

PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
PUBLIC MEETING DATE: February 9, 2016

REGULAR X CONSENT _____ EFFECTIVE DATE _____ Upon Commission Approval _____

DATE: February 2, 2016

TO: Public Utility Commission

FROM: Brittany Andrus *BA*

THROUGH: Jason Eisdorfer and Aster Adams *JEG AA*

SUBJECT: OREGON PUBLIC UTILITY COMMISSION STAFF:
(Docket No. AR 593) Petition to Amend OAR 860-029-0040, Relating to Power Purchases by Public Utilities From Small Qualifying Facilities.

STAFF RECOMMENDATION:

Staff recommends that the Commission grant, in part, Obsidian Renewables, LLC's (Obsidian) petition for rulemaking. The Commission should grant Obsidian's request to open a rulemaking to promulgate rules under ORS 758.535(2)(a). However, the Commission should deny Obsidian's request to adopt the specific rules that it proposes. Staff also recommends that the Commission not suspend Public Utility Regulatory Policy Act (PURPA) contracting pending the outcome of the rulemaking proceeding.

ISSUE:

Obsidian petitions the Commission to open a rulemaking to adopt rules implementing the PURPA, and proposes rules, some of which would be inconsistent with the Commission's current policies. Staff addresses whether the Commission should grant Obsidian's petition for rulemaking and whether to adopt rules as drafted by Obsidian.

RULES, STATUTES AND APPLICABLE ORDERS:

ORS 183.390 allows any person to petition an agency to adopt, amend, or repeal a rule. In reviewing such a petition, the agency shall consider the: (a) continued need for the rule; (b) nature of complaints or comments received concerning the rule from the public; (c) complexity of the rule; (d) extent to which the rule overlaps, duplicates or conflicts with other state rules or federal regulations and, to the extent feasible, with local government regulations; (e) degree to which technology, economic conditions or other factors have changed in the subject area affected by the rule; and (f) statutory citation or

legal basis for the rule. The most pertinent criterion in this case is the last, the statutory citation or legal basis for the rule.

ANALYSIS:

Obsidian's Petition

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

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

Statutory Requirements

Upon advice of counsel, Staff's position is that Obsidian's argument that the Commission is required under Oregon's APA to adopt terms and conditions for PURPA power purchase agreements by rule is flatly contradicted by opinions of the Oregon Supreme Court. That Court has held that whether an agency is required to adopt rules cannot be "divined from the state administrative procedures act, ORS 183.310 to 183.725, which does no more than set uniform procedures for state agencies."⁴ The Court has explained that "if an agency is required to adopt a rule through rulemaking proceedings, that requirement must be found through an analysis of the

¹ Petition for Rulemaking 1.

² Petition for Rulemaking 1.

³ Petition for Rulemaking 6-13.

⁴ *Trebesch v. Employment Division*, 300 OR 264, 267 (1985).

specific statutory scheme under which an agency operates and the nature of the rule that the agency wishes to adopt.”⁵

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

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

The Commission⁶ has previously rejected the argument that it must adopt *all* PURPA purchase agreement terms and conditions when it first adopted rules in 1984 to implement ORS 758.535(2)(a). Staff agrees with the Commission’s 1984 decision that it is not necessarily feasible to devise a generic PURPA power purchase agreement by rule. However, on advice of counsel, Staff concludes that it would be prudent for the Commission to adopt rules as necessary to ensure compliance with ORS 758.535(2)(a).

Staff does not support Obsidian’s request to adopt the rules that it proposed in its petition because they differ from the Commission’s currently established policies. Opening a rulemaking to adopt terms and conditions for PURPA power purchases by rule does not require the Commission to substantively revisit its previous decisions adopting terms and conditions that are not already codified in rule. As discussed in Staff Comments, the Commission’s use of contested case determinations as the basis for proposed rules is permissible under Oregon’s APA.

Stakeholder Comments

Portland General Electric Company (PGE), PacifiCorp, Community Renewable Energy Association (CREA), Renewable Energy Coalition (REC), Small Business Utility Association (SBUA), Idaho Power Company (Idaho Power), Oregon Solar Energy Industry Association (OSEIA), Sierra Club, the City of Portland, and Oregonians for Renewable Energy Program (OREP) submitted comments regarding Obsidian’s petition. All parties that submitted comments support a rulemaking to adopt terms and

⁵ *Forelaws on Board v. Energy Siting Council*, 306 OR 205, 214 (1988).

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

conditions for standard contracts, though not all the commenters support the rules proposed by Obsidian.

PGE agrees that the Commission should open a rulemaking to establish uniform terms and conditions that are applicable to contracts with all three investor-owned utilities. PGE recommends that the Commission suspend QF contracting until after the Commission has adopted rules implementing terms and conditions for contracts that apply uniformly to all utilities.⁷ PGE does not assert that the current terms and conditions are invalid because they were not adopted by the proper rulemaking procedures.

PacifiCorp disagrees that the Commission is statutorily required to adopt rules to establish terms and conditions for contracts, noting that the Commission previously rejected this idea in 1984.⁸ PacifiCorp argues that to the extent the Commission open a rulemaking, it should do so to codify the previously determined policies and those determined in pending dockets (UM 1610, UM 1734, and UM 1725).⁹

Idaho Power does not believe the Commission is required to act through a rulemaking rather than contested case process, but supports a rulemaking because “[r]esolving 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.”¹⁰ Idaho Power disagrees with some of the rules as proposed by Obsidian, because they are illegal and inconsistent with current Commission policy.¹¹ And, Idaho Power recommends that the Commission temporarily stay contracting for all QFs over 100 kW until after it has resolved the rulemaking proceeding.

REC supports a rulemaking. REC asserts that it is not necessary to suspend contracting because the current terms and conditions are valid and argues that in any event, the Commission does not have authority to suspend PURPA contracting pending the outcome of a rulemaking. REC asserts that suspending contracting would have a devastating impact on the QF market in Oregon.¹²

CREA also supports a rulemaking. Like REC, CREA asserts that suspending QF contracting pending the outcome of a rulemaking is not necessary because the Commission’s previous determinations regarding terms and conditions are valid until

⁷ AR 593 - PGE’s Comments 3-4, 8.

⁸ AR 593 - PacifiCorp’s Comments 3, *quoting* Order No. 84-742, AR 102 at 4 (Sept. 24, 1984).

⁹ *Id.*, 6-7.

¹⁰ AR 593 Idaho Power Company’s Comments 1.

¹¹ AR 593 Idaho Power Company’s Comments 5.

¹² AR 593 REC Comments 7.

repealed. CREA also asserts that the Commission does not have authority to temporarily suspend QF contracting.¹³

OSEIA, the City of Portland, OREP, and Sierra Club support Obsidian's request for a rulemaking. These stakeholders assert that a rulemaking proceeding is preferable to a contested case proceeding for establishing generally applicable PURPA policies.

SBUA supports a rulemaking. SBUA asks that the Commission take into consideration the needs of small businesses when conducting the rulemaking proceeding, and notes that in the course of a rulemaking SBUA will provide information regarding small business's cost of compliance with rules adopted by the Commission.¹⁴

CONCLUSION:

Staff recommends that the Commission deny Obsidian's request to adopt Obsidian's proposed rules, but recommends that the Commission open a rulemaking to adopt rules to ensure compliance with ORS 758.535(2).

Staff does not support PGE's and Idaho Power's proposal to suspend QF contracting until after the rulemaking is complete. On advice of counsel, Staff concludes that all prior Commission decisions establishing PURPA terms and conditions remain valid and in effect.¹⁵

PROPOSED MOTION:

Obsidian's request to open a rulemaking to ensure compliance with ORS 758.535(2) be granted, but deny Obsidian's request to adopt Obsidian's proposed rules.

¹³ AR 593, Comments of the Community Renewable Energy Association 4.

¹⁴ AR 593 SBUA Comments 2-3.

¹⁵ See ORS 183.355(5).