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December 18, 2015

*VIA ELECTRONIC FILING*

Public Utility Commission of Oregon
201 High Street SE, Suite 100
Salem, OR 97301-1166

Attn: Filing Center

**RE: AR 593—PacifiCorp's Comments in the Matter of Obsidian Renewable LLC's Petition for Rulemaking**

PacifiCorp d/b/a Pacific Power encloses for filing its comments in the above-referenced docket.

If you have questions about this filing, please contact Erin Apperson, Manager Regulatory Affairs, at (503) 813-6642.

Sincerely,

R. Bryce Dalley
Vice President, Regulation

Enclosure

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**AR 593**

| In the Matter of<br>OBSIDIAN RENEWABLE LLC'S<br>Petition for Rulemaking. | PACIFICORP'S COMMENTS |
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## INTRODUCTION

PacifiCorp d/b/a Pacific Power (PacifiCorp or Company) submits these comments in response to Obsidian Renewable LLC's (Obsidian) Petition for Rulemaking (Petition). Obsidian's Petition asks the Public Utility Commission of Oregon (the Commission) to initiate a rulemaking to develop, among other things, the fixed-price terms and standard price eligibility thresholds applicable to qualifying facility (QF) power purchase agreements (PPAs). At first blush, Obsidian seemingly advances a novel theory under which the Commission would be constrained to developing PURPA policies by notice and comment rulemakings. According to Obsidian's reading of the relevant statute, contested case proceedings have no place in developing the terms and conditions of PURPA purchases.

But a more careful reading reveals that Obsidian's Petition is much ado about nothing. Obsidian's Administrative Procedures Act (APA) arguments are misplaced. The Commission has recognized that it may use contested case procedures to develop PURPA polices since it first began implementing the statute in the early 1980s. If accepted at face value, Obsidian's argument that PURPA policies can be set only by rulemaking would cast doubt on years of PURPA implementation in Oregon and cause significant disruption for both utilities and QF developers.

But that result is not necessary. Obsidian concedes that the Commission may investigate any matter within its jurisdiction (e.g., PURPA policies) and may codify the results of those investigations through formal rulemakings if necessary. By Obsidian's own logic, nothing would prevent the Commission from establishing a standard pricing eligibility cap and fixed-price term for PacifiCorp via the UM 1734 investigation, so long as the results of the investigation are codified in the Commission's administrative rules via a formal rulemaking. Thus, Obsidian has rendered its own Petition moot because the very issues it seeks to address in a rulemaking are currently being addressed in UM 1734 (and UM 1725 with respect to Idaho Power).

The path forward is simple–the Commission may proceed with developing eligibility thresholds and fixed-price terms in UM 1734 and then initiate a conforming rulemaking to codify the new policies. By Obsidian's own reasoning, that outcome would result in lawful rules. Accordingly, PacifiCorp asks the Commission to either deny Obsidian's Petition, or in the alternative stay it, until the Commission enters an order resolving the issues in UM 1734.

## DISCUSSION

### A. The Commission may develop PURPA policies using contested case proceedings.

#### 1. The Commission has consistently used contested Case procedures to develop PURPA policies.

Obsidian's principal argument conflicts with the Commission's interpretation of its statutory authority and its past practices. A strict reading of Obsidian's arguments would upset decades of PURPA implementation in Oregon. Since it first began implementing PURPA in the early 1980s, the Commission has recognized that it is not limited to formal rulemakings when developing general terms and conditions for mandatory PURPA purchases. In one of its earliest

orders implementing PURPA, the Commission addressed arguments that House Bill 2320 (which was codified at ORS 758.505-.555) requires the Commission to set the terms of power purchase contracts through a rulemaking process. The Commission interpreted the section codified as ORS 758.535(2) as not requiring formal rulemakings for developing generic contract terms:

> The [Commission] believes that, in light of the difficulty of setting general terms that would adequately address the peculiarities of various projects, the Legislature intended the [Commission] to act as an arbitrator in ruling on the terms to be included in specific contracts. [The Commission] does not believe it is feasible to devise a "generic" contract or contracts through the rulemaking process.[1]

Consistent with its statutory interpretation that ORS 758.535(2) does not always compel the use of rulemaking procedures, the Commission has repeatedly used contested case procedures to set PURPA terms and conditions, including the fixed-price term and eligibility threshold for standard pricing.[2] Most recently, the Commission has used contested case procedures to assess numerous critical PURPA policies of general applicability in Phases I and II of UM 1610.[3] As noted above, Obsidian fully participated in Phase II of UM 1610 but failed to formalize its objection to the contested case procedures as a legal issue for the Commission to resolve in that docket.

Obsidian argues that PURPA terms and conditions not established by rulemaking are invalid.[4] If accepted, this interpretation of the APA and ORS 758.535(2) would cast doubt on years of PURPA implementation in Oregon—a result Obsidian seems to support. Indeed, Obsidian boldly argues that "any PURPA polices established through contested case proceedings

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[1] Order No. 84-742, AR 102 at 4 (Sept. 24, 1984).
[2] *See, e.g.*, Order No. 05-584, Docket No. UM 1129 (May 13, 2005) (increased fixed-price PPA term from five years to 15 years and increasing the eligibility threshold from 1 MW to 10 MW); Order No. 14-058, Docket No. UM 1610 (Feb. 24, 2014) (affirming 15 year fixed price term).
[3] *See generally* Order No. 14-058, Docket No. UM 1610 (Feb. 24, 2014) (addressing PPA terms and conditions).
[4] Motion, Ex. A at 7 ("Any purported rule, regulation or policy that is not adopted through rulemaking procedures required by the APA is invalid.").

are not valid."[5] That argument implicates years of policy development in dockets UM 1129, UM 1369, and UM 1610, among others. Such a result defies reason and would result in chaos for both QF developers and purchasing utilities. Staff has observed that Obsidian's argument, if accepted, would necessitate temporarily staying PURPA contracting "pending the outcome of any rulemaking proceeding that stems from Obsidian's petition."[6]

**2. The Commission may use contested case procedures to develop generally applicable standards.**

The Commission is authorized to use contested case procedures to establish PURPA terms and conditions and other PURPA policies. The Commission's enabling legislation endows the Commission with "the broadest authority—commensurate with that of the legislature itself—for the exercise of [its] regulatory function."[7] The expansive grant of legislative power empowers the Commission with considerable discretion to conduct investigations to "protect … customers, and the public generally, from unjust and unreasonable rate exactions and practices and to obtain for them adequate service at fair and reasonable rates."[8] The Commission's decision to use contested case procedures in this docket is consistent with this broad grant of legislative discretion.

Furthermore, the "APA 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."[9] More specifically, ORS 183.355 states that, "if an agency, in disposing of a contested case, announces in its decision the adoption of general policy applicable

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[5] *See* Motion, Ex. A at 12. The following contested case orders, among others, have set generally applicable terms and conditions of PURPA purchases: Order Nos. 05-584, Docket No. UM 1129 (May 13, 2005); Order No. 07-360, Docket No. UM 1129 (Aug. 20, 2007); Order No. 11-505, Docket No. UM 1369 (Dec. 13, 2011); Order No. 10-488, Docket No. 1396 (Dec. 22, 2010); and Order No. 14-058, Docket No. UM 1610 (Feb. 24, 2014).
[6] Staff Response to Motion to Hold in Abeyance, UM 1725 and UM 1734, at 3 (Nov. 30, 2015).
[7] *Pac. Nw. Bell Tel. Co. v. Sabin*, 21 Or. App. 200, 214 (1975); ORS 756.515.
[8] ORS 756.040.
[9] *Homestyle Direct, LLC v. Dep't of Human Servs.*, 354 Or. 253, 266 (2013).

to such case and subsequent cases of like nature the agency may rely upon such decision in disposition of later cases." Thus, rules of general applicability need not be developed solely by formal rulemaking procedures. As the Oregon Court of Appeals has explained: "We do not believe that administrative agencies should be hobbled by an inflexible requirement that every refinement of an articulated policy be promulgated through the rulemaking machinery of the [APA]."[10]

It is true that ORS 758.535(2)(a) states that the Commission must establish the "terms and conditions for the purchase of energy or capacity from a [QF] ... by rule." The statute, however, does not specify how the Commission must establish such rules (i.e., generally applicable standards), and does not expressly reference the APA's rulemaking provisions found at ORS 183.335. The Legislature's silence on what procedures the Commission must use when establishing terms and conditions under ORS 758.535(2)(a) stands in stark contrast to other Oregon laws where the Legislature expressly ordered agencies to adopt rules via APA rulemaking consistent with ORS 183.335.[11] By omitting an express reference to formal rulemaking under ORS 183.335, the Legislature did not intend the Commission to be bound by those procedures when developing PURPA purchase terms and conditions.[12]

Furthermore, Obsidian's argument that the Commission may only use the rulemaking procedures found in ORS 183.335 would render ORS 183.355 superfluous. As discussed above, ORS 183.355 allows agencies to develop generally applicable standards in contested case proceedings. Obsidian's interpretation would nullify the Commission's authorization to develop

[10] *Larsen v. Adult & Fam. Servs. Div.*, 34 Or. App. 615, 619-20 (1978) (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-93 (1974)).
[11] *See, e.g.*, ORS 707.670 ("The Director of the Department of Consumer and Business Services may specify by rule, in accordance with ORS 183.315, 183.330, 183.335 and 183.341 to 183.410, the minimum frequency with which a board of directors of a banking institution must meet.").
[12] *In the Matter of Perlenfein*, 316 Or. 16, 22–23 (1993) (en banc) ("When a legislature or agency uses a particular term in one provision of a statute or regulation, but omits that same term in a parallel and related provision, we infer that the legislature or agency did not intend that the term apply in the provision from which the term is omitted.").

generally applicable standards in contested cases and would render ORS 183.355 moot. Such a result conflicts with the axiomatic canon of statutory construction under which interpretations that render statutory language superfluous are rejected.[13]

Finally, the Commission's Internal Operating Guidelines do not support Obsidian's argument that contested case procedures may only be used when the Commission is exercising its quasi-judicial (rather than legislative) authority. The Commission's Internal Operating Guidelines expressly state that the Commission may use contested case procedures to "address a wide variety of issues" including purely legislative "general rate case proceedings."[14] PacifiCorp's Petition is analogous to a rate case where the Commission exercises its legislative function and uses contested case procedures to establish just and reasonable rates. PacifiCorp has asked the Commission to modify the terms of Schedule 37 (which applies only to PacifiCorp) to prevent its customers from being harmed. While Schedule 37 is technically not a rate schedule, the Commission's broad grant of legislative authority nonetheless authorizes it to open a contested case investigation to address the terms of Schedule 37 purchases that are "unreasonable" to customers.[15]

### B. PacifiCorp agrees that a limited conforming rulemaking may be appropriate *after* policies are adopted in a contested case investigation.

Obsidian's hyperbole masks the common-sense path forward. Obsidian's arguments seemingly rest on a binary paradigm–PURPA policies may only be developed via rulemakings and not contested case investigations. But contested case investigations and rulemakings are not mutually exclusive—a point Obsidian ultimately concedes. The Commission may develop (and

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[13] *See, e.g.*, *Henry v. Yamhill Cty.*, 37 Or. 562, 564 (1900) ("It is a cardinal rule of interpretation that a statute should be so construed as to give effect to every clause … and to reject none…"); *Shoulders v. SAIR Corp.*, 300 Or. 606, 615 (1986) (en banc) (rejecting interpretation that would render statutory provisions superfluous); *State v. C.C.*, 258 Or. App. 727, 733 (2013) ("As a matter of statutory construction, we assume that the legislature does not create superfluous language.").

[14] Order No. 14-358, App. A at 8.

[15] ORS 756.515(1).

has developed) PURPA policies via contested case proceedings and then codify them in its administrative rules as necessary. The Commission may do the same here by developing standard pricing thresholds and fixed-price terms in UM 1734 then codifying the adopted policies via a notice and comment rulemaking after the fact.

There is no authority that would prevent the Commission from developing policies using contested case procedures then codifying them in a rulemaking. In fact, the Commission has previously used a similar approach to develop PURPA policies. In UM 1129, the Commission developed policies and procedures related to negotiated contracts between utilities and large QFs. Among other things, the Commission established dispute resolution policies applicable to negotiated contracts between utilities and large QFs.[16] The Commission then opened a rulemaking to "promulgate rules consistent with our decision in this order on dispute resolution for negotiated QF contracts."[17] If a formal notice and comment rulemaking is necessary, the Commission can develop policies via contested case procedures then initiate a rulemaking to promulgate rules consistent with its final order resolving the issues presented in PacifiCorp's application.[18]

Obsidian ultimately agrees with this reality. Obsidian expressly recognizes that the Commission may develop PURPA policies through contested case proceedings and then codify those policies in a conforming rulemaking:

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[16] *See* Order No. 07-360, Docket No. UM 1129 (Aug. 20, 2007).
[17] *Id.* at 3.
[18] Using formal notice-and-comment rulemaking procedures to codify policy decisions made in contested case proceedings is administratively cumbersome and would significantly extend the time needed to modify PURPA policies. If the Commission elects to codify the standards developed in this docket via a rulemaking, it can prevent harm to customers by issuing temporary rules under ORS 183.335(5). That provision authorizes the Commission to immediately adopt temporary rules without prior notice or when the failure to do so would result in "serious prejudice to the public interest or the interest of the parties concerned…." 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).

> Petitioners do not disagree that the Commission may investigate matters within its jurisdiction. The Commission also has the authority to set procedures applicable to such investigations. Such investigation may precede a rulemaking. What the Commission may not do, however, is use an investigation as a substitute for a rulemaking.[19]

The terms and conditions of QF PPAs are undisputedly within the Commission's jurisdiction because PURPA delegates to state regulatory authorities the responsibility of determining a utility's avoided costs, as well as the terms and conditions of PURPA PPAs.[20] Therefore, consistent with Obsidian's position, the Commission can develop the eligibility threshold and fixed-price term applicable to PacifiCorp in a contested case investigation, then codify the results through public notice and comment rulemaking.

The Commission's current regulations state that standard pricing is available for QFs with a nameplate capacity of 1 MW or less.[21] The codified 1 MW threshold is inconsistent with both 10 MW cap affirmed in Order No. 14-058 and the 3 MW interim threshold established in Order No. 15-241. This inconsistency can be simply corrected by codifying–through an APA rulemaking–the final eligibility threshold and fixed-price term developed in UM 1734 (and UM 1725). To avoid any delay in implementing newly-developed terms while a rulemaking is proceeding, the Commission may simply issue temporary rules under ORS 183.335(5).

### C. Obsidian's Petition should be denied, or in the alternative, stayed until the Commission renders its decisions in UM 1725 and UM 1734.

Obsidian's Petition should be denied outright, or in the alternative, stayed until the Commission issues a decision in UM 1734. The exact issues Obsidian has asked the Commission to address in this rulemaking (standard pricing eligibility cap and fixed-price term) are being addressed in UM 1734 for PacifiCorp and in UM 1725 for Idaho Power. Obsidian has

[19] Petition at 10.
[20] *Idaho Power Co. v. Idaho Pub. Util. Comm'n.*, 155 Idaho 780, 782 (2013) (citing *FERC v. Mississippi*, 456 U.S. 742, 751 (1982)).
[21] OAR 860-029-0040(4)(a).

asked to stay those proceedings in light of the Petition, but the Administrative Law Judge (ALJ) deferred ruling on Obsidian's motions and instructed the parties to proceed with the dockets' respective procedural schedules.[22] The ALJ's rulings state that the Commission will rule on Obsidian's motions once the records are closed.[23]

Proceeding with the Petition at this time would be administratively inefficient. While the record in UM 1725 is complete, the record in UM 1734 is still under development. Prehearing briefs are due on January 5, 2016; cross-examination statements are due on January 11, 2016; hearing exhibits are due on January 14, 2016; and the matter is set for hearing on January 21, 2016. Additionally, post-hearing briefs are due on February 12, 2016, and reply briefs are due on February 19, 2016. If the Petition is granted, PacifiCorp, Staff, and other stakeholders will be required to develop the record in the rulemaking docket while simultaneously litigating identical issues in UM 1734. Such an inefficient outcome can easily be avoided by denying the Petition or staying it until final orders have been issued in both UM 1725 and UM 1734.

Furthermore, the timing of Obsidian's Petition renders it improper. Obsidian's motions for abeyances in UM 1725 and UM 1734, and this related Petition, are the first efforts by Obsidian to formally raise its novel legal argument—despite the fact that PacifiCorp and Idaho Power filed their applications nearly six months ago. Obsidian did not timely move to dismiss PacifiCorp's application after it was filed in May 2015. Obsidian did not timely attempt to establish a briefing schedule for addressing its "threshold" argument at the July 29, 2015, prehearing conference where the parties (including Obsidian) agreed to a procedural schedule for this docket.

[22] Ruling, UM 1734 (Dec. 9, 2015).
[23] *Id.*

Instead of taking reasonable steps to have its arguments heard in a timely and non-prejudicial manner, Obsidian elected to wait to file its Petition until the eve of hearing in UM 1725 and in the midst of testimony filings in UM 1734. Obsidian filed the Petition three business days before the hearing in UM 1725 (November 18, 2015) and the business day before cross-examination statements were due (November 16, 2015). The Petition came on the same day as Staff's and intervenors' cross-response testimony in UM 1734 was filed.[24]

Obsidian's delay is made all the more egregious by the fact it has known for months it intended to raise this legal issue. Obsidian publically announced its theory as early as September 2, 2015, when it argued in a UM 1610 prehearing conference that solar integration charges could not be developed using contested case proceedings.[25] Despite knowing that it intended to raise these arguments, Obsidian has fully participated in this docket, UM 1725, and Phase II of UM 1610 without taking any steps to have its arguments decided in an orderly and non-prejudicial manner. Since September 2, 2015, Obsidian filed response testimony in this docket[26] and two legal briefs in UM 1610[27]—none of which objected to the contested case procedures being used.

Simply put, Obsidian should not be allowed to disrupt UM 1734 and UM 1725 by initiating an untimely and redundant rulemaking when it had every opportunity to raise its legal theory at an earlier date. PacifiCorp, Commission staff, and other parties–who have been

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[24] If Obsidian was truly concerned about efficiency, it would have presented its arguments before the Staff and the parties devoted resources to addressing the merits of PacifiCorp's Application.

[25] *See* Order No. 15-292, Docket No. UM 1610 at 1 (Sept. 23, 2015). The September 2, 2015, prehearing conference addressed the Commission's decision to open a new phase of UM 1610 (Phase IIA) to address solar integration charges and other issues. Upon request of all parties except Obsidian, the Commission closed Phase IIA.

[26] Obsidian's and Cyprus Creek's Response Testimony and Exhibits, UM 1734 (Oct. 15, 2015).

[27] *See* Obsidian's UM 1610 Phase II Prehearing Brief (Sept. 2, 2015) and Post-Hearing Brief (Oct. 13, 2015). Neither of Obsidian's legal briefs in Phase II of UM 1610 advanced its legal argument concerning rulemaking versus contested case procedures. In fact, Obsidian stipulated to the Phase II issue list and participated in that docket without objection even though the issues involved establishing generally applicable terms and conditions of PURPA purchases (e.g., legally enforceable obligations).

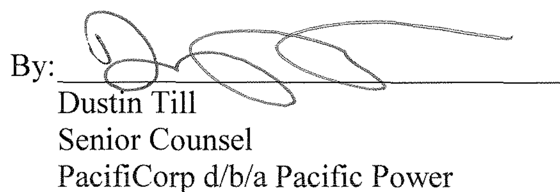
diligently following the agreed-to procedural schedule in UM 1725 and UM 1734–should not be prejudiced by Obsidian's efforts to delay the Commission's resolution of PacifiCorp's and Idaho Power's requests.

## CONCLUSION

For the reasons set forth above, PacifiCorp respectfully asks the Commission to either deny Obsidian's Petition or stay it until an order is issued resolving the issues in UM 1734.

Respectfully submitted this 18th day of December, 2015

By:



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