

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 593

In the Matter of)	
)	RENEWABLE ENERGY COALITION
the Petition of Obsidian)	COMMENTS
Renewables LLC for Rulemaking)	
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I. INTRODUCTION

The Renewable Energy Coalition (“REC”) submits these comments responding to the petition for rulemaking by Obsidian Renewables, LLC (“Obsidian”). REC supports opening a rulemaking proceeding, but does not believe the Oregon Public Utility Commission (the “Commission” or “OPUC”) needs to address most of the merits of Obsidian’s arguments at this time. In order to simply open a rulemaking, the Commission does not need to resolve or opine on Obsidian’s claims that certain policies under the Oregon Public Utility Regulatory Policies Act (“PURPA”) need to be adopted in a rulemaking rather than generic investigation. This legal issue can be resolved in any rulemaking proceeding. Even more importantly, the Commission should not suspend or otherwise limit any qualifying facility’s (“QF”) ability to enter into a contract during the pendency of any rulemaking proceeding. Suspending the utilities’ obligation to purchase the net output of QFs would be illegal and could cause permanent harm to existing and future Oregon renewable energy projects.

REC notes that all of the major interested PURPA parties have already agreed that the Commission should open a rulemaking proceeding. The parties in the Commission’s

generic investigation into QF and PURPA issues (Docket No. UM 1610) have stipulated that the Commission should open a rulemaking proceeding following the final order in UM 1610. As there is widespread agreement that at least some sort of rulemaking should be opened to address PURPA related issues, the Commission does not need to address at this early stage Obsidian's arguments regarding the proper scope of rulemakings and investigations. Based upon a more comprehensive record and legal analysis in the rulemaking proceeding, the Commission can specifically define and resolve how, when, and in what forum it will decide future avoided cost and other PURPA matters. The Commission needs to carefully consider the fact that the Commission's investigation and contested case process provides important procedural safeguards that should not be abandoned if PURPA issues are resolved in rulemakings.

Staff's suggestion that PURPA contracting be suspended while the Commission resolves issues related to whether its policies should be included in rules or orders is simply irresponsible. Staff's proposal would violate PURPA, undermine decades of established precedent, and result in terrible public policy. There is no uncertainty regarding the utilities' obligation to enter into future QF contracts, and Obsidian's petition does not call into question existing PURPA contracting policies. Any suspension of contracting would be illegal and result in unprecedented harm to QFs, the utilities, and ratepayers.

II. COMMENTS

1. The Commission Should Open A PURPA Rulemaking

There is general support for a rulemaking proceeding early next year to address at least some PURPA matters. In Phase II of UM 1610, the Commission Staff, Portland

General Electric Company, PacifiCorp, Idaho Power Company (“Idaho Power”), REC, OneEnergy, Obsidian, the Community Renewable Energy Association, the Small Utility Business Advocates, and the Oregon Department of Energy all agreed that there would be additional processes following the Commission’s issuance of the final order in Docket No. UM 1610. The parties agreed that: 1) there would be a Phase III or separate docket to address interconnection issues; and 2) the Commission would “initiate a rulemaking to revise the Commission’s rules regarding qualifying facilities to comply with the final order(s) in this docket.”¹

While the parties intended this rulemaking to focus on compliance with the final orders, the Commission cannot limit the scope of interested parties’ comments. In addition, there is no reason why the Commission cannot expand this planned rulemaking to address the issues raised by Obsidian’s petition. In the end, it does not matter if this rulemaking is formally processed as Obsidian’s request or the planned rulemaking following Phase II of UM 1610.

2. The Commission Cannot Stay Contracting Under PURPA

The Commission should reject any proposals to stay or limit PURPA contracting pending the outcome of any proceeding. Any suspension of QF contracting would be based on the assumption that the Commission has violated Oregon PURPA time and time again over the past thirty-five years. Instead, the Commission should proceed on the basis that its decades long PURPA implementation policies are lawful.

In response to Obsidian’s motions to stay the investigations into PacifiCorp’s and Idaho Power’s contract term and size thresholds, Staff stated that it “intends to

¹ Re Commission Investigation into QF Contracting and Pricing, Docket No. UM 1610, Stipulation Re: Issues List at 4 (Feb. 20, 2015).

recommend that the Commission temporarily suspend PURPA contracting until after the Commission has reached a final resolution on the petition for rulemaking”² Notably, Staff did not recommend that Idaho Power’s and PacifiCorp’s requests to shorten contract term and size thresholds be stayed. Staff’s comment is terse, and does not explain the legal basis or justification for such a suspension, other than to state that it might be prudent to avoid potential litigation regarding whether certain policies should be included in rules or orders.³ Litigation related to any potential stay is far more likely than any potential litigation regarding whether PURPA policies should be set in a rulemaking, utility specific filings, and/or investigations. Once the basis for Staff’s request becomes clearer, REC may provide a more detailed response; however, REC notes that any suspension of PURPA is illegal and contrary to sound public policy.

Earlier this year, the Commission already rejected a proposal by Idaho Power to temporarily suspend its PURPA obligations.⁴ The Commission explained that federal law explicitly requires that standard avoided cost prices be available to QFs and that it lacks the authority to suspend that requirement.⁵

The Commission’s conclusion is consistent with the Federal Energy Regulatory Commission’s (“FERC”) regulations that require a utility to purchase the net output of a

² Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Charge, and for Change in Resource Sufficiency Determination, Docket No. UM 1725, Staff Response at 3-4 (Nov. 30, 2015); Re PacifiCorp’s Application to Reduce the QF Contract Term and Lower the QF Standard Contract Eligibility Cap, Docket No. UM 1734, Staff Response at 3-4 (Nov. 30, 2015).

³ UM 1725, Staff Response at 3; UM 1734, Staff Response at 3.

⁴ Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Charge, and for Change in Resource Sufficiency Determination, Docket No. UM 1725, Order No. 15-199 at 6 (Nov. 30, 2015).

⁵ Id.

QF, subject to specific exemptions that do not apply here. FERC’s regulations state that: “Each electric utility shall purchase ... any energy and capacity which is made available from a” QF.⁶ Such purchases must be consistent with FERC’s regulations, including those regarding the rates paid to QFs.⁷

The Commission also does not have the authority under Oregon law to suspend a utility’s obligation to purchase power from a QF. Oregon’s state PURPA law specifically requires an electric utility to “offer to purchase energy or energy and capacity whether delivered directly or indirectly from a qualifying facility.”⁸ REC is not aware of any Oregon statute, court case, or administrative decision that authorizes the Commission to ignore or otherwise stay PURPA’s mandatory purchase obligations.

The Commission has consistently set PURPA policies using both rulemaking and investigations. Since at least 1984, the Commission has implemented PURPA in a manner in which it has not codified all its PURPA related policies in rules.⁹ The Commissioner specifically rejected arguments that Oregon’s PURPA requires the terms of power purchase agreements be set through a rulemaking process.¹⁰ The Commissioner explained:

[T]hat, in light of the difficulty of setting general terms that would adequately address the peculiarities of various projects, the legislature intended the Commissioner to act as an arbitrator in ruling on the terms to

⁶ 18 C.F.R. § 292.303(a).

⁷ 18 C.F.R. § 292.304. FERC, and not the Commission, can grant a limited exemption from the utility’s obligation to purchase when QFs have access to specific markets to sell their power; however, this exemption does not apply in Oregon. 18 C.F.R. §§ 292.303(a), 292.309, 292.310.

⁸ ORS § 758.525(2).

⁹ Proposed Amendments to Rules Relating to Cogeneration and Small Power Production Facilities, Docket No. AR 102, Order No. 84-742 at 4 (1984).

¹⁰ At this time there was only one commissioner.

be included in specific contracts. He does not believe it is feasible to devise a “generic” contract or contracts through the rulemaking process.¹¹

Instead of codifying all aspects of how it set rates or inserting every small detail and contract provision in its PURPA rules, the Commission has fleshed out these rules in generic policy dockets and other proceedings. For example, the Commissioner opened a non-rulemaking proceeding just a few years after the Oregon PURPA was passed to establish avoided costs for electric utilities.¹² A number of key issues that were determined included: 1) the term of the avoided cost payment schedule; 2) the load forecast used to set avoided cost rates; 3) the resource costs; 4) the impact of power decrements; 5) the capital costs and inflation rate to estimate the present value of rates; 6) levelization; and 7) line losses and transmission costs.¹³ The Commissioner specifically directed the utilities to revise their avoided cost rates to conform to the general policies established in a non-rulemaking proceeding.¹⁴ Utilities also entered into QF contracts with terms and conditions based on these policies. Similarly, in 1991, the Commission concluded that the size threshold for standard contracts should be increased, and later implemented this decision in a rulemaking proceeding, and made other policy decisions, which do not appear to have been incorporated into formal rules.¹⁵ There can be no doubt that the Commission has repeatedly established policies, avoided cost rates, and

¹¹ Id. (emphasis added).

¹² Re Investigation of Avoided Costs and Cost Effective Fuel Use and Resource Development, Docket No. UM 21, Order No. 84-720 at 4 (1984) (adoption of avoided cost policies).

¹³ Id. at 5.

¹⁴ Id. at 33.

¹⁵ See Re Investigation into Competitive Bidding by Investor-Owned Electric Utility Companies, Docket No. UM 316, Order No. 91-1383 at 15-17 (1991).

contract terms and conditions in both generic investigations and utility specific proceedings.¹⁶

Suspending PURPA due to potential uncertainty regarding the utilities' obligation to enter into future PURPA contracts under terms and conditions established in investigations would have a devastating impact on the QF market and violate the Commission's responsibilities to "[c]reate a settled and uniform institutional climate for the qualifying facilities in Oregon."¹⁷ QFs attempting to enter into contracts with their utilities are not overly concerned about the applicability of Commission policies, but are terrified that the Commission may prevent them from entering into contracts or repeal its existing policies. The Commission has established comprehensive PURPA implementation policies in its investigations, the majority of which benefit QFs by reducing and limiting the utilities' opportunities to refuse to enter into contracts under reasonable terms and conditions. It would be an extreme overreaction to suspend PURPA contracting in response to Obsidian's petition.

III. CONCLUSION

The Commission should open a generic rulemaking proceeding into PURPA policies. The parties already agreed to have a rulemaking proceeding early next year, and there is no reason that Obsidian's issues cannot be addressed in that proceeding (or Obsidian's petition expanded to include issues related to implementation of the orders in

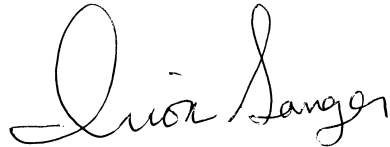
¹⁶ E.g., Re Investigation Relating to Elec. Util. Purchases from QFs, Docket No. UM 1129, Order No. 05-584 (2005) (adoption of numerous generic policies); Re Investigation Relating to Elec. Util. Purchases from QFs, Docket No. UM 1129, Order No. 07-120 at 1-2 (April 2, 2007) (adoption of PacifiCorp's standard contracts); Re Investigation Into Resource Sufficiency Pursuant to Order No. 06-538, Order No. 11-505 at 1-2 (2011).

¹⁷ ORS § 758.515(3)(b).

UM 1610). Critically, any suspension of QF contracting would violate the federal and Oregon PURPA statutes, and cause significant and potentially irreversible harm to QFs and the Commission's credibility.

Dated this 18th day of December, 2015.

Respectfully submitted,

A handwritten signature in black ink that reads "Irion Sanger". The signature is written in a cursive style with a large, looped initial "I".

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