BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

AR 593

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| In the Matter of<br><br>OBSIDIAN RENEWABLES LLC<br><br>Petition to Amend OAR 860-029-0040, Relating to Power Purchases by Public Utilities from Small Qualifying Facilities. | COMMENTS OF THE COMMUNITY RENEWABLE ENERGY ASSOCIATION |

## I. INTRODUCTION AND SUMMARY

The Community Renewable Energy Association ("CREA") respectfully submits its comments to the Public Utility Commission of Oregon ("OPUC" or "Commission") in response to the Petition for Rulemaking filed by Obsidian Renewables LLC ("Obsidian").

First, and most immediately, CREA strongly disagrees with assertions by some parties that the Commission should place a moratorium on contracting under the Public Utility Regulatory Policies Act of 1978 ("PURPA") and related state law until this rulemaking is resolved. Federal law prohibits any such moratorium. Additionally, under Oregon law, the policies embodied in the orders from dockets UM 1129, UM 1396, and UM 1610 are now de jure rules under Oregon's Administrative Procedures Act ("APA") that remain in effect and cannot be lawfully suspended without a rulemaking. The Commission must therefore reject arguments for a suspension of PURPA contracting.

Second, on the merits of the Petition, CREA agrees that the Commission's administrative rules should reflect the results of its investigations into PURPA policies and submits that the Commission should encourage more public comment and involvement in its implementation of

PURPA. However, CREA also finds benefit in the opportunity to engage in investigation of technical, and often factually complex, PURPA-related issues and recommends against engaging in a rulemaking as the sole mechanism in all instances where the Commission is implementing PURPA.

## II. BACKGROUND

This matter regards the Commission's implementation of PURPA and related state law. States must "implement" the Federal Energy Regulatory Commission's ("FERC") PURPA regulations, but FERC provides broad discretion in how a state may choose to do so. *See FERC v. Mississippi*, 456 U.S. 742, 751(1982) (noting that FERC provides states with "latitude in determining the manner in which [FERC's] regulations are to be implemented" – whether that "manner" be issuance of regulations, resolution of disputes on a case-by-case basis or some other manner).

Obsidian's Petition argues that under Oregon law the Commission must implement PURPA by rulemaking procedure. Obsidian relies upon Oregon's APA and Oregon's PURPA statute, which provides, "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 . . . ." ORS 758.535(2). Accordingly, Obsidian proposes substantial modifications to the existing version of OAR 860-029-0040(4)(a), which is the administrative rule that currently addresses implementation of standard avoided cost rates.

## III. COMMENTS

### A. The Commission Should Reject Proposals to Suspend PURPA.

In other dockets, the Commission's Staff has indicated that it "intends to recommend that the Commission temporarily suspend PURPA contracting until after the Commission has

reached a final resolution on the petition for rulemaking." *Staff's Response to Motion to Hold in Abeyance*, OPUC Docket No. UM 1725, at 3-4 (filed Nov. 30, 2015). CREA strongly opposes this proposal. Such a suspension would violate federal law. Furthermore, the proposal for a suspension appears to be premised on a misunderstanding of Oregon law. Under Oregon law, the Commission's well-established PURPA policies from orders in prior contested case dockets are legally binding until invalidated by a court or repealed by rulemaking.

**1. Federal Law Preempts a PURPA Moratorium.**

Under the Supremacy Clause, preemption occurs when, *inter alia*, there is "any conflict with a federal statute." *Crosby v. Natl. For. Trade Council*, 530 U.S. 363, 372 (2000) (internal quotation omitted); U.S. Const., art. VI, cl. 2. Conflict arises when "compliance with both federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal quotations omitted). Federal law includes federal regulations, which have no less preemptive effect than federal statutes. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984).

PURPA is a federal law that mandates that the Commission implement the bare minimum requirements of FERC's PURPA regulations. 16 U.S.C. § 824a-3(f); 18 C.F.R. Part 292. FERC's regulations include the requirement that this Commission require utilities to enter into long-term contracts with QFs. 18 C.F.R. § 292.304(d)(2)(ii). There is no provision in PURPA or in FERC's regulations for a suspension of this mandatory purchase obligation – even on a temporary basis. Thus, Staff is incorrect to rely upon Oregon's APA to justify a suspension of PURPA's mandatory purchase obligation because PURPA and FERC's regulations would preempt such a suspension. Simply put, any procedural violations of state law that have

occurred during the Commission's implementation of PURPA provide no basis to suspend PURPA.

Indeed, this Commission very recently rejected a similar request to suspend one of FERC's PURPA regulations. In docket UM 1725, Idaho Power proposed suspension of the requirement that standard avoided cost rates be made available for QFs of 100 kilowatts or less, which exists in 18 C.F.R. § 292.304(c). The Commission ruled, "We lack the authority to suspend that requirement." Order No. 15-199 at 6. The Commission further overruled its own contrary past precedent, explaining:

> We acknowledge that we previously stayed Idaho Power's obligation to enter into all standard contracts during a two-month period in 2012. *In re Idaho Power,* Docket Nos. UE 244, UM 1575, Order No. 12-042 (Feb 14, 2012). That decision was in error to the extent it precluded QFs that are 100 kW and less from obtaining standard, fixed-cost prices during that period.

*Id.* at 6 n.8. Staff's proposal for a suspension of PURPA contracting in the present case is no different than the past suspension the Commission found unlawful in Order No. 15-199.

Accordingly, federal law preempts any suspension of PURPA contracting during the pendency of this rulemaking. All QFs (standard and non-standard) are entitled to enter into long-term contracts during the pendency of this rulemaking under federal law. That is so regardless of how Oregon's APA is interpreted.

In light of the obvious illegality of this proposal, we believe that this proposal has been designed, or gives the appearance of having been designed, as a punitive measure for Obsidian's decision to assert legal arguments that are unpopular with certain parties. CREA fundamentally opposes any attempt to chill public participation and assertion of legal rights through such punitive measures. The Commission should soundly reject the proposal to suspend federally protected PURPA contracting rights. Should the Commission fail to do so, CREA will

unfortunately be left with no choice but to consider all possible remedies to reverse any unlawful suspension.

**2. The Directives in the Orders from Dockets UM 1129, UM 1396, and UM 1610 Are De Jure Administrative Rules with the Force of Law.**

Aside from its illegality under federal law, the proposal to suspend PURPA also misunderstands state law. The underlying premise for the proposal to suspend PURPA contracting rests upon an incorrect conclusion that the Commission's directives from its prior PURPA orders have no legal effect. However, under a correct application of Oregon's APA, the Commission's policies from dockets UM 1129, UM 1396, and UM 1610 *must* remain in effect pending this rulemaking.

In support of the proposal for a suspension, Staff explains that the "utilities' obligation to enter into future PURPA contracts under terms and conditions that are not in rule is uncertain." *Staff's Response to Motion to Hold in Abeyance*, OPUC Docket No. UM 1725, at 3 (filed Nov. 30, 2015). Thus, according to Staff, the Commission should suspend PURPA contracting to avoid confusion over whether the directives of the Commission's extant PURPA orders have legal effect.

Staff's concern ignores that the existing directives from PURPA orders are de jure administrative rules that cannot be suspended in the manner proposed by Staff. *See Burke v. Children's Services Div.*, 288 Or. 533, 607 P.2d. 141 (1980). In *Burke*, the Children's Services Division ("CSD") terminated a program of direct payments to certain providers of child care. 288 Or. at 536. The plaintiffs argued the termination failed to follow the APA's procedures for repealing a rule, and sought payment in the amounts by which their net incomes had been reduced by the termination of the program. *Id.* at 537. The Oregon Court of Appeals rejected

the plaintiffs' claim because the original benefit program had not been created by a valid rulemaking and did not need to follow rulemaking procedures to be repealed. *Id.* But the Oregon Supreme Court held that the original benefit program had legal force because an agency's failure to employ proper procedures when adopting a rule does not eliminate the need to employ proper procedures when repealing it. *Id.* at 537.

The *Burke* court reasoned, "Certainly the original 'directive' or 'statement' adopting CSD's day care payment program, whatever its precise form and whatever informality attended its promulgation, constituted an implementation of agency policy within the meaning of the definition [of a 'rule' in the APA] and was therefore a rule." *Id.* at 537-38. In a directly apt passage, the court explained:

> It is true that a rule may be declared by a court to be invalid if it was adopted without the proper procedures. *See* ORS 183.400. In the absence of such a declaration, however, it remains an effective statement of existing practice or policy, binding on the agency, until repealed according to procedures required by the Administrative Procedures Act. An agency may not rely on its own procedural failures to avoid the necessity of compliance with its rules.

*Id.* at 538.

Under *Burke*, there is no lawful basis to ignore the directives from the Commission's orders in dockets UM 1129, UM 1396, and UM 1610. As in *Burke*, the policies and directives emerging from those orders fall within the broad definition of a "rule" in the APA, which is defined as "any agency directive, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedures or practice requirements of any agency." ORS 183.310(9).[1] Likewise, there is no judicial declaration that the directives in the Commission's extant orders are invalid for failure to follow rulemaking

[1] The APA's current definition of "rule" is materially the same as the definition relied upon in the *Burke* decision. *See* 288 Or. at 537.

procedures. The Commission's current implementation of PURPA arising from well-established directives in Commission orders remain valid, and may only be lawfully changed through a proper rulemaking process.

Therefore, Staff's proposal for a suspension of PURPA contracting should be independently rejected under state law because the de jure rules promulgated in the Commission's extant PURPA orders remain legally binding on the utilities and the Commission. In sum, in addition to federal law, state law also prohibits Staff's proposed suspension of PURPA contracting processes.

**B. CREA Supports the Substance of Obsidian's Proposed Rule and the Call for More Public Involvement in PURPA Implementation.**

On the merits of the Petition, CREA agrees with Obsidian that the OPUC's administrative rules should be regularly amended to accurately and completely reflect the Commission's PURPA policies, and CREA supports the specific language proposed by Obsidian for OAR 860-029-0040(4)(a). Obsidian's proposed amendment to this rule would result in a rule that is consistent with existing policies related to standard contracts from dockets UM 1129, UM 1396, and UM 1610 and with policies that the Commission must change to bring its PURPA implementation into compliance with applicable law. For example, Obsidian's proposed rule would properly increase in the term of fixed avoided cost rates to 20 years, as required by existing Oregon law. *See CREA's Prehearing Brief*, OPUC Docket No. UM 1725, at 11-16 (filed Nov. 12, 2015) (demonstrating that Oregon law requires a minimum fixed-price term of 20 years). Other administrative rules also need to be updated to make them consistent with the existing policies, such as the option for rates based upon a renewable avoided cost for renewable QFs as directed in docket UM 1396.

More generally, CREA shares Obsidian's apparent concern that the existing investigation process lacks some of the potentially beneficial aspects of a rulemaking. It has become exceptionally clear that the utilities possess an unfair advantage in the continuous contested cases that they have initiated, and the Commission has allowed, in the utilities' attempt to undermine Oregon's implementation of PURPA. The utilities have the resources to continually litigate these issues with ratepayer funding, as Idaho Power and PacifiCorp have done in dockets UM 1725 and UM 1734 with regard to the contract term and eligibility cap issues. Unless the Commission develops mechanisms to disallow rate recovery of regulatory expenses incurred by the utilities' anti-PURPA campaigns, there is no deterrent to the utilities' ongoing war of attrition against Oregon's implementation of PURPA. Because QFs are direct competitors of the utilities for the electricity generation market, allowing the utilities to utilize ratepayer funds in their fight against PURPA necessarily results in an unfair and anticompetitive advantage over the utilities' competitors. Instead, the utilities' shareholders should be responsible for efforts to squelch the utilities' competition.

Additionally, due to the expense of prosecuting or defending a contested case proceeding, the Commission may obtain a broader perspective and more complete record on the important questions of public policy that arise in the implementation of PURPA if it were to encourage additional opportunities for public participation. For example, the Commission should hold public hearings where parties without the resources to hire attorneys and technical consultants could voice their position, similar to the manner in which public hearings are held in utility rate cases.

However, CREA also believes that some PURPA matters involve technical allegations by utilities that must be investigated to obtain information from the utilities and test the accuracy of

the utilities' complaints about QFs and PURPA contracting policies. A rulemaking alone will not provide an opportunity for this type of inquiry by the interested parties or the Commission's Staff. As Obsidian notes, the Commission may hold investigations into such matters within the framework of the APA, so long as it also follows the rulemaking procedures to update the rules consistent with the investigation. *Obsidian's Petition* at 10. CREA supports continued use of technical investigations where appropriate, but also supports and urges any means to decrease the cost to non-utility parties in such proceedings and to level the playing field by requiring the utilities' shareholders to fund their war of attrition against PURPA.

## IV. CONCLUSION

For the reasons explained herein, the Commission should not suspend PURPA pending this rulemaking. However, CREA agrees that the Commission's administrative rules should reflect the results of its investigations into PURPA policies and submits that elements of the rulemaking process that encourage public comment could benefit the Commission's implementation of PURPA.

RESPECTFULLY SUBMITTED this 17th day of December 2015.

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