance filing, and again at the public meeting, Staff explained that it neither understood nor intended that the PDDRR methodology would eliminate the renewable price-stream for non-standard QFs. Further, Staff made no such recommendation to the Commission. "Staff finds no indication in Order 16-174 that the Commission intended to rescind the requirement imposed under Order 11-505 that PacifiCorp offer renewable QFs a renewable and non-renewable avoided cost price stream and allow the QF to choose one or the other." PacifiCorp's characterization of Staff's position is inconsistent with Staff's own findings.

Obsidian actively participated in the UM 1610 workshops and followed all filings and, like Staff, never understood that use of the PDDRR method would somehow excuse PacifiCorp from offering a renewable price stream on Schedule 38 projects.

2. Order 16-174 is silent as to the non-standard renewable price stream.

Staff's interpretation of Order 16-174 is correct. The plain language of Order 16-174 is silent with respect to the potential application of the PDDRR methodology to PacifiCorp's renewable price stream. There is no indication that the Commission, either expressly or

impliedly, intended for the PDDRR methodology to repeal the renewable price stream required by Order 11-505. There is no indication that the Commission or other parties contemplated that this was even a possible outcome--let alone their intended outcome. PacifiCorp's compliance filing, therefor, improperly seeks to insert into Order 16-174 words and meaning that were omitted by the Commission. *See* ORS 174.010 (In interpreting the law, one is supposed "simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert was have been omitted, or to omit what has been inserted.").

3. When the Commission changes its prior decisions, it does so expressly.

PacifiCorp's assertion that the Commission *implicitly* repealed the renewable price stream required by Order 11-505 is contrary to Commission practice. Typically, when the Commission repeals or changes its prior PURPA policies it does so expressly rather than by negative implication. There are multiple examples of this practice on display in Order 16-174 itself:

> With respect to third-party transmission costs, the Commission acknowledged a concern with how it previously stated its policy and expressly declared that "we modify the statement in Order No. 14-058 as follows . . .." The Commission then explained exactly how Order 14-058 was being modified.
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> With respect to capacity contribution adder for solar projects, the Commission expressly stated that the "calculation we adopted in Order 14-058 contains an inadvertent flaw with respect to solar QFs . . .. Staff recommends an adjustment to fix the error and we adopt the adjusted calculation . . .."
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> With respect to the creation of a legally enforceable obligation ("LEO"), the Commission wrote "[w]e concur with Staff and the other parties that our existing LEO rule is inconsistent with FERC precedent and should be modified."

By contrast, the Commission made no such express announcement with respect to the requirement that PacifiCorp provide a renewable price stream for non-standard QFs. The Commission did not acknowledge any flaw or concern with this requirement. Most important,

the Commission did not expressly state that it intended to modify Order 11-505 in this regard. Where the Commission did not expressly modify Order 11-505, the most reasonable interpretation is that the Commission did not intend to make such modification.

4. PacifiCorp did not change its contracting practices with respect to non-standard renewable QFs following Order 16-174.

PacifiCorp's argument that Order 16-174 implicitly repealed its obligation to offer renewable prices to non-standard QFs finds no support in PacifiCorp's own contracting practices. PacifiCorp's argument implies that, prior to Order 16-174, PacifiCorp formerly offered renewable prices for non-standard QFs. PacifiCorp further implies that, by approving the PDDRR methodology in Order 16-174, the Commission silently relieved PacifiCorp prospectively of its obligation to provide renewable prices for non-standard QFs. In other words, PacifiCorp implies that its approach to contracting with non-standard QFs was changed by Order 16-174.

In reality, Order 16-174 changed nothing about PacifiCorp's contracting practices. As far as Obsidian is aware, PacifiCorp never complied with its obligation to provide renewable prices to non-standard QFs. In the Complaint filed against PacifiCorp by Cypress Creek Renewables in UM 1799, for example, it is alleged that PacifiCorp refused to honor requests for renewable prices for non-standard QFs that were made in April of 2016, well before Order 16-174 was issued. Order 16-174 did not change PacifiCorp's obligation to provide renewable prices. The only thing that Order 16-174 changed was PacifiCorp's rationale for its long-standing practice of refusing to provide a renewable price stream to non-standard QFs.

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IV. PACIFICORP'S INTERPRETATION OF ORDER 16-174 WOULD BE INCONSISTENT WITH UM 1734

It is also noteworthy that, while PacifiCorp's proposal to use the PDDRR methodology was pending in Phase II of UM 1610, PacifiCorp was simultaneously petitioning the Commission in UM 1734 to slash the threshold for wind and solar QFs eligible to receive a standard contract (and standard renewable prices). PacifiCorp asked the Commission in UM 1734 to reduce the threshold for standard wind and solar QF contracts from 10 MW to 100 kW. If PacifiCorp's arguments about the meaning of Order 16-174 were correct--that the adoption of the PDDRR methodology implicitly repealed its obligation to offer renewable rates for non-standard QFs--then PacifiCorp was actually arguing in UM 1734 that it should not have to provide renewable prices to any wind or solar QFs larger that 100 kW. PacifiCorp certainly did not disclose in either docket that it intended to eliminate renewable prices for all wind and solar projects larger than 100 kW. It is unclear to Obsidian that *any* party to these proceedings—other than PacifiCorp itself—understood that this was PacifiCorp's true intention.

PacifiCorp ultimately succeeded in UM 1734 in reducing the threshold for solar QFs from 10 MW to 3 MW. The stated rationale for this change is that it was needed to prevent the disaggregation of large solar projects. Further, it was believed that developers building 3 MW solar projects were sophisticated enough to negotiate non-standard contracts with PacifiCorp. There was never any indication, however, that solar projects above 3 MW would no longer be eligible for renewable rates (upon approval of the PDDRR). Obsidian's understanding was that solar QFs above 3 MW would remain eligible for renewable prices on a negotiated basis. Obsidian believes that the other parties to UM 1734 shared this understanding.

If the Commission were to agree that non-standard QFs are no longer eligible for a renewable price stream from PacifiCorp, then the Commission should revisit its decision in Order 1734 and raise the eligibility threshold for standard solar QFs back to 10 MW.

V. CONCLUSION

The Commission should reject PacifiCorp's compliance filing to the extent that it fails to offer a renewable price stream for non-standard QFs. Staff is correct in concluding that Order 16-174 did not expressly repeal PacifiCorp's obligation to provide renewable prices to non-standard QFs. On its face, Order 16-174 is silent with respect to PacifiCorp's renewable rates for non-standard projects. PacifiCorp's attempt to insert into Order 16-174 words or intent that the Commission had omitted is legally improper. Further, when the Commission wishes to modify or repeal an existing policy, it does so expressly and not implicitly through silence. Because PacifiCorp's compliance filing rests on an impermissible reading of Order 16-174, the Commission is well within its procedural and substantive authority to reject it.

If the Commission wants to investigate the issue further, then Obsidian requests that the Commission open a new docket (or a new phase in this docket) to determine how PacifiCorp shall set renewable prices for non-standard QFs. While that investigation remains pending, the Commission should require PacifiCorp to use its standard renewable prices as the starting point for calculating its non-standard renewable prices.

Although PacifiCorp suggests that this matter is already under review in UM 1799, Obsidian does not believe that it would be proper to undertake a general policy investigation inside of a complaint proceeding. By its nature, a complaint proceeding is only enforceable by and against the parties thereto. Further, because it is inherently fact-specific, the complaint proceeding may not be the best vehicle for making policy applicable to the general public.

Finally, a complaint proceeding arising out of a dispute between two litigants may not have the same level of public participation as a policy investigation. It may be appropriate to begin any new investigation, if it is required at all, after the complaint of Cypress Creek is determined.

DATED this 31st day of October 2016.

Respectfully submitted,

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