BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DOCKET AR_____

In the Matter of the Petition of Obsidian Renewables LLC for Rulemaking	**PETITION FOR RULEMAKING**

Obsidian Renewables, LLC ("Obsidian" or "Petitioner") files this Petition ("Petition") requesting that the Public Utility Commission of Oregon ("Commission") 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"). The issues to be resolved in the rulemaking shall specifically include: (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; (c) Purchasing utilities shall begin paying "insufficieny" 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) and (d) such other items as may be determined in the course of establishing rulemaking.

The Petitioners submit this Petition in order to bring clarity to standard QF contract terms, to bring the Commission's standard QF contract policies within the requirements of Oregon administrative law, and to advance the state's express goals of promoting affordable renewable electric generating resources and the state's express goal of promoting

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community-based renewable energy projects. Petitioner is well aware that these issues are currently the subject of several Commission investigations, including UM 1610, UM 1725 and UM 1734. Nevertheless, *Oregon law requires that these issues shall be addressed by rulemaking rather than through contested case proceedings.* Petitioner will therefore file, along with this Petition, a motion to hold in abeyance each of UM 1725 and UM 1734 until the proper rulemaking process can be concluded.

A. Background Facts

Obsidian is in the business of developing clean, reliable and cost-effective renewable energy facilities in the State of Oregon. Obsidian has successfully developed three utility scale solar projects in Oregon, as well as multiple other distributed generation projects. The Outback Solar Project is a 5 MW generating facility located near the hamlet of Christmas Valley, Oregon. Portland General Electric ("PGE") purchases the output of the Outback Solar Project. The Black Cap Solar project is a 2 MW generating facility located near the town of Lakeview, Oregon that Obsidian developed for PacifiCorp. The Old Mill solar project is under construction in Bly Oregon. It is 5MW and its power will be sold to PacifiCorp under a 25 year power purchase agreement. Obsidian is working hard to further unlock Oregon's potential for clean and reliable solar generation. Obsidian has made significant investments in Oregon's renewable energy future.

The work that Obsidian is doing is consistent with Oregon's statutory energy goals of increasing renewable energy production while decreasing reliance of fossil fuels—particularly coal—for electric generation. ORS 469.010(1) states that "[c]ontinued growth in demand for nonrenewable energy forms poses a serious and immediate, as well as future, problem. It is essential that future generations not be left a legacy of vanished or depleted

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resources, resulting in massive environmental, social and financial impact." ORS 469.010(2) further states that "[i]t is the goal of Oregon to promote the efficient use of energy resources and to develop permanently sustainable energy resources." Likewise, ORS 468A.200(8) says that Oregon "has been a national leader in energy conservation and environmental stewardship, including the areas of energy efficiency requirements and investments [and] renewable energy investments . . . . Significant opportunities remain to reduce greenhouse gas emissions statewide, especially from major contributors of greenhouse gas emissions, including electricity production . . . ."

Sadly, the statewide policy of increasing renewable energy production while reducing dependence on fossil fuels has come under direct attack by both PacifiCorp and Idaho Power—two utilities heavily reliant on legacy coal generation to maximize shareholder profits.[1] Their attack is predicated on gutting the legal requirement to purchase affordable renewable energy from small power producers pursuant to the federal Public Utility Regulatory Policies Act of 1978 ("PURPA") as administered in Oregon. The cornerstone of PURPA is the obligation that public utilities such as PacifiCorp and Idaho Power shall purchase power from QFs, which are small renewable and cogeneration facilities. Although a federal statute, PURPA is administered on a state level through statutes adopted by the Oregon legislative assembly and through administrative rules adopted by the Commission.

The twin goals of the Oregon Legislative Assembly for implementing PURPA in Oregon are clearly stated in the statute:

(2) It is the goal of Oregon to:

(a) Promote the development of a diverse array of permanently

[1] http://www.oregonlive.com/business/index.ssf/2014/03/eight_things_ratepayers_should.html. https://www.idahopower.com/aboutus/energysources/

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sustainable energy resources using the public and private sectors to the highest degree possible; **and**

(b) Insure that rates for purchases by an electric utility from, and rates for sales to, a qualifying facility shall over the term of a contract be just and reasonable to the electric consumers of the electric utility, the qualifying facility and in the public interest.

ORS 758.515(2).

PacifiCorp and Idaho Power have each asked the Commission to open investigations, in the form of contested case proceedings, for the purpose of adopting generally applicable policies sharply reducing—in effect *eliminating*—the utilities' obligation to purchase electricity from new wind and solar QF projects. Both Idaho Power and PacifiCorp asked the Commission to open proceedings under ORS 758.535(2). ORS 758.535(2) states:

(2) 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;

Idaho Power and PacifiCorp are public utilities. Under Oregon law, as explained in greater detail below, the terms and conditions applicable to PacifiCorp's and to Idaho Power's purchase of energy from a QF must therefore "be established by rule."

Both utilities have asked the Commission to reduce the eligibility threshold for standard PURPA contracts for wind and solar projects from 10 MW to 100 kw (a 99 percent decrease). Both utilities have also asked the Commission to reduce the standard contract term from 20 years (15 of which being at a fixed price) to 2 or 3 years. These policies changes would make it all but impossible for private developers to build small scale wind or solar QF projects in Oregon. PacifiCorp and Idaho Power have represented that such drastic and immediate changes to the Commission's PURPA policies are necessary because the utilities are being overwhelmed by solar QF projects in Oregon. Immediate action is needed,

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they say, to hold back an "extreme and unprecedented" tidal wave of solar development that is crashing over them. In response to the utilities' filings, the Commission established two contested case proceedings, not rulemaking. That was a mistake both of law and sound public policy.

With respect to the merits of the petitions, Obsidian and others submitted testimony in UM 1734 explaining that there are, in fact, *no existing solar PURPA projects in Oregon.*[2] Not one. Over the last 15 years, at least 95 different solar projects have requested interconnection service from PacifiCorp in Oregon. Only one was built—that being the 2 MW Black Cap project developed by Obsidian (which is not a QF project). The data further shows that since 2010, there has never been more than four (4) QF projects completed in PacifiCorp's Oregon service territory during a single year. In 2014 there were three (3). In 2015, only two (2). Further, since 2011 the combined capacity of all QF projects completed in PacifiCorp's Oregon service territory in all years is just 18.97 MW. None of these completed QFs were solar projects. There has been no "extreme and unprecedented" increase in QF project development. The data presented by Obsidian to the Commission actually shows a need to adopt policies that encourage more renewable power development on PacifiCorp's system—not stamp it out.

Obsidian and others submitted similar testimony with respect to Idaho Power in UM 1725.[3] Between January 2001 and June of 2015 Idaho Power received 87 requests for interconnection services for renewable energy projects in its Oregon service territory representing 3,472 MWs of capacity. Of these, only three projects representing 140 MWs of capacity have actually come into service. None were solar. The vast majority of that

[2] http://edocs.puc.state.or.us/efdocs/HTB/um1734htb94351.pdf
[3] http://edocs.puc.state.or.us/efdocs/HTB/um1725htb1698.pdf

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installed capacity was a single wind farm (also not a QF project). Further, over the last ten (10) years only one single QF project of any type has been completed in Idaho Power's Oregon service territory. It has a capacity of just three (3) MWs. Again, the hard data of actual project development shows there is no crisis; except maybe the total failure of new renewable energy development.

Notwithstanding the data presented by Obsidian, the Commission decided in UM 1725 and UM 1734 that it was necessary to grant both PacifiCorp and Idaho Power "emergency" relief even before investigating their claims. In Order 15-241, the Commission stated "PacifiCorp's filings persuade us that there has been significant growth in QF development in its territory." Again, the relief requested is aimed specifically at solar projects. Again, there are *no* solar PURPA projects in Oregon. The Commission also explained in Order 15-241 that "[c]hanging circumstances require reevaluation of previous decisions regarding the implementation of our PURPA policies. Furthermore, we are acting in a legislative capacity, rather than enforcing or interpreting an agreement between litigants, in addressing these matters."

B. Applicable Law

In Order 15-241, the Commission correctly stated that it is acting in a "legislative" capacity, rather than a judicial capacity, when it makes or changes its PURPA contract policies. This raises the question of whether the issues in UM 1734 and UM 1725 should actually be addressed in a rulemaking rather than an investigation or any other type of contested case proceeding. Upon review of the applicable law, it is clear that Oregon statutes prohibit the Commission from granting Idaho Power and PacifiCorp the relief they have requested through a contested case proceeding. Both the Oregon Administrative Procedures

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Act ("APA") and the state's statutes implementing PURPA mandate that the terms and conditions applicable to PURPA sales "shall" be established "by rule." There is but one way for the Commission to amend, repeal or enact a "rule," and that is through a rulemaking.

1. The Oregon Administrative Procedures Act Requires Rulemaking To Establish or Change Generally Applicable PURPA Policies

The Oregon APA is set forth at ORS 183.310 through ORS 183.750. With few exceptions that are not applicable here,[4] the APA applies to actions by the Commission. The APA specifically requires that any generally applicable rules, regulations or policies adopted by an administrative agency such as the Commission must be adopted through a rulemaking proceeding. ORS 183.310(9) broadly defines the term "rule" as "any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency. The term includes the amendment or repeal of a prior rule . . ."

The process for adopting, repealing or amending any "rule" is set forth in great detail in ORS 183.335. The statutory rulemaking process generally includes: (i) public notice of the proposed action, including draft proposed rules, through the Secretary of State's Bulletin; (ii) an opportunity for public participation and comment; and (iii) filing the new rules with Legislative Counsel and appropriate legislative committees to facilitate legislative review of policy changes embodied in the new rules.

Any purported rule, regulation or policy that is not adopted through the rulemaking procedures required by the APA is invalid. ORS 183.335(11)(a) states that "a rule is not valid unless adopted in substantial compliance with the provisions of this section in effect on

[4] ORS 183.315(6) states that ORs 183.410, 183.415, 183.417, 183.425, 183.440, 183.450, 183.460, 183.470 and 183.482(3) do not apply to the Commission.

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the date that the notice required under subsection (1) of this section is delivered to the Secretary of State for the purpose of publication in the bulletin referred to in ORS 183.360." *Burke v. Children's Servs. Div.*, 288 Or 533, 538, 607 P2d 141, 144 (1980) ("It is true that a rule may be declared by a court to be invalid if it was adopted without the proper procedures."). Oregon administrative agencies do not have the discretion or legal authority to deviate from the rulemaking procedures required by the APA.

Generally applicable rules and policies cannot be established through a contested case proceeding. Under the APA, a "contested case" is limited to circumstances in which the agency is determining the legal rights of particular litigants under a specific set of facts. ORS 183.310(2)(a)(A) defines a contested case as a proceeding before an agency "[i]n which the individual legal rights, duties or privileges of specific parties are required by statute or Constitution to be determined only after an agency hearing at which such specific parties are entitled to appear and be heard." In other words, contested case proceedings are intended to resolve disputes the Commission has with specific parties, or for resolving disputes between specific contending parties, but not to establish rules or policies applicable to the general public. A contested case proceeding may inform an agency about modifications or interpretations of its rules, which can then be adopted through a rulemaking, but an agency cannot choose to make policy using the contested case format in lieu of a rulemaking.

In UM 1709, the Commission recently adopted Order 14-358 to update its own internal guidelines for rulemakings and contested case proceedings consistent with the APA.[5] The Commission explained that it "acts in a quasi-legislative capacity when it conducts rulemakings to implement or interpret a statute, or prescribe law or policy on matters of

[5] http://apps.puc.state.or.us/orders/2014ords/14-358.pdf

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general applicability." Thus, according to the Commission's own guidelines, the hallmarks of a rulemaking are: (i) acting in a legislative capacity; and (ii) adopting policy of general applicability. A contested case proceeding, by contrast, is one in which "[t]he Commission acts in a quasi-judicial capacity when it determines the rights of individual parties, or where the Commission has determined to use a trial-like procedures to investigate a particular matter." The Commission's guidelines indicate that the hallmarks of a contested case include: (i) acting in a judicial capacity; and (ii) determining or enforcing the particular legal rights of individual litigants.

In this case, the Commission admits that it is acting in a legislative capacity to adopt generally applicable PURPA policies. Both PacifiCorp and Idaho Power have asked the Commission to change significant PURPA contracting policies that would be generally applicable to any person seeking to make a PURPA sale to those utilities. In response, the Commission explained in Order 15-241 in UM 1734 that "[c]hanging circumstances require reevaluation of previous decisions regarding the implementation of our PURPA policies." The Commission further explained in Order 15-241 that "*we are acting in a legislative capacity, rather than enforcing or interpreting an agreement between litigants*, in addressing these matters." Also in UM 1734, in Order 15-209, the Commission stated:

> 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.

The Commission correctly explains that it is acting in a legislative capacity to establish PURPA policies of general applicability.

Under a plain reading of the APA, as well as the Commission's own procedural

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guidelines, the Commission must establish new PUPRA policies through a rulemaking process and not through a contested case process. The obvious problem is that the proceedings in which the Commission is currently reexamining its PURPA policies, particularly UM 1725 and UM 1734, are investigations that are being conducted as contested case proceedings. In each case, the Commission is running a trial-type proceeding where litigants represented by attorneys must provide testimony for the record. Such testimony is subject to cross-examination. Participants are subject to discovery by other litigants. The Commission has not followed any of the procedural requirements for a rulemaking. There are no proposed rules published for consideration. There will be no public hearings or opportunities for participation by the public. The UM 1725 and UM 1734 proceedings are neither appropriate nor legally permissible for adopting new PURPA policies. By law, any purported policies adopted through these proceedings would be invalid.

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. The Commission may not adopt, modify or suspend a rule without following the rulemaking procedures of the APA. Nevertheless, that is precisely what the Commission is seeking to do in UM 1725 and UM 1734.

2. Oregon's PURPA Legislation Also Requires Rulemaking To Establish PURPA Contracting Policies.

ORS 758.535(2)(a) is part of Oregon's "mini-PURPA" legislation, which was enacted to govern the state's implementation of the federal law. In their applications to open UM 1734 and UM 1725, both PacifiCorp and Idaho Power specifically cite to and rely on the

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Commission's authority under ORS 758.535(2). In UM 1725, for example, Idaho Power wrote that "[pursuant to OAR 860-001-0400(2) *and ORS 758.535(2)* [Idaho Power] respectfully requests that the [Commission] issue an order modifying the terms and conditions under which Idaho Power enters into power purchase agreements with [QFs] pursuant to [PURPA]." (Emphasis added). In UM 1734, PacifiCorp wrote that it "respectfully submits this Application to Reduce the [QF] Contract Term and Lower the QF Standard Eligibility Cap under *ORS 758.535(2)* and OAR 860-001-0400(2)." Neither PacifiCorp nor Idaho Power cite to any statutory authority for the relief requested other than ORS 758.535(2).

The problem is that ORS 758.535(2)(a) expressly requires the Commission to set the terms and conditions of PURPA power sales "by rule." The text of ORS 758.535(2)(a) states "[t]he 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." (Emphasis added). This statute leaves no room for discretion or interpretation. Where, as here, the Commission is establishing the terms and conditions for PURPA sales, it *shall* do so *by rule*. As discussed above, the only way in which the Commission may establish a rule is through a rulemaking proceeding that complies with the APA.

The Commission has long agreed that ORS 758.535(2)(a) requires rulemaking in order to establish PURPA policies. In Order 05-584, the Commission provided a comprehensive history of its PURPA rulemaking proceedings. The Commission explained that it "first started developing rules implementing the federal and state requirements in 1980." The Commission further explained:

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> In August of 1980, the Commission initiated rulemaking proceedings, Docket No. R 58, to establish QF policies. Order No. 80-568 solicited public input on identified issues and directed each utility to submit draft tariffs and other written materials detailing proposals for contracting with QFs. On May 6, 1981, the Commission entered Order No. 81-319 setting forth general policies and proposed rules for contracting with QFs.

The Commission subsequently "entered Order No. 81-755 adopting *rules* for contracting with QFs." (Emphasis added). Those rules have been amended from time to time to address such things as the contract term and the threshold for standard contract terms. In 1991, for example, the Commission "specified that a rulemaking would be opened to change the capacity limitation."

Consistent with the forgoing, the Commission has, in fact, enacted current and enforceable OARs—rules adopted through formal rulemakings—that address certain PURPA contract terms and conditions. For example, OAR 860-029-0040(4)(a) provides that standard rates for purchases shall be implemented:

> In the same manner as rates are published for electricity sales each public utility shall file with the Commission, within 30 days of Commission acknowledgment of its least-cost plan pursuant to Order No. 89-507, standard rates for purchases from qualifying facilities with a nameplate capacity of one megawatt or less, to become effective 30 days after filing. The publication shall contain all the terms and conditions of the purchase. Except when a public utility fails to make a good faith effort to comply with the request of a qualifying facility to wheel, the public utility's standard rate shall apply to purchases from qualifying facilities with a nameplate capacity of one megawatt or less.

Another rule indicates that all PURPA projects less than 10 MW shall be eligible for standard contract terms and need not negotiate the terms with the purchasing utility. OAR 860-029-0100(1) states that "[t]his rule applies to a complaint, filed pursuant to ORS 756.500, regarding the negotiation of a Qualifying facility power purchase agreement for facilities with a capacity greater than 10 MWs."

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Petitioners understand that, in addition to the rulemakings and rules described above, the Commission may have previously tried to set PURPA policies through contested case proceedings similar to UM 1725 and UM 1734. For the reasons set forth above, any PURPA policies established through contested case proceedings are not valid. Further, the fact that the Commission may have engaged in such improper practices in the past does not justify continuing to do so now. To the contrary, the end result is a PUPRA policy comprised of a hodgepodge of contradictory rules, contested case orders and stipulations executed by private parties. The conflict between existing rules and contested case orders only highlights the need for the Commission to engage in the comprehensive rulemaking as requested by Obsidian to clarify the status of the terms and conditions applicable to PURPA sales.

C. Filing Requirements under OAR 137-001-0070

As part of the Commission's rules regarding rulemakings, OAR 860-001-0250 states that "[a] person may petition the Commission to promulgate, amend, or repeal a rule. A petition to promulgate, amend or repeal a rule must comply with OAR 137-001-0070." OAR 137-001-0070 was adopted by the Oregon Attorney General pursuant to the Oregon APA, ORS 183.390. OAR 137-001-0070 requires Petitioners to include the following information:

1. The Name and Address of Petitioner and Other Interested Persons.

For purposes of OAR 137-001-0070(1), the name and address of the Petitioner is:

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Other interested persons include those who have petitioned to intervene in UM 1610, UM 1725 and UM 1734. The name and address of each such interested person is included as

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Attachment A to this Petition. All persons named on Attachment A shall be served a copy of this Petition.

2. The Rule Petitioner Requests that the Commission Repeal and Adopt

For purposes of OAR 137-001-0070(1)(a), Petitioner requests that the Commission substantially modify OAR 860-029-0040(4)(a). The new version of OAR 860-029-0040(4)(a) should set forth the terms and conditions for standard QF contracts. The terms and conditions should specify, among other things, that the standard QF contract shall be available to all QF projects regardless of fuel source that have a nameplate capacity of 10 MW or less. The terms and conditions shall also specify that the standard QF contract must allow a term of at least twenty (20) years. The proposed language of the new rule is set forth in full in Attachment B to this Petition.

3. Facts and Arguments Showing The Reasons for the Proposed Rule

For purposes of OAR 137-001-0070(1)(b), the facts and arguments showing the reasons for and the effects of repealing OAR 860-029-0040(4)(a) and adopting a new version of the rule are set forth above. The primary reason for the proposed rulemaking is that the Commission is now and has been impermissibly making PURPA policies through contented case proceedings. The end result is a conflicting tangle of contested case orders, existing administrative rules and private stipulations. Further, PacifiCorp and Idaho Power are currently asking the Commission to substantially revise its PURPA policies through a contested case process that is contrary to state law and for a purpose that is contrary to the state's express policies and goals favoring renewable energy.

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4. Propositions of Law Asserted by Petitioner

For purposes of OAR 137-001-0070(1)(c), the proposition of law asserted by Petitioner is that the Commission may not establish generally applicable PURPA rules or policies through an investigation or other form of contested case proceeding.

- The Oregon APA specifically requires the Commission to adopt generally applicable rules and policies through a rulemaking process that complies with state law. *See* ORS 183.310(9) and ORS 183.335.

- Oregon's "mini-PURPA" legislation states that the Commission "shall" establish PURPA contract terms and conditions "by rule." *See* ORS 758.535(2)(a).

- Oregon's Renewable Portfolio Standard statute establishes a statewide goal for community-based renewable energy projects and then directs that

  > "All agencies of the executive department as defined in ORS 174.112 (Executive department defined) shall establish policies and practices promoting the goal declared in this section." ORS 469A.210.
  >
  > The Commission is an executive department for purposes of this law and is evidencing no support or even recognition of the goals of community-based renewable energy projects as it renders PURPA ineffective.

- Under the Commission's own procedural guidelines, when the Commission acts in a legislative capacity it shall do so through a rulemaking process. *See* Order 14-358.

In this case, the Commission admits in Orders 15-209 and 15-241 that it is acting in a legislative capacity to modify policies generally applicable to the terms and conditions of PURPA standard contracts. The law requires that the Commission do so through a rulemaking rather than an investigation or other form of contested case proceeding.

5. Options for Achieving The Substantive Goals of OAR 860-029-0040(4)(a) While Reducing the Negative Economic Impact on Business.

Pursuant to OAR 137-001-0070(2)(a), Petitioner is required to comment on options for achieving the rule's substantive goals while reducing the negative economic impact on businesses. Petitioner believes that the overriding substantive goal at issue here is the state's

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goal of promoting the development of cost-effective community-based renewable power generation. PURPA can play a substantial role in meeting this statewide goal by requiring public utilities to purchase the output from qualifying small cogeneration and renewable power facilities. Unfortunately, the Commission is being guiled by the purchasing utilities to adopt policies, using improper procedures, that would essentially nullify the PURPA purchase obligation for wind and solar projects. Obsidian has provided testimony in UM 1725 and UM 1734 that proves the current PURPA rules and policies are suffocating the development of new renewable resources. This has a direct negative impact on Oregon's goal for building community-based renewable power energy projects.

6. Comments on the Continued Need for OAR 860-029-0040(4)(a).

Pursuant to OAR 137-001-0070(2)(b), Petitioner is required to comment on the continued need for the existing rule. Obsidian has submitted written testimony in UM 1725 and UM 1734 showing that there currently are no solar QF projects in Oregon. The testimony further shows that the vast majority of proposed renewable generation projects in the Oregon service territories of PacifiCorp and Idaho Power die before Construction. Notwithstanding these facts, PacifiCorp and Idaho Power continue to ask the Commission to adopt—through improper means—draconian rule changes making it even more difficult to develop renewable QF projects. The rules, and the process by which the rules have been established, are clearly stacked against renewable power developers.

There is an urgent need for the Commission to follow these statutory policies in establishing its rules:

(3) It is, therefore, the policy of the State of Oregon to:

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(a) Increase the marketability of electric energy produced by qualifying facilities located throughout the state for the benefit of Oregons citizens;

and

(b) Create a settled and uniform institutional climate for the qualifying facilities in Oregon. [1983 c.799§2] ORS 758.515(3)

7. Comments on the Complexity of OAR 860-029-0040(4)(a).

Pursuant to OAR 137-001-0070(2)(c), Petitioner is required to comment on the complexity of the existing rule. The existing rule itself is not particularly complex. What is complex, however, is the network of contradictory PURPA policies that have established by contested case orders and stipulations. Currently, there is no single administrative rule or set of rules that QF developers and utilities can look to in order to know their respective rights and obligations. Further, as discussed above, state law requires the Commission the establish rules and policies governing PURPA sales through rulemakings. Thus, Petitioner proposes a rulemaking that will substantially simplify, clarify and legitimize the Commission's PURPA policies.

8. Comments on the Extent to Which OAR 860-029-0040(4)(a) Overlaps, Duplicates, or Conflicts with Other State or Federal Rules and With Local Government Regulations.

Pursuant to OAR 137-001-0070(2)(d), Petitioner is required to comment on the extent to which OAR 860-029-0040(4)(a) overlaps, duplicates or conflicts with other state or federal rules and with local government regulations. As explained above, the purpose of OAR 860-029-0040(4)(a) is to implement the federal PURPA statute, Oregon's mini-PURPA legislation and the Oregon APA. The Commission has made, and is now making, PURPA policies through investigations rather than rulemakings. These actions are contrary to state law. The proposed rulemaking is required in order to properly adopt and establish PURPA

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policies in a coherent manner that complies with the Commission's obligations under state and federal law.

9. Comments on the Degree to Which Technology, Economic Conditions, or Other factors Have Changed in the Subject Area Affected by OAR 860-029-0040(4)(a) Since Being Adopted by the Commission.

Pursuant to OAR 137-001-0070(2)(e), Petitioner is required to comment on the degree to which technology, economic conditions or other factors have changed in the subject area affected by OAR 860-029-0040(4)(a) since it was adopted by the Commission. Renewable energy has become more efficient and more cost competitive since the last changes to the rules. The economic and health hazards of coal generation are far better understood, making renewable energy a more cost-competitive alternative. The utilities have persuaded the Commission to adopt an avoided cost structure that has caused PURPA contract prices to plummet. The utilities are permitted to ignore their PURPA contracting obligations with impunity. The utilities are allowed to impose interconnection costs that are grossly disproportionate with the cost of the QF projects. The utilities are now trying to eliminate standard contracts wind and solar QF projects and to reduce the contract term to a point where no renewable QF project would ever be financeable. These steps are being taken without public hearings, without public testimony and without required notices and publication as required by law.

D. Conclusion

Petitioner hereby asks the Commission to open a rulemaking proceeding to modify existing rules and to adopt new administrative rules establishing standard contract terms, conditions and policies for power purchases by public utilities from small QFs. Petitioner seeks to bring clarity to standard QF contract terms, to bring the Commission's standard QF

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contract policies within the clear requirements of Oregon administrative law, and to advance the state's express goal of promoting affordable renewable electric generating resources, particularly including community-based renewable energy projects. Petitioner is well aware that these issues are currently the subject of several contested case proceedings, and that the Commission has previously established PURPA policy through contested case proceedings. For the reasons set forth above, however, Oregon law *requires* that these issues be addressed by a rulemaking rather than a contested case. Petitioner therefor asks that the Commission comply with its statutory obligation to establish important state policies by public rulemaking.

DATED: November 13, 2015.

Respectfully submitted,

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ATTACHMENT B: DRAFT RULE

OAR 860-029-0040(4)(a) should be modified as follows:

(4) Standard contracts and rates for purchases shall be implemented as follows:

(a) Public Utilities shall purchase electric energy and capacity from any qualifying facility, regardless of primary energy source, having a nameplate capacity of 10 MW or less, according to standard contract terms and standard rates. The standard contract terms shall include the following:

(A) The term of any standard contract for purchase shall be the term requested by the qualified facility, not to exceed twenty (20) years. Standard contracts may not be terminated early by the purchasing public utility upon the repeal of PURPA, unless such termination is mandated by Oregon or federal law.

(B) Unless a different option is agreed to by mutual consent, the fixed price term of any standard contract for purchase shall be the full term.

(C) The term begins on the commercial operation date.

(D) The terms of standard contracts for each public utility shall be consistent with these rules and shall be substantially the same.

(E) Rates for standard purchases shall be approved by the Commission for each public utility. The rates shall be established in a manner that supports Oregon's renewable energy goals established by statute.

(F) Avoided cost rates shall be updated annually to reflect updated natural gas prices, forward electric market prices, changes to the status of any applicable tax credits and any other change in the public utility's acknowledged IRP relevant to the calculation of avoided cost rates.

(G) If a purchasing public utility acquires a generating resource during the sufficiency period indicated at the time the standard contract is executed, then the rate paid to the qualifying facility pursuant to such standard contract shall immediately switch from sufficient to deficiency rates for the remaining fixed price term of the contract.

(H) Standard contracts rates may include an adjustment for integration costs for qualifying facilities that are intermittent resources. Such integration costs shall be established by the Commission based on evidence presented of actual costs incurred.

(I) Standard contract rates shall include an adjustment for the actual contribution to the purchasing public utility's capacity requirements made by the qualifying facility. Such capacity contribution adjustments shall be established by the Commission based on industry standard methodologies.

(J) Standard contract rates shall be adjusted to reflect the costs and benefits associated with third-party transmission that is needed or avoided by a qualifying facility.

(K) Two or more qualifying facilities shall be deemed to be a single facility for purposes of determining their eligibility for a standard contract and standard rates if: (a) they are located within five (5) miles of each

other; and (b) they have a common owner. For purposes of this section, a "common owner" shall not include a passive investor or a common developer that does not intend to own the qualifying facility.

(L) Standard contracts may include provisions requiring an annual mechanical availability guarantee (MAG). The MAG may not require more than 90% availability for any primary energy source, and may not begin prior to the third year of the contract. The percentage availability requirement shall take into account a planned maintenance allowance that may vary by resource type. The penalty for violating the MAG may include the recovery of actual replacement power costs. The purchasing public utility may only terminate the standard contract if the qualifying facility does not satisfy the MAG for two consecutive years and for more than 8 months out of 12.

(M) Qualifying facilities may be required by the purchasing public utility to establish creditworthiness by making commercially reasonable representations and warranties that the qualifying facility has good credit. Qualifying facilities may also be required to provide default security in the form of either senior lien, step-in rights, cash escrow or line of credit. The form of default security shall be at the discretion of the qualifying facility, and the amount of the default security may not exceed one-quarter of the expected annual cost of purchases under the power purchase agreement.

(N) Standard contracts may include mutual indemnity clauses, and may purchasing public utilities may require qualifying facilities having a nameplate capacity greater than 200 kW to obtain and maintain general liability insurance.

(O) Qualifying facilities may select a scheduled commercial online date (COD) that is anytime within three (3) years of contract execution. A qualifying facility may schedule a COD that is more than three (3) year after contract execution upon the consent of the purchasing public utility, which consent shall not be unreasonably withheld. If the qualifying facility does not meet the scheduled COD, then the purchasing public utility may issue a written notice of default. Thereafter, the qualifying facility shall have twelve (12) months from the date of the notice in which to cure the default. During the cure period, the purchasing public utility may recover any replacement power costs incurred due to the default. Following the cure period, and if the default has not been cured, the purchasing public utility may terminate the standard contract.

(P) A qualifying facility may file a complaint asking the Commission to adjudicate disputes regarding the formation or interpretation of the standard contract. The public utility may respond to the complaint within ten (10) days of service. The Commission will limit its review to the issues identified in the complaint and response, and use a process similar to the arbitration process adopted to facilitate the execution of interconnection agreements among telecommunications carriers. The ALJ will act as an administrative law judge, not as an arbitrator.