

1 **BEFORE THE PUBLIC UTILITY COMMISSION**  
2 **OF OREGON**

3 **AR 593**

4 In the Matter of

5 OBSIDIAN RENEWABLES, LLC

6 Petition to Amend OAR 860-029-0040,  
7 Relating to Power Purchases by Public  
8 Utilities From Small Qualifying Facilities.

RESPONSE TO PETITION FOR RULEMAKING

8 **I. Obsidian's request for a rulemaking proceeding.**

9 Obsidian Renewables, LLC ("Obsidian") petitions the Commission to "open a  
10 rulemaking proceeding to revise and adopt new administrative rules establishing the generally  
11 applicable standard contract terms, conditions and policies for power purchases by public  
12 utilities from small Qualifying Facilities ("QFs")" under the Public Utility Regulatory  
13 Procedures Act (PURPA).<sup>1</sup> Obsidian proposes rules specifying that "(a) The threshold  
14 nameplate capacity for any small QF that is eligible for standard contract terms and pricing shall  
15 be 10 MW; (b) The contract term for such standard contracts shall be twenty (20) years; and (c)  
16 Purchasing utilities shall begin paying "insufficiency" avoided cost pricing to all QFs as soon as  
17 the utilities add generating resources, whether by lease, ownership, or long-term power purchase  
18 agreements (regardless of the purchasing utility's projections of resource sufficiency at the time  
19 of contracting)[.]"<sup>2</sup>

20 Staff agrees it is appropriate to open a rulemaking proceeding to establish by rule terms  
21 and conditions for PURPA power purchase agreements between QFs and investor-owned  
22 utilities. However, Staff recommends that the Commission deny the petition to adopt the rules  
23 proposed by Obsidian because Obsidian's proposed rules would establish a requirement for  
24 avoided cost prices during resource deficiency periods that is inconsistent with current

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26 <sup>1</sup> Petition for Rulemaking 1.

<sup>2</sup> Petition for Rulemaking 1.

1 Commission orders. Accordingly, Staff recommends that the Commission deny Obsidian's  
2 petition for rulemaking, but open a rulemaking to adopt terms and conditions for PURPA  
3 purchase agreements that use currently effective terms and conditions as the basis of the  
4 proposed rules.

5 **II. Analysis.**

6 ORS 183.390(3) specifies that in reviewing a petition to amend, adopt, or repeal an  
7 administrative rule, the agency shall consider the (a) continued need for the rule, (b) nature of  
8 complaints or comments received concerning the rule from the public, (c) complexity of the rule,  
9 (d) extent to which the rule overlaps, duplicate or conflicts with other state rules or federal  
10 regulations and, to the extent feasible, with local government regulations, (e) degree to which  
11 technology, economic conditions or other factors have changed in the subject area affected by  
12 the rule, and (f) statutory citation or legal basis for the rule. The most pertinent criterion in this  
13 case is the last, the statutory citation for the rule.

14 Obsidian asserts that the requested rulemaking is required under Oregon's Administrative  
15 Procedures Act (APA) and ORS 758.535(2)(a), which provides that the "terms and conditions  
16 for the purchase of energy or energy and capacity from a qualifying facility shall \* \* \* [b]e  
17 established by rule by the commission if the purchase is by a public utility[.]"<sup>3</sup> Staff disagrees  
18 that rulemaking is required under the APA, but concedes that rulemaking is required under ORS  
19 758.535(2)(a).

20 **A. A requirement to adopt rules cannot be found in Oregon's Administrative  
21 Procedures Act but may be found in statute.**

22 **1. Any requirement to adopt rules is not found in Oregon's  
23 Administrative Procedures Act.**

24 Obsidian's argument that the Commission is required under Oregon's Administrative  
25 Procedures Act (APA) to adopt terms and conditions for PURPA power purchase agreements by  
26 rule is flatly contradicted by opinions of the Oregon Supreme Court. That Court has held that

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<sup>3</sup> Petition for Rulemaking 6-13.

1 whether an agency is required to adopt rules cannot be “divined from the state administrative  
2 procedures act, ORS 183.310 to 183.725, which does no more than set uniform procedures for  
3 state agencies.”<sup>4</sup> The Court has explained that “if an agency is required to adopt a rule through  
4 rulemaking proceedings, that requirement must be found through an analysis of the specific  
5 statutory scheme under which an agency operates and the nature of the rule that the agency  
6 wishes to adopt.”<sup>5</sup>

7 Accordingly, Obsidian’s claim that the APA requires that the Commission adopt rules to  
8 establish terms and conditions for power purchases from QFs is easily dismissed. To the extent  
9 the Commission must adopt terms and conditions for PURPA contracts, the requirement must be  
10 found in statutes governing the Commission. Such a requirement is found in ORS 758.535.

11 **2. ORS 758.535 requires that the Commission adopt terms and conditions for**  
12 **PURPA purchase agreements between QFs and investor-owned utilities by**  
**rule.**

13 ORS 758.535(2)(a) provides that the “terms and conditions for the purchase of energy or  
14 energy and capacity from a qualifying facility shall \* \* \* [b]e established by rule by the  
15 commission if the purchase is by a public utility[.]” As argued by Obsidian, this statute does  
16 impose a rulemaking requirement on the Commission.

17 The Commission<sup>6</sup> rejected the argument it must adopt *all* PURPA purchase agreement  
18 terms and conditions when it first adopted rules in 1984 to implement ORS 758.535(2)(a),  
19 however. ORS 758.535 was adopted by the legislature in 1983 and is a codification of House  
20 Bill 2320. In a rulemaking proceeding in 1984, the Commission stated,

21 some of the parties [to AR 112] expressed concern about the equality of  
22 bargaining power between small power producers and utilities. They  
23 believe House Bill 2320 requires the Commissioner to set terms of power  
purchase contracts through a rulemaking process.

24 <sup>4</sup> *Trebesch v. Employment Division*, 300 OR 264, 267 (1985).

25 <sup>5</sup> *Forelaws on Board v. Energy Siting Council*, 306 OR 205, 214 (1988).

26 <sup>6</sup> In 1984, there was one Public Utility Commissioner rather than a three-member Commission.  
Staff refers to the Commissioner as the Commission for convenience.

1 The Commissioner believes that, in light of the difficulty of setting general  
2 terms that would address the peculiarities of various projects, the  
3 legislature intended the Commissioner to act as an arbitrator in ruling on  
4 the terms to be included in specific contracts. He does not believe it is  
5 feasible to devise a “generic” contract or contracts through this rulemaking  
6 process.<sup>7</sup>

7 Staff agrees with the Commission’s 1984 decision that it is not necessarily feasible to  
8 devise a generic PURPA power purchase agreement by rule. However, Staff concludes that it is  
9 appropriate for the Commission to adopt rules incorporating terms and conditions for PURPA  
10 power purchases that the Commission has previously established by order after general  
11 investigations.

12 **B. A rulemaking proceeding to adopt terms and conditions for PURPA  
13 purchase agreements is appropriate.**

14 Staff supports Obsidian’s petition for a rulemaking for three reasons. First, adopting the  
15 terms and conditions by rule would ensure that the Commission is in compliance with the  
16 rulemaking requirement of ORS 758.535(2)(a). Second, adopting rules to establish terms and  
17 conditions for PURPA power purchases would forestall challenges to currently effective terms  
18 and conditions on the ground they are invalid because they were not adopted with rulemaking  
19 procedures required under Oregon’s APA. Third, opening a rulemaking proceeding would  
20 provide the Commission opportunity to adopt rules that are consistent with the Commission’s  
21 orders implementing PURPA. For example, the Commission determined in Order No. 14-058  
22 that the eligibility cap for standard contracts should be set at 10 MW. The Commission has since  
23 imposed temporary three MW caps for QFs in PacifiCorp’s and Idaho Power’s service  
24 territories.<sup>8</sup> However, the eligibility cap found in Oregon Administrative Rule is one MW.<sup>9</sup>

25 <sup>7</sup> *In the Matter of the Proposed Amendments to Rules Relating to Cogeneration and Small Power  
26 Production Facilities as Required by Chapter 799, Oregon Laws, 1983 (HB 2320), Order No.  
27 84-742 at 4.*

28 <sup>8</sup> *In the Matter of PacifiCorp dba Pacific Power Application to Reduce the Qualifying Facility  
29 Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap (Docket No.  
30 UM 1734), Order No. 15-241; In the Matter of Idaho Power Company Application to Lower  
31 Standard Contract Eligibility Cap and to Reduce Standard Contract Term, for Approval of Solar  
32 Integration Charges, and for Change in Resource Sufficiency Determination (Docket No. UM  
33 1725), Order No. 15-199 at 3.*

1 Staff does not support Obsidian’s request to adopt rules that differ from the  
2 Commission’s currently-established policies. Opening a rulemaking to adopt terms and  
3 conditions for PURPA power purchases by rule does not mean the Commission must  
4 substantively re-visit its previous decisions adopting terms and conditions that are not already  
5 codified in rule. The Commission’s use of contested case determinations as the basis for  
6 proposed rules prior is permissible under Oregon’s APA.

7 Oregon has adopted “informal” rulemaking procedures.<sup>10</sup> Under these procedures, “an  
8 agency first publishes notification of an intent to adopt, amend, or repeal a rule” and “shall give  
9 interested persons opportunity to submit data or views.”<sup>11</sup> The Commission may choose to hold  
10 a hearing on its own motion and must do so if asked to do so by a request from at least 10  
11 persons or an association with no less than 10 persons.<sup>12</sup> The Commission is required to  
12 “consider fully any written or oral submission” in a rulemaking, but is not limited to considering  
13 only the rulemaking record when adopting rules.<sup>13</sup> Instead, [t]he agency in (informal) rule  
14 making, can look beyond the particular hearing record since it would otherwise be unable to  
15 draw upon its expertise.”<sup>14</sup>

16 The Commission has previously made decisions regarding implementation of PURPA in  
17 contested cases and then opened a rulemaking proceeding to modify the administrative rules to  
18 reflect those changes. For example, in 1991, the Commission issued an order in a general  
19 investigation increasing the eligibility cap for standard contracts from 100 kW to one MW, and  
20 stated in the order that it would open a rulemaking to adopt the one MW cap in rule: “OAR 860-

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21 <sup>9</sup> OAR 860-29-0040(4)(a).

22 <sup>10</sup> *International Council of Shopping Centers, et al., v. Oregon Environmental Quality*  
23 *Commission*, 27 Or App 321, 325-26 (1976).

24 <sup>11</sup> ORS 183.335(1)-(3), and (6).

25 <sup>12</sup> ORS 183.335(3).

26 <sup>13</sup> *International Council of Shopping Centers, et al., v. Oregon Environmental Quality*  
*Commission*, 27 Or App at 325-026.

<sup>14</sup> *Id.*

1 29-040 mandates a standard rate for purchases from QFs with a capacity size limit of 100  
2 kilowatts or less. That size limitation should be increased to one megawatt of nameplate  
3 capacity. \* \* \* A rulemaking docket to consider changing the capacity limitation contained in  
4 OAR 860-29-040 will be opened.”<sup>15</sup>

5 Similarly in Docket No. UM 1129, the Commission issued an order adopting several  
6 policies related to non-standard (negotiated) PURPA contracts and opening a rulemaking “to  
7 promulgate rules consistent with our decision in this order on dispute resolution for negotiated  
8 QF contracts and to update Division 29 rules for consistency with federal and state PURPA  
9 requirements and decisions in this proceeding.”<sup>16</sup>

10 Staff recommends that any rules proposed by the Commission be consistent with its  
11 effective policies implementing PURPA (even those that may be adopted in orders issued after  
12 this response). The Commission may choose to modify these policies after the rulemaking  
13 proceeding, but there is no reason for the Commission to disregard previously-determined terms  
14 and conditions for PURPA power purchases simply because they are not found in administrative  
15 rules. The terms and conditions were decided by the Commission after lengthy proceedings in  
16 which parties provided evidence and arguments that support those decisions.

17 **C. The Commission could adopt temporary rules to avoid uncertainty regarding**  
18 **the validity of currently-established terms and conditions.**

19 Obsidian asserts that “any PURPA policies established through contested case  
20 proceedings are not valid.”<sup>17</sup> If Obsidian is correct, the validity of contracts incorporating these  
21 terms and conditions could be challenged. Or, utilities could assert that they are not obligated to  
22 enter into PURPA purchase agreements that incorporate “invalid” terms and conditions. These

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24 <sup>15</sup> *Re Competitive Bidding by Investor-Owned Electric Utility Companies* (Docket No. UM 316),  
Order No. 91-1383 (1991 WL 501921).

25 <sup>16</sup> *In the Matter Public Utility Commission of Oregon Staff's Investigation Relating to Electric*  
26 *Utility Purchases from Qualifying Facilities*, (Docket No. UM 1129), Order No. 07-360 at 43.

<sup>17</sup> Petition for Rulemaking 13.

1 uncertainties could lead to a significant pause in new PURPA purchase agreements until formal  
 2 rules can be adopted. To avoid uncertainty regarding the utilities' obligation to enter into  
 3 purchase agreements based on the Commission's currently-established terms and condition for  
 4 power purchases or regarding the validity of executed purchase agreements under PURPA, Staff  
 5 recommends that the Commission adopt temporary rules incorporating currently-effective terms  
 6 and conditions for power purchase agreements that would be effective while the Commission  
 7 conducts a rulemaking proceeding.

8 Temporary rules could establish the following terms and conditions, and possibly others,  
 9 that are currently found in Commission orders:

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Term or Condition	Order No.
Eligibility cap for standard contracts	Order Nos. 14-058, 15-199, 15-241
Contract term for standard and non-standard contracts	Order Nos. 05-564, 07-360
Interval between contract execution and scheduled commercial on-line date	Order No. 15-130
Terms of default	Order No. 05-584
Opportunity to cure default	Order No. 15-130
Penalties for default	Order No. 15-130
Minimum Availability Guarantee (MAG)	Order No. 14-058
Penalties for failure to meet MAG	Order No. 15-130
Criteria for Eligibility for the Community - Based/Independent Family-Owned Exemption to the Single QF Project Rule	Order No. 15-130
Dispute resolution process for standard and non-standard contracts	Order Nos. 07-360, 15-130

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23 **III. Conclusion.**

24 For the reasons stated above, Staff recommends that the Commission deny Obsidian's  
 25 Petition for a Rulemaking to adopt rules proposed by Obsidian. However, Staff concludes that  
 26 adopting rules stating the terms and conditions for power purchases under PURPA is appropriate

1 and recommends that the Commission open rulemaking to establish by rule the terms and  
2 conditions the Commission has adopted in contested case orders. To avoid uncertainty regarding  
3 the validity of the terms and conditions pending adoption of final rules, Staff recommends that  
4 the Commission adopt temporary rules adopting terms and conditions for PURPA power  
5 purchases that the Commission has previously adopted by order in contested case proceedings.

6 DATED this 18<sup>th</sup> of December, 2015.

7 Respectfully submitted,

8  
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13 Of Attorneys for Staff of the Public Utility  
14 Commission of Oregon