BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1734

In the Matter of PACIFICORP d/b/a PACIFIC POWER, Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap	)))))))))	OBSIDIAN RENEWABLES, LLC'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO HOLD THIS PROCEEDING IN ABEYANCE

Obsidian Renewables, LLC ("Obsidian") respectfully submits this reply brief in support of the Motions that it filed on November 13, 2015 to hold the UM 1725 and UM 1734 proceedings in abeyance until the Commission decides whether or not to open a rulemaking proceeding as requested by Obsidian in AR 593. The Sierra Club and the Community Renewable Energy Association ("CREA") each filed responses in support of holding these proceedings in abeyance. Staff filed a response in which it agreed with Obsidian that the requested rulemaking was both required and appropriate under the circumstances. But Staff also suggested that this proceeding should not be held in abeyance so as not to waste the "hundreds of pages of testimony" that have already been filed in this contested case. Finally, Idaho Power and PacifiCorp filed responses in which they: (a) attacked Obsidian's motives for suggesting that the Commission should follow the appropriate legal procedures for rulemaking; (b) contradicted the Commission's own determination that it is acting in a legislative rather than a judicial capacity; and (c) repeated the discredited fiction that their

ratepayers will somehow be harmed if the Commission does not immediately and permanently squelch new renewable PURPA projects. Obsidian replies as follows.

A. The Purpose of This Proceeding Is To Modify and Adopt Rules

In their respective responses, Idaho Power, PacifiCorp and Staff attempt to argue that these UM 1725 and UM 1734 proceedings are something other than an improper rulemaking. Staff, for example, suggests that this docket is merely an "investigation." Staff says that "[c]ontrary to Obsidian's assertion, the Commission need not ignore the decisions it has made in previous PURPA investigations, or that it may make pending PURPA investigations." Staff further states that it "disagrees with Obsidian's implicit assertion that the Commission must disregard hundreds of pages of testimony in pending dockets and decisions in previous orders when adopting terms and conditions for PURPA PPAs." Staff suggests that these dockets are nothing more than an "investigation," and not an impermissible exercise of the Commission's legislative authority to adopt and change rules.

In its petition for rulemaking in AR 593, Obsidian actually anticipates and agrees with many of Staff's comments about Commission investigations. Obsidian asserted in its petition for rulemaking that 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 a contested case format in lieu of a rulemaking." Obsidian further stated in its petition for rulemaking that it "does 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." Clearly the Commission may use a contested case proceeding to

investigate its PURPA contracting policies if it so chooses. The question is whether the Commission is using *these* contested case proceedings to do more than investigate by also adopting and modifying PURPA contracting policies through orders rather than rulemaking?

Any attempt to restyle these proceedings as mere "investigations" cannot be squared with the policy changes sought by Idaho Power and PacifiCorp, not in follow-on rulemaking proceedings, but in these very proceedings. Idaho Power, for example, directly asked the Commission to "issue an order modifying the terms and conditions under which Idaho Power enters into power purchase agreements with [QFs]." Likewise, PacifiCorp "asks the Commission to issue an order directing the Company to implement . . . changes to its PURPA contracting procedures." Both utilities asked the Commission to reduce the eligibility threshold for standard PURPA contracts for wind and solar projects from 10 MW to 100 kw. They 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. The utilities did not ask the Commission to investigate; they asked the Commission to act. And act it did. Even without undertaking any investigation (and, more importantly, without following procedures for rulemaking), the Commission granted interim relief to both utilities by slashing the eligibility threshold for standard contracts. Unless the only outcome of these "investigations" is a "report" on PURPA contracting policies, then the Commission is clearly engaging in rulemaking rather than just an investigation.

Idaho Power also tries to make the case that the Commission is doing something other than "rulemaking." Idaho Power suggests that the Commission is not engaging in rulemaking because this proceeding with result in an "order" rather than a "rule." But that is exactly the problem that Obsidian is trying to remedy. As Staff explains in its response, ORS

758.535 expressly and unambiguously requires the Commission to establish terms and conditions of PURPA sales "by rule." The Oregon courts have long held that where an administrative agency is required by statute to undertake some action "by rule," the agency may not satisfy this obligation through a contested case order. *See, e.g., Dinkins v. Bd. Of Accountancy,* 118 Or App 220, 846 P.2d 1186 (1993). Likewise, the Oregon Attorney General's Administrative Law Handbook says: "Some agencies may be expressly directed by statute to adopt rules relating to a specific subject. Alternatively, an agency's statutes may implicitly require the agency to adopt rules in order for the agency to properly implement those statutes. In either case, the agency must complete the legislative policy through rulemaking before applying it to specific cases."

PacifiCorp and Idaho Power also suggest that these are legitimate contested case proceedings, analogous to an administrative licensing decision, because the Commission's orders will be directly binding on them. PacifiCorp, for example, writes that it "has asked the Commission to determine its 'individual legal rights [and] duties' of PacifiCorp [sic] with respect to its mandatory purchase obligations under PURPA." But this is precisely what the Commission has said that it is *not* doing in these cases. If that is what the Commission were doing in this case, then PacifiCorp would have been precluded from initiating UM 1734 in the first place by the stipulation that it signed in UM 1610. In order to save PacifiCorp from the stipulation, therefore, the Commission invoked its legislative authority as opposed to its judicial authority. The Commission 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.*" Further, in Order 15-209 the Commission clearly stated that "this Commission acts in a legislative capacity when it establishes general policies to implement

PURPA." As the Commission recently explained in Order 14-358, acting is a legislative capacity is the very definition of rulemaking.

Obsidian has simply asked for the Commission to take a step back from these proceedings in order to determine, as a threshold matter, whether a contested case proceeding is a proper exercise of its "legislative" authority in this context.

B. Staff Agrees that A Rulemaking Is Required

In its response, Staff agrees with Obsidian's basic assertion that the change of policy sought by Idaho Power and PacifiCorp in these proceedings must be done through a rulemaking.

> Staff intends to respond more fully to Obsidian's petition for a rulemaking in response to the petition. Staff intends to support Obsidian's petition. As Obsidian asserts, ORS 758.535 requires the Commission to adopt terms and conditions for PURPA power purchase agreements (PPAs) between qualifying facilities and investor-owned utilities by rule. The Commission has adopted some of the terms and conditions of PURPA PPAs by rule.

Staff further explained that it "recommends that the Commission adopt rules to implement terms and conditions for PURPA PPAs in order to ensure the terms and conditions are valid under ORS 758.535." Finally, Staff agrees with Obsidian's basic assertion that "[w]hen adopting rules the Commission is required to follow the notice and comment process outlines in Oregon statute." Staff's analysis of the Commission's legal obligations under the Oregon APA should be given considerable weight.

C. ORS 183.355(5) Does Not Negate the Rest of the Oregon APA

Contrary to Staff's analysis, Idaho Power and PacifiCorp assert that the Commission may adopt PURPA rules without complying with the rulemaking procedures of the Oregon APA. The utilities argue that ORS 183.355(5), which applies generally to all state agencies and departments, is an affirmative grant of authority that allows the Commission (and all

other state agencies and departments) to make rules through a contested case. ORS 183.355(5) reads in its entirety as follows:

> No rule of which a certified copy is required to be filed shall be valid or effective against any person or party until a certified copy is filed in accordance with this section. However, if an agency, in disposing of a contested case, announces in its decision the adoption of a general policy applicable to such case and subsequent cases of like nature the agency may rely upon such decision in disposition of later cases.

Idaho Power and PacifiCorp suggest that the narrow exception to the filing of a certified copy of a rule prior to its effectiveness against a particular party, as stated in the second sentence of ORS 183.355(5), somehow overrides all of the other detailed provisions of the Oregon APA that otherwise require notice and comment rulemaking.

The utilities' reliance on ORS 183.355(5) is misplaced. On its face, ORS 183.355(5) is not an affirmative grant of authority that creates an alternative path for administrative rulemaking via contested case proceedings. Rather, it is a narrow exception to one step of the normal rulemaking process that gives preclusive effect to any generally applicable legal principle that may be announced by an agency in the course of resolving disputes involving individual litigants. This exception does not apply in this case. As the Commission has explained in Orders 15-209 and 15-241, the purpose of these proceedings is not to resolve a dispute between litigants but to change its generally applicable PURPA contracting rules. There is nothing in ORS 183.355(5) that allows an agency to initiate a contested case proceeding for the purpose of making new rules or changing existing rules. As far as Obsidian is aware, the Commission itself has never laid claim to such broad authority under ORS 183.355(5). Allowing such a broad exception would, in effect, render meaningless the rulemaking procedures of the Oregon APA.

Even if ORS 183.355(5) were an affirmative grant of rulemaking authority as Idaho Power and PacifiCorp suggest, it still would not apply in this case. Oregon courts have repeatedly held that an agency's discretion to announce rules incidental to resolving a contested case proceeding does not apply where the underlying statute expressly requires the agency to make policy decisions "by rule." In such case, the agency *must* follow the Oregon APA rulemaking procedure even if it would otherwise have discretion to articulate a general rule in the context of resolving a dispute between individual litigants. *See, e.g., Dinkins v. Bd. Of Accountancy,* 118 Or App 220, 846 P.2d 1186 (1993) (statute requiring applicant to have specified years of education or "equivalent thereof satisfactory to the board under its rules" requires the adoption of experience requirement through rulemaking); *See also Marbet v. Portland General Electric*, 277 Or. 447 (1977) (holding that where the energy facility citing council is directed by statute to adopt standards "by rule," it is required to do so through a formal rulemaking and may not rely on its authority under ORS 183.355(5)). In this case, ORS 758.535(2) expressly requires the Commission to establish the terms and conditions of PURPA sales "by rule." Under well-settled Oregon law, therefore, the Commission is required to follow the rulemaking procedures required in the Oregon APA to set PURPA contracting rules.

D. There Is No Harm In Waiting For the Commission's Initial Decision in AR 593

There will be no harm to Idaho Power, PacifiCorp or their ratepayers by holding these proceedings in abeyance until the Commission decides whether or not to initiate the required rulemaking. Comments on Obsidian's petition for a rulemaking are due on December 18. Presumably, the Commission will decide shortly thereafter whether to initiate the rulemaking. Thus, if the Commission declines to initiate a rulemaking, the delay in these proceedings will

be minimal. Such minimal delay will have no adverse affect on Idaho Power or PacifiCorp because the utilities have already been granted the interim relief that the Commission deemed appropriate. While it is arguable that the orders granting interim relief are unlawful and voidable for all of the reasons set forth in AR 593, to date neither Obsidian nor any other party has asked a court to vacate the orders.

Further, there is nothing in the record in this proceeding that indicates that either utility is in any danger of suffering financial harm. If the fundamental allegation made by PacifiCorp in UM 1734 were correct, then the Commission should expect to see a sharp (or, at least discernable) increase in completed QF projects during years 2014 and 2015. What the record in UM 1734 actually shows, and shows conclusively, is that there has been *no* increase in completed PURPA projects since Order 14-058. According to PacifiCorp's own data, the number of completed QF projects, and the corresponding nameplate capacity, is as follows

Year	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Number of completed QF Projects	2	3	1	12	4	1	4	1	3	2
Installed QF Capacity (MW)	26.25	18	1.28	76.55	12.53	1.6	6.10	.75	7.5	3.02

Contrary to PacifiCorp's scare tactics, the record shows no "extreme and unprecedented" spike in QF development since Order 14-058 was issued. If anything, the data in the record shows that the Commission should be doing more to facilitate new renewable QF development.

The record in UM 1725 tells the same story with respect to Idaho Power. Idaho Power complains of increased "interest" in renewable QF development. As Obsidian explained in its testimony, there is no correlation between "interest" and completed projects. The reality is

that, even under current PURPA contracting policies, completed renewable QF projects are exceedingly rare. Between January 2001 and June of 2015 Idaho Power received 87 requests for interconnection services for all renewable energy projects (not limited to QFs) 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 in the last 15 years. None were solar. The vast majority of that installed capacity was a single wind farm that is not a QF project. Looking past Idaho Power's hyperbole, the data overwhelmingly demonstrates that there has been no spike in renewable energy projects—QF or otherwise—in its Oregon service territory.

Less than a week before briefs were scheduled to be filed in UM 1725, Idaho Power submitted supplemental testimony in which it conceded—as it must—that there has been no spike in completed renewable PURPA projects. Just as Obsidian predicted in its testimony, the vast majority of the projects that Idaho Power said are "in development" have already fallen by the wayside. The supplemental testimony states that "of the original 1,081 MW of Idaho solar QFs in development as of May 18, only two projects totally 40 MW are still active. Neither of these projects have an executed contract." The supplemental testimony confirms that neither Idaho Power nor its ratepayers are at risk of "extreme and unprecedented" renewable project development.

Even if there were a spike in renewable PURPA projects, it bears repeating that this would not "harm" the purchasing utilities or their ratepayers. The "harm" alleged by Idaho Power and PacifiCorp arises out of pure speculation that avoided costs paid to the new QF would exceed actual avoided costs in the future. Although the utilities present this theory as if it were a proven "fact," the validity of this future price speculation is highly questionable.

First, for the majority of its contract term, any new QF would be paid market rates rather than avoided cost rates. There is, by definition, no risk of overpayment during these years. For any years in which the QF is actually receiving avoided cost pricing, those avoided cost prices are updated at least annually based on the most current cost projections of a natural gas generating facility. These avoided cost prices should be a reasonably accurate projection of avoided costs.

There also seems to be a fundamental disconnect between the utilities' extremely low avoided cost prices and the much higher generation and transmission costs paid by retail ratepayers. Developers of QF projects do not set avoided cost prices, the utilities do based on their own cost projections. Both Idaho Power and PacifiCorp complain of allegedly excessive avoided costs prices that were informed by proxy natural gas plants substantially similar to large natural gas plants recently placed in service. If renewable QF power prices reflecting existing gas plant prices is excessive and unfair to ratepayers, then generation and transmission costs currently paid by retail ratepayers must also be excessive and unfair.

E. Proper Rulemaking Does Not Mean "Disregarding" The Record In These Proceedings or Prior Commission PURPA Orders

In its response, Staff says that it "disagrees with Obsidian's implicit assertion that the Commission must disregard hundreds of pages of testimony in pending dockets and decisions in previous orders when adopting terms and conditions for PURPA PPAs." Although Obsidian does not intend for the requested rulemaking to merely rubber-stamp the *status quo*, Obsidian also has *not* asked the Commission to disregard its prior orders or the record compiled in these proceedings. Nor has Obsidian asked a court to set aside such prior orders. Obsidian's understanding is that, absent a court order declaring such prior orders void, they

will remain in effect. Further, Obsidian expects the Commission's work in UM 1610 and UM 1129 and prior dockets will be heavily reflected in any new administrative rules.

The purpose of the requested rulemaking, and for holding these proceedings in abeyance, is not to undo what has already been done. The purpose is to legitimize the Commission's PURPA contracting policies by: (a) following the rulemaking procedures prescribed by law; (b) bringing greater clarity to potentially inconsistent PURPA rules, orders and stipulations; and (c) expressly considering whether existing and proposed PURPA rules and rules related to community based renewable project development are consistent with statutory policies and goals promoting renewable energy development in Oregon.

DATED this 7th day of December 2015.

/s/ Richard G. Lorenz
Richard G. Lorenz, OSB No. 003086
Cable Huston LLP
1001 SW Fifth Avenue, Suite 2000
Portland, OR 97204-1136
(503) 224-3092 (Telephone)
(503) 224-3176 (Fax)
rlorenz@cablehuston.com

Of Attorneys for
Obsidian Renewables, LLC