

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1734

In the Matter of
PACIFICORP, dba, PACIFIC POWER'S
Application to Reduce the Qualifying Facility
Contract Term and Lower the Qualifying
Facility Standard Contract Eligibility Cap.

**STAFF RESPONSE TO MOTION TO
HOLD IN ABEYANCE**

Staff of the Public Utility Commission of Oregon (Staff) opposes Obsidian Renewable LLC's request to hold Docket No. UM 1734 in abeyance pending the resolution of Obsidian's petition to adopt certain policies implementing the Public Utility Regulatory Policy Act (PURPA) by rule. Even if the Commission grants Obsidian's request for a rulemaking, this docket need not conflict with the rulemaking proceeding. The Commission may consider the information provided in this docket when adopting rules. Accordingly, information provided in this proceeding may inform the Commission in a rulemaking proceeding opened in response to Obsidian's motion.

A. Staff supports Obsidian's motion to open a rulemaking proceeding.

Staff intends to respond more fully to Obsidian's petition for a rulemaking in its 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.¹ For example, OAR 860-29-0040(4)(a) includes an eligibility cap for standard contracts, providing that the utility must file standard rates for purchases for qualifying facilities with a nameplate capacity of one megawatt or less.

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¹ See OAR 860-29-0001, *et seq.*

1 However, some of the terms and conditions for PPAs are not found in rule but in orders
2 issued after investigation.² Staff recommends that the Commission adopt rules to implement
3 terms and conditions for PURPA PPAs in order to ensure the terms and conditions are valid under
4 ORS 758.535.

5 **B. The Commission should not hold UM 1734 in abeyance.**

6 Contrary to Obsidian's assertion, the Commission need not ignore the decisions it has made
7 in previous PURPA investigations, or that it may make in pending PURPA investigations, if it
8 chooses to adopt terms and conditions for PURPA PPAs by rule. When adopting rules the
9 Commission is required to follow the notice and comment process outlined in Oregon statute.³
10 However, the Commission may rely on information outside of the rulemaking record when
11 adopting rules: "The significance of the conclusion that Oregon's Administrative Procedures Act
12 provides for only informal rulemaking is that it is universally recognized that in
13 informal rulemaking an agency is not limited to consideration of only the record before it. * * *
14 The agency, in (informal) rule making, can look beyond the particular hearing record since it
15 otherwise would be unable to draw upon its expertise."⁴

16 Staff disagrees with Obsidian's implicit assertion that the Commission must disregard hundreds
17 of pages of testimony in pending dockets and decisions in previous orders when adopting terms
18 and conditions for PURPA PPAs. The Commission can rely on its determinations in other
19 dockets to inform its final determination in a rulemaking proceeding.⁵ In fact, the Commission
20 has previously made a determination regarding a condition for a standard contract in an
21 investigation and then conducted a rulemaking proceeding to adopt that condition by rule.

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23 ² See e.g., Order No. 07-360 (requiring utilities to offer contracts of up to 20 years for qualifying
24 facilities entering into a "nonstandard" PURPA PPA); Order No. 05-582 (requiring utilities to
offer standard contracts that have a term of up to 20 years).

25 ³ ORS 183.310-.355.

26 ⁴ *International Council of Shopping Centers, et al., v. Oregon Environmental Quality
Commission*, 27 Or App 321, 326 (1976) (citations omitted).

⁵ *Id.*, at 326-327.

1 In 1991, Commission decided in its general investigation into competitive bidding guidelines that
2 the eligibility cap for standard contracts under PURPA should be raised from 100 kW to 1 MW.⁶
3 The Commission held a rulemaking proceeding later that year to place that eligibility cap in its
4 administrative rules.⁷

5 The Commission could do the same with determinations made in previous and pending
6 investigations into implementation of PURPA. Meaning, it could propose rules based on its
7 previous resolution of issues related to terms and conditions of PPAs and conduct a rulemaking
8 proceeding in accordance with Oregon's Administrative Procedures Act to take comments on
9 whether to adopt these previously-determined terms and conditions by rule.

10 **C. Other relief may be required by Obsidian's petition for rulemaking.**

11 As discussed above, it would be counter-productive to stay UM 1734 (as well as other
12 pending investigations into PURPA policies) while the Commission considers the petition for
13 rulemaking or to stay UM 1734 pending the outcome of any rulemaking proceeding that stems
14 from Obsidian's petition. However, it may be prudent to temporarily stay contracting under
15 PURPA until the Commission has considered whether some of the policies it has determined by
16 orders should be included in administrative rules. The utilities' obligation to enter into future
17 PURPA contracts under terms and conditions that are not in rule is uncertain. Rather than inviting
18 litigation on this issue, Staff intends to recommend that the Commission temporarily suspend

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26 ⁶ Order No. 91-1383 (1991 WL 501921).

⁷ Order No. 91-1605 (1991 WL 537183).

1 PURPA contracting until after the Commission has reached a final resolution on the petition for
2 rulemaking when Staff submits its response to the petition.

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DATED this 30th day of November 2015.

Respectfully submitted,

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