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December 18, 2015

VIA ELECTRONIC

PUC Filing Center
Public Utility Commission of Oregon
PO Box 1088
Salem, OR 97308-1088

Re: **AR 593 – OBSIDIAN RENEWABLES LLC Petition to Amend OAR 860-029-0040,
Relating to Power Purchases by Public Utilities from Small Qualifying Facilities.**

Attention Filing Center:

Attached for filing in the above referenced docket are Idaho Power Company's Comments.

Please contact this office with any questions.

Very truly yours,

A handwritten signature in cursive script that reads "Wendy McIndoo".

Wendy McIndoo
Office Manager

Attachment

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 593

In the Matter of
OBSIDIAN RENEWABLES LLC

**IDAHO POWER COMPANY'S
COMMENTS**

Petition to Amend OAR 860-029-0040,
Relating to Power Purchases by Public
Utilities from Small Qualifying Facilities.

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I. INTRODUCTION

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Pursuant to the Invitation to Comment issued on November 17, 2015, Idaho Power Company (Idaho Power or Company) submits these Comments to the Public Utility Commission of Oregon (Commission) responding to the Petition for Rulemaking (Petition) filed by Obsidian Renewables LLC (Obsidian) on November 13, 2015. Obsidian petitioned the Commission to initiate a rulemaking proceeding to revise and adopt new administrative rules related to the generally applicable standard contract terms, conditions, and policies for power purchases by utilities from small Qualifying Facilities (QFs) under the Public Utility Regulatory Policies Act (PURPA).

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Although the Company does not agree with many of the legal and policy arguments advanced by Obsidian, the Company generally supports the Commission updating its administrative rules to conform the rules to the policy determinations made in recent PURPA investigations. Resolving the current inconsistencies between the Commission's rules and its orders, and codifying the significant policy decisions that have historically not been included in rule will create a more settled PURPA implementation policy in Oregon.

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To eliminate any ambiguity regarding the applicable Commission policies during the rulemaking process, Idaho Power also recommends that the Commission issue a

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1 temporary stay of each utility's obligation to enter into contracts with any QF greater than
2 100 kW until the rulemaking has concluded and there is no dispute regarding each
3 company's PURPA obligations in Oregon.

4 In any event, the Commission should ensure that any rulemaking docket it might
5 open does not delay the issuance of a final order in the fully submitted docket UM 1725.
6 In that case, Idaho Power has made narrowly tailored requests intended to remedy
7 significant deficiencies in the Commission's existing PURPA implementation as *it is*
8 *applied to Idaho Power under today's circumstances.*¹ Delaying resolution would pose
9 serious risk to customers that Idaho Power will be required to enter into long-term
10 contracts at excessive avoided cost prices. The Commission can implement its decision in
11 docket UM 1725 through the adoption of temporary rules.

12 II. DISCUSSION

13 A. Idaho Power Supports a Rulemaking Docket to Conform the Commission's 14 Rules to the Generally Applicable Policies Adopted in Contested Cases.

15 The Commission has long utilized both rulemaking and contested case proceedings
16 to implement PURPA.² As a result, not every generally applicable policy has been

¹ See *Re Applications to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Charge, and for Change in Resource Sufficiency Determination*, Docket No. UM 1725, Idaho Power Company's Prehearing Brief (Nov. 12, 2015); *Re Applications to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Charge, and for Change in Resource Sufficiency Determination*, Docket No. UM 1725, Idaho Power Company's Post-Hearing Brief (Dec. 10, 2015).

² *Proposed Amendments to Rules Relating to Cogeneration and Small Power Production Facilities*, Docket No. AR 102, Order No. 84-742 (Sept. 24, 1984) (rejecting argument that ORS 758.535 requires that every term and condition be established by rule); *Re Investigation of Avoided Costs and Cost Effective Fuel Use and Resource Development*, Docket No. UM 21, Order No. 84-720 (Sept. 12, 1984) (adopting generally applicable policies in contested case); *Re Investigation into Competitive Bidding by Investor-Owned Electric Utility Companies*, Docket No. UM 316, Order No. 91-1383 (Oct. 18, 1991) (establishing broadly applicable PURPA policies); *Re OAR 860-029-040(5)(a) Relating to Qualifying Facilities*, Docket No. AR 246, Order No. 91-1605 (Nov. 26, 1991) (codifying in rule a policy adopted in contested case); *Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 (May 13, 2005); *Re Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129,

1 codified in rule and the Commission's rules do not necessarily reflect the latest policy
2 determinations made in generic PURPA investigations.³ For this reason, Idaho Power
3 supports the Commission opening a rulemaking docket to conform its rules to the policies
4 adopted in recent contested case proceedings. By revising its rules to accurately reflect
5 these generally applicable policies, the Commission can remove any potential ambiguity
6 regarding the implementation of QF development in Oregon.

7 Further, the Commission and a broad array of stakeholders have expended
8 considerable time and energy in the last ten years to develop policies that are supported
9 by robust and comprehensive evidentiary records. Thus, the rulemaking should begin with
10 a presumption that the Commission's current policies are valid and should not be modified.
11 If a party can establish changed circumstances, or raise new issues that the Commission
12 did not consider when adopting its current policies, then the Commission may consider
13 whether a modification of its current policies is appropriate.⁴ Utilizing these standards will
14 streamline the rulemaking process and ensure that the considerable effort spent to
15 develop current policies was not in vain.

16 While Idaho Power supports a rulemaking proceeding, the Company does not agree
17 with Obsidian's legal argument that the Commission cannot implement PURPA through
18 contested case proceedings. Obsidian contends that "[b]y law, any purported policies

Order No. 07-360 (Aug. 20, 2007); *Re Investigation Into Qualifying Facility Contracting and Pricing*,
Docket No. UM 1610, Order No. 14-058 (Feb. 24, 2014).

³ For example, the Commission has established the contract term for standard and negotiated
contracts through contested case investigations, not rulemaking. See *e.g.*, Orders Nos. 84-742 and
84-720. Similarly, the Commission's rules establish a 1 MW eligibility cap for standard contracts
even though that eligibility cap has not applied to standard contracts since 2005. OAR 860-029-
0040(4)(a); Order No. 05-584 at 17.

⁴ See *e.g.*, *Re PacifiCorp's Application to Reduce the Qualifying Facility Contract Term and Lower
the Qualifying Facility Standard Contract Eligibility Cap*, Docket No. UM 1734, Order No. 15-241 at
3 (Aug. 14, 2015) ("Changing circumstances require reevaluation of previous decisions regarding
the implementation of our PURPA policies.")

1 adopted through [contested case] proceedings [are] invalid.”⁵ On the contrary, as
2 described in briefing submitted by Idaho Power in docket UM 1725, the Commission has a
3 well-established and perfectly legal history of implementing PURPA through generic
4 investigations using contested case processes.⁶ Neither the Administrative Procedures
5 Act⁷ (APA) nor the Commission’s enabling statutes, including ORS 758.535(2)(a),⁸ prohibit
6 the adoption of generally applicable policies through contested cases.^{9,10} Therefore, the
7 Commission’s policies established in recent contested case proceedings are valid and
8 legally enforceable even though they are not formally codified in rule.¹¹

⁵ Petition at 10, 13 (“any PURPA policies established through contested case proceedings are not valid.”).

⁶ *Re Applications to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Charge, and for Change in Resource Sufficiency Determination*, Docket No. UM 1725, Idaho Power Company’s Response to Obsidian Renewables LLC’s Motion to Hold a Proceeding in Abeyance (Nov. 30, 2015).

⁷ ORS 183.310 *et seq.*

⁸ ORS 758.535(2)(b) (“The terms and conditions for the purchase of energy or energy and capacity from a qualifying facility shall: (a) Be established by rule by the commission if the purchase is by a public utility.”).

⁹ *Homestyle Direct, LLC v. Dep’t of Human Servs.*, 354 Or 253, 266 (2013) (ORS 183.355(5) “provides that agencies are authorized to adopt general policies that otherwise would qualify as ‘rules’ during contested case proceedings, without going through notice-and-comment rulemaking.”); *see also Pac. Nw. Bell Tel. Co. v. Davis*, 43 Or App 999 (1979) (upholding generally applicable guidelines adopted by Commission order).

¹⁰ *Re Internal Operating Guidelines*, Docket No. 1709, Order No. 14-358 (Oct. 17, 2014) (Commission’s Internal Operating Guidelines authorize it to adopt generally applicable policies through contested cases); ORS 756.515 (Commission authorized to investigate and hold contested case proceeding regarding any matter within jurisdiction); *Pac. Nw. Bell Tel. Co. v. Sabin*, 21 Or App 200, 214, *rev den* (1975) (Commission has “the broadest authority—commensurate with that of the legislature itself—for the exercise of [its] regulatory function.”); *Am. Can Co. v. Lobdell*, 55 Or App 451, 463 (1982) (Commission uses contested cases for ratemaking even though “[r]ate-making is a purely legislative function, involving broad discretion in selecting policies and methods of allocating rates among classes of customers.”); *Pac. Nw. Bell Tel. Co. v. Katz*, 116 Or App 302, 309, (1992) (“Utility regulation, including ratemaking, is a legislative function, and the legislature has granted broad power to PUC to perform its delegated function.”).

¹¹ The Commission’s orders are enforceable until revoked by the Commission or found invalid by a court, even if they constituted improper rulemaking through a contested case. *Burke v. Children’s Services Div.*, 288 Or 533, 538(1980).

1 Idaho Power also disagrees with the terms of the draft rule Obsidian submitted with
2 its Petition.¹² The draft rule includes provisions that are illegal under PURPA and contrary
3 to well-established Commission policy.¹³ Therefore, Obsidian's draft rule represents a
4 poor starting point for a rulemaking proceeding and should be rejected. Instead, as
5 discussed above, the Commission's recently-adopted policies should serve as the
6 presumptive foundation for the rulemaking.

7 **B. The Commission should Issue a Temporary Stay of Each Utility's PURPA**
8 **Obligations Pending Rulemaking.**

9 If the Commission agrees with Obsidian that there is a question as to the validity of
10 its contested case PURPA orders, the Commission can resolve that question by codifying
11 in rule each of the policies established in recent contested cases. However, to protect
12 customers in the interim, the Commission should also temporarily stay each utility's
13 obligation to provide contracts to any QF greater than 100 kW during the pendency of the
14 rulemaking.¹⁴ A temporary stay is consistent with prior Commission action. In Order No.
15 87-1154 the Commission found that during the pendency of a PURPA investigation,
16 docket UM 155, "no new facilities should be undertaken that might harm ratepayers."¹⁵
17 The Commission reasoned that the "best way to assure no adverse impact from new
18 facilities" was to repeal certain administrative rules pending the outcome of its

¹² Petition, Attachment B.

¹³ For example, the draft rule includes a provision that would automatically adjust the fixed rates in an executed PURPA contract during the term of the contract if the utility acquires a generating resource during the sufficiency period. It is well-established, however, that, once executed, the prices included in PURPA contracts cannot be adjusted. See e.g. *Freehold Cogen. Assoc., L.P. v. Bd. of Reg. Comm'rs of New Jersey*, 44 F.3d 1178, 1192 (3d Cir. 1995).

¹⁴ See *Re Applications to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Charge, and for Change in Resource Sufficiency Determination*, Docket No. UM 1725, Order No. 15-199 at n. 8 (June 23, 2015).

¹⁵ *Re Investigation into Rules for Cogeneration and Small Power Production Facilities*, Docket No. AR 174, Order No. 87-1154 at 1-2 (Nov. 3, 1987).

1 investigation.¹⁶ Similarly, in 2012 the Commission temporarily suspended Idaho Power's
2 obligation to enter into standard PURPA contracts until the Company updated its avoided
3 cost prices.¹⁷ A temporary stay would eliminate the risk of confusion regarding the validity
4 of the Commission's recent PURPA orders pending a rulemaking proceeding.

5 **C. Rulemaking should not Delay a Commission Order in Docket UM 1725.**

6 The parties and the Commission have expended considerable resources developing
7 a comprehensive evidentiary record and thorough legal briefing in docket UM 1725 and
8 the matter is now fully submitted and ready for a Commission decision. Thus, the
9 Commission should not delay issuing an order in docket UM 1725 pending the outcome of
10 the rulemaking.

11 **1. Delay will Cause Customer Harm.**

12 There can be little doubt that delaying resolution of docket UM 1725 poses serious
13 risk to customers that Idaho Power will be required to enter into long-term contracts at
14 excessive avoided cost prices.¹⁸ Indeed, when adopting interim relief in that case, the
15 Commission recognized this risk and adopted an expedited schedule that would provide
16 for a Commission order by the end of the year.¹⁹ The Commission should not disregard its
17 obligation to protect customers by unnecessarily delaying an order in docket UM 1725.²⁰

¹⁶ *Id.*

¹⁷ *Re Idaho Power Company*, Docket No. UE 244, Order No. 12-042 (Feb. 14, 2012). In Order No. 15-199, the Commission acknowledged that the full stay granted in Order No. 12-042 was in error to the extent it applied to QFs less than 100 kW seeking standard contracts. Order No. 15-199 at n. 8.

¹⁸ The fully developed and undisputed record in docket UM 1725 demonstrates: (1) the Company's current avoided cost prices are excessive due to an outdated deficiency period; (2) long-term contracts have historically included systematically excessive avoided cost prices; and (3) negotiating wind and solar PURPA contracts results in a more accurate avoided cost price that better ensures customer indifference. *Idaho Power/100, Allphin/17*; *Idaho Power/104, Allphin/1*; Order No. 05-584 at 16.

¹⁹ Order No. 15-199 at 6-7.

²⁰ ORS 756.040.

1 **2. The Relief Requested in Docket UM 1725 is not Generally Applicable**
2 **and Therefore Rulemaking is not Required.**

3 There is no legal requirement that the Commission implement its decision in docket
4 UM 1725 through the formal rulemaking requested by Obsidian.²¹ Obsidian argues that it
5 is not “legally permissible” for the Commission to adopt new PURPA policies in docket UM
6 1725 because the Commission can only grant Idaho Power’s requested relief through
7 rulemaking.²² On the contrary, by definition rulemaking is appropriate only when the
8 Commission is adopting generally applicable policies.²³ In docket UM 1725, however,
9 Idaho Power has requested narrowly tailored relief that will relate exclusively to Idaho
10 Power. Therefore, even if the Commission concludes that either the APA or ORS
11 758.535(2) require rulemaking to adopt *generally applicable* PURPA policies, that
12 conclusion does not require rulemaking to implement the decision in docket UM 1725.²⁴

13 **3. The Commission can Issue Revised Rules Implementing its Decision**
14 **without Delaying docket UM 1725.**

15 To the extent that the Commission believes that rulemaking is legally required or
16 good policy to implement its decision in docket UM 1725, the APA and existing rules
17 authorize the Commission to implement its decision to prevent customer harm during the
18 pendency of a formal rulemaking. The Commission can issue temporary rules of general
19 applicability under ORS 183.335(5), which allows for the immediate adoption of temporary

²¹ In fact, Obsidian’s Petition does not even address two of the three issues in docket UM 1725.

²² Petition at 10.

²³ ORS 183.310(9) (defining a “rule” as an “agency directive, standard, regulation or statement of general applicability . . .”); *Oregon Environmental Council v. Oregon State Board of Education* 307 Or 30, 35-36 (1988) (agency order is not generally applicable when directed to a named person); *see also Pac. Nw. Bell Tel. Co. v. Eachus*, 107 Or App 539, 542-43 (1991) (determining a Commission order was actually a rule because it was not directed to a particular person).

²⁴ ORS 758.535(2)(a) directs the Commission to establish the terms and conditions for the purchase of electricity from QFs “by rule.” The APA defines a “rule” as a regulation of “general applicability that implements, interprets or prescribes law or policy . . .” ORS 183.310(9). Together, these statutes make clear that the requirement for rulemaking in ORS 758.535(2)(a) applies to only generally applicable terms and conditions.

1 rules without prior notice or hearing when, *inter alia*, the failure to do so will result in
2 “serious prejudice to the public interest or the interest of the parties concerned . . .”²⁵
3 Then, if the Commission determines that Idaho Power’s specific factual circumstances
4 require a utility-specific policy to protect customers, the Commission can grant Idaho
5 Power a waiver of any of its generally applicable rules necessary to implement its decision
6 in this case.²⁶ By using both temporary rules and its waiver authority, the Commission can
7 act to protect customers now.

8 **III. CONCLUSION**

9 Idaho Power supports a rulemaking to conform the Commission’s rules to the
10 policies it has adopted in recent investigatory dockets. While that rulemaking docket is
11 pending, the Commission should issue a temporary stay of Idaho Power’s PURPA
12 obligations to eliminate any ambiguity over the policies governing PURPA contracting in

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²⁵ Even without temporary rules, the Commission’s order in this contested case is enforceable during the pendency of a rulemaking proceeding. *Burke v. Children’s Services Div.*, 288 Or 533, 538(1980).

²⁶ OAR 860-029-0005(4).

1 Oregon. The Commission should also not allow the rulemaking proceeding to delay
2 resolution of docket UM 1725.

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4 Respectfully submitted this 18th day of December, 2015.

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